



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT ASBURY
COMMISSIONER BISSETT
COMMISSIONER JOHNS**

C2023/557

s.604 – Appeal of decisions

**Brett Steed v Active Crane Hire Pty Ltd
(C2023/557)**

Brisbane

10.00 AM, WEDNESDAY, 24 MAY 2023

PN1

VICE PRESIDENT ASBURY: Thank you. Good morning, could I start by taking the appearances, please.

PN2

MR P. BONCARDO: If the Commission pleases, my name is Boncardo, initial P, and I seek permission to appear on behalf of Mr Steed.

PN3

VICE PRESIDENT ASBURY: Thanks, Mr Boncardo.

PN4

MR H. BUCHBERGER: Good morning, Commissioner, my name is Herman Buchberger. I am appearing on behalf of Active Crane Hire, the respondent.

PN5

VICE PRESIDENT ASBURY: Thank you, Mr Buchberger, and Mr Buchberger, have you considered the submissions from the appellant in relation to seeking permission to be represented by Mr Boncardo today?

PN6

MR BUCHBERGER: Yes, and I would like, actually, to discuss this.

PN7

VICE PRESIDENT ASBURY: Sure.

PN8

MR BUCHBERGER: We have not opted for any legal representation throughout the whole case, and I think Mr Grumley previously represented Mr Steed during the hearing and I would, in a matter of fairness, like that the Commission considers that it is fair for Mr Boncardo to appear on behalf of Mr Steed in this case.

PN9

We believe it's not that complex, and in a matter of fairness, I would like that you consider this, as we obviously had short notice yesterday by Mr Grumley for the application, and yes, we would like that you consider this, please.

PN10

VICE PRESIDENT ASBURY: So, you didn't note that the submissions that the appellant filed were settled by counsel?

PN11

MR BUCHBERGER: I did notice that. Obviously, I always actually have never been in this situation thus far, so maybe an oversight on our behalf, but I certainly would like – obviously, we will respect – we will respect your decision, but I would like that this is considered as a matter of fairness.

PN12

VICE PRESIDENT ASBURY: Certainly. Mr Boncardo, do you want to say anything in response?

PN13

MR BONCARDO: Only these things, Vice President, and I will try my best not to repeat what's in the written submissions. My client is someone who does not have any formal education. He left school in year 10. He cannot effectively conduct the appeal, given the matters at issue and we would submit that 596(2)(b) is satisfied.

PN14

Contrary to what Mr Buchberger says, there are issues of complexity raised by the grounds of appeal, and the Commission would be, under the circumstances, assisted by counsel appearing for the appellant. I do apologise to the Full Bench and Mr Buchberger for the oversight of not filing the Section 596 submissions in accordance with the directions, but as you have pointed out, Vice President, my name was on the submissions, the submissions were my submissions, and Mr Buchberger has had notice of that since I have filed the (indistinct).

PN15

VICE PRESIDENT ASBURY: And is there any reason why the TWU is not able to represent Mr Steed?

PN16

MR BONCARDO: There isn't. Mr Steed has instructed me in lieu of the TWU, to run the appeal.

PN17

VICE PRESIDENT ASBURY: So, you're directly instructed by Mr Steed?

PN18

MR BONCARDO: Just to be absolutely clear, because I wasn't in answer to your question, my instructions come from the TWU but I am instructed by Mr Steed.

PN19

VICE PRESIDENT ASBURY: Okay, thank you. Mr Buchberger, do you have anything further you want to say in relation to permission?

PN20

MR BUCHBERGER: No, I just thought I'd bring that to your attention. I know it's our right to question, in terms of fairness but as I said, we would like the matter to be resolved, of course, and we are obviously in the Commission's hands to make a decision accordingly.

PN21

VICE PRESIDENT ASBURY: All right, we might just take a moment to consider Mr Buchberger's submissions in relation to the Commission, and to consider our views in relation to permission, so we'll just stand the matter down for a few minutes to have that discussion. Thank you.

PN22

MR BUCHBERGER: Thank you.

SHORT ADJOURNMENT

[10.10 AM]

RESUMED

[10.14 AM]

PN23

VICE PRESIDENT ASBURY: Thank you. Having considered the submissions advanced on behalf of the appellant in relation to permission to be represented by a lawyer, we are satisfied that it would enable the matter to be dealt with more efficiently, given that it raises issues of significant complexity, including whether the decision was affected by a number of jurisdictional errors of law, or errors of the kind detailed in *House v The King*.

PN24

So, on that basis, on the basis that the complexity of the matter would indicate that permission should be granted, we grant permission for the appellant to be represented by a lawyer. Thank you.

PN25

MR BONCARDO: If the Commission pleases.

PN26

VICE PRESIDENT ASBURY: Mr Boncardo, we have read the written submissions that have been filed on behalf of the appellant. Would you like to take an opportunity to speak to them?

PN27

MR BONCARDO: Yes, thank you, Vice President. Can I formally ask the Full Bench for leave to rely upon an amended notice of appeal which was filed concurrently with our written submissions on 20 February.

PN28

VICE PRESIDENT ASBURY: Yes.

PN29

MR BONCARDO: The amended notice of appeal adds one ground which is fleshed out in our submissions at paragraph 6 in respect to errors of fact which are significant in the requisite sense, that appear to have influenced the Deputy President's decision in respect to remedy.

PN30

I seek leave to rely upon the amended notice of appeal, noting that Mr Buchberger was served with it on 20 February and has had a substantial amount of time to (indistinct) and it does raise some fairly discrete issues.

PN31

VICE PRESIDENT ASBURY: Yes. Mr Buchberger, you received the amended notice of appeal?

PN32

MR BUCHBERGER: I received one of them.

PN33

VICE PRESIDENT ASBURY: It was filed on 20 February, and it's the form F7, and it's got an additional paragraph 6 which has been underlined, and then an amendment in ground 4.

PN34

MR BUCHBERGER: Okay, what – is there a way someone could read that out, that amendment?

PN35

VICE PRESIDENT ASBURY: Sure.

PN36

MR BUCHBERGER: Yes, please.

PN37

VICE PRESIDENT ASBURY: The amendment in ground 4 is that – it previously said, and I think it's a typographical error, 'The Deputy President made a serious – made a' – and then that's been deleted, and so it reads, 'The Deputy President made a significant error of fact in holding that there was severe animosity between the applicant and the respondent.'

PN38

And the new ground 6, or the additional ground 6 is, 'The Deputy President made significant errors of fact in determining that, a) the appellant had no reason to be resting up or escaping the rain in the truck; and/or b) the appellant was asleep whilst on duty.'

PN39

MR BUCHBERGER: Okay. Yes.

PN40

VICE PRESIDENT ASBURY: So, you'd received those?

PN41

MR BUCHBERGER: Yes, yes. Yes. I did, yes. Yes.

PN42

VICE PRESIDENT ASBURY: And then your response to the appeal, I think, addresses those additional - - -

PN43

MR BUCHBERGER: Yes. Yes.

PN44

VICE PRESIDENT ASBURY: Those amendments. All right. Thank you.

PN45

MR BUCHBERGER: Yes. No, that's fine. Thank you, very much.

PN46

VICE PRESIDENT ASBURY: All right, then. Yes, we grant permission for you to rely on the amended notice of appeal, Mr Boncardo.

PN47

MR BONCARDO: Thank you, Vice President. I was going to, in my oral address today, deal with each of the grounds of appeal by way of some further amplification and also address some of the matters raised by Mr Buchberger in his submissions filed on 19 May.

PN48

Could I commence with ground 1, and the Full Bench will have seen from our written submissions that a core aspect of Mr Steed's case on remedy was that there was neither any evidence from the respondent, nor any submission or assertion that there'd been a loss of trust and confidence, so as to militate against the making of an order for reinstatement. Our complaint is that this was a central aspect of Mr Steed's case, which the Deputy President just did not deal with.

PN49

And can I make good the proposition that it was a central aspect of Mr Steed's case, by taking the Full Bench to Mr Steed's submissions which were all in writing before the Deputy President. Firstly, can I take the Full Bench to Mr Steed's outline of submissions of 12 July 2022. They commenced at appeal book 168.

PN50

The paragraphs I wanted to take the Full Bench to commence at page 188.

PN51

VICE PRESIDENT ASBURY: Yes.

PN52

MR BONCARDO: And I apologise, perhaps I should go back to page 187, in the first instance. On page 187 the Full Bench – I'm sorry, no it is, I apologise, page 188. The Full Bench will see in paragraph 93, the heading of 'Remedy', where Mr Steed sets out that he seeks reinstatement.

