



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**VICE PRESIDENT ASBURY  
DEPUTY PRESIDENT BEAUMONT  
DEPUTY PRESIDENT ROBERTS**

**C2023/7994**

**s.604 - Appeal of decisions**

**Appeal by Austin  
(C2023/7994)**

**Sydney**

**2.00 PM, TUESDAY, 12 MARCH 2024**

PN1

VICE PRESIDENT ASBURY: Good afternoon. Could we start by taking the appearances, please. For the appellant?

PN2

MR ALLAN: If it please the Full Bench of the Commission, my name is Allan, spelt A-l-l-a-n, initials T H, Allan Walt solicitors and advocates for the appellant. Thank you.

PN3

VICE PRESIDENT ASBURY: Thank you. If you look straight ahead we can see you better.

PN4

MR ALLAN: Apologies.

PN5

VICE PRESIDENT ASBURY: Straight ahead from where you're sitting, that's great, yes, or if you want to stay seated if that's more convenient that's fine as well.

PN6

MR ALLAN: I'm a creature of habit, deputy Commissioner, thank you.

PN7

VICE PRESIDENT ASBURY: All right. No problem, thank you. For the respondent?

PN8

MR VAN DER WOUDE: Thank you, vice president. It's Van Der Woude, V-a-n D-e-r W-o-u-d-e, first name Ian.

PN9

VICE PRESIDENT ASBURY: Thank you. Do you have any objection to the appellants being legally represented – to the appellant being legally represented?

PN10

MR VAN DER WOUDE: No, I don't.

PN11

VICE PRESIDENT ASBURY: All right. Well, given that the matter may raise issues of some complexity and it is an appeal, we're satisfied that the requirements for legal representation have been met and we will grant permission for the appellant to be legally represented. Thank you. We've read the submissions and the material that's been filed in the matter so if you'd just like to speak to that. You can take it as read.

PN12

MR ALLAN: Thank you very much, Commissioners – deputy Commissioners. I'd like to start very briefly with a short summary of the material facts giving rise to the appeal which bear out what are a series of cascading errors

of fact and law where in this jurisdiction the House errors are augmented slightly by section 590 to allow for a significant error of fact as a ground of appeal and on this basis the appellant has three errors of law which it submits and brings before the Full Bench and one significant error of fact.

PN13

To the extent that there are a series of cascading errors, it is submitted by the appellant in first instance the cascading nature of them renders the three errors of law and the one error of fact somewhat interwoven but the starting position, as it always should be, is what material can be, ought to be and in this case ought not to have been before the Commission and to the extent that weight was then placed on that evidence, this is how the errors, the appellant submits and brings before the Commission, came to be.

PN14

In point of fact, the appellant brought by form 3 the unfair dismissal claim. It was heard on 25 October last year and in that and the material before the Commission so filed in accordance with the directions of Commissioner Simpson the appellant and applicant and the respondent then legally represented put on significant material given the factual nature and background being the respondent entity conducting a number of hospitality venue - or running of hospitality venues.

PN15

The nature of the conduct of the business operations of the respondent not just in this business and this entity – or respondent entity but across his expertise and a 40 year history of hospitality venues was directly relevant in circumstances where it gave rise to the concerns of the applicant and ultimately his dismissal. What was borne out on the day was difficult to ascertain what evidence would be taken by the Commission, how and then how the case would be decided.

PN16

In the transcript of the first instance, the very first matter that was brought before the open of evidence was on what basis the Commission proposes to decide this matter. The critical - - -

PN17

VICE PRESIDENT ASBURY: Sorry, can you take us to the appeal, what page, where that is – where you're referring to.

PN18

MR ALLAN: Of course. Of course, Commissioner – deputy president – or president.

PN19

VICE PRESIDENT ASBURY: Vice president.

PN20

MR ALLAN: Vice president, my apologies.

PN21

VICE PRESIDENT ASBURY: No problem.

PN22

MR ALLAN: It always gets mired when it's not your Honour. You've really got to have your game on.

PN23

VICE PRESIDENT ASBURY: The transcript, I think, starts on 467.

PN24

MR ALLAN: Thank you very much, Commissioner. Terrible with technology. ]Apologies to the Full Bench.

PN25

VICE PRESIDENT ASBURY: That's all right.

PN26

MR ALLAN: I've had my paragraph numbers on the transcript erase themselves and put in little boxes in place, so.

PN27

VICE PRESIDENT ASBURY: Yes, ours too, I'm sorry. Well, mine has.

