



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

**VICE PRESIDENT ASBURY
DEPUTY PRESIDENT MASSON
COMMISSIONER BISSETT**

C2023/1801

s.604 - Appeal of decisions

**John Bracken v OFX (OxForex Limited)
(C2023/1801)**

Melbourne

2.00 PM, WEDNESDAY, 7 JUNE 2023

PN1

VICE PRESIDENT ASBURY: Good afternoon. Could I start by taking the appearances, please. Mr Bracken, you're the appellant in the matter?

PN2

MR J. BRACKEN: Correct, yes. Yes, Commissioner.

PN3

VICE PRESIDENT ASBURY: Thank you, and for the respondent?

PN4

MR D. STEWART: Stewart, S-t-e-w-a-r-t, initial D, and I seek permission for the respondent to be legally represented, Vice President.

PN5

VICE PRESIDENT ASBURY: Thank you, and you filed submissions in relation to why permission should be granted?

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MR STEWART: Yes, they were filed on 1 May 2023.

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VICE PRESIDENT ASBURY: Yes, thank you, we have those.

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MR STEWART: Thank you.

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VICE PRESIDENT ASBURY: Mr Bracken, did you have a view in relation to the respondent seeking permission to be legally represented?

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MR BRACKEN: I guess I would put forward that I'm okay with them being represented if they would perhaps forgo the option of applying for costs, just in the interests of keeping the costs down on this. For me, that is.

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VICE PRESIDENT ASBURY: Certainly. So, you're seeking some sort of undertaking that should you not succeed with respect to this appeal, that the respondent would not seek to apply for costs in relation to the matters?

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MR BRACKEN: Yes. Yes, your Honour.

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VICE PRESIDENT ASBURY: Mr Stewart, do you have a position on that?

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MR STEWART: I can't give that undertaking, I'm sorry, Vice President.

PN15

VICE PRESIDENT ASBURY: I understand. So, Mr Bracken, the respondent is not prepared to provide that undertaking. Do you wish to be heard further in relation to whether or not permission should be granted?

PN16

MR STEWART: Yes, in that case I would like to object. I don't think it's something that the company would necessarily need external advice on, or need external representation on. Basically, everything that has been provided is everything – it sort of explains itself, to tell the truth, so yes, it – and they do have their own inhouse legal team, which I guess further goes to the point that they potentially wouldn't need to go external for this, but yes, I guess that's my position on it.

PN17

VICE PRESIDENT ASBURY: All right. We might just stand the matter down for a brief moment and consider the application for the respondent to be legally represented.

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MR STEWART: May the Commission please.

PN19

VICE PRESIDENT ASBURY: So we'll adjourn temporarily. Thank you.

SHORT ADJOURNMENT [2.04 PM]

RESUMED [2.05 PM]

PN20

VICE PRESIDENT ASBURY: Thank you. Having considered the application of the respondent seeking that permission be granted for the respondent to be legally represented, and having considered the appellant's objection, we are satisfied that this is a matter that does raise issues of some complexity, having regard to the background.

PN21

We think that despite the narrowing of the grounds of appeal there are a considerable number of documents and there are some complex matters involved. Accordingly, we are satisfied that it would allow the matter to be dealt with more efficiently, having regard to that complexity, so permission is granted for the respondent to be legally represented. Thank you.

PN22

MR STEWART: May it please the Commission.

PN23

VICE PRESIDENT ASBURY: Thank you. Mr Bracken, we've seen your submissions about why you're seeking permission to appeal, and to appeal. We have had an opportunity to consider those. Would you like to speak to those submissions and elaborate on, or clarify any point or perhaps respond to some of the things the respondent has said?

PN24

MR BRACKEN: Is it okay if my partner perhaps speaks, as in, my – yes, my wife?

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VICE PRESIDENT ASBURY: Well, Mr Bracken, you - - -

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MR BRACKEN: Just so - - -

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VICE PRESIDENT ASBURY: You represented yourself at first instance, didn't you?

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MR BRACKEN: My partner did assist with the previous appeal, and has assisted and basically done the submission for this appeal. I was under the impression that it wasn't required if it wasn't a paid agent, that I needed approval. But I could be wrong, so if I am wrong I stand to be corrected.

PN29

VICE PRESIDENT ASBURY: It's just that that's the representation, but it's not clear that your wife is – or your partner is your representative, but in any event, perhaps if I hear from Mr Stewart. Mr Stewart, do you have a view about this?

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MR STEWART: We are entirely in the Commission's hands. I can add that there have been times when Mr Bracken has represented himself, and times when his partner has represented him. There is no difficulty, whatever course is adopted by the Full Bench, from the respondent's perspective.

