



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

**VICE PRESIDENT ASBURY
DEPUTY PRESIDENT BINET
DEPUTY PRESIDENT GRAYSON**

C2023/5135

s.604 - Appeal of decisions

**Appeal by Pecker Maroo Verano Pty Ltd
(C2023/5135)**

Sydney

10.00 AM, MONDAY, 13 NOVEMBER 2023

Continued from 06/09/2023

PN1

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

PN2

MR BARDEN: Geoffrey Barden, general manager, Pecker Maroo Verano.

PN3

VICE PRESIDENT ASBURY: Thanks, Mr Barden. And for the respondents?

PN4

MR STEVENS: Matthew Stevens.

PN5

MS STEVENS: And Linda Stevens.

PN6

VICE PRESIDENT ASBURY: Thank you. Mr Barden, the appellant has filed some information and material in the notice of appeal and the other documents in the appeal book. Firstly, can you just confirm that all of the documents in the appeal book that we sent out to the parties are the documents that were before the Deputy President at first instance?

PN7

MR BARDEN: Yes. I received back from the Fair Work that I didn't have previously, and they are included on that. I think there was about 297 pages in total, but the main appeal wasn't that many pages.

PN8

VICE PRESIDENT ASBURY: Sorry, the appeal book is supposed to include all of the documents that were before the Deputy President at the first instance hearing, and I'm just asking you to confirm that that is the case, because what the appellant filed was not a proper appeal book and we needed to assemble that to enable the appeal to proceed.

PN9

MR BARDEN: Yes. I understand what you mean now. Yes, it was assembled in - - -

PN10

VICE PRESIDENT ASBURY: Okay. So there are no additional documents that are missing.

PN11

MR BARDEN: No.

PN12

VICE PRESIDENT ASBURY: And can you confirm that at no point did the appellant ever file a formal response to this application, a formal form F3, that was requested.

PN13

MR BARDEN: No, I didn't file.

PN14

VICE PRESIDENT ASBURY: Sorry, Mr Barden, can you just put yourself into the camera view. That's all right then. Thank you. So they're all of the documents.

PN15

MR BARDEN: That's correct.

PN16

VICE PRESIDENT ASBURY: Thanks. Mr and Mrs Stevens, can you identify any missing documents in that appeal book that were before the Deputy President at first instance that aren't in there?

PN17

MR STEVENS: No, I can't.

PN18

VICE PRESIDENT ASBURY: So as far as you're concerned, all of the relevant documents are there.

PN19

MR STEVENS: Yes, that's correct.

PN20

VICE PRESIDENT ASBURY: Thank you.

PN21

MS STEVENS: Sorry, we did put in some more new documents not from the registry or appeal from the last one.

PN22

VICE PRESIDENT ASBURY: Sorry, can - - -

PN23

MS STEVENS: Sorry.

PN24

VICE PRESIDENT ASBURY: Can you just say that again?

PN25

MS STEVENS: Sorry. What I'm trying to say is from the original documents we did put a new one in for the meeting today.

PN26

VICE PRESIDENT ASBURY: Yes, I understand that, but there's no documents that were before the Deputy President at first instance that we don't have in these proceedings.

PN27

MS STEVENS: That's right. That's correct.

PN28

VICE PRESIDENT ASBURY: In that appeal book. All right. Thanks. Mr Barden, would you like to speak to the appeal and perhaps outline the basis on which the appellant says it should be granted permission to appeal and the grounds on which it appeals.

PN29

MR BARDEN: Yes. As stated in the documents, I wasn't present for every part of the evidence in the first hearing. When I appeared at the second hearing with Deputy President Millhouse the facts were stated then. The facts in the first hearing was it was taken on the assumption that the termination was just because of abandoning the post and simply that there were many other contributing factors to that.

PN30

When Pecker Maroo Verano, or Stephanie Charlton and Stephen Shanks, when they terminated Matt and Linda, it was based on the fact that they were demanding their annual leave – or their sick leave, sorry, their (indistinct) annual leave, and they were leaving immediately. That was the third time that they had said that they were doing that and so that was the grounds for Stephanie to actually send out the termination letter.

PN31

There were many other mitigating facts that could have been put on that termination letter regarding performance and complaints, et cetera, and also the serious misconduct, given the fact of using apartments that are unused and disobeying rules of the resort, which is smoking and using foul language, et cetera, but all of those were not put on the termination letter, which is why Deputy President Millhouse has actually put a stay on and then put the appeal in, because it wasn't stated factually in the first meeting.

PN32

VICE PRESIDENT ASBURY: Perhaps, Mr Barden, what might assist – the difficulty, for my part, anyway, is the difficulty I am having is in the first instance hearing - as you're referring to, at the first 'meeting'. It was in fact the first hearing.

PN33

It seems to me that in that first hearing the respondent, which is now the appellant, was given every possible opportunity to file material in support of its contention that it was not an unfair dismissal and didn't really engage with the process and instead sent a whole lot of completely irrelevant material, pretty much buried the Deputy President in completely irrelevant material, and there is about three or four pages of documents that were actually relevant to the issue of whether the respondents in this appeal were or were not unfairly dismissed.