PN28

MR ALLAN: Apologies.

PN29

DEPUTY PRESIDENT BEAUMONT: Mine have too.

PN30

VICE PRESIDENT ASBURY: I don't know what's happened with the appeal book but something.

PN31

MR ALLAN: If I could take the Full Bench to page 471.

PN32

VICE PRESIDENT ASBURY: Yes.

PN33

MR ALLAN: Midway through the page the paragraph number that's got box three box:

PN34

*MR ALLAN: Is the Commission intending to be bound by the rules of evidence?*

PN35

From there, carrying on through, to the following proceeding page of the appeal book, page 472 of 636.

PN36

VICE PRESIDENT ASBURY: Well, just bear with us for a moment. You're inquiring whether the Commission's bound by the rules of evidence and the Commissioner answers correctly:

PN37

*Arguably, as a matter of general approach we follow - we adopt the rules.*

PN38

Yes.

PN39

MR ALLAN: The nuance here, vice president, is this, statute has specifically provided, as I'm sure the Full Bench is aware under section 590 of the Fair Work Act, that the Commission isn't bound by the rules of evidence and obviously how it takes evidence is informed by the objects of the Act which is efficiency, particularly in the circumstances of form 3, unfair dismissal. To the extent that the Commission isn't bound by the rules of evidence, they are not excluded.

PN40

If it is not excluded, the rules of evidence, the Commission must set out at the start on what basis it proposes to take evidence. The Commissioner - Commissioner Simpson in first instance did so do that but it was limited to the extent that he said that he would admit the two witness statements in full, objections as to paragraph numbers in the usual format won't be dealt with and they can be addressed in closing submissions as matters going to weight. Perfectly acceptable.

PN41

VICE PRESIDENT ASBURY: Just bear with us for a moment:

PN42

*I'm admitting the witness statements.*

PN43

MR ALLAN: Yes.

PN44

VICE PRESIDENT ASBURY: So:

PN45

*We don't object on the basis that the rules of evidence aren't strictly applying. There will be a number of paragraphs we would object to.*

PN46

Yes, okay.

PN47

MR ALLAN: The options before the Commission were this, it can elect to be bound by the rules of evidence and follow them exactly. It can elect not to be bound by them. If it elects not to be bound by them it must set out on what basis it's going to decide the case because in circumstances where additional evidence was adduced in this proceeding, i.e. marked for identification and then admitted

exhibits, particularly seven partial meeting minutes, notes which were of relevance to the final decision handed down by Commissioner Simpson on 23 November.

PN48

It was not known to the parties, and as a matter of procedural fairness that's why we have the rules of evidence, how and why and on what basis that objectionable material that's otherwise inadmissible, that was admitted where the rules of evidence do not strictly apply, that is permissible. But in order to achieve the objects of the Act within the meaning of section 590 the parties must be aware of how that evidence is going to be taken, i.e. there was a departure from the rules of evidence, the middle ground if you will.

PN49

Strictly bound by the rules of evidence? No. Are the rules of evidence excluded? No. In circumstances where particularisation about the departure was:

PN50

*I will admit the two statements in full. There will be no objections in the usual course as if we were bound by the rules of evidence.*

PN51

The next inquiry is, 'Okay, is there going to be other evidence admitted in this proceeding?' and the parties need to have an opportunity to understand how otherwise inadmissible material, if the rules of evidence were to be strictly applied which they were not here, is going to be taken because it's - - -

PN52

VICE PRESIDENT ASBURY: I'm sorry, can you give us a practical example of what happened because speaking for myself, it's very common – I accept the Commission is not bound to follow – the Commission is not bound as a matter of law to follow the rules of evidence but it generally does because they afford procedural fairness so if essentially you're asserting a denial of procedural fairness, then it's not a failure to follow the rules of evidence that denied procedural fairness.

PN53

It's something that occurred that you weren't able to properly respond to. Because very often in unfair dismissal proceedings, again speaking for my part, there are numerous objectionable matters in statements and the member deals with it on the basis of saying, 'If there's an issue of weight, you can make a submission about it' and that's as I understand what the Commissioner did.