PN31

VICE PRESIDENT ASBURY: Okay, so Mr Bracken, as long as we're clear that your partner is making the submissions on your behalf, and they are, in fact, your submissions, then we'll be quite happy to hear from your partner to speak to those submissions, thank you.

PN32

MS MORKOS: Thank you, Vice President and to Mr Stewart, we appreciate that. From our understanding and research, the principle of res judicata that was raised by the respondent, and again, correct us if we're incorrect but we don't feel that it applies in this case because this is an appeal from a decision which is the one and only action brought by the appellant against the respondent, and so, it shouldn't apply because this isn't a secondary action in another court. It's an appeal from the first decision.

PN33

Also, he based the – that we should be estopped from being able to bring or submit errors of fact from the first appeal, or the first decision. The principle of Estoppel, again, in our understanding, precludes a person from denying the truth of some statement previously made by himself or herself.

PN34

The appellant's submissions remain consistent with previous statements and as far as we're aware, Estoppel is a rule of evidence, and as per Section 591 of the Fair Work Act, the Commission is not bound by the rules of evidence or procedure, and as such, we request or ask that the Full Bench exercises their discretion in regards to Section 591, in order for justice to be served in this case.

PN35

VICE PRESIDENT ASBURY: I think the point that the respondent is raising, is that the Full Bench granted permission to appeal, the first Full Bench granted permission to appeal and allow the appeal on only one ground, and that you are not permitted to reargue other grounds that were not found by the Full Bench at first instance.

PN36

So, the Full Bench has only found error with respect to the one area of the decision, and that the res judicata argument applied so that you can't relitigate matters that the Full Bench, the first Full Bench made no finding as to error in relation to them.

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MS MORKOS: I understand.

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VICE PRESIDENT ASBURY: All we're dealing with is the one matter.

PN39

MS MORKOS: I understand, Vice President. In regards to that, if I may, the Full Bench found in regards to one ground, and that ground was quite ambiguous and broad, and it was the ground that there was substantial errors of fact.

PN40

DEPUTY PRESIDENT MASSON: Mr Morkos, I'm not sure that's correct. I mean, my reading of the Full Bench decision on permission to appeal and an appeal, is that they found error in relation to one narrow point, that being factual conclusions reached by the Commissioner in relation to one particular matter, and it was remitted back to the Commissioner to deal with, subject to the excision of that factual finding.

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MS MORKOS: In that particular hearing, or instance, you have to understand, we're lay people, but we're not - - -

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DEPUTY PRESIDENT MASSON: I don't have to understand. I'm just looking at the decision.

PN43

MS MORKOS: Okay.

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VICE PRESIDENT ASBURY: The decision was very clear about what the remitting it back to Commissioner Ryan was focussed on, and that was the decision of that incorrect factual finding.

PN45

MS MORKOS: I just wanted to explain that we weren't aware of, like, all the procedures and rules in regards to the appeal process. We put forward our – what we thought were our strongest points in the outline of that appeal, and then we just left those broad appeal grounds, and we didn't actually – because we weren't aware of the, you know, rules and regulations or procedures and whatnot.

PN46

We didn't go in depth in explaining all of the errors because we understood that we would be asked to elaborate on those within the hearing. And during the hearing, we also weren't aware that there was a time constraint on it, either. We were – we assumed that it would go until – you know, we spoke about all matters.

PN47

And as a result, we only dealt with one of the errors of fact that we felt were strong for our case, and that was all that was deal with in the permission to appeal hearing, and as a result of the permission to appeal hearing, the Full Bench then gave us permission to appeal based on the grounds of errors of fact.

PN48

When it came time for the actual hearing for the appeal, and we had submitted in our outline of submissions, all of the errors, or most of the errors of fact that we could fit within ten pages, Mr Stewart objected to those errors of fact being submitted and heard and, you know, decided by the Full Bench because he felt that the Full Bench only meant that we could appeal on the one error of fact that we discussed in the permission to appeal hearing.

PN49

So, what I'm trying to say is, we're not deviating from anything that we've said previously. We're not contradicting anything we've said previously. We've stated
- - -

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VICE PRESIDENT ASBURY: Ms Morkos, that might be the case, but this appeal is against the last decision issued by Commissioner Ryan. It's not a chance to relitigate everything that you weren't successful on in the first appeal. So, this is not about re-arguing matters that you weren't successful on in the first appeal, and it's not – this Full Bench's role is not to overturn that decision. It's to deal with the appeal against the decision, Commissioner Ryan's most recent decision. And that's the limit of what we're doing.