PN53

Over the page in paragraph 94, the well known comments in Perkins v Grace Worldwide are set out. Then over the page on appeal book 190, at page 96 there is an assertion that there are no compelling factors which would make reinstatement practicable. Then at paragraph 97, Mr Steed's advocate below sets out factors that demonstrate trust and confidence between the parties have not been destroyed. There are some six factors set out there and over the page.

PN54

Mr Buchberger's submissions, which commence at appeal book 192 and go through to appeal book 194 - these are the submissions of 2 August 2022, filed in anticipation of the hearing, don't address the question of remedy, at all. Mr Steed's advocate then filed some reply submissions prior to the commencement of the hearing on 17 August. They commence at appeal book 192.

PN55

Now, at appeal book 207, the question of remedy is again dealt with, and the Full Bench will see at paragraph 45 that it is pointed out that Active Hire has not raised

or submitted that it has lost trust and confidence in Mr Steed and that his ongoing employment is untenable.

PN56

COMMISSIONER JOHNS: Mr Boncardo, it's Commissioner Johns here, speaking for myself. In order to be satisfied that reinstatement is not appropriate, you don't have to make the finding about mutual trust and confidence. The Deputy President says in this matter, there are three reasons why it's not appropriate:- contrition, no remorse, and clear animosity.

PN57

Now, I know you dispute the clear animosity bit. But it would be different if the Deputy President had made a finding about mutual trust and confidence. He just hasn't engaged with it, at all. It's not something he relies upon, at all.

PN58

It is a serious submission in the sense that the authorities talk about, and it is not dealt with or engaged with, and that is, we say, a constructive failure to exercise jurisdiction, because it was a substantial and material argument which my client advanced below, that wasn't the subject of any contest by the respondent, and it is ignored entirely by the Deputy President in his reasons.

PN59

But even if the Deputy President had found there is no loss of mutual trust and confidence, the Deputy President could still find that because there's no contrition, no remorse, and animosity, reinstatement was inappropriate, couldn't he?

PN60

MR BONCARDO: He could well have done that, but - - -

PN61

COMMISSIONER JOHNS: But what's it matter?

PN62

MR BONCARDO: It matters because my client advanced a substantial argument that there was no breakdown in trust and confidence. That is a relevant consideration, as the authorities, going back to *Nguyen v Walsh Co*, make absolutely clear, and the argument was not engaged with by the Deputy President.

PN63

COMMISSIONER JOHNS: But my point is this. Even if he had engaged with it and found your way, it was still open to him to find that reinstatement was inappropriate, wasn't it?

PN64

MR BONCARDO: It could have been open but it's for him to make that finding, Commissioner. But that is not the nature of the error that we are relying up and it is, with respect, no answer to the nature of the error that we are relying upon, to say that just because a finding may have been open to the Deputy President as a matter of discretion or a valiative judgment, that there is no jurisdictional error or

error of law based upon a failure to actually engage with and consider the argument that Mr Steed raised below.

PN65

COMMISSIONER JOHNS: Yes, all right. Thank you, I understand the submission.

PN66

MR BONCARDO: Yes. Can I complete the survey of the submissions that were put below, by taking the Full Bench to Mr Steed's closing submissions of 30 November. They commence at appeal book 212, and the question of remedy is relevantly dealt with at about appeal book 235, and the Full Bench will see there at paragraph 104 that there's reference to evidence given by Mr Buchberger that Active Hire hadn't lost trust and confidence in Mr Steed, and Mr Buchberger's evidence that Mr Steed had otherwise complied with directions to perform work, and company policies.

PN67

Then over the page, Mr Buchberger had accepted that there were alternatives available to Active Hire, other than termination, and that there was nothing to suggest that Mr Steed would not have complied with all reasonable directions to perform work and adhere to company policy, had he not been terminated. Those submissions make reference to a number of aspects of the transcript, and can I give the Full Bench some references to Mr Buchberger's evidence at appeal book 96. It is toward the end of Mr Buchberger's cross-examination.

PN68

The Full Bench will see at paragraph 912, at about point 4 on the page, Mr Steed's advocate asked Mr Buchberger, 'Based on Mr Steed's prior conduct, overall performance, length of service', then the transcript is indistinct, 'There is nothing to suggest that if he is given a warning, he could have corrected his behaviour and still been employed with Active Hire today?'

PN69

Mr Buchberger agrees with that proposition, and he says, 'Look, if he'd taken the opportunity to talk to us, absolutely, yes.' And then down at paragraph 916, it's put to Mr Buchberger that there's nothing to suggest he would not have continued to comply with reasonable directions and company policies, had he been issued a warning. Mr Buchberger says he doesn't know. The question is elaborated on at PN917, and Mr Buchberger accepts that proposition.

PN70

And Mr Buchberger's submissions, which are at appeal book 240 to 248, are entirely silent on reinstatement, these being the respondent's submissions in closing and reply. The only reference to remedy is, in fact, made at appeal book 242, at paragraph 3(w), where the respondent addresses the question of compensation and asserts that the notice period afforded to Mr Steed and amounts payable by way of ASERT should be taken into account.

PN71

So, there was, in fact, no joinder of issue between the parties about reinstatement. The respondent didn't contest or otherwise say that it would be inappropriate, or that there had been a loss of trust and confidence. Mr Steed's closing submissions are found at appeal book 249 to 258. At appeal book 251 Mr Buchberger's evidence as to there not being a loss of trust and confidence, is again referred to.

PN72

That, the Full Bench will see at paragraph 15.

PN73

Then finally, at paragraph 49 at appeal book 258, that evidence, again, is set out and the lack of evidence, I should say, that trust and confidence has not been destroyed, is again referred to.

PN74

In our respectful submission, the argument that there had been no relevant breakdown with the relationship of trust and confidence, was plainly a material and substantial one, advanced by Mr Steed, below. We have given the Full Bench in our list of authorities, the decision of the Court of Appeal in *Minn v Director of Public Prosecutions NSW* (2022) NSWCOA 209. That's number 1 in our list of authorities.

PN75

Can I take the Full Bench to page 10 of our list of authorities, where Justice Kirk describes the nature of the error that we assert here, from paragraph 12 onwards. The Full Bench will see at paragraph 12, there's the heading, 'Constructive Failure to Exercise Jurisdiction.'

PN76

His Honour explains from about the third sentence that 'a constructive failure to exercise jurisdiction will arise when a decision-maker purports to have exercised the jurisdiction, but in substance has not undertaken or completed the task of doing so because of a failure to address some essential matter.' That essential matter may be, as his Honour points out in the final sentence of that paragraph, 'A critical argument raised by the party.'

PN77

Paragraph 14 deals with the variant of constructive failure of jurisdiction invoked in that case, in which we invoke here, which was discussed in the High Court case of *Drenichnicov*(?), where by, 'an administrative decision-maker who fails to respond to a substantial, clearly articulated argument relying upon established facts, constructively fails to exercise jurisdiction or afford a party natural justice.'

PN78

Paragraphs 15 to 16, over the page, make clear that such an argument needs to be significant and that it must be clearly material. Our submission simply is, this was a significant argument, it was a material argument, and it is elementary that a loss of trust and confidence, or a lack of a loss of trust and confidence, is a relevant matter in determining whether or not reinstatement is, or is not appropriate.

PN79

And the totality of the Deputy President's reasons, as Commissioner Johns, with respect, pointed out, are contained at paragraph 48 of the decision on page 12 of the appeal book and the Full Bench will see there that there is absolutely no reference to the argument made by my predecessor below, where we'll have something to say about the clear animosity issue in due course.

PN80

But the Full Bench, whilst well familiar with what the High Court said in *Wu Shang Liang* about ensuring that appellant decision aren't read with a fine appellants tooth comb attuned to the discernment of error, needs also to recall what the Full Court said in *Solomon v University of Technology*, which is number 2 on our list of authorities.

PN81

That is a decision which is reported in Federal Court reports at volume 207, page 277. And it is perhaps worthwhile to recall the facts of that case because they are illustrative for present purposes. A case had been mounted before Vice President Watson about the harshness or otherwise of a particular disciplinary consequence that was metered out to the applicant in that case, and one of the grounds of judicial review relied upon by Mr Solomon was that that argument just hadn't been considered by the Vice President.