PN54

So at the end of the day, if you want to object to anything in the witness statements that I've just – that I'm admitting and say that shouldn't be given weight, then you need to identify it in your submission which the Commissioner did and then very often the directions that are usually issued, and I'd need – I accept we need to look specifically at the directions, but the directions that are issued generally say that if you want to adduce evidence beyond the statements and material that's been filed then you'll need to seek leave of the Commission and

leave may or may not be granted and generally speaking, again for my part, if there's some document or evidence that's directly relevant or relevant to the matters in dispute, provided the other party gets an opportunity to look at it, make a submission about it or call evidence in response if it wants to, I admit it in a proceeding.

PN55

MR ALLAN: Vice president, that is - - -

PN56

VICE PRESIDENT ASBURY: What do you say occurred here that denied procedural fairness? What's the specific material that you say was put into evidence that denied procedural fairness?

PN57

MR ALLAN: Seven partial – or seven pages of seven company meeting minutes conducted on a weekly basis that were admitted during the cross-examination of the applicant by my learned friend, counsel Mendelson, and if I could just take - - -

PN58

VICE PRESIDENT ASBURY: Were those documents put to the applicant during cross-examination? Were they appended to the witness statement that had been tendered?

PN59

MR ALLAN: No, Commissioner, and this is the nuanced part of the two-step inquiry because the – your query and further question as to the usual course is a hundred per cent correct and as the exact – and the appellant does not press or maintain the adducing of witness statements and tendering in full of those. That's no issue. We park that to the side. We then get onto the trial and the hearing day. During cross-examination documents, select not complete documents, select pages of seven discrete documents, were, with no notice, tabled for – marked for identification and leave was sought to put them to the witness.

PN60

Now submissions were heard but the error that comes and flows from this taints the ability for any findings to be made not just in errors of fact but then the findings of law in the proceeding on the basis of this. If you had directions leading to the trial and you were afforded an opportunity to put on a witness statement which was tendered in full and that witness statement, in the first instance contained whole meeting minute documents but not these and not partial documents, it was open to the respondent to tender that as an annexure to their witness statement prior to the trial. To the extent - - -

PN61

VICE PRESIDENT ASBURY: You objected to the documents. Did you call for the full copies to be shown to you?

PN62

MR ALLAN: Yes, your Honour.

PN63

VICE PRESIDENT ASBURY: Did you ask for an adjournment to look at them?

PN64

MR ALLAN: Yes, your Honour.

PN65

VICE PRESIDENT ASBURY: Can you take us to what actually happened?

PN66

MR ALLAN: Of course.

PN67

VICE PRESIDENT ASBURY: Rather than arguing the principles of it can you take us to what actually you say occurred before telling us what you say flows from it?

PN68

MR ALLAN: Of course, deputy president – or vice president. Pardon me just one moment, Commissioners. Commencing at paragraph 138 and I'm just going to identify what that is on the – page 480 with apologies for the suspense.

PN69

VICE PRESIDENT ASBURY: That's all right. I understand there's a problem with this. So 480?

PN70

MR ALLAN: Yes.

PN71

VICE PRESIDENT ASBURY: Yes.

PN72

MR ALLAN: We start midway down the page where there's no paragraph reference:

PN73

*MS MENDELSON: At this stage there are seven minutes or seven pages of minutes*

PN74

And they're on - - -

PN75

VICE PRESIDENT ASBURY: Well, above that there's a paragraph that says you – that I understand is you:

PN76

*I'd seek the Commissioner's indulgence to reserve any objection until the end of the evidence and subject to those documents being provided by the respondents to my email address such that they can be reviewed and any objections properly formulated to their admission.*



PN77

They were marked for identification:

PN78

*So we'll stand the matter ...*

PN79

The Commissioner stood the matter down.

PN80

MR ALLAN: And I'll seek - - -

PN81

VICE PRESIDENT ASBURY: Gave an opportunity to review.

PN82

MR ALLAN: Then if we proceed onto the following page, 481.

PN83

VICE PRESIDENT ASBURY: Yes. You were heard in relation to the documents being admitted.

PN84

MR ALLAN: Yes.

PN85

VICE PRESIDENT ASBURY: Accepted on the basis that they were complete documents. Did you – incomplete. Did you call for them to be – the complete documents to be produced?

PN86

MR ALLAN: No, I reserved the right to object and then I, in my closing submissions which is where I'll take the Full Bench, address the matter of weight and it is these seven documents upon which all findings of unsatisfactory performance turn on.

PN87

VICE PRESIDENT ASBURY: Right. Just bear with us. What happens to the documents? They're marked for identification or they're admitted?

PN88

MR ALLAN: They're admitted then as an exhibit.

PN89

VICE PRESIDENT ASBURY: Right.