PN34

MR BARDEN: Yes, I understand that, and I have addressed that issue. It was lax. Bear in mind that we are a small business. We do not have an HR

department and it was probably a bit retaliation and it should not have happened. The fact is that she didn't take it as serious – Stephanie Charlton didn't take it as serious as it was because of the threats of leaving before and the fact that they were leaving then. So that's why the termination letter went out and she didn't take the hearing as serious as she should have done, and for that we apologise.

PN35

VICE PRESIDENT ASBURY: Mr Barden, can you point to where the appellant told the Deputy President it was a small business and where it put any evidence on or any material on in that respect beforehand?

PN36

MR BARDEN: On the directions it states it. It wasn't put on that original document, it was only put on the second document, when – we are only eight employees, maximum of eight employees, which is three full-time and the rest are casual, and like I say, it wasn't taken as serious. The threat was there. We didn't realise the power of Fair Work Australia. Like I say, we didn't have HR department, and it was taken in that context, and for that we must apologise.

PN37

DEPUTY PRESIDENT GRAYSON: Sorry, Mr Barden, what's this second document that you're referring to that you say that information was in?

PN38

MR BARDEN: On the directions, when I filed for the book – I'll find it. I think it was on the original application where it said how many employees.

PN39

VICE PRESIDENT ASBURY: That's the document that Mr and Mrs Stevens filed. They ticked the box. The respondent employer was supposed to file a form F3, which would have given you an option to tick a box saying that you were or were not a small business, but it doesn't appear that that was ever filed.

PN40

MR BARDEN: That's correct. Yes, it wasn't - - -

PN41

VICE PRESIDENT ASBURY: So what you're relying on is the fact that in the document that Mr and Mrs Stevens filed, they ticked the box to say that there was one to 14 employees.

PN42

MR BARDEN: That's correct, yes.

PN43

VICE PRESIDENT ASBURY: Okay.

PN44

MR BARDEN: Yes, so it wasn't ticked. It wasn't taken into account.

PN45

VICE PRESIDENT ASBURY: Can you point to where there was evidence about this other misconduct – for example, having family members staying in apartment 5 and having Netflix accounts with Mr and Mrs Stevens' grandchildren or children's names on them? Where was the evidence of that?

PN46

MR BARDEN: There was two - - -

PN47

VICE PRESIDENT ASBURY: To the Deputy President.

PN48

MR BARDEN: There were two statements, affidavits, signed by Carla, a part-time receptionist, and also Laura Bowart, who is an owner of the apartment that was being used. Laura Bowart has considered taking criminal proceedings against them because it is larceny as a servant, there is an act of theft, and so she was considering, at which we stayed that for the time being, because it was obviously not in Matt and Linda's interests to be charged, to have to go to court on something like that. So those statements are in with the documents that I filed.

PN49

VICE PRESIDENT ASBURY: Are they in the appeal book that we sent you?

PN50

MR BARDEN: Yes.

PN51

VICE PRESIDENT ASBURY: Whereabouts? What page?

PN52

MR BARDEN: I'm just trying to find the page number. I think it may be in the stay decision, page – I think it was Deputy President Millhouse that actually sent it back, but I'm just trying to find the page number now.

PN53

VICE PRESIDENT ASBURY: But there's nothing about this in the appeal book material. So is this the document that's got all the room transactions on it, the bookings?

PN54

MR BARDEN: No. That's just the confirmation that bookings were put in and cancelled by the managers at that time. There were false bookings put in and then they were cancelled after the – so what it means is that someone cannot book into that apartment. So a booking is put in as an owner booking, which means there is no charge or no deposit to be taken, and then it was deleted after that. So that's why the bookings is put in.

PN55

Now, there was a notice from Laura Bowart, and I'm trying to find out why it's not in here, about the TV. That statement did go through and I'm just – a lot of pages to go through. I apologise. Page 50, according to - - -

PN56

VICE PRESIDENT ASBURY: Page 50

PN57

MR BARDEN: I think it's 50.

PN58

VICE PRESIDENT ASBURY: Page 50 is the unfair dismissal applications. See, the difficulty is, Mr Barden, that you've sent through material for the appeal, but it doesn't seem that that material was actually before the Deputy President. So material in the appeal, you sent in some information - - -

PN59

MR BARDEN: But wasn't that sent through in the original case about the - - -

PN60

VICE PRESIDENT ASBURY: You sent through material saying all the following cancelled bookings were made by 'the owners.'

PN61

MR BARDEN: Yes.

PN62

VICE PRESIDENT ASBURY: And then you've got a document that says, 'Booking information', which is a number of pages.

PN63

MR BARDEN: Yes, that's correct.

PN64

VICE PRESIDENT ASBURY: And then there's something about - - -

PN65

MR BARDEN: (Indistinct) made by Carla, and also Laura Bowart was part of the previous hearing. They had gone through - they were emailed off.