PN82

And that is dealt with by the court from paragraph 55 onwards, and the Full Bench will find paragraph 55, conveniently on page 55 of the authorities book where their Honours point out that even in the absence of a statutory requirement to provide findings or reasons, a failure to address the submissions centrally relevant to the decision being made, may found a basis for concluding that the submission had not been taken into account, and that such a failure may be exposed and the reasons voluntarily provided, and that such a failure may constitute judicial error.

PN83

At paragraph 56 the Full Court notes that the submission relied on in respect are termed, 'mitigating circumstances and reasonableness', was not one that was referred to by the Vice President. Then at paragraph 57 the principle in *Wu Shang Liang* is set out, and then over the page their Honours say that 'I should not be, however, so blinkered as to report a discerning an absence of reasons, or reasons to (indistinct) any consideration of a submission central to a party's case.'

PN84

They then set out (indistinct) dictate the conclusion that the reasons of the Vice President fail to give any real consideration to the submissions advanced as to mitigating circumstances, namely that the Vice President was legally qualified and had the benefit of the submissions and the reasons, in fact, disclose no attempt to engage with the submission, at all.

PN85

That, in our respectful submission, is exactly the case here, and we have here a (indistinct) Deputy President who was formerly a barrister, who had the benefit of this (indistinct), and the reasons for decision do not even not the submission, let

alone engage with it. And in those circumstances we say that there was a constructive failure to exercise jurisdiction by reason of a failure to deal with a substantial component of Mr Steed's case on reinstatement.

PN86

VICE PRESIDENT ASBURY: And Mr Boncardo, can I just ask, is it also your submission that the error that you allege with respect to the procedural fairness matter meant that there was not another significant matter that went to the discretion about reinstatement, and the finding that was made, because of the error with respect to the animosity that you allege?

PN87

MR BONCARDO: Yes, that's so. That's so, Deputy President. I'll come to that, very quickly.

PN88

VICE PRESIDENT ASBURY: Yes.

PN89

MR BONCARDO: But can I just say that ground 2 is really an alternative to ground 1, and that is that there was a failure to take into account a relevant consideration in that there hadn't been, or at least wasn't, any attempt by the respondent to lead evidence or otherwise submit that there had been a breakdown in the relationship of trust and confidence.

PN90

If ground 1 is upheld, ground 2 really doesn't take the matter much further, but it is an alternate ground to ground 1, and premised on the matter actually being – well, it doesn't really add much to ground 1 but it is an alternative. But going to ground 3, and as Commissioner Johns and the presiding member have observed, one of the matters apparently vexing the mind of the Deputy President as to why reinstatement was not appropriate, was that there was clear animosity between my client and the respondent's evidence.

PN91

The Full Bench will look in vain for any evidence, anywhere in the materials of any animosity whatsoever, between the parties, and the Full Bench will also look in vain for any submission by the respondent or any attempts by the Deputy President to raise this as an issue in the case.

PN92

To the extent that there was evidence about the parties' attitudes to one another, that evidence is found in my client's reply statement at appeal book 112. There at paragraphs 21 to 22, Mr Steeds says this, and none of this was challenged in cross-examination. At paragraph 21 he says, 'I remain hopeful that I am able to return to Active Hire in the future. I built up rapport with my co-workers, management and with clients.'

PN93

And in paragraph 22 he says he's not lost trust and confidence in his ability to maintain a productive and safe working relationship, and he looks forward to

going back and working at Active hire for many years to come. So, not only was there no evidence of any animus between the parties, my client gave positive evidence that he had a good rapport with management.

PN94

COMMISSIONER JOHNS: Mr Boncardo - - -

PN95

MR BONCARDO: Yes.

PN96

COMMISSIONER JOHNS: Noting your submissions that it's not the subjective view of employers about whether or not trust and confidence exists - - -

PN97

MR BONCARDO: Yes.

PN98

COMMISSIONER JOHNS: This applicant says in the applicant's statement that he thinks that trust and confidence is also a subjective view.

PN99

MR BONCARDO: I accept that entirely, Commissioner. That's absolutely correct but the point I'm, perhaps attempting to make inelegantly, is that not only was there no evidence of any animus, subjective animus between the parties, my client gave positive evidence that he thought he had a good relationship with management, which wasn't challenged by the respondent.

PN100

Now, the finding that there was animosity was, we say, a finding made as a consequence of a denial of procedural fairness to Mr Steed. It is elementary in our submission, that procedural fairness requires a person to know the substance of the case against them and be given an opportunity to respond to that case.

PN101

Whilst a decision-maker such as the Deputy President isn't obliged to expose their provisional views or anticipated reasoning process to a litigant, if a matter is going to be taken into account as a material matter, that does not appear an obvious one or one that would naturally follow from the evidence or the submissions made between the parties, procedural fairness requires the decision-maker to bring that to the parties' attention.

PN102

We have provided in the list of authorities, the decision of *Habib v Director General of Security*. It's at number 4 in the list of authorities. It is reported in the Federal Court Reports at Volume 175, page 411. And can I give the Full Bench a reference to paragraphs 63 and 64 where the general principles are set out, and in particular, at paragraph 64 which is at page 131 of the list of authorities.

PN103

Their Honours' point that there are obviously sound and practical reasons why a decision-maker isn't generally obliged to expose their reasoning process or provisional views, they then say this. 'There may, nevertheless, be circumstances where fairness requires prior disclosure of such matters, as where they relate to a critical issue or factor, or where they do not follow from an obvious or natural evaluation of the evidence.'

PN104

And it is that latter part of the statement of principle that we rely upon here. It was not a matter that the respondent raised. It was not a matter that arose naturally from the evidence, and it was a matter that in substance, the Deputy President determined for himself, without putting Mr Steed on notice. And that constituted, we say, a denial of procedural fairness.

PN105

That denial was material in the requisite sense because if the Deputy President had complied with the rules of procedural fairness and put Mr Steed on notice that he was proposing to take into account, as a material factor against ordering reinstatement that there was animus between the parties, Mr Steed could have done a number of things.

PN106

He could have made a submission that, one, there was no evidence of that; and two, he could have pointed out to the Deputy President that his evidence at paragraphs 21 and 22 of his reply statement was not contested. There was, we say in the circumstance, a realistic possibility that a different decision could have been made for those reasons, and that denial of procedural fairness was a material one for a jurisdictional error.

PN107

We also say in ground 4, that there's an alternate way to consider the finding at paragraph 48 of clear animosity between the parties, and that is that that's a significant error of fact in circumstances where there just was no evidence before the Deputy President to ground that conclusion.

PN108

In terms of the grant of permission to appeal in respect to grounds 1 and 3 which raise issues of jurisdictional error, in my submission if an error is found that is jurisdictional in nature, that is a matter that would trigger the public interest so as to warrant a grant of permission to appeal.

PN109

Can I give the Full Bench a reference in that regard, to the relatively recent decision of the Full Bench in *Qube Ports v Burkhardt* [2022] FWCFC 65, that's number 3 in our list of authorities, paragraphs 60 to 61 which are found on page 68 of the bundle of authorities.

PN110

There the Full Bench concluded that the first instance decision was infected by jurisdictional error because the Commission had not undertaken the task required by Section 387, and at 61 they set out that it is in the public interest that

jurisdictional errors of this type be identified and corrected on appeal, and decisions and orders made under part 3(2) are based on the proper exercise of the statutorily required evaluation.

PN111

We have also given the Full Bench a reference to footnote 36 to our submissions to a decision in appeal by CFMEU [2014] FWCFB 2709 at paragraph 182, where the same point is raised. Can I deal quickly with grounds 5 and 6. These grounds go to - - -

PN112

VICE PRESIDENT ASBURY: Mr Boncardo, before you go on with that, can I just ask, is the error that you assert with respect to denial of procedural fairness, is it also akin to the position in *Newton v Toll Transport*, where an adverse finding was made without the matter being put that it was in contemplation, it wasn't put to the - - -

PN113

MR BONCARDO: Precisely. The error in *Newton* was - - -

PN114

VICE PRESIDENT ASBURY: I mean, it's a different kind of factual scenario, but the same principle, because - - -

PN115

MR BONCARDO: Indeed.

PN116

VICE PRESIDENT ASBURY: Yes.

PN117

MR BONCARDO: Indeed. Yes, the Commission is entitled to form its own views about matters. The Deputy President may have theoretically been entitled to form the view that there was clear animosity between the parties. But if he was going to form that view and take that into account, he needed to alert Mr Steed's representative, and indeed, Mr Buchberger, to that fact, particularly in circumstances where the question of whether or not reinstatement was or was not appropriate, had not been contested or controverted by the respondent.