PN90

MR ALLAN: Which they ought to have been marked for identification but the formal - - -

PN91

VICE PRESIDENT ASBURY: Well, was there – well you'd only marked them for identification if the maker of the document - yes, there was some issue about what the document was but in any event - - -

PN92

MR ALLAN: Well, marked for identification in congruency with my reserved right of objection which was that to reserve the right until the close of evidence, so they should be marked for identification. At the close of evidence, the Commissioner should have gone through all the marked for identification documents and made a determination as to whether or not to admit them or not.

PN93

VICE PRESIDENT ASBURY: Well, the Commissioner said already - he'd already admitted statements that may or may not have had objectionable content in them and he'd already put you on notice that that was the approach he was going to take and then he admitted the next lot of documents and there was no objection taken at that point to them being admitted, was there?

PN94

MR ALLAN: The witness statements and the admission of them wholesale is not pressed or maintained by the appellant and it wasn't pressed or maintained in first instance and then it - - -

PN95

VICE PRESIDENT ASBURY: But in principle it's exactly the same. You've got a right to object to the statements and anything in them that you don't think weight should be put on and then you say that you object – or conditionally on the basis that, 'Subject to the advice of counsel these documents aren't prepared by us or in our possession or control', et cetera, et cetera, so they're incomplete, you object and then the Commissioner says, 'Well, all right, I'll allow the documents in on that basis that they're being used for a limited purpose' and then at the end of the – anyway, so that's so far. So then what do you say occurred – so you say the error was to not mark them for identification at that point?

PN96

MR ALLAN: The error was to fail to rule – fail to mark them for identification instead they were admitted as incomplete documents where I had conditionally reserved my right until the close of evidence, and evidence was still open at the time, and that once we get to the close of evidence, and if I just may – because I think it's important to press or clarify and underscore this point, there is no error of law in the Commission - Commissioner Simpson electing and deciding to admit the two witness statements wholesale.

PN97

That is not a problem and that's perfectly within the scope. If he had just done that, there would be no error of law. The error – he fell into error in circumstances he purported to take additional evidence that wasn't the subject of the directions on the day of hearing and then failed to properly and in accordance with either the rules of evidence or if not the rules of evidence say how and on what basis where incomplete documents are strictly inadmissible in all jurisdictions where the rules of evidence do apply, his error was to then tender the

documents, allow them to be used in cross and then we get to the close of submissions where I, at the end, having already had the material documents in question additional and separate to witness statements, being seven pages of company minutes, which were adduced to show that the benchmark target of 33 per cent never moved, became the key part – the key documentary evidence relied on by Commissioner Simpson to find that the targets were clear and the applicant – or appellant's conduct and work performance was unsatisfactory.

PN98

So it strikes to the very core of this claim and the core of the material and evidence that's before this Commission for the Commission to then have it open to them to find that there was unsatisfactory performance and to the extent we've got a statutory test of 387 and the features there to then find on a weighing of those features that the preponderance of evidence supported the respondent's dismissal being valid.

PN99

At its crux, those seven documents, incomplete and where the submissions as to weight notwithstanding that they were incomplete, the closing submissions of the applicant said no weight should be given, in fact all of the weight was given by the Commission to those seven documents where it was not open as a matter – in point of fact to find that those documents supported stationary, unmoving benchmark targets. Where - - -

PN100

VICE PRESIDENT ASBURY: You argued that in your submissions so Mr Mendelson said:

PN101

*I'm not relying on any of the other content other than to show what the total labour was for that week and what the relevant benchmark was.*

PN102

And as I understand it, the objections with the applicant's performance were – now the appellant's performance were rostering too many boots on the ground at a particular time and not meeting benchmarks so I accept the documents should have been appended to a witness statement in ideal circumstances, they weren't, but it was open – if there was a denial of procedural fairness it wasn't due to a failure to follow the rules of evidence.

PN103

It really – the rules of evidence, it's got to do with procedural fairness. That's why the Commission follows the rules of evidence because – or when it does because it must afford procedural fairness and I'm – for my part, I'm struggling with the proposition that strict provisions of the rules – the Commission has to adopt one, two or three of your propositions about the rules of evidence. All the Commission has to do is afford the parties procedural fairness and in doing so it's not bound as a matter of law to apply the rules of evidence but it often does, so.