PN51

MS MORKOS: I guess – I understand, thank you, but considering that Commissioner Ryan has noted in the decision that we're appealing now, that both the first and the second decisions should be read together, and that - - -

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VICE PRESIDENT ASBURY: But Ms Morkos, I'm sorry, I think we're at cross purposes. The first Full Bench found only one error in Commissioner Ryan's decision. The rest of the matters that you argued before the first Full Bench were not upheld. You were only - - -

PN53

MS MORKOS: But we didn't – I apologise (indistinct).

PN54

VICE PRESIDENT ASBURY: The first Full Bench has only left open one finding in paragraph 110 of the first decision, and the consequential references for that finding in paragraph 131 to 135, and sent the matter back to Commissioner Ryan to decide whether the error that had been identified – so, the fact that the finding was erroneous would change the outcome of the decision.

PN55

The Full Bench made it not – it specifically said that the remittal is on a strictly limited basis, and Mr Bracken's unfair dismissal application will be redetermined on the basis of the finding of facts contained in the Commissioner's reasons, except for the erroneous finding in paragraph 110, and the consequential references to that finding in paragraphs 131 to 135.

PN56

'No other party will be entitled to educe further evidence that you can make further submissions.' So, what that means is, all the other findings that the Commissioner made in the first decision stood in the appeal, in the first appeal, except for the finding in paragraph 110.

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So, in this appeal that is the only matter we're dealing with, whether that finding has now been reconsidered, the decision has been reconsidered, and the Commissioner has basically found, even if I'm wrong on that finding, I'm still of the view that the dismissal was not unfair. So, that's what we're dealing with in this proceeding.

PN58

We're dealing with one matter of the balance of that finding against the other finding, on the basis the other finding stands. The first Full Bench let them stand, they're correct. So, you're not permitted to come back in this appeal and argue all the errors that you argued before the first Full Bench, because the first Full Bench has found of all those matters that you argued, there was one error.

PN59

And it was with respect to the finding in paragraph 110, and it sent the matter back to Commissioner Ryan to consider whether the fact he got that finding wrong changed the ultimate decision, and he decided that it didn't. So, all these other findings have been held to be correct. They've been left to stand.

PN60

The Full Bench hasn't addressed any of them, hasn't found any of them to be erroneous, only the one. And so, that's what we're dealing with. So, you're not able to relitigate all the things that you argued before the first Full Bench.

PN61

MR BRACKEN: I understand, Commissioner, and if it is pertaining to that one particular erroneous finding, with the Commissioner making a new determination or a new decision based on the removal or the excision of that particular finding, that in itself, it would seem, would – that was essentially the only conduct related issue in all of the issues.

PN62

The rest of them were performance related. And the Commissioner didn't really touch on why he still found this to be serious misconduct, even though the one conduct related issue which was issue number 6, had been removed, and if he was only taking into account one, three, four, five and seven, but I guess the point that I would like to get across is, this falls out of being a conduct related issue, because the one conduct related issue was removed from the decision-making process.

PN63

However, the Commissioner has still found grounds that - - -

PN64

DEPUTY PRESIDENT MASSON: So, Mr Bracken, do you characterise a failure to follow fairly important policies in the code of conduct of the respondent, not to be conduct but performance issues?

PN65

MR BRACKEN: I would suggest that is the case, Commissioner, and I don't mean to be, you know, skirting around the issue, and this wasn't – I submit that it wasn't a wilful or deliberate action, and as I was doing what I did, I honestly and wholeheartedly believed I was doing the right thing. And there was no underlying intention to do anything deliberately incorrect, or do anything intentionally incorrect, and if there was anything that was found to be a mistake on my part – I did apologise, and I said I was sorry. Like, I - - -

PN66

DEPUTY PRESIDENT MASSON: Right, I understand all that. But to summarise, you say that once you take out of consideration, the excised incorrect factual finding, you say the balance of the matters found against you are not sufficient to found a valid reason for your dismissal?

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MS MORKOS: What we're saying is that what – the balance of the issues or reasons for the dismissal did not constitute misconduct. They were in performing his duties that - - -

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DEPUTY PRESIDENT MASSON: All right, I understand that - - -

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MS MORKOS: (Indistinct) - - -

PN70

DEPUTY PRESIDENT MASSON: I understand that it is being said that those were not conduct issues but performance issues, which in your submission wouldn't justify a finding of this conduct leading to dismissal.

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MR BRACKEN: Yes, leading to summary dismissal.

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DEPUTY PRESIDENT MASSON: Yes. Okay.

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MR BRACKEN: Yes. It may have been the case that they still had - - -

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MS MORKOS: A valid reason.