PN118

And I appreciate the respondent was self-represented below, but this wasn't merely a live issue, as the submissions I've taken you to have demonstrated, and that compounds, we say, the error made by the Deputy President.

PN119

VICE PRESIDENT ASBURY: Thanks. I understand.

PN120

MR BONCARDO: Those matters, in and of themselves, are sufficient to set aside the decision and for the Full Bench to re-exercise the discretion to grant, we say, reinstatement. There are no, in our submission, real reasons why reinstatement

ought not be granted, given that there is no contest, or evidence that the relationship of trust and confidence has broken down.

PN121

But lest the further matters taken into account by the Deputy President that militate against a finding of reinstatement, we have raised grounds 5 and 6. Those findings go to unfairness, which isn't challenged by the respondent. But they are pertinent and relevant because the reasoning at paragraph 48 appears to include that but for the Deputy President's conclusion that there was a denial of procedural fairness, it would have been unlikely that he would have found the dismissal was unfair.

PN122

And the Deputy President's conclusions in that regard are really found at paragraph 45 where he states the three factors, two of which are material, which ground his conclusion that the dismissal was unfair, is a valid reason; the criteria in 387(c) and 387(h), were in play with the finding of harshness, unjustness and unreasonableness, and then the ultimate conclusion of unfairness is stated at paragraph 46.

PN123

In respect to 387(h), the only matters considered by the Deputy President are those set out in paragraphs 41 through to 43, which are contained on appeal book page 11, and the only factor, in fact, taken into account was that the dismissal was effected in a procedurally unfair manner.

PN124

Contrary to what is set out at paragraphs 41 through to 43 of the decision, Mr Steed ran a harshness case below which, in our respectful submission, the Deputy President entirely ignored. We see in Mr Steed's initial submissions, 185 to 186, paragraph 78 to 85, Mr Steed's advocate made a submission that the dismissal was disproportionate to the gravity of the conduct, and harsh in light of Mr Steed's personal circumstances and unblemished employment history.

PN125

Mr Steed did, in fact, give evidence in his first statement at paragraph 8, at appeal book 101 that he had always carried out his duties to the best of his abilities, and worked as hard as he could and was dedicated to his job. And in his second statement at appeal book 112, paragraphs 19 to 20, he set out that he was struggling financially and emotionally, and that he had had to make changes in respect to his financial circumstances as a result of the dismissal.

PN126

None of those matters were challenged by the respondent below. They were plainly relevant to the harshness case that Mr Steed advanced before the Deputy President, which the Deputy President entirely (indistinct) at paragraphs 41 to 43.

PN127

COMMISSIONER JOHNS: Sorry, Mr Boncardo, at 46 the Deputy President does say, 'I find the applicant's dismissal was unfair' - - -

PN128

MR BONCARDO: Yes.

PN129

COMMISSIONER JOHNS: 'i.e., harsh, unjust and unreasonable.' I mean, it's not entirely clear to me why he finds it was harsh, unjust and unreasonable, but he does make the finding.

PN130

MR BONCARDO: He does make the finding, and we're obviously not challenging the finding but to the extent that – these grounds are only raised, Commissioner to the extent that the second last sentence at paragraph 48 constitutes a further reason for not ordering reinstatement, namely that 'had the respondent effected the applicant's dismissal in a procedurally fair manner, it's unlikely I would have found his dismissal unfair.' Now that is somewhat ambiguous and cryptic. The Deputy President is not saying, 'I would have found his dismissal unfair', he's saying, 'It's unlikely I would have found' - - -

PN131

VICE PRESIDENT ASBURY: But Mr Boncardo, this is for my part, I guess – the issue that I have is that all the eggs seem to be in the failure to award reinstatement basket.

PN132

MR BONCARDO: They are, yes.

PN133

VICE PRESIDENT ASBURY: Well, what do you say about the findings that there was a valid reason for dismissal? Because you're not seeking that the finding for valid reason for dismissal is quashed.

PN134

MR BONCARDO: Well, we are in ground 6 of our amended notice of appeal, and obviously whether there's a valid reason for dismissal is relevant to unfairness, and it can bear upon whether or not reinstatement is appropriate, and on the Full Bench re-exercising the discretion would be, we accept, a relevant matter, but can I deal with the question of valid reason by way of elaboration of what we've put in our written submissions.

PN135

VICE PRESIDENT ASBURY: I understand you've put in paragraph 38 that there wasn't a valid reason for dismissal on the basis of those matters but it would seem, again for my part, that at first instance that the cross-examination and the evidence about this left quite a bit to be desired. Because I would have thought, again for my part, that rather than focussing on the rainfall chart, you would have had to focus on what time did people finish that day.

PN136

MR BONCARDO: And the evidence as to what time people finished, was perhaps somewhat equivocal but there was evidence that Mr Fuller knocked people off at 2.30, and I can take you to that because - - -

PN137

VICE PRESIDENT ASBURY: No, I've read it, and the evidence was someone said, 'Well, you'd better knock off Mr Steed, as well.' So, arguably, at the point Mr Steed was found, whatever he was doing in the truck, the employees had already been knocked off. And it seems that further, there was a view, again speaking for my part, from Mr – it might have been Mr Buchberger, it might have been somebody else, that he was sleeping on overtime when, in fact, they'd been knocked off.

PN138

MR BONCARDO: Yes. And that is why we do challenge the finding of valid reason, and the finding that he was sleeping while on duty. If I can perhaps just give the Full Bench the references to the evidence in that regard. Mr Fuller in his statement, which the Full Bench will find commenced at page 120, at paragraph 7, says that 'at about 2.30 I started to finish off some of the yard people', and it's then referenced at paragraph 9 to the matter that you pointed out to me, Vice President.

PN139

Then he goes down in his car to where the truck is, where Mr Steed is present, and paragraph 13 he says at 2.35 pm, he approaches the truck again and that's when he sees Mr Steed asleep. Now, he's gone up to the truck some time before that at paragraph 12, and seen someone lying in the compartment, but he only seems Mr Steed asleep at 2.45(sic) pm, and that's in circumstances where everyone has been knocked off, or the process of knocking everyone off has been ongoing since 2.30.

PN140

And Mr Fuller's evidence in cross-examination was to a similar effect, and - - -

PN141

VICE PRESIDENT ASBURY: I understand that evidence, Mr Boncardo.

PN142

MR BONCARDO: Yes.

PN143

VICE PRESIDENT ASBURY: But the point I'm making is that it doesn't seem to have been put to any of the respondent's witnesses in cross-examination, and the approach seems to have been, 'I wasn't sleeping.' And the applicant in his first statement, says, 'I was sitting up in the truck with my boots off', and then in his reply statement at paragraph he says, 'I do not deny that Mr Hagerty did knock and open the door of the truck, and that I did sit up and speak with Mr Hagerty.'

PN144

So, clearly there's an inconsistency there, that arguably Mr Steed was lying down. And I accept in the submission that there was a submission that, well, if he was asleep, it wasn't a sackable offence.

PN145

MR BONCARDO: Yes.

PN146

VICE PRESIDENT ASBURY: But Mr Steed appears to be denying that he was asleep, at all, or that there's any possibility that he was asleep, and really, that he was lying down.

PN147

MR BONCARDO: I think his evidence, such as it was, was that he accepted that he was lying down and had his boots off. There was a live issue about whether or not he was, in fact, asleep. He denied that and he continued to deny that in his cross-examination. But the issue as to whether or not he was asleep on duty, which appears to be the finding made by the Deputy President, is not one, we say, that can be substantiated on the evidence, in circumstances where he's observed to be asleep at quarter to three, and Mr Fuller's evidence is that he had started knocking people off at half past two.

PN148

VICE PRESIDENT ASBURY: I understand that, and I accept that the decision is somewhat, again, speaking from my part, it's somewhat light on in relation to the rationale for the finding, but there was evidence, as I understand it, from the GPS system that showed that someone got into the truck at 12.45, which would put Mr Steed in the truck for a pretty long period of time.

PN149

MR BONCARDO: The GPS evidence, I don't think that actually got before the -
- -

PN150

VICE PRESIDENT ASBURY: It was referred to, and regrettably, a lot doesn't seem to have gotten – CCTV footage that could have showed the weather on the day - - -

PN151

MR BONCARDO: Yes.

PN152

VICE PRESIDENT ASBURY: And the GPS data that might have shown when the truck was entered and exited.