PN66

VICE PRESIDENT ASBURY: Yes. There's a document with some handwritten notes on it that doesn't seem to have been part of the original hearing material. There's a statement from Carla Goldsmith.

PN67

MR BARDEN: Yes, and one from Laura Bowart.

PN68

VICE PRESIDENT ASBURY: Not that I can see. Where's the statement from Laura Bowart?

PN69

MR BARDEN: I'll find it in the appeal book.

PN70

VICE PRESIDENT ASBURY: Laura Bowart was an owner, is that the case?

PN71

MR BARDEN: Yes, she is the owner of a club Si, which is directly above one which is the manager's (indistinct).

PN72

VICE PRESIDENT ASBURY: Yes. So this is the apartment where you allege Mr and Mrs Stevens had their family staying and their grandchildren or children's names were on the Netflix account?

PN73

MR BARDEN: That's correct.

PN74

VICE PRESIDENT ASBURY: Where is the statement from the owner of that apartment, because for my part I'm not aware there was anything of that nature before the Deputy President in the first instance proceeding?

PN75

MR BARDEN: I'll have to – I'll get it off an email, but I believed it was in there.

PN76

VICE PRESIDENT ASBURY: Are you referring to the email sent by Ms Bowart, as opposed to a statement?

PN77

MR BARDEN: That's correct.

PN78

VICE PRESIDENT ASBURY: At page 112 of the appeal book?

PN79

MR BARDEN: Yes.

PN80

VICE PRESIDENT ASBURY: So when you say a 'statement' on 28 February 2023, you provided an email from Ms Bowart?

PN81

MR BARDEN: That's correct.

PN82

VICE PRESIDENT ASBURY: And a report from Ms Goldsmith?

PN83

MR BARDEN: Yes. That was page 123, did you say?

PN84

VICE PRESIDENT ASBURY: The email from Ms Bowart was 112 – page 112, and - - -

PN85

MR BARDEN: Yes.

PN86

VICE PRESIDENT ASBURY: Mr Barden, I don't see anywhere in Ms Bowart's statement that where she says that the names of the grandchildren were on the Netflix account.

PN87

MR BARDEN: That was where Mr Bowart, her partner, came up to replace a TV that had broken in that apartment, and he was the one that mentioned that the children's names were on there.

PN88

VICE PRESIDENT ASBURY: Yes, and there's nothing in Ms Bowart's statement about that. Can you point us to where that was put to the Deputy President at first instance?

PN89

MR BARDEN: Millhouse DP or - - -?

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VICE PRESIDENT ASBURY: No. Millhouse DP dealt with the stay application.

PN91

MR BARDEN: Yes.

PN92

VICE PRESIDENT ASBURY: I'm referring to Lake DP, because – Mr Barden, you can agree or disagree with this, but it seems to me that what the respondent is saying is all of this information wasn't taken into account, in circumstances where it really didn't put it very clearly before the Deputy President when it had a chance to do so, because it spent most of its time sending hundreds of pages of absolutely irrelevant material to him instead of what it should have been sending, which was a statement from Mrs Bowart and Mr Bowart saying why they were concerned about people staying in their apartment. It just seems completely unlikely that Mrs Bowart would go to the trouble of writing an email complaining, and yet you're saying that the grandchildren of Mr and Mrs Stevens were staying in her apartment without being given permission to do so and using the Netflix, and there's nothing in that statement that says that.

PN93

MR BARDEN: Well, I thought the statement would have been enough. As I said, I didn't have input into the first hearing. I was there as a witness. Had I have been there I would have made sure that that statement was in there.

PN94

VICE PRESIDENT ASBURY: But - - -

PN95

MR BARDEN: The statement and the email.

PN96

VICE PRESIDENT ASBURY: But is there any such statement from Mr Bowart saying the children's names were on the Netflix and when I arrived this was what I saw?

PN97

MR BARDEN: No, other than hearsay. There's only a statement (indistinct) that's – I can get that from them, but we didn't want to pursue it, because they will be the ones that will be taking criminal charges, and we persuaded Ms Laura Bowart and Mr Bowart to not go down that path for the sake of Matt and Linda Stevens, who don't want to take this to a criminal matter, which it is, because it is theft. It is larceny as (indistinct).

PN98

VICE PRESIDENT ASBURY: Well, Mr Barden, that's a really serious allegation to make without any evidence whatsoever being put – any proper evidence. As you say, you've got hearsay, and you had an opportunity to put that evidence before the Deputy President in the first case, and it sounds like you didn't. So now you're turning up in the appeal and saying that the respondents to the appeal are guilty of theft, in circumstances where you had a perfectly reasonable opportunity in the first place to put that material to the Deputy President.

PN99

MR BARDEN: Well, as we said, we did not want to pursue that. We didn't expect Fair Work Australia to come to a decision about something that we were talking about performance and not about the criminality of the thing. We don't want to pursue that. We persuaded Laura Bowart not to pursue it.