PN104

MR ALLAN: Respectfully, Commissioner, that's part of the correct proposition. They're not bound by the rules of evidence, step 1. Step 2, nor are they excluding. To the extent you decline to be bound and the Commission declines to be bound, that is their right, that's a statutorily enshrined right under section 519, that the Commission is not bound by the rules of evidence. But that does not mean that they are excluded. That second step is the critical part which -

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PN105

VICE PRESIDENT ASBURY: I accept that. I accept that but what I'm saying, the proposition I'm putting, is the Commission doesn't have to notify you that in this case in advance I'm telling you I'm going to strictly apply the rules of evidence, I'm not going to strictly apply the rules of evidence but I might apply bits of them or I'm just going to dispense with them. The Commission doesn't have to inform you of that. What the Commission has to do is tell you, as a matter of practice, what it is going to do and give you an opportunity to be heard in relation to it and the proposition I'm putting to you is that if you were concerned that the documents were incomplete you could have called for them at the point.

PN106

If you were concerned at them being admitted at all, you could have noted again after the Commissioner had made his ruling your objection and asked the Commissioner to perhaps re-visit the ruling or you could have asked for an adjournment to properly – there's any range of things that you could have done so I'm just not understanding how there's been a denial of procedural fairness when the documents were admitted at that point, the witness was cross-examined on them and you got an opportunity to make a submission about why no weight should be put on them and weight was put on them.

PN107

MR ALLAN: Respectfully, Commissioner – vice president, I submit that the let's say lack of meeting of the minds here on this point is that there's a fundamental disagreement, in my submission, to what you have said in moments just prior which is you say, if I understand what you have put to me correctly, the Commission does not have to tell you how it's going to – it has to afford procedural fairness, it doesn't have to tell you if it's going to be strictly bound, partially bound or not bound.

PN108

VICE PRESIDENT ASBURY: Yes.

PN109

MR ALLAN: Fundamentally, the line of all the High Court authorities that are cited in my appellant outline of submissions, which is document 1 – all High Court authorities says to the contrary going back to Dixon CJ and as a matter of procedural fairness in applying the rules of evidence that's exactly what the Commissioner has to do and that's what – exactly what the Commissioner had to do. The fact that the matter that in other cases the Commission isn't put to the task of having to do it is neither here nor there and not relevant.

PN110

What is relevant is in this case, in this appearance at this matter before the open of evidence the Commission was put to the task and the Commissioner had to decide and all High Court authority says that they had to and in doing so Commissioner Simpson got partway there but not the full way and in failing to get the full way, which is, 'I'm going to be partially bound and I'll admit the witness statements', great, done, that's over, no error of law.

PN111

To the extent he takes any other document, errors of law to the extent he fails to say how, why and on what basis he is going to depart from the rules of evidence or not and to the extent that those – there's disagreement on the proper application  
- - -

PN112

VICE PRESIDENT ASBURY: Well, how – what rule of evidence did he depart from? Perhaps you can point to that?

PN113

MR ALLAN: Admitting an incomplete document. You can't do it because the context is lost and to the extent there were seven meeting minutes, company meeting minutes, with all staff which looked at revenue, performance for the week gone, performance for the week ahead, to the extent that there is a bare assertion from my learned friend in first instance that the other stuff that's not before the Commission isn't relevant, we don't know and so as a matter of procedural fairness until it's there and until it is decided, which the order was about face, horse – cart before the horse, to the extent that the documents were allowed to be put to the witness incomplete and, yes, there was reservation of right of conditional objection that was dealt with in submissions at the end in accordance with how the Commissioner said he was going to deal with objections to hold witness statement tendered wholesale, the fact that any weight was applied becomes the error.

PN114

So it's a two-step chain in – the link in the chain of a cascading error here. The first step is you went halfway on the rules of evidence in their proper application of the statutory test because it was misunderstood, you think you're not excluded, that the rules of evidence do not bind you. That is correct. The missing link is nor are they excluded so when you depart you must say how you're going to depart.

PN115

It's that simple and that is what Dixon CJ of the High Court and every High Court Bench has maintained over and over in the construction of the common law body of rules of evidence which aren't excluded by the Fair Work Act.

PN116

VICE PRESIDENT ASBURY: Right. Perhaps can you point us to a case that says there's an explicit rule of evidence that in those circumstances can part of a document ever be admitted?

PN117

MR ALLAN: I can. I believe I said the objection – I would have to turn up the case because I haven't brought the first instance decision. I think it's Queens – it is Queens case. If I may just look up the High Court official citation for the decision.