PN153

MR BONCARDO: Yes. None of that was before the Deputy President and none of that was explored by either side of the hearing. But there is also, and perhaps alluded to, Vice President, a difficulty in really understanding what the valid reason is. If the Full Bench looks at paragraph 26 of the decision at appeal book 8, the Deputy President says that whilst he accepts Mr Fuller and Mr Hagerty's evidence that Mr Steed had been asleep, that's not the real issue.

PN154

The real issue is that he didn't have any reason to be resting up or escaping the rain in the truck. And then the four reasons are listed, which we have dealt with in our written submissions. So, the valid reason does not appear to be, at least so far as paragraph 26 is concerned, that my client was sleeping in the truck. It's that he had no real reason to be resting up or escaping the rain.

PN155

Ambiguity is then added by the finding at, or the reference at paragraph 48, from the second sentence to the conclusion that – or my client's denial that he was sleeping, and then the Deputy President's finding that he was asleep. Now, whether that finding constitutes a valid reason, is somewhat unclear. But we have dealt in the written submissions, with the four matters set out 26, and we can contend in the circumstances that those matters are not well founded and cannot be established on the evidence.

PN156

And it would be a matter, with respect, for the Full Bench if the decision is quashed, to evaluate for itself as to the component of assessing whether or not reinstatement was appropriate, what the valid reason was if there was one, and whether it was such as to militate against reinstatement. Can I just, in dealing with - - -

PN157

VICE PRESIDENT ASBURY: So, essentially what you are saying is, look, we say that the finding in respect of valid reason is not sufficiently soundly based to warrant the decision not to reinstate, so we're not going to forensically go through the basis of the evidence, we're just saying there's not sufficient evidence in the decision? Are you saying that, or are you saying, even if he was asleep, it wasn't a sackable offence?

PN158

MR BONCARDO: The second in the alternative, because the first is the primary submission. That is, that you accept what the Deputy President has found, to the extent it can be discerned, and it is not a matter in an of itself that means that reinstatement is inappropriate. The second - - -

PN159

VICE PRESIDENT ASBURY: And there doesn't seem to be a finding about the evidence that, or the suggestion from the respondent's witnesses that things were being lifted over the truck, which made it inherently dangerous for the applicant to be asleep in it without anybody knowing he was there, which I think members of the Full Bench, and again, speaking for my part, are entitled to know, just as I know there's a bend in the road, it's dangerous for somebody to be asleep in a truck when there's a crane working over it.

PN160

MR BONCARDO: That evidence was, in fact, disclaimed by Mr Hagerty in his cross-examination, and can I take the Full Bench to that.

PN161

VICE PRESIDENT ASBURY: Yes.

PN162

MR BONCARDO: It's at paragraph number 566, which is on page 65 of the appeal book.

PN163

VICE PRESIDENT ASBURY: Yes.

PN164

MR BONCARDO: And can I take the Full Bench, firstly, to paragraph numbers 565, where paragraph 17 of Mr Hagerty's statement is referred to.

PN165

VICE PRESIDENT ASBURY: He says that was the previous day.

PN166

MR BONCARDO: Yes.

PN167

VICE PRESIDENT ASBURY: Yes, so I recall that. Sorry, I hadn't marked that. So, you say that there was evidence that that was not a live issue because Mr Hagerty accepted that - - -

PN168

MR BONCARDO: That's right.

PN169

VICE PRESIDENT ASBURY: The work was being done the previous day, and the applicant's evidence, or the applicant at first instance's evidence, was that he was working alone in the yard.

PN170

MR BONCARDO: Yes, that's right. That's right. And to the extent that there's any doubt about it, the Full Bench will see the answers at 566 and 567 to Mr Hagerty's evidence, that 'there were no overhead works at the time, we weren't working on the road, at all.'

PN171

VICE PRESIDENT ASBURY: Okay. I understand your submission, thank you.

PN172

MR BONCARDO: Thank you, Vice President. We have dealt with the balance of grounds 5 and 6 in the written submissions, and I don't need to say anything additional to what we've said there in respect to those matters. Can I perhaps just address the matters raised in Mr Buchberger's submissions. Many of these matters are relevant to what the Full Bench might do in the event that there is a re-hearing.

PN173

At paragraphs 7 and 21, there's a contention that there was evidence that the relationship and trust and confidence had broken down. In paragraph 7 there's a number of citations of evidence in – or the evidence given by Mr Hagerty before the Deputy President, the first of which is paragraph number 679 which is at appeal book 74. This was evidence that was given in cross-examination, and in order to understand the context of the evidence at paragraph number 679, it's useful to go to 677.

PN174

Now, this cross-examination was directed to one of the issues before the Deputy President, which he found in Mr Steed's favour, namely that he had been dismissed on 7 April. He is asked at 677 whether or not Mr Steed handed his keys back. He says that he asked for his keys back. And at 678 he's asked whether that's something that's normally done, and his response to was that if he finds someone to be untrustworthy, 'especially in a place where there's so much valuables, that that's what occurs.'

PN175

And then he is asked, again, 'When someone finishes up and you ask them to return the keys and clear out the locker, it's not something that would happen on a normal, average day, and then he said, 'If I find them to be untrustworthy on that day, yes, I definitely would.' Now that, in my respectful submission, is not evidence that goes to whether or not the relationship of trust and confidence has irretrievably broken down, it's evidence about Mr Hagerty's state of mind on the afternoon of 7 April, noting that it was Mr Buchberger, not Mr Hagerty, who was the relevant decision-maker.

PN176

The other evidence that is cited by the respondent in its submissions at paragraphs numbered 747 to 749 of Mr Hagerty's cross-examination, they are found at appeal book 81. Now, this is re-examination of Mr Hagerty, which commences around about page 80, and at 743 on page 80, he is asked about getting an email from Brett for a meeting. At 744, he was asked about responding to that email and who gave authorisation for the letter, and he's not sure about that.

PN177

He is then asked at 746 about a discussion that was had. And then he is asked about, at 747, 'What motivation does it send to other team members of Active Hire if someone is asleep in the truck?' He says, 'It's very negative, it shouldn't be accepted.' He is asked about culture being important, and at 749, what the workplace means to him, and family oriented.

PN178

Again, that's not evidence, in my submission, that the relationship of trust and confidence has irretrievably broken down, as appears to be suggested in the written submissions, and again, it's evidence of Mr Hagerty, not Mr Buchberger, the relevant decision-maker.

PN179

The other matters I wanted to deal with in respect to Mr Buchberger's submissions are these, and that is, at paragraphs 12 to 13, there's reference to a company policy that there is always indoor work available in case of inclement weather, and Mr Steed was aware of this. That submission is not supported by any evidentiary reference and there's a good reason for that, and that's because there is no evidence of any such policy before the Deputy President.

PN180

The Full Bench will see no such written policy amongst the materials, or any question put to Mr Steed about his awareness of any such policies. There was

also, and I don't think this is contested, no evidence that there was, in fact, indoor work available for Mr Steed to do on 7 April.

PN181

Mr Buchberger at paragraph 19, refers to a procedure to contact a supervisor when there is inclement weather. In support of that, Mr Steed's cross-examination at paragraph numbers 139 to 140 is cited. That cross-examination is found at page 27 of the appeal book, and the Full Bench will see there at paragraph number 139, Mr Steed is asked, 'I asked why you didn't talk with the procedure in place to talk to your supervisor when you suspend work because of inclement weather.'

PN182

The answer to that question is just, 'No.' It doesn't, with respect, supply any evidence to ground the submission that there was a procedure to contact a supervisor, and none of the respondent's witnesses in their statements give that evidence. And paragraph 140 doesn't contain the question, in any event, the answer to whatever question may have been asked, was no.

PN183

Two other relatively minor matters. At paragraph 10 there is an assertion that there were suitable facilities for sheltering from the rain in yard 5 where Mr Steed was working. Mr Steed's evidence at appeal book 25, paragraph numbers 121, 123, 125 and 127 are cited. What is ignored in the answer to paragraph 11 at appeal book page 25. There is a hut area where the respondent asserts Mr Steed should have been sheltering that he is asked about.

PN184

He's asked, 'Has it got cover outside?' And the response is, 'Yes, but everything was wet from the rain and it's not an enclosed area.' And at paragraph 130, over the page at appeal book 25, Mr Steed is asked, 'Why didn't you take shelter at the lunch room', which presumably is a reference to the hut area, again, and his response is, 'Everything was just soaking wet in the lunch area.' Those are the reason why he took shelter, on his evidence, in the truck.

PN185

There is also an assertion that Mr Steed was working with others, at paragraph 9 of the respondent's submissions. The evidence was he was working with others from time to time, throughout the course of the day, but that when the rain started in the afternoon he was working by himself. That is found at appeal book 25. Now, paragraph number 115 is what's relied upon, where Mr Steed accepts that there were other people working in the yard.