PN100

VICE PRESIDENT ASBURY: Mr Barden, whether you want to pursue it as a criminal matter or not is irrelevant. What I'm saying is that if it was a reason you dismissed Mr and Mrs Stevens, and as I understand it, one of the reasons for their dismissal was an allegation that their children were staying in apartments that were empty and there were false bookings to give the impression that the apartments were booked. They were cancelled at the last minute and the children were put in the apartments and using the Netflix. There was no really solid evidence of that happening before the Deputy President, was there?

PN101

MR BARDEN: Other than the evidence of Carla Goldsmith who was there, who has made a statement on that fact.

PN102

VICE PRESIDENT ASBURY: But Ms Goldsmith wasn't called as a witness, was she?

PN103

MR BARDEN: No, she wasn't required to be called as a witness. She sent in the statement, and Lake DP didn't call Carla Goldsmith as a witness, although her statement was on that first hearing.

PN104

VICE PRESIDENT ASBURY: So you didn't seek to call Ms Goldsmith as a witness?

PN105

MR BARDEN: As I said, on the first hearing I was a witness myself. On the second hearing, which was an appeal for a stay order, I didn't call Carla Goldsmith, but I could have called Carla Goldsmith, yes, but I didn't believe I had to. Bear in mind we are not lawyers. We don't know how Fair Work Australia works, how a Bench works; we are a small business. We have done what we can for this hearing. If that's not enough there should be more – should we get legal representation. We have paid over \$30,000 in legal fees because of other performance issues by the couple, and for us to spend another \$30,000 on lawyers to get over this Fair Work Australia hearing where the charge was \$13,000, it gets out of hand. We are a small business. We can't afford that.

PN106

VICE PRESIDENT ASBURY: Mr Barden, you didn't have to spend \$13,000 or any amount of money. You just had to read emails from the Deputy President and respond to them, and fill in a pretty simple form that every other small business seems to have no difficulty doing – tick a box: do you have this many employees - yes/no; what are the grounds that you dismissed the person on - here they are. That's all you had to do. So I'm sorry, for my part at least, I'm not accepting that somehow this was a particularly onerous process, and my concern is you didn't engage in the first instance. Lake DP wrote repeatedly to the respondent saying here is the form F3, please fill it in and send it back; here it is again, here's a blank document, fill it in and send it back. It didn't need a lawyer to do that. It just needed somebody to have the courtesy of reading the document they were sent; filling it in and sending it back.

PN107

MR BARDEN: So the punishment is for the fact, not the fact about an unfair dismissal, it's the fact that we did not follow correct procedure for Fair Work Australia, is that - - -

PN108

VICE PRESIDENT ASBURY: Mr Barden, I'm not saying that at all. What I'm saying is in an appeal you need to show that the Deputy President made a significant error of fact or an error of law in his consideration of your case in the first instance hearing. Lake DP, not Millhouse DP.

PN109

So you need to show that in the first instance hearing before Lake DP, he did not follow the correct legal approach to considering your case, or he did not have regard to a significant factual matter that had he had regard to it, it would have changed the outcome of the hearing. And the difficulty I am having is that it

doesn't seem that you put – you're saying in the appeal, Lake DP didn't do this and he didn't do that, when it wasn't put before him in the first case.

PN110

MR BARDEN: I am not in any way putting the blame or saying Lake DP - I understand what Lake DP had to go through with the paperwork. The point is we didn't believe it would go to the fact of having to provide all this evidence, when the fact was that we thought it would be an unfair dismissal claim that would be dismissed because of previous – of threats of resigning.

PN111

So as I say, I didn't have any input into the very first hearing, and so to Lake DP I apologise. There's no way I am saying he was lax in his decision, but when I spoke to Millhouse DP, then she had an understanding of the procedure and what we were going through.

PN112

It is a very – you may think it's simple, and you may say that other small businesses don't have a problem, but we do have a problem in completing all these forms. There is – I mean it's unbelievable the amount of emails and loops that we have to go to to get this.

PN113

So it's not an easy task, and we apologise to you, and to your Bench, the Full Bench, for the original hearing. We didn't take it seriously, or I – I wasn't involved, but we didn't take it seriously.

PN114

VICE PRESIDENT ASBURY: So are you saying that the points that you outlined in the original hearing were not fully considered by the Deputy President, that there was material before him that he didn't fully consider in the first hearing, being the points that you outlined in - - -

PN115

MR BARDEN: Yes, I am - - -

PN116

VICE PRESIDENT ASBURY: - - - Ms Charlton's email of 25 April?

PN117

MR BARDEN: Yes, I am saying that. That is correct. It was very badly presented and it wasn't taken as serious(sic) as it should be. But as I said, I apologise, Deputy President. It makes him look as though he hasn't done his job. He has. And I said that to Deputy President Newhouse(?).

PN118

VICE PRESIDENT ASBURY: Okay, so page 372 of the appeal book which is the email from Ms Charlton dated 25 April, your submission is there are points in that email that were not taken into account by the Deputy President in his decision?