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MR BRACKEN: A valid reason. However, if that was the case that it was not a valid reason for summary dismissal, then they have in their code of conduct, a set of criteria which they are set to follow, which would be a meeting with a written warning, a first and – sorry, a written counselling, a first warning, a second warning, and so on and so forth, with – and the opportunity to improve or remediate any mistakes or errors that I previously committed.

PN76

So, yes, that's essentially the crux of the statement, so if it is the case that the one conduct related issue is to be removed from the decision, then it can only be looking at the remaining issues, which were certainly performance related. I didn't do anything. I never once refused to do any – refused to follow any directives.

PN77

I always complied with what I thought was correct, and all I was suggesting is, I just needed to be told that these were issues, and without being ever told or having the opportunity to rectify or remediate any performance related matters, it would then, itself be unfair because they haven't followed their own process which is set down in their code of conduct. And if they're suggesting I've breached the code of conduct, that in essence, would be their breach of the code of conduct, as well, by not following the - - -

PN78

DEPUTY PRESIDENT MASSON: No, the respondent's conduct is not on trial.

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MR BRACKEN: I don't mean – yes, okay. Sorry, I apologise. I'll withdraw that.

PN80

VICE PRESIDENT ASBURY: So, essentially, you're saying when the remaining findings are weighed up, absent the finding in relation to example 6, that it didn't justify dismissal?

PN81

MR BRACKEN: Correct, and – yes, that's the crux of it. And, again, there was never any conduct related issues. I'd never been spoken to about this in the seven years that I'd worked there. I never knew that anything I had done was incorrect.

PN82

MS MORKOS: Or inadequate or unsatisfactory.

PN83

MR BRACKEN: I truly and honestly thought that I was following the procedures. I understood the importance. In all the material that the respondent submitted, in all of their training material, it never lays out specifically what to do in that situation. They have – I could go into further detail on that but yes, it – your summary, Vice President, is essentially correct, that it's not conduct related and if it is performance related then the summary dismissal options shouldn't be available to the respondent.

PN84

VICE PRESIDENT ASBURY: So, this is little bit round in circles, Mr Bracken, but the Commissioner, in the first decision found that it was conduct related, for conduct related reasons that your employment was terminated, and that was the basis of him finding a valid reason. But there's nothing anywhere that says that over at 110, example 6 it is conduct (indistinct) performance but that's not the part of the first decision that stands.

PN85

MS MORKOS: But the Full Bench in their decision, in their findings, found – made the finding that they believed that if number 6 standards was removed, they believed that a conduct related dismissal couldn't be - - -

PN86

DEPUTY PRESIDENT MASSON: No, they didn't say that. They opined that it might affect it, I recall.

PN87

MS MORKOS: But then Commissioner Ryan didn't actually delve further into that and explain why, or why he didn't agree with what the Commissioners from the Full Bench - - -

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VICE PRESIDENT ASBURY: What the Full Bench has said is that it does not appear to us that the Commissioner considered that, apart from example 6, any of the examples he found to be sustained on the evidence taken alone, constituted a valid conduct reason for dismissal. Certainly, he did not say this.

PN89

Rather, our impression is that the Commissioner considered that the other examples considered cumulatively, constituted a valid reason, together with example 6, and this raises the possibility that if example 6 is taken out, then the other examples do not weigh sufficiently in favour of being a valid reason for dismissal.

PN90

And the Commissioner has reconsidered the matter, absent finding 6, and has found that taken cumulatively, the other matters do warrant a valid reason for dismissal, notwithstanding that item 6, or finding 6 is removed. So, where do you say the error in that is?

PN91

MS MORKOS: Well, the error would be that since – example 6 being removed, and he not expressly stating in the first instance that they weren't considered a valid finding, singularly, that in his subsequent decision, Commissioner Ryan perhaps should have addressed section 387 in more detail than what he did in the current decision.

PN92

I believe he only made one point, that he just stands by his findings from the first decision.

PN93

VICE PRESIDENT ASBURY: Commissioner Ryan was not able to reconsider the findings, 1, 2, 3, 4, 5 and 7. He was able to reconsider whether those findings, absent finding 6, together constituted a valid reason for dismissal. He'd already considered and made those findings.

PN94

They were not set aside on appeal, and he went back, arguably Commissioner Ryan went back and looked at the matter, again, weighed up the findings that were left to stand, and decided that that was sufficient. The factual findings underpinning 1, 3, 4, 5 and 7 were not disturbed on the appeal. I am satisfied that each of these examples', and considered collectively, they were a valid reason for dismissal.