PN118

VICE PRESIDENT ASBURY: Certainly. I would have thought if this was a central point it would be there but anyway, yes, most certainly. Would you like – take your time and bring it up.

PN119

MR ALLAN: Thank you very much, Commissioner.

PN120

VICE PRESIDENT ASBURY: Mr Allan, would you like us to go off the record for a minute because I'd also be interested in seeing the case authority or taking – being taken to the case authority where Dixon J said you must notify people specifically when you're going to depart from the rules of evidence and you've got three ways that you have to deal with every matter?

PN121

MR ALLAN: Yes, of course.

PN122

VICE PRESIDENT ASBURY: If we stand the matter down for say five minutes and see if you can locate that authority?

PN123

MR ALLAN: Of course. Thank you, Commissioner.

PN124

VICE PRESIDENT ASBURY: Both of them. Thank you.

**SHORT ADJOURNMENT**

**[2.39 PM]**

**RESUMED**

**[2.47 PM]**

PN125

MR ALLAN: Thank you for the indulgence.

PN126

VICE PRESIDENT ASBURY: Thanks, Mr Allan, no problem.

PN127

MR ALLAN: And my apologies for the delay. I was not anticipating traversing this point but I have found the cases you've asked for and I need to correct the record, Queens case that I cited before the adjournment is a document being put to a witness in cross-examination must be physically put to them. The decision I was referring to is the decision of Walker v Walker [1937] 57 CLR 630. In that decision Dixon J, as he then was, referred to the decision of Renton v Renton.

PN128

The facts in that case about the admissibility of evidence in the first instance, a letter was written by the respondent's father and it was not admissible. What took place at the hearing before the magistrate in relation to this letter was analogous to an examination on the voir dire. The probative – and the ratio of this decision and why it is relevant is although it had - although the admitted letter was admitted into evidence, the letter had no probative value and there was no sufficient and satisfactory evidence to support the magistrate's order by reason of it being part of a document.

PN129

The object and rationale of the principle of Walker v Walker in evidence is to prevent distortion by counsel in cross-examination by ensuring that the whole of the document is available and before the record – on the record and before the appeal – in this case the appeal Bench, in the instant that an appeal is conducted where it's a vacuous endeavour to speculate on what wasn't in evidence and it can all be obliterated by ensuring that the whole document is and so we can determine if there is a lack of procedural fairness and to the extent that there was or wasn't and a failure to take up an objection or not, putting the whole document in evidence overcomes any potential prejudice and this – none of the principles – no aspect of the principle of Walker v Walker was applied in this instance.

PN130

VICE PRESIDENT ASBURY: I understand your submission. Thank you.

PN131

MR ALLAN: Thank you.

PN132

VICE PRESIDENT ASBURY: That's the case that also stands for the proposition that there's a rule of evidence that precludes admitting a part of a document and is that case also what you say is authority for the proposition that specific advice has to be provided by a tribunal that's not bound by the rules of evidence before it departs from them?

PN133

MR ALLAN: That is – the need to – it's just in my submissions, vice president.

PN134

VICE PRESIDENT ASBURY: Yes.

PN135

MR ALLAN: It is - - -

PN136

VICE PRESIDENT ASBURY: Is that - - -

PN137

MR ALLAN: I cannot turn up the authority presently because I had to get those two sorted. In circumstances where, as a matter of procedural fairness, it was the judgement of Gummow, Hayne, Heydon, footnote 7.

PN138

VICE PRESIDENT ASBURY: Footnote 7.

PN139

MR ALLAN: The majority in the decision of Hogan v Hinch that was affirming O'Sullivan v Farrer which was a majority Bench constituted by Mason CJ as he then was, but they set out the manner in which departure – or confirmed the manner of departure from the rules of evidence such that the - as the decision of Bell principally in that which I can bring up and - - -

PN140

VICE PRESIDENT ASBURY: Sorry, footnote 7 is Crozier v Palazzo Corporation which is about being notified of a reason for dismissal, from my recollection. Footnote 7 in your - - -

PN141

MR ALLAN: I'm reading my appellant's outlines of submissions.

PN142

VICE PRESIDENT ASBURY: Okay, so not the annexure to the - - -

PN143

MR ALLAN: No, my apologies. No, the - - -

PN144

VICE PRESIDENT ASBURY: Yes, footnote 7, yes.

PN145

MR ALLAN: Yes.

PN146

VICE PRESIDENT ASBURY: Okay, great, thanks.

PN147

MR ALLAN: Hogan v Hinch and O'Sullivan v Farrer and that those are cited in paragraph 9 of the written outline.