PN119

MR BARDEN: That's correct.

PN120

VICE PRESIDENT ASBURY: And can you take me - - -

PN121

MR BARDEN: Here in exhibit 2.

PN122

VICE PRESIDENT ASBURY: Mr Barden - - -

PN123

MR BARDEN: Yes.

PN124

VICE PRESIDENT ASBURY: Can you just indicate, Pecker Maroo Verano has eight employees, is that the case?

PN125

MR BARDEN: That's correct.

PN126

VICE PRESIDENT ASBURY: Are there any other businesses that are related to Pecker Maroo Verano that have employees in addition to that?

PN127

MR BARDEN: No.

PN128

VICE PRESIDENT ASBURY: So, Ms Charlton doesn't own any other businesses that have management of other entities, or she doesn't have any other businesses that employ people?

PN129

MR BARDEN: They do. But I know nothing about that. This is the only Pecker Maroo Verano.

PN130

VICE PRESIDENT ASBURY: So, it's possible that Ms Charlton has other businesses of which she is a director or an owner that employ people?

PN131

MR BARDEN: That's correct, yes.

PN132

VICE PRESIDENT ASBURY: Okay. And what does the appellant have to say, or what do you have to say about the argument that the Deputy President's finding that Mr and Mrs Stevens were employees rather than contractors?

PN133

MR BARDEN: How do you mean? They were contractors.

PN134

VICE PRESIDENT ASBURY: Well, the Deputy President found they were employees.

PN135

MR BARDEN: Well, they were taken on as contractors.

PN136

VICE PRESIDENT ASBURY: So, you say the Deputy President erred by finding they were employees and not contractors?

PN137

MR BARDEN: I'm not saying the Deputy President – I think this is about protecting Deputy President Lake, not about - - -

PN138

VICE PRESIDENT ASBURY: I'm sorry, Mr Barden - - -

PN139

MR BARDEN: (Indistinct).

PN140

VICE PRESIDENT ASBURY: Mr Barden, it's the - - -

PN141

MR BARDEN: You seem to be – you seem to be making a big point about whether Deputy President Lake made an error, and I - - -

PN142

VICE PRESIDENT ASBURY: But Mr Barden - - -

PN143

MR BARDEN: (Indistinct) - - -

PN144

VICE PRESIDENT ASBURY: Mr Barden, Mr Barden, I'm doing that because that is the way that you have to run an appeal. You have to say the decision was wrong and this is why it was wrong. So, I'm trying to facilitate you - - -

PN145

MR BARDEN: There were 14 points I put why the decision was wrong. Those 14 points were stated in this work book. They're not being taken into account. Whether they were stated at the very first hearing, they wasn't(sic). But I put them into the appeal.

PN146

VICE PRESIDENT ASBURY: Okay.

PN147

MR BARDEN: So, I'm not saying that Deputy President Lake is erroneous in his findings. But I'm saying there's a lot more that we did not – it's our fault – we did not put through to Deputy President Lake in the first instance, right? We need to

take those into account. That's why Deputy President Millhouse took them into account at the hearing.

PN148

VICE PRESIDENT ASBURY: Okay. And I'll try again, Mr Barden. Deputy President Lake made a finding that Mr and Mrs Stevens were employees and they were not contractors. Do you agree or disagree with that finding?

PN149

MR BARDEN: I disagree.

PN150

VICE PRESIDENT ASBURY: Okay. So, you say that finding was wrong?

PN151

MR BARDEN: Yes.

PN152

VICE PRESIDENT ASBURY: And as I understand it, you say that the Deputy President should have found that they were not employees, at all, they were contractors and therefore they could not have been dismissed?

PN153

MR BARDEN: They were – they could not have been dismissed. As contractors they can. We terminate the contract.

PN154

VICE PRESIDENT ASBURY: Mr Barden, let me try one more time. You can only make an unfair dismissal application if you are an employee. You can't make an unfair dismissal application if you are an independent contractor. The Deputy President found that Mr and Mrs Stevens were employees, not contractors. And you say you think that finding was wrong, you don't agree with the finding?

PN155

MR BARDEN: I disagree that they are employees. They were taken on as contractors. They had the ability to run other businesses, as well, with that which I'm not sure if they did or not, and they were (indistinct) in that case. It was quite clearly spoken on the original agreement that was signed by them, what their terms of employment would be.

PN156

VICE PRESIDENT ASBURY: Okay. Thanks for that. Is that all you want to say?

PN157

MR BARDEN: Yes, for the time being, yes.

PN158

VICE PRESIDENT ASBURY: Well, this is the time being. So, the next thing you're going to do is get a response after Mr and Mrs Stevens have spoken. So, is that all you want to say in your appeal?

PN159

MR BARDEN: Yes, that's all. That's all I have to say.

PN160

VICE PRESIDENT ASBURY: Okay, thank you. Mr and Mrs Stevens, do you have anything you want to say in reply?