PN186

And then at paragraph 131 over the page he's asked, 'where your colleagues were working.' 'Did you work on your own there or did you have work colleagues work there, as well?' And he says, 'There was people working around the area but I was working on my own, yes.' Then at 134, and this is critical, 'At the time when it was pouring down in the afternoon there was no one else there but me.' So, he was working by himself, contrary to what is set out in the respondent's submissions.

PN187

I have dealt with the timeline in respect to the discovery of Mr Steed sleeping, which the respondents deal with at paragraph 14 of their submissions. Just in respect to paragraph 13, there's an assertion that Mr Steed was required to clock out via a Bundy clock system. There was no evidence of that before the Deputy President.

PN188

There was also, at paragraph 16, a reference to trucks being within 20 metres of Mr Steed and that he would have heard them leave at 2.25 if he hadn't been asleep. No evidentiary reference was cited in support of that proposition. There was no evidence of that before the Deputy President. The closest one gets to their being any evidence of trucks moving around where Mr Steed was in the vehicle, is his cross-examine at appeal book 29, paragraph 163 onwards where it's suggested to him that trucks left the area, around 2.25. He says he is not aware of that.

PN189

At 164, he doesn't recall seeing them, and 165, he just wasn't aware of where any of the trucks were. At 166, he didn't see any other truck leave. And there was no other evidence before the Deputy President about the presence of trucks, at all. Those are the matters I wanted to raise in respect to the respondent's submissions. Can I deal with the happy event that permission to appeal is granted and the decision is quashed, and what the Full Bench ought do by way of re-hearing.

PN190

In our submission, reinstatement ought be ordered. There are good reason for that, given that it is the primary remedy under the Act and there is no evidence that the relationship of trust and confidence has been sullied to such an extent that the employment relationship cannot be a viable one if it is reinstated, and Mr Buchberger's evidence at paragraph numbers 912 and 916 to 197, is in fact to the contrary.

PN191

The respondent, at paragraph 20 of its submissions, says that reinstatement as a truck driver cannot be provided, as it has never been employing personnel, a hundred per cent only on truck driving duties.' That (indistinct), with respect, goes nowhere (indistinct) any reinstatement order would be an order that Mr Steed be reinstated to his previous position, which combined truck driving and yard duties.

PN192

It is also perhaps worth noting that in the performance review that was before the Deputy President, at appeal book 128, I think it's in a number of places, that Mr Steed's role is described as that of a truck driver. But in any event, what's said at paragraph 20 does not constitute a reason why reinstatement would not be (indistinct).

PN193

The contention that there is a significant loss of trust by management and work colleagues, is made in a (indistinct) vacuum. That contention is raised at

paragraph 21 of Mr Buchberger's submissions. Then at paragraphs 22 and 23, a number of suggestions are made about the adverse monetary impact of reinstatement and the possible retrenchment of current employees.

PN194

I say two things about those. One is that there was no evidence about any of those matters before the Deputy President, nor is there any evidence of those matters before the Full Bench. They cannot be considered and relied upon for that reason alone. Secondly, can I remind the Full Bench respectfully of what was said by the Full Bench in *Club Assist Pty Ltd v Yapp*, which is at tab 8 of our authorities, commencing at page 215 at paragraphs 45 through to 46, where a similar admission was made, albeit in the context of the applicant's position not being vacant at the time of the arbitration.

PN195

The Full Bench pointed out that the fact that an applicant's position is no longer vacant at the time of an unfair dismissal application, without more does not bear so significantly upon the assessment of appropriateness so as to require its express consideration in the statement of reasons. And at 46, the evidence there before the Commission in that matter is there set out.

PN196

But in any event, the fact that a position has been filled, is not and cannot be in our submission, an answer to a reinstatement application, and in any event there is no evidence here. I don't think that I have given you the correct reference to Yapp and I apologise for that. The paragraphs I was intending to take the Full Bench to – I'm sorry, it's paragraphs 44 and 43, where it's pointed out at paragraph 44 that the mere fact that an employer has filled the position previously occupied, would rarely of itself justify the conclusion that reinstatement is inappropriate. There is no evidence here of that, in any event.

PN197

VICE PRESIDENT ASBURY: But there could be. If we did what you're asking, Mr Boncardo, we could receive further evidence.

PN198

MR BONCARDO: You certainly could. I - - -

PN199

VICE PRESIDENT ASBURY: About the current situation of the respondent.

PN200

MR BONCARDO: Yes, and indeed, the current situation of my client.

PN201

VICE PRESIDENT ASBURY: Of the appellant.

PN202

MR BONCARDO: Yes.

PN203

VICE PRESIDENT ASBURY: So, what do you say about the submissions in relation to that, that he's got a job?

PN204

MR BONCARDO: He had a job, and this was evidenced before the Deputy President at the compensation hearing, that he had a job as at 2 February that was, in fact, a permanent job. I'm instructed that he no longer has that job and is in casual work, so he does still seek reinstatement. But I would accept - - -

PN205

COMMISSIONER JOHNS: So- - -

PN206

MR BONCARDO: I would accept, Vice President, that error is found and the respondent does seek to educe further evidence on the question of remedy, that is certainly a course that the Full Bench may consider appropriate for itself to engage in, or alternatively to remit the matter to another member of the Commission to deal with.

PN207

COMMISSIONER JOHNS: So, is he no longer with Black Mount Springwater?

PN208

MR BONCARDO: No.

PN209

VICE PRESIDENT ASBURY: Okay. Thanks, Mr Boncardo.

PN210

MR BONCARDO: If the Commission pleases.

PN211

COMMISSIONER BISSETT: Just before we finish, Mr Boncardo, so there has been a further decision and order of the Deputy President with respect to the question of compensation.

PN212

MR BONCARDO: Yes. Yes.

PN213

COMMISSIONER BISSETT: What happens to that decision and that order? Because even if we quash this decision, that other decision is still sitting there and the order is still sitting there.

PN214

MR BONCARDO: I think the appropriate course would be, if this decision is quashed, for that decision also to be quashed because that decision is premised on and flows from - - -

PN215

COMMISSIONER BISSETT: On this one.

PN216

MR BONCARDO: That's right, and Mr Steed could not have - - -

PN217

COMMISSIONER BISSETT: Still seeks - - -

PN218

MR BONCARDO: That's right. So, in the event that we are successful in having this decision quashed, then it would flow logically that the compensation decision ought also be quashed.

PN219

COMMISSIONER BISSETT: Yes. Thank you, Mr Boncardo.

PN220

MR BONCARDO: Can I give you the reference to that decision if that's convenient, if the Full Bench - - -

PN221

COMMISSIONER BISSETT: That's fine. We have that.

PN222

VICE PRESIDENT ASBURY: We have that decision, thanks, Mr Boncardo.

PN223

MR BONCARDO: If the Commission pleases.

PN224

VICE PRESIDENT ASBURY: Thank you. Mr Buchberger, would you like a break, to gather your thoughts and prepare to make your submissions?

PN225

MR BUCHBERGER: Yes, I would appreciate that. There's been obviously a lot of things cropped up, a little bit.

PN226

VICE PRESIDENT ASBURY: Sure.

PN227

MR BUCHBERGER: I do have, obviously, my views on certain things, which I would like to express.

PN228

VICE PRESIDENT ASBURY: Yes.

PN229

MR BUCHBERGER: My apologies in advance, that I might not be as good as referencing every point as Mr Boncardo is doing, through the numbers and paragraphs, but I think in terms of the context, I'm sure the Full Bench – you will have our point of view on all these items. So, if we could have maybe a little break that would be appreciated, and then I can, I guess, respond to Mr Boncardo's submissions.

PN230

VICE PRESIDENT ASBURY: All right, how long would you seek, 15, 20 minutes, half an hour?

PN231

MR BUCHBERGER: Fifteen minutes is fine.

PN232

VICE PRESIDENT ASBURY: Fifteen minutes?

PN233

MR BUCHBERGER: Fifteen minutes if fine, yes.

PN234

VICE PRESIDENT ASBURY: All right, I make the time 25 past 11.00.

PN235

MR BUCHBERGER: Yes.

PN236

VICE PRESIDENT ASBURY: So, if we resume at 20 to 12.00.

PN237

MR BUCHBERGER: Thank you, very much.

PN238

VICE PRESIDENT ASBURY: Thank you.