PN148

VICE PRESIDENT ASBURY: Okay, thanks.

PN149

MR ALLAN: Perfect. And there are difficulties here with the various links because there's an overlapping of the evidence and then how that evidence was treated because of the lack of application of the rules of evidence. That inconsistency of the application of the rules of evidence then translated to an inconsistency with the findings that were ultimately made in point of fact and a law and the appellant's submission is this, the outcome and the published decision of Commissioner Simpson, in failing evidentially in the manner so done and making the findings so made which are the particular findings, a mis-application of the statutory test and what evidence was considered to consider each subsection between 387(a) to 387(h), ultimately resulted in the decision that satisfies the



House v King and the section 400 permission to appeal statutory threshold and that's the crux of the appellant's appeal to the Full Bench.

PN150

Where there are a number of cited Fair Work decisions and Fair Work Full Bench decisions where the statutory test has been applied differently. Now it's not lost on the appellant nor the respondent nor the Commission that we're not speaking and dealing with an exorbitantly large quantum claim here, we're not dealing with an overly complex matter. But in terms of the relevant evidence that was provided and the fundamental discharge of the Commission's functions which is to adjudicate these such that employers and employees alike have certainty, the manner in which Commissioner Simpson applied the statutory test ultimately that if you tie it all back right to its very crux, by failing to properly to say and following how he was going to take evidence and decide this matter, we've got a decision published that's inconsistent with a number of other Fair Work decisions and that supports the public interest component here of the relevant statutory feature of what this Bench needs to be satisfied – the Full Bench needs to be satisfied of in granting permission to appeal and hearing the appeal and making findings to correct what is an incongruent decision with the established body of Fair Work decisions.

PN151

And to the extent that any case law was cited and applied a notable decision was the decision of Bowen v Cape York Grassroots Corporation and having conducted that trial in Cairns in March 2023 for the respondent who was successful, the application of the relevant features in 387(f) and (g) as Commissioner Simpson applied it was simply not correct nor open nor congruent with the factual matters here and so it was distinguishable and the appellant's submission in this respect in – if you look at the totality of the four errors – three errors of law, one error of fact, the totality of the appellant's submission is it produces a manifestly unsafe outcome where it is no great – there is a great cost risk exposure and expense particularly to employees as applicants in pressing and maintaining an unfair dismissal to have this judgement stand is anathema to the objects of the Fair Work Act.

PN152

The statutory test, if properly applied, cannot produce this outcome and so on the basis of these grounds, the appellant says that the proper decision was not made but fundamentally if you boil it all down, it was admitted by the respondent in cross-examination and I will take the Bench to the page but if the Full Bench would bear with us for a moment, the crux of the error here and a manifestly unsafe decision is this, by the respondent's own admission they had company HR policies and procedures, they have a manual of what to do with unsatisfactory performance. By their own admission it was never followed.

PN153

If it wasn't followed the applicant in his employment prior to his termination had no knowledge of, consistent with admissible evidence that could have been put before this Commission, satisfactory compliance with the company's own policies and procedures, they had 28 employees or so the form – the response form of the respondent so said. If by their own admission they didn't follow their own

policies and procedure in managing the unsatisfactory work performance, they failed to follow their own procedure in terminating the performance.

PN154

They failed to comply with section 117 in giving written notice and there was no written notice, where the applicant and appellant's entitlements are still unpaid, where you have that failure of such a magnitude for section 38B it is impossible to have satisfaction to the requisite statutory standard that there was a valid reason for the dismissal within the meaning of section 387(a) and in doing so there can be no unfair dismissal. There is a dismissal.

PN155

That is it. It does not comply with the relevant statutory features to be rendered an unfair – a valid dismissal within the meaning of 387 and the balancing of those features in light of the evidence that was before the Commission required the Commissioner fundamentally to make findings on credit, which he did, but those credit findings which were then the preponderance for the application of the statutory test or mis-application as submitted by the appellant which then resulted in this unsafe decision in circumstances where effectively two witness statements - three witness statements tendered wholesale, unobjected with all complete documents annexed were effectively ignored to prefer oral evidence in cross-examination on bare parts of documents that were conveniently produced on the day.