PN161

MR STEVENS: (No audible reply)

PN162

VICE PRESIDENT ASBURY: I think you're on mute.

PN163

MR STEVENS: Yes, sorry. In the original paperwork the word 'abandonment' has been bandied around by Mr Barden and Mrs Charlton, as well, which was not an abandonment. We actually did put our resignation in originally which was withdrawn, after we were threatened that if we took it they would take – if we took our – if we followed through with it legal action would be taken against us for putting our resignation in.

PN164

And the second time we'd actually resigned (indistinct) an argument which was discussed about – within that same – we did it face to face with the Charltons and we actually came to an arrangement that we would carry on and there would be no further discussion with this and that it would not be discussed again. When Linda actually applied for – we applied for annual leave when she was not well, and that was the reason we didn't – we actually put that letter in at the time. So, we do believe we were employees because a contractor doesn't get given annual leave, which we were given.

PN165

MS STEVENS: Which we've never been paid for.

PN166

MR STEVENS: Yes. But I don't think there's anything else. And I think what Deputy President Lake did actually do was correct with all the evidence that was given at the time, and I think the just outcome.

PN167

VICE PRESIDENT ASBURY: Mr Stevens, do you agree or disagree that in the hearing before Deputy President Lake that you told him that you had an ABN and that you provided invoices to Ms Charlton for your services?

PN168

MR STEVENS: Yes.

PN169

VICE PRESIDENT ASBURY: And tax was not deducted from the amounts that were paid to you?

PN170

MR STEVENS: No, tax wasn't deducted.

PN171

VICE PRESIDENT ASBURY: Sorry?

PN172

MR STEVENS: No, there was no tax taken out of the amount.

PN173

VICE PRESIDENT ASBURY: And you had your own insurances, I'm assuming, for injury or - - -

PN174

MR STEVENS: Yes, we did.

PN175

VICE PRESIDENT ASBURY: And did you operate any other businesses?

PN176

MR STEVENS: No, we don't.

PN177

VICE PRESIDENT ASBURY: And as I understand it you agree that Pecker Maroo Verano has less than 15 employees?

PN178

MR STEVENS: That's correct.

PN179

VICE PRESIDENT ASBURY: You ticked the box in your form F2?

PN180

MR STEVENS: Yes, that's correct. Yes, we did.

PN181

VICE PRESIDENT ASBURY: Are you aware of any businesses or other companies that Ms Charlton operates?

PN182

MR STEVENS: There was a business they were running down in Sydney. I'm not too sure the exact type of – it was a – some kitchen repair business or something. That's all I know about it though.

PN183

VICE PRESIDENT ASBURY: Okay. Thanks for that. Is that all you wanted to say, Mr Stevens? Did you have anything else you wanted to add?

PN184

MR STEVENS: No. Yes, there is. Linda would like to say something, so - - -

PN185

MS STEVENS: Yes. Yes, good morning. Yes, a question I wanted to ask is, with actually repaying any leave by Penny and Steven, and we've never – actually three weeks' annual leave still owing to us that wasn't (indistinct) at the time. We don't mind that. But also my doctor wrote me a letter about me because I've been in ICU three times from a virus. He made a mistake on the date. He's actually passed away. He was going to rectify it. You can ask Steven. That has not been (indistinct). He was a lovely doctor and he died at 56. That's just really disrespectful asking about someone passing away. How rude. Sorry, Judge. That's all I have to say.

PN186

VICE PRESIDENT ASBURY: Okay, so as I understand it you say that you sent an email to the employer saying that you were needing to take this sick leave to Ms Charlton, and provided a doctor's letter subsequently which had an incorrect date on it?

PN187

MS STEVENS: That's correct. And my doctor was going to rectify it because he'd put the wrong date. And I had just had ICU and if I didn't have any leave I was going to die.

PN188

VICE PRESIDENT ASBURY: Okay, and did you place any evidence before the Deputy President about your attendance in an ICU facility, or just that doctor's letter?

PN189

MS STEVENS: No, just the doctor's letter because the hospital – I discharged myself because we couldn't get anyone to cover for Stephanie Charlton's job, so we – I resigned – I checked myself out because we had no one to cover for the resort and I ended up back in there three times. There was no support from Stephanie or Stephen, or from Geoff Barden. He didn't want to know anything about it.

PN190

VICE PRESIDENT ASBURY: So, when were these hospitalisations, Ms Stevens?

PN191

MS STEVENS: It was in December and early January.

PN192

VICE PRESIDENT ASBURY: Okay, thank you.

PN193

MS STEVENS: And I can prove that I was (indistinct).

PN194

VICE PRESIDENT ASBURY: Sorry, Ms Stevens, could you just repeat that? You can prove?

PN195

MS STEVENS: I can prove that I was in Noosa Hospital and I can prove that, that I was there. And I was taken there by ambulance three times.

PN196

VICE PRESIDENT ASBURY: And were you ever paid sick leave for any of these absences?