SHORT ADJOURNMENT

[11.23 AM]

RESUMED

[11.40 AM]

PN239

VICE PRESIDENT ASBURY: Thank you. Mr Buchberger?

PN240

MR BUCHBERGER: Thank you, very much. Okay, in reference of Mr Boncardo's submission, again, I do in advance, apologise if I may be not as clinical as Mr Boncardo is. Please understand, whilst I have tertiary education, I do not have a very deep insight in law, and I'm not a lawyer, but I've certainly been in this business for nearly 22 years now. So, I do have a little bit of more practical understanding.

PN241

So, I guess, in a company that's grown from five employees, to currently 45, what does work, and what might not work, I think at the end, hopefully we can keep also in mind that we would like a practical decision which certainly works, not just for one side, I think for everyone involved.

PN242

At the start I would like to really give a better understanding to the Commission about the job Mr Steed had, because we also outlined it in our submissions, and I

think it's very important to understand the 50/50 split of work, what Mr Steed was employed as. Active Crane Hire is a very versatile beast. We have many different positions. We are very versatile employees.

PN243

We do not have hundred per cent truck drivers. Truck drivers, when cranes are not installed or dismantled on building sites, have to also work in the yard. There's a lot of work to be done in the yard, and hence the split is usually around 50/50. We make that very clear in our job descriptions, and also that should not be, I believe, challenged by Mr Boncardo. Mr Steed was 50 per cent yard, 50 per cent truck driver.

PN244

It is correct that Mr Steed, we could not fault his abilities to drive trucks, yes? So, this has been all along, hence when it says no formal warnings, no ability of Mr Steed, Mr Steed as a truck driver, I can speak for all management, for all people who have been cross-examined, we had no issues. Mr Steed, in the yard, that was different. There was - - -

PN245

COMMISSIONER JOHNS: Sorry, Mr Buchberger, I'm sorry to interrupt.

PN246

MR BUCHBERGER: Yes.

PN247

VICE PRESIDENT ASBURY: It's Commissioner Johns here.

PN248

MR BUCHBERGER: Yes.

PN249

VICE PRESIDENT ASBURY: We're here, hearing an appeal from the decision of the Deputy President.

PN250

MR BUCHBERGER: Sure.

PN251

VICE PRESIDENT ASBURY: We're not here to hear, if you like, a rerun of the case that was run before the Deputy President. And so, say for example, the first round of appeal is essentially that the appellant made lots of submissions about reinstatement, and they actively engaged with the concept of a loss of trust and confidence.

PN252

And the criticism of the Deputy President is, the Deputy President failed to address that, failed to engage with that argument. And just speaking for myself, it seems to me that maybe you would agree with that proposition.

PN253

MR BUCHBERGER: This is where I'm leading to. The loss of - - -

PN254

COMMISSIONER JOHNS: But the question before us is - - -

PN255

MR BUCHBERGER: Sorry. Yes, please - - -

PN256

COMMISSIONER JOHNS: The question before us isn't whether there has been a loss of trust and confidence.

PN257

MR BUCHBERGER: Right.

PN258

COMMISSIONER JOHNS: The question before us is, did the Deputy President engage with that argument. And it seems to me, just speaking for myself, looking at the Deputy President's decision, he doesn't seem to have engaged with the argument despite the fact that the applicant raised it very squarely. Do you agree with that?

PN259

MR BUCHBERGER: I agree with that, that he – look, in his decision he obviously didn't make it explicit, but when – he obviously heard the whole hearing, and I believe he certainly engage but listening to the witness statements and cross-examination of the management, especially Mr Hagerty and Mr Fuller who were the direct supervisors of Mr Steed, that there was a loss of trust, a loss of trust during the events that happened on 7 April. So, I believe - - -

PN260

COMMISSIONER JOHNS: But what does that matter? You're the decision-maker, aren't you?

PN261

MR BUCHBERGER: Yes, but I have to certainly listen to my management, yes, when you - - -

PN262

COMMISSIONER JOHNS: But you - - -

PN263

MR BUCHBERGER: When you run – it's a corporate decision we make. It is correct that at the end of the day, I have to say yes or no, but I have to listen to my management, as well, what their input is, whether we terminate someone's employment or not. At the end of the day, this is my job and I know I'm the final decision-maker, that's correct, but I have to listen to my management, as well, for a company to operate the way it is, yes.

PN264

And when it comes to loss of trust, I think that Mr Hagerty – I've never heard that Mr Hagerty asked for someone's keys back, and I think in his evidence that was quite clear that there was a loss of trust. He just didn't trust Mr Steed anymore,

after what happened on 7 April. And in cross-examination Mr Hagerty did actually mention it. And Mr Grumley asked Mr Hagerty, 'Is that normal, handing keys back?' And Mr Hagerty said, 'Well, it's the loss of trust, absolutely.' So, I can - - -

PN265

COMMISSIONER JOHNS: I don't know that he exactly says those words, but - - -

PN266

MR BUCHBERGER: Yes. Well, it was a big event to ask for keys back, and for someone to clean out their locker when he was asked, and a loss of trust - - -

PN267

VICE PRESIDENT ASBURY: Except - - -

PN268

MR BUCHBERGER: Yes?

PN269

VICE PRESIDENT ASBURY: Except, Mr Buchberger, the issue about that was whether that indicated that the applicant had been dismissed, at that point, which the Deputy President found that he had been.

PN270

MR BUCHBERGER: Yes.

PN271

VICE PRESIDENT ASBURY: But it seems to me, again from my part, if you look at Mr Hagerty's evidence he's formed the view that Mr Steed was sleeping on the job while in overtime. And arguably, that is – it lets – even assuming that Mr Steed was sleeping on the job, at the time that he was found in the truck, work had ceased for the day. It wasn't overtime.

PN272

So, I guess the proposition from my perspective is, is Mr Hagerty's lack of trust validly founded when he appears to have based it on a view that he was sleeping in a truck while he was on overtime, which arguably was not the case.

PN273

MR BUCHBERGER: I need to clarify that he was certainly still on duty, yes. I do not take the evidence of Mr Boncardo, where he says at 2.30 he was off duty.

PN274

VICE PRESIDENT ASBURY: But I'm sorry - - -

PN275

MR BUCHBERGER: Yes?

PN276

VICE PRESIDENT ASBURY: It's not Mr Boncardo's evidence, Mr Buchberger, it's your evidence.

PN277

MR BUCHBERGER: Yes.

PN278

VICE PRESIDENT ASBURY: Your witness' evidence was that they knocked off the workers at – decided to knock them off at 2.00 or 2.30, whatever it was.

PN279

MR BUCHBERGER: Yes.

PN280

VICE PRESIDENT ASBURY: And someone said, 'Well, you'd better let Mr Steed know.'

PN281

MR BUCHBERGER: Yes.

PN282

VICE PRESIDENT ASBURY: So, the point is, Mr Steed says, 'I was there on my own, I wasn't sleeping.' Even if he was, at that point a decision had been made to knock off the workers, and they were going to tell Mr Steed the same thing, I'm assuming, that you're knocking off.

PN283

MR BUCHBERGER: Okay, Mr Fuller, at 2.30, started the rounds to close the yards.

PN284

VICE PRESIDENT ASBURY: Yes.

PN285

MR BUCHBERGER: And that's why I want to – I don't want to rerun the case but it was made quite clear one of the workers said to Mr Fuller, 'You better wake up Brett who's asleep down in yard 5.' And Mr Steed, at that stage, was still on duty. The only way our employees are off duty, when they come up to the main yard which is at 8 Ainsley Close, and clock out in our Bundy clock. That's how our payroll system works.

PN286

And Mr Steed clearly had not yet done that, and in fact, he's done that after he was addressed by Mr Hagerty and then followed him up in the truck, which was then around 3 o'clock. So, Mr Steed definitely was still on duty. But the - - -

PN287

VICE PRESIDENT ASBURY: Okay, I understand your submission.

PN288

MR BUCHBERGER: So, in terms of animosity, I guess, how can you – we treat people with respect, but we do have, obviously, company values and a company culture. And teamwork is very important, and for workers to report Mr Steed being asleep, there was certainly a lot of animosity between the workforce.

PN289

VICE PRESIDENT ASBURY: But Mr Buchberger, I'm sorry - - -

PN290

MR BUCHBERGER: Yes.

PN291

VICE PRESIDENT ASBURY: The issue that we're determining is the argument.

PN292

MR BUCHBERGER: Yes.