PN95

MS MORKOS: If what is considered such a serious issue, singularly, in the first instance had been removed, wouldn't it logically then go that he should have to reconsider proportionality and harshness, given that the example that he considered to be such a serious, like, misconduct issue or a breach of procedure or policy, that, yes, the proportionality and harshness should be gone through, again, and addressed?

PN96

VICE PRESIDENT ASBURY: But the Commissioner arguably did that, because what he did, he went back, looked at the findings he'd made about the other matters, decided that he stood by them - he wasn't asked to reconsider them, decided that he stood by them, and further, said that he didn't accept the further submissions that failure to comply with these were mere errors.

PN97

And he set out, 'The applicant remains steadfast in his view that he has not breached the policies and procedures, despite clear evidence to the contrary. The lack of acknowledgement of misconduct, remorse or contrition weighs against any findings of unfairness.' So, the Commissioner was satisfied that those matters, considered together, still constituted a valid reason for dismissal, even without allegation 6.

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MR BRACKEN: But - - -

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VICE PRESIDENT ASBURY: So, where do you say the error in that is?

PN100

MR BRACKEN: In that statement, itself. So, where was it open that I wasn't showing any contrition, or I wasn't remorseful for (indistinct)? That's essentially where the appeal was coming from. So, now that he's made the redetermination based on the facts as he saw them, then that's why, essentially, we're here because of – we're appealing the decision based on that finding that – I don't know if I wasn't sorry enough for – for the Commissioner's liking, or he didn't feel I was sorry enough, but how – how does that exactly get determined? Like, I was sorry. Again, I - - -

PN101

VICE PRESIDENT ASBURY: In the first hearing the Commissioner decided that the fact you were arguing the toss about these matters and saying you hadn't breached any policies and procedures, was to him, unacceptable.

PN102

He decided that your position at the first hearing that you hadn't breached the policies and procedures, despite clear evidence to the contrary, he was entitled to stand by his findings at the first hearing, and he did, except for number 6, and reconsider the matter with removing number 6, and he still decided that the other matters were sufficient, and that it was still the case, as it was back then.

PN103

It was the case that you were not acknowledging any error, and you did make errors, and that they were a valid reason for dismissal. You failed to follow policies and procedures, and that was the valid reason for dismissal. And none of those findings were set aside.

PN104

SPEAKER: Could I just ask, Mr Bracken, in your notice of appeal, where did you raise this issue?

PN105

MS MORKOS: Sorry, what was – we couldn't hear you, you were cutting out then.

PN106

SPEAKER: In your notice of appeal, where do you raise this as an estoppel error?

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MR BRACKEN: In the error in the facts, I believe.

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SPEAKER: Pardon?

PN109

MR BRACKEN: So, it was the – sorry, my partner is just having a look at the submission.

PN110

SPEAKER: But I was looking at the (indistinct) set of notes of appeal - - -

PN111

MS MORKOS: Point number 6 on page 11 of our outline of submissions, (indistinct). Also, if I may, point 4 of our outline, the Commissioner made an erroneous finding that the appellant was given notice. He was not given notice in regard to payment in lieu, if that's what that particular statutory requirement was in regards to.

PN112

Yes, he was notified of the existence of their valid reasons, but if – is it (b), those (indistinct) – sorry – sorry, I've lost where I am.

PN113

DEPUTY PRESIDENT MASSON: It may well be that the summary that was previously provided to you, what we understand the submission to be, is that - and if I get this wrong, please correct me, that when you take out example 6, you say, as I've said previously, the balance of the matters relied on by the employer to summarily dismiss you, in your view, were not conduct issues, which considered individually or commutatively, justified a finding that would warrant summary dismissal, and therefore the discretion available to the Commissioner to find it was a valid reason, you would argue, miscarried?

PN114

MR BRACKEN: That's – yes, that's it. That's the (indistinct) - - -

PN115

MS MORKOS: That you've made your point, yes.

PN116

MR BRACKEN: Yes.

PN117

MS MORKOS: And then further on from that, that even if you, as the Full Bench, found that there was still a valid reason, that he perhaps should have delved into the reasons why – like, the proportion – like, the (indistinct) - - -

PN118

DEPUTY PRESIDENT MASSON: Yes, (indistinct).

PN119

MS MORKOS: You know, that the summary dismissal was disproportionate – a disproportionate penalty in regards to the valid finding, and the fact that he wasn't given notice, or paid in lieu of notice, that could have contributed to the dismissal being harsh, on top of the (indistinct) - - -

PN120

DEPUTY PRESIDENT MASSON: I understand your to be saying that when you excise example 6, you are left with perhaps, my words, not yours, misconduct which is reduced in gravity, which wasn't properly weighed, in assessing whether summary dismissal was appropriate. Is that what - - -

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MS MORKOS: That's correct.