PN197

MS STEVENS: No, but the other issue I was going to say, no, I didn't get paid sick leave. I took annual leave because Stephanie didn't believe in paying me for that. And I had to get annual leave for my time in hospital.

PN198

VICE PRESIDENT ASBURY: Thank you. Thanks. Is there anything else that the respondents want to say, Mr and Mrs Stevens?

PN199

MR STEVENS: No, I think we've pretty well covered - - -

PN200

MS STEVENS: Just basically what we needed to say because it's nearly twelve months down the track. We have suffered emotionally, financially and everything for the last twelve months because of this, and we just want to move on and go (indistinct) and just do what we're entitled to and move on. We had nothing to do with Stephanie and the business at (indistinct) but I thought that \$30,000 was the (indistinct). I had issues (indistinct) even (indistinct). That's all I have to say. Thank you.

PN201

VICE PRESIDENT ASBURY: Okay. Mr Barden, anything else in response?

PN202

MR BARDEN: There is just a couple of things. There's the fact that the contact didn't say about sick pay. When Linda first started she had an operation on her leg which she claimed was an injury and it wasn't an injury. So, she was paid for all that period although Matt was doing most of the work, Matt being her father. And if Linda was sick at that time and you know, the February when they actually resigned, there was no reason if Matt was still able to do that job then he could have approached Stephanie Charlton and Steve or myself and said, 'We need help to do this. Linda's sick, she's going into hospital.' There was never any occasion like that. They just said, 'We are going off.' So, it wasn't – Linda was sick but Matt could have supported her by staying in the job.

PN203

VICE PRESIDENT ASBURY: Okay, thanks for that.

PN204

MS CHARLTON: Excuse me, am I allowed to say something?

PN205

VICE PRESIDENT ASBURY: Certainly.

PN206

MS CHARLTON: Hello, everybody. Firstly, I'd like to say, yes, we do run another business and we pay wages and take tax out and pay the super every month – or every week. Linda and Matt came on as contractors and there's a contractual agreement. No super, no tax was paid, no sick leave, no benefits, because they are contractors.

PN207

The first time they threatened to leave was two weeks before Christmas. The second time they threatened to leave and we said, you know, 'You need to abide by the contract and do the right thing because you are under contract', and then the third time they actually just left. They rang – without notice. The contractual terms of agreement is that they must give us notice in writing and approve their annual leave and they said they're just out of there. They rang Geoff Barden and said, 'You'd better get yourself over here', with foul language, 'because we're leaving. We're going on holidays.'

PN208

VICE PRESIDENT ASBURY: Ms Charlton, all of these things were matters that there was evidence about before the Deputy President at first instance, so I don't know that there's any point repeating them.

PN209

MS CHARLTON: Well, because the reality - - -

PN210

VICE PRESIDENT ASBURY: You had an opportunity at the - - -

PN211

MS CHARLTON: The reality is – are you - sorry, Chambers(?) – the reality is that they are not employees, they are contractors, and they were taken on as a contract basis and they are a team, and the very fact that she left under the pretence that she was sick, or even if she was sick, there's no reason that Matt could not perform his contractual agreement and do his job and we would have assisted or got somebody else in to help.

PN212

VICE PRESIDENT ASBURY: Which is what you put before the Deputy President at first instance, so I understand your submission. Thank you.

PN213

MS CHARLTON: Right.

PN214

VICE PRESIDENT ASBURY: Mr and Mrs - - -

PN215

MS CHARLTON: They're threatening to leave three times on a contract. They were not performing. The body corporate were not happy with them, and as such

they would not renew our option because of their poor performance, and Linda did have – not accident surgery, she had planned surgery, so she was off for three months and could not perform her duties.

PN216

So on the third and final time that they actually abandoned ship, we said, 'You know what, it's going to be easier if you just leave', so we had to terminate them. We had no choice but to do risk management and – because nobody was happy. The owners weren't happy and neither was the body corporate, given the evidence that they would not renew our option based on their performance. So coming back to the contract and not employees, yes, we terminated their contract.

PN217

VICE PRESIDENT ASBURY: Yes, I understand, Ms Charlton, and the Deputy President at first instance had a lot of effort involved in trying to extract the relevant information out of what you provided to him, given that you provided hundreds of pages of material that was just completely irrelevant to the issues in dispute and not a statement from yourself setting all of that out. But in any event - - -

PN218

MS CHARLTON: It was – I beg your pardon. Apologies for butting in, but I did send all of the reasons, and there was 14 different reasons why we terminated their contract, and one of them was the email from Laura, the owner of apartment 5. So that was put in the submissions in the original dealings.

PN219

VICE PRESIDENT ASBURY: Yes, I understand that, and the email says nothing about Mr and Mrs Stevens' children staying in the apartment rent free and using the Netflix. It just says a lot about the place being dirty. It doesn't say anything at all about this really serious matter that you're now alleging, but in any event - - -

PN220

MS CHARLTON: Well, her partner, her husband, actually found people in the apartment after Matt and Linda told them, 'Yes, you can bring the TV down tonight', and he got there and found people in the apartment.