PN293

VICE PRESIDENT ASBURY: The argument that is being made on behalf of Mr Steed, is that in the hearing before the Deputy President, he made a finding based on what he observed at the hearing that there was animosity between the witnesses for the company, and Mr Steed. And the proposition that's being put is, first, there's no evidence of that anywhere in the transcript that anybody displayed any animosity to anyone else in that hearing.

PN294

Also, that there is nowhere in the transcript where the Deputy President told the parties, 'I am considering making a finding. I'm observing you're behaving with animosity towards each other, and on that basis I could make a finding that reinstatement is not open because of that animosity.' That's the argument.

PN295

MR BUCHBERGER: Right.

PN296

VICE PRESIDENT ASBURY: So, if you want to say something in contradiction to that, that would be of assistance.

PN297

MR BUCHBERGER: Right.

PN298

VICE PRESIDENT ASBURY: Because that's the position that the appellant is putting.

PN299

MR BUCHBERGER: Yes.

PN300

VICE PRESIDENT ASBURY: And for my part, I can see nothing in the transcript indicating animosity, and I can see nowhere in the transcript where the Deputy President has notified the parties that he is contemplating making that finding. And also, I can't see where any of your witnesses have said, 'We think there's animosity between us and Mr Steed.'

PN301

MR BUCHBERGER: Okay, it's a factor – you're probably right in that there is not but when you have been engaged in a three hour hearing, and you hear witnesses, I guess, with languages or – or signals besides work, yes? And I think this – I know this might not count here, but I think Mr Boyce has certainly witnessed the divide between the parties.

PN302

Now, in terms of facts of the day, there's one thing I would like to ask. If there is a re-hearing, I certainly would like that the GPS records are considered, of the trucks. We did table them at the hearing, late. That's why they were not officially as evidence in front of Justice Boyce.

PN303

But the GPS records of trucks will certainly set the facts straight what happened on that day, which we believe will support that there was a valid reason for us to terminate the employment of Mr Steed.

PN304

VICE PRESIDENT ASBURY: As I understand it, what the GPS records will show is, someone got into the truck at a particular time, got out of the truck at a particular time, and got back in it again.

PN305

MR BUCHBERGER: Yes, but that will also show the movements of trucks around, and that there were trucks very close to Mr Steed, and had he not been allegedly asleep, he certainly would have seen trucks leaving the yard at 2.25 to go up to head office for the work day to finish. So, Mr Steed was – he was allegedly – he said he was not asleep.

PN306

He could not see, in his statement, apparently the trucks leaving, which were five or ten metres away from him. And those GPS records obviously pinpoint the location within five metres, and certainly all the records.

PN307

VICE PRESIDENT ASBURY: Okay. Again, even accepting, Mr Buchberger, accepting for the sake of the discussion, that Mr Steed was asleep, it seems to me that the way that this could have played out was that if he'd been given an opportunity to come in and have a discussion with you, and he'd said something like, 'Look, I had a really bad night, I was tired', something, you know, this might have been a different scenario.

PN308

And one of the other issues is that the Deputy President made a clear finding that that opportunity was denied. It wasn't given to him.

PN309

MR BUCHBERGER: We did offer him the opportunity, but Mr Steed didn't take it up.

PN310

VICE PRESIDENT ASBURY: Well, the finding is to the contrary, that what in fact happened was quite to the contrary, that Mr Steed was told, 'Do you want to come in and get your paperwork', and he said, 'Well, if it's only going to be paperwork, no, I'm not coming in', just email it to him. That was the opportunity. And the Deputy President has made a finding that there was no opportunity to discuss the termination or your view that he'd been asleep in the truck, and to get him to respond to it.

PN311

MR BUCHBERGER: Yes, and we accept our findings. I think, for us, the real issue is whether a reinstatement has merit of success, I trust. I could not see how it would work that if – let's say the decision is quashed and reinstatement is now considered and granted, I could not see how this would work at the current conditions. It's just - - -

PN312

VICE PRESIDENT ASBURY: Again, speaking for my part - - -

PN313

MR BUCHBERGER: Yes.

PN314

VICE PRESIDENT ASBURY: Mr Steed seems to be saying in one of his statements, I accept that, all right, I've done the wrong thing. If there's a policy about what to do in the event I can't work due to inclement weather, then in future I will comply with it. And, you know, arguably there was an error on the part of Mr Hagerty that it was on overtime when it wasn't, in fact, that arguably, this could be put back together again, because there's been some misunderstanding on both sides.

PN315

So, what's so fatal to reinstatement on the evidence before the Deputy President?

PN316

MR BUCHBERGER: Fatal reinstatement is, we do not have a position as a hundred per cent truck driver.

PN317

VICE PRESIDENT ASBURY: But then that's not what's being sought. What is being sought is, reinstatement to the position that Mr Steed held prior to the termination of his employment, which is as a truck driver and working in the yard. That's what's being sought. He's not asking for reinstatement as a hundred per cent truck driver.

PN318

MR BUCHBERGER: Bu this position – we have those positions filled at the moment. It puts us in a very, very – hence the submission of what impact such a determination would have on the current business at Active Crane Hire.

PN319

VICE PRESIDENT ASBURY: Okay.

PN320

MR BUCHBERGER: If positions are filled a hundred per cent, it puts us in a very - - -

PN321

COMMISSIONER JOHNS: Mr Buchberger - - -

PN322

MR BUCHBERGER: Yes.

PN323

COMMISSIONER JOHNS: Mr Buchberger, if this matter is quashed or remitted, and the question of reinstatement comes up, I do note that your Website says, 'At Active Crane Hire we are always growing and looking for new team members to drive our successful business. Right now we are hiring the following positions – yard personnel, general maintenance.' So, it might be a question that could very relevantly be dealt with if the matter was remitted.

PN324

MR BUCHBERGER: That is correct. However, Mr Steed, as his quality in the yard, that is highly questionable. And this is what - - -

PN325

VICE PRESIDENT ASBURY: Well, Mr Buchberger, there was never ever a warning. I accept there was a performance review, but there is nowhere in the evidence, any evidence, not a skerrick of evidence, that any issue had ever been taken with Mr Steed's conduct, capacity or work performance, other than one of the witnesses said, 'Oh, orally, I've raised some things with him, 'but sufficient to justify a warning.

PN326

So, there's no evidence of that, at all, really. And you didn't rely on that to terminate.

PN327

MR BUCHBERGER: Yes, it's – yes, I have no further – no further comment.

PN328

VICE PRESIDENT ASBURY: Do you have any other submission you want to make in relation to the other grounds of appeal?

PN329

MR BUCHBERGER: No, look, to be honest, this is – as I said, this is above my capacity as – I'm a managing director of a company, but I'm not legally educated in such a case that I can run a fair proposition, yes.

PN330

VICE PRESIDENT ASBURY: Mr Buchberger, can we assume that if the decision is quashed and remitted for rehearing, you would be wanting to call some additional evidence about whether reinstatement is practical in the current circumstances of your company?

PN331

MR BUCHBERGER: Yes, I certainly would like to do that, yes.

PN332

VICE PRESIDENT ASBURY: All right, I understand that. Would you like a further opportunity to look at the transcript of these proceedings and make some written submissions, or are you content that you rely on your written submissions that you've already filed?

PN333

MR BUCHBERGER: Yes, I think I rely on the current paperwork that's in place.

PN334

VICE PRESIDENT ASBURY: All right. That's all you wish to say?

PN335

MR BUCHBERGER: Yes. Thank you, very much.

PN336

VICE PRESIDENT ASBURY: Thank you. Mr Boncardo, do you have anything in reply, any reply?

PN337

MR BONCARDO: No, Vice President, other than just to make the matters that have been put by Mr Buchberger from the Bar table, so to speak, in respect to factual circumstances, we formally note that we don't accept those propositions shouldn't take them as being evidence, but that's trite but I just thought that I'd note that for the record.

PN338

VICE PRESIDENT ASBURY: Yes, Mr Boncardo.

PN339

MR BONCARDO: But otherwise, I don't have anything further to say.

PN340

VICE PRESIDENT ASBURY: I'm sure we're aware of the difference between a submission and evidence, Mr Boncardo.

PN341

MR BONCARDO: Indeed. Yes.

PN342

VICE PRESIDENT ASBURY: Thank you for that. All right, on that basis I'll indicate that we will reserve our decision and issue it in due course, and these proceedings are adjourned. Thank you for your participation. On that basis I will adjourn.

PN343

MR BONCARDO: If the Commission please.

PN344

MR BUCHBERGER: Thank you.

ADJOURNED INDEFINITELY

[12.03 PM]