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MR BRACKEN: Yes.

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MS MORKOS: You said it perfectly, thank you.

PN124

DEPUTY PRESIDENT MASSON: All right.

PN125

VICE PRESIDENT ASBURY: So, does it follow that you also accept that if summary dismissal wasn't appropriate, that dismissal with notice might have been appropriate?

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MS MORKOS: It may have been.

PN127

MR BRACKEN: It may have been, but there would have been a process, in that case, so if a summary dismissal wasn't to be invoked or used as a course of action then they would have relied on their policies, which would have been a verbal warning, which would have been a written warning, and it would have gone down the chain, as per their own code of conduct. So, that - - -

PN128

VICE PRESIDENT ASBURY: Or they might have decided to dismiss you, regardless, and pay you in lieu of notice.

PN129

MS MORKOS: Correct.

PN130

MR BRACKEN: They may have, but they didn't.

PN131

MS MORKOS: Which they didn't. And also, they knew about the infractions and the performance issues for over a month before they decided to question him

about it and summarily dismiss him. So, as per regulation 107, part 4, in our opinion, like they waived the right to summary dismissal in that (indistinct).

PN132

VICE PRESIDENT ASBURY: But Ms Morkos, regulation 107 doesn't have any relevance to whether there's a valid reason for dismissal. You don't have to establish that you had grounds to summarily dismiss under regulation 107. It's not the issue we're looking at. We're looking at, was there a valid reason for dismissal. That's what 387 subsection (a) requires. Regulation 107 is in a separate section of the Act and it doesn't relate to the unfair dismissal provision.

PN133

MS MORKOS: But it relates to that it may have been considered unfair that he was summarily dismissed, because it could have been found that although there was a valid reason for dismissal, it would have been a fair dismissal if it had have been a dismissal with notice, not a summary dismissal.

PN134

VICE PRESIDENT ASBURY: Okay, I understand.

PN135

MR BRACKEN: It wasn't just notice, it was also the – so there was the notice period, and then there would have also been the payment of the pro rata long service leave. So, altogether it would have been about 11 weeks of payment, which they chose to go a different track and go for the summary dismissal, to mean that they didn't have to pay anything.

PN136

VICE PRESIDENT ASBURY: So, you say that makes the dismissal harsh because when the ground 6 is removed, if it didn't warrant summary dismissal it was harsh because you did not receive payment in lieu of notice, and also I'm assuming you're saying you didn't receive payment for your long service leave because you were dismissed for serious misconduct?

PN137

MS MORKOS: Correct.

PN138

MR BRACKEN: Correct, and – yes, correct. That's right.

PN139

VICE PRESIDENT ASBURY: Okay, I understand your submission. And is that one of the grounds of appeal?

PN140

MS MORKOS: Yes, that was in number 6, I believe, of our grounds, or outline. Yes. Yes, it's there.

PN141

VICE PRESIDENT ASBURY: Okay.

PN142

MS MORKOS: And also, if I may, in number 4, I think, of our outline - I'm just trying to find it, bear with me -sorry, I beg your pardon, number 3, we touched on the fact that the Commissioner stated that the respondent was entitled to rely on clause 8.2(2)(a) in the contract of employment, but we would just like to put forward that the clause in the employment contract was not entirely in keeping with what is required under the Fair Work regulations that would enable them to dismiss him summarily.

PN143

SPEAKER: So, what did you say, that you couldn't rely on 9.2?

PN144

MS MORKOS: That's what we're submitting, yes.

PN145

SPEAKER: But that's a matter for (indistinct). That wasn't related to the appeal.

PN146

MS MORKOS: Okay. I'm sorry.

PN147

MR BRACKEN: It wasn't overturned in the first instance, but considering that it was put back to be redetermined, should that not have been part of the decision that you're (indistinct) - - -

PN148

MS MORKOS: (Indistinct).

PN149

MR BRACKEN: Something that the Commissioner should have considered when determining - - -

PN150

SPEAKER: He's relied on findings in the previous decision, Mr Bracken. He relied on findings in the previous decision, so he didn't need to rewrite it. It's considered and determined that that - - -

PN151

MR BRACKEN: Did he consider it based on the fact that number 6 was regarded, or - - -

PN152

SPEAKER: I think we understand what it is you say about the effect of taking number 6 out, okay.

PN153

VICE PRESIDENT ASBURY: So, essentially, you're saying that where the Commissioner in the first decision considered the personal impact, he made a finding that your personal circumstances do not outweigh the seriousness because of the misconduct, and that had finding 6 been excised from the misconduct that was found, that outcome may have changed in the second consideration? That's essentially your point?