PN156

It does not provide a certainty of procedure which effectively taints the whole of the hearing and so it's a totality when I say we unravel what is effectively a ball of yarn. If you start pulling at the string of the evidence and then you start pulling at the string of the mis-application of a statutory test and then you start pulling at how credit findings were weighed over evidence that was persuasive and probative to the issues in dispute where the alleged unsatisfactory performance inter alia was an inability to manage numbers, that failure and how it was found to be a failure was simply not open to the Commission on what was before it.

PN157

Now there may be suppositions about what else was out there but that just doesn't matter here. On what was before the Commission it just wasn't congruent and those are the totality of what these four select errors of law – there are law but no one wants to go through a shopping list. The four errors that are pressed are the ones that are most probative, most critical and most damning that oblivate any prospect of this decision in the first instance being maintainable and consistent with law, established law.

PN158

I was going to wait for any questions from the Commission. Unless I can be of further assistance, are there any other - - -

PN159

VICE PRESIDENT ASBURY: No, not from me.

PN160

MR ALLAN: If I - - -

PN161

DEPUTY PRESIDENT BEAUMONT: No, definitely not.

PN162

MR ALLAN: I'll repeat and rely on the written submissions and the appellant appeal book and is it the case that the Full Bench does reply submissions, or?

PN163

VICE PRESIDENT ASBURY: Yes, you can reply on points of law if they arise from – or anything you want to reply on if it arises from the respondent's submission.

PN164

MR ALLAN: Yes.

PN165

VICE PRESIDENT ASBURY: Thank you.

PN166

MR ALLAN: Thank you.

PN167

VICE PRESIDENT ASBURY: Thanks for that. Mr Van Der Woude.

PN168

MR VAN DER WOUDE: Thank you, vice president. I'll just submit my submissions as read or take them as read. I'll just have another couple of comments regarding a few points that Mr Allan made. It follows some I don't – but I say this, he made a few points. First point seemed to infer that I was expert evidence – I was giving expert evidence. That's never been the case. I appeared at the original hearing in my role as a manager of that business and again today as a manager for that business.

PN169

The second point is from what I understand and just hearing what Mr Allan's said, it appears to be an argument here that spins around what he says are the seven partial pages of minutes and an argument therefore that Commissioner Simpson should not have taken that evidence into account. But I note from my understanding and having done a bit of research on this lately that Commissioner Simpson did not breach section 590 or 591 of the Act.

PN170

He certainly – the minutes that were submitted, and I give a bit of a – yes, they were partial minutes but an explanation is important here, that the parts of the minutes were submitted, here was the relevant part. Management meetings can consider other things such as cleaning or reviews from customers or you getting the gardening done or what day stock arrives, so.

PN171

But that section of the minutes that were submitted were relevant and they were the relevant part. The reason they were only partial is because I was having issues with our home scanner when our solicitors asked for it but I did have them available on the day. We weren't asked for them. They were available if you wanted to see the other 15 pages of reviews or other comments but they really weren't relevant and for Commissioner Simpson they weren't relevant either, the other parts of it, so.

PN172

So in that regard the other comment I make in those minutes is it's – Mr Allan referred to Walker v Walker where all of a sudden a particular letter was written and handed up. This wasn't the case here when Commissioner Simpson heard it. The minutes related to a meeting where the appellant, Mr Austin, was at that meeting and he had those minutes and his representative could have asked for those minutes at any time leading up to the hearing.

PN173

That we produced them was not an error of law, just not an error of fact. Commissioner Simpson just took them into account in determining his decision and he weighted them as he was able to weight them when making a decision of the matter. The last one I want to make is Mr Allan referred to earlier that we didn't follow procedure in the HR policy. That was well covered in evidence and in factual fact, Commissioner Simpson did weigh that in the appellant's favour when he was making a decision.

PN174

It is in the decision. Hindsight, yes, it was a bit of a mistake and it's been a learning for my part. Need to maybe do a little bit more, dot my I's, crossing my T's. But at the end of the day Commissioner Simpson weighed all the evidence in what I say a fairly orthodox way to arrive at the decision that he did. There's no error of law here. There are no House errors and no errors of fact. The decision was the decision. I think here sometimes no means no. It might not sit well with the applicant but that's how it was. Thank you.

PN175

VICE PRESIDENT ASBURY: Thank you, Mr Van Der Woude. Anything you want to say in reply, Mr Allan?

PN176

MR ALLAN: No, Commissioner, and no, thank you, Full Bench.

PN177

VICE PRESIDENT ASBURY: All right.

PN178

MR ALLAN: That is the appellant's submissions.

PN179

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

**ADJOURNED INDEFINITELY**

**[3.07 PM]**