PN221

VICE PRESIDENT ASBURY: Yes, so you say, Ms Charlton. Regrettably, there wasn't a witness statement from the husband, but I understand your submission.

PN222

MS CHARLTON: Okay.

PN223

VICE PRESIDENT ASBURY: You didn't file any statement from the husband setting that information out, and I would have thought if the wife had the same concern, she would have put it in her statement, but in any event, she didn't. There's just an email from her that doesn't mention any of that what you say now is very important information, but in any event, we understand your submission.

PN224

MS CHARLTON: Okay.

PN225

VICE PRESIDENT ASBURY: Mr and Mrs Stevens, do you have anything you want to say in reply to all of that, or you just rely on what you said before the Deputy President in the first hearing?

PN226

MR STEVENS: No, I want to say something. Linda actually did have an operation on her leg, and during the time that she was recovering she sat upstairs in the unit and worked the full time from - - -

PN227

MS STEVENS: Stephanie (indistinct).

PN228

MR STEVENS: On the computer, and the - - -

PN229

VICE PRESIDENT ASBURY: I understand that, Mr Stevens. There's evidence about it in the proceedings - - -

PN230

MS STEVENS: Okay.

PN231

VICE PRESIDENT ASBURY: - - - before the Deputy President. She was wheelchair-bound. She stayed upstairs. She linked the computer to the downstairs office. Understand all that, yes.

PN232

MR STEVENS: Okay. That is just what we wanted to raise (indistinct).

PN233

MS STEVENS: But also, we never, ever, ever abandoned our employment. We were there until we got the termination email and were told to give the keys to Geoff Barden within an hour of him sending the email about my leave.

PN234

VICE PRESIDENT ASBURY: Okay. All right.

PN235

MS CHARLTON: No – excuse me, no, you need to know the truth and the facts. That is not the case at all. She was terminated after they rang and said, 'We're out of here.'

PN236

VICE PRESIDENT ASBURY: Mrs - - -

PN237

MR STEVENS: No, we didn't say, 'We're out of here', we said we needed to have leave.'

PN238

MS STEVENS: Have leave.

PN239

MR STEVENS: Those words - - -

PN240

VICE PRESIDENT ASBURY: Everybody stop.

PN241

MR STEVENS: (Indistinct) that.

PN242

VICE PRESIDENT ASBURY: This is not a fresh hearing. This is an appeal, and all of this stuff, I'm sure, was deeply interesting and it should have been argued in the first instance proceedings. We will look at that material, we'll look at the material the parties have filed and we'll make a decision in relation to this matter. Mr Barden has dropped out of the call. Do you want us to attempt to get him back?

PN243

MS CHARLTON: Yes, please, because there's untruths being said right now.

PN244

VICE PRESIDENT ASBURY: We've got everyone back on. You're muted, Mr Barden.

PN245

MR BARDEN: Okay, thank you.

PN246

VICE PRESIDENT ASBURY: Thanks. Mr Barden, I'm not sure how much of that last part of the proceedings you heard.

PN247

MR BARDEN: I did, up until you started questioning Stephanie, or Stephanie made a statement. I didn't hear that.

PN248

VICE PRESIDENT ASBURY: The position really is, this is not an opportunity to re-argue the case that was heard by the Deputy President. This is an appeal, which is, as I've tried to explain – I'm not trying to defend the Deputy President's position, I'm trying to tell you how to conduct an appeal, which is you need to show an error, and as I understand it, the appellant in this case is saying that Mr and Mrs Stevens were not even employees, they were independent contractors, and if the Deputy President found they were employees, that's incorrect.

PN249

MR BARDEN: Correct.

PN250

MS CHARLTON: Yes.

PN251

VICE PRESIDENT ASBURY: And secondly, that there were 14 points that were raised in relation to the reasons for terminating the contract, and that they were not fully considered by the Deputy President in his decision.

PN252

MR BARDEN: Correct.

PN253

VICE PRESIDENT ASBURY: And, Mr and Mrs Stevens, I'm assuming your submission is to the contrary. You say that the Deputy President did make correct findings and did fully consider all the material before it?

PN254

MR STEVENS: As far as we're concerned, yes, he did.

PN255

MS STEVENS: Yes.

PN256

MR STEVENS: Because otherwise he wouldn't have come to the decision he made.

PN257

VICE PRESIDENT ASBURY: All right. I'll indicate that we will reserve our decision and we will issue it in due course, and if there's nothing further from the parties, I propose to adjourn this appeal.

PN258

MR STEVENS: Okay.

PN259

MR BARDEN: Fine. That's okay. We will wait to hear.

PN260

MS STEVENS: Thank you for your time. Thank you.

PN261

VICE PRESIDENT ASBURY: Thank you.

PN262

MS CHARLTON: Thank you.

PN263

MR BARDEN: Thank you.

ADJOURNED INDEFINITELY

[11.07 AM]