PN154

MR BRACKEN: Yes. Yes, yes, that's – yes, correct.

PN155

VICE PRESIDENT ASBURY: So, he considered the seven years of service, the fact that you'd lost your pro rata long service leave entitlements and a bonus, but that had the Commissioner – the Commissioner should have, having excised finding 6, have gone back and considered whether that outcome still was proportionate on the basis of the misconduct that he still found had occurred?

PN156

MR BRACKEN: Correct, yes.

PN157

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

PN158

MR BRACKEN: (Indistinct), I'm sorry.

PN159

VICE PRESIDENT ASBURY: That's all right. It's fine. So, that's the submissions?

PN160

MR BRACKEN: They are. They've the submissions, yes.

PN161

VICE PRESIDENT ASBURY: Yes. Okay, understood. Thank you. Mr Stewart?

PN162

MR STEWART: Thank you. The really only conceivable way for the appellant to be successful is if he can bring some weight to bear on his ground 6. Grounds 1 to 5, with the greatest respect to Mr Bracken, are re-agitations of matters that have been determined, dealt with, and finalised.

PN163

The ground 6 issue is, if I may take this Bench to the critical paragraphs of the second decision of Commissioner Ryan, what may not be immediately apparent from the paper is that Commissioner Ryan heard the parties on 28 October 2022, with respect to the remittal from the Full Bench. There's just that piece of the puzzle missing. The decision then is the March 2023 decision.

PN164

In the important paragraphs which are also found neatly in appeal book 6, if your Honours were minded, they are dealt with at paragraphs 40 and 41, which is appeal book page 900. I think, Vice President, you have read from part of that section of the decision when you were putting a number of propositions to Mr Bracken.

PN165

The important part about that is that if each of the five matters that Mr Bracken says in his ground should have been taken into account once we take out example 6, are the very matters that his Honour are, albeit slightly in a shorthand form, has referred to there because he refers to the five matters that had been dealt with in the substantive hearing, which was dealt – he refers to paragraph 175. I won't take your Honours to that, but that's found at the appeal book page 34.

PN166

And then he says that the difference with what Mr Bracken is saying in his ground now is that it's the classic, the punishment doesn't fit the crime, which is sort of a rhetorical device that's often said, but what the critical difference is, is that in his appeal ground he talks about the punishment not fitting the crime, but then in the submission he talks about that there was no crime, which is what this Full Bench has heard, again today which is that it was mere performance, it wasn't misconduct, or conduct issues.

PN167

Even in this one breath he says, oh, I actually followed the policies, I don't know why we're here, and so on – that's the gist of what has been constantly before previous Full Benches and before Commissioner Ryan. But the really critical paragraph is at 41, because Commissioner Ryan, with the greatest of respect, he then did when determining said he was still not persuaded, and one of the critical factors was that he drew particular attention to paragraph 178 of his first decision.

PN168

That's found at appeal book page 34. This is about Mr Bracken remaining steadfast that he did nothing wrong.

PN169

VICE PRESIDENT ASBURY: Which is set out at paragraph 36 of the second decision, as well.

PN170

MR STEWART: It is.

PN171

VICE PRESIDENT ASBURY: Yes.

PN172

MR STEWART: It is, absolutely. And Mr Bracken, as this Full Bench will probably have appreciated, remains steadfast. In those circumstances, and this is the last thing I need to say on this aspect, is that where that has remained, then there is no appealable error that permission should be granted, or in turn, even if it was that there is no merit, because Commissioner Ryan, with the greatest of respect, has gone out of his way to consider every conceivable aspect of this case.

PN173

He has taken out example 6, and when faced with exactly what he had found in each of these other quite serious examples, then he exercised that discretion. And the fact that it's not in favour of Mr Bracken does not speak of error, it speaks of exercising the discretion that is very much open.

PN174

VICE PRESIDENT ASBURY: So, you'd say that the Commissioner did in fact re-weigh that matter in paragraph 141, and indeed, in the consideration under section 387(h) in the second decision?

PN175

MR STEWART: Absolutely.

PN176

VICE PRESIDENT ASBURY: And decided that notwithstanding all the things he'd earlier considered, being the service, the loss of the long service leave, et cetera, it still was conduct that warranted the outcome that the respondent had undertaken?

PN177

MR STEWART: Yes.

PN178

VICE PRESIDENT ASBURY: Right.

PN179

MR STEWART: Correct, Vice President, bearing in mind that one of the most important parts of the remittal from the Full Bench was because, and I'm paraphrasing, correct me if I'm – I can give you the exact – but the Full Bench said that he had heard the evidence unfold, he was in the best – Commissioner Ryan was in the best position.

PN180

That was accepted by me at that appeal decision that the proper course for the matter was, rather than an exercise of, I use the word, 'discretion', but I don't mean it in any sense other than deciding on weighing up a series of factors, but the Full Bench – it would not be the most appropriate course, and that Commissioner Ryan, having heard five days of evidence plus read countless pages and heard submissions, would have an opportunity, having heard the evidence unfold, to make that determination.

PN181

And that was not cavilled with by the respondent. That was considered to be the correct course in fairness to everyone, if I can say bluntly. I have nothing further, unless – obviously, the submission is longer than the 10 pages but it was hopefully done just to try and sort of mark out the territory, but ground 6 being the only conceivable one, doesn't have legs, in my respectful submission, and should -
- -

PN182

VICE PRESIDENT ASBURY: And – sorry to interrupt you - - -

PN183

MR STEWART: No, no, please.

PN184

VICE PRESIDENT ASBURY: I was just going to ask, essentially, is your submission with respect to that paragraph 178 and the steadfastness of the appellant's position, I take it that the issue is not that the appellant is apologetic and says, 'I should have been warned', et cetera, but that the appellant is saying, 'I had no idea that I was doing the wrong thing', and arguably the finding was that the appellant should have known that he was doing the wrong thing, because of the training, et cetera?

PN185

So, the steadfastness is not the appellant defiantly saying, you know, nothing to see here, it's because the appellant is essentially saying, 'I genuinely thought I'd done nothing wrong', and even if that's the position, that it's still an indication of concern that the Commission had in relation to the steadfastness of his position?

PN186

MR STEWART: Yes, exactly. And the tell, if I can put it that way, is in the submission where it's said that there was no crime. Now, 'crime' is not in the sense of the criminal code of the Crimes Act, it's in the sense of Mr Bracken believes, and may well, bone fide, believe in his heart that he did nothing wrong.

PN187

But that argument has been run and lost by Mr Bracken.

PN188

And in those circumstances that is, with respect, the end of the matter. And that was writ large at each stage of this matter, from the trial through to the matters today.

PN189

VICE PRESIDENT ASBURY: Thank you, Mr Stewart. I understand your submission.

PN190

MR STEWART: Thank you.

PN191

VICE PRESIDENT ASBURY: Thank you. Mr Bracken or Ms Morkos, do you have anything in reply?

PN192

MS MORKOS: Thank you, Vice President. Yes. In regards to what Mr Stewart submitted, I'd just like to say that we appreciate his acknowledgement of the appellant believing bona fide that, yes, he believes that he hadn't done anything wrong, not in the sense that no errors were made, but just in the sense that he didn't commit any misconduct.

PN193

He didn't intentionally or deliberately disobey any orders. He thought what he was doing was correct, considering for seven years nobody had spoken to him about these issues, earlier and that had somebody had done that, he was happy to oblige and improve his performance, but wasn't given that opportunity to.

PN194

And in regards to the Commissioner's findings in the second instance, in paragraphs 38 and 39, he goes through all of the findings in regards to section 387, which goes towards finding whether it was harsh or unjust or unfair, and in that – in 39 specifically, at the fourth point, 'The dismissal did not relate to unsatisfactory performance', and that is a summary of what was set out in his first decision.

PN195

And we'd just like to submit that because example 6 was removed, and that was a conduct related issue that was found to be erroneous, that should have been touched upon, again and found – or, at least, considered, again because, you know, we submit that it was unsatisfactory performance. Because in the respondent's submissions they – sorry, I'm just trying to think – they submitted that he was summarily dismissed, or one of the reasons was inadequate KYC, you know.

PN196

'Inadequate', in my opinion, implies that it was done but just not to a satisfactory standard. It wasn't a breach in that he overlooked something or didn't observe a requirement. In his opinion he thought he was doing the right thing, but it wasn't misconduct but should have been found to have been performance.

PN197

VICE PRESIDENT ASBURY: Yes, I think we understand that submission, Ms Morkos. Thank you.

PN198

MS MORKOS: Okay.

PN199

VICE PRESIDENT ASBURY: Are there any other submission you wanted to make?

PN200

MR STEWART: No, your Honour.

PN201

MS MORKOS: Thank you.

PN202

VICE PRESIDENT ASBURY: All right, thank you. I'll indicate that we will reserve our decision and issue it in due course. On that basis, we're adjourned, thank you.

PN203

MR STEWART: May it please the Commission.

PN204

MS MORKOS: Thank you.

ADJOURNED INDEFINITELY

[3.01 PM]