



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**VICE PRESIDENT CATANZARITI  
DEPUTY PRESIDENT ASBURY  
DEPUTY PRESIDENT LAKE**

**C2022/5655**

**s.604 - Appeal of decisions**

**Low Latency Media Pty Ltd T/A Frameplay & Frameplay Holdings Corporation  
and  
Mr Eric Rossi  
(C2022/5655)**

**Brisbane**

**2.00 PM, MONDAY, 6 MARCH 2023**

PN1

THE ASSOCIATE: This Commission is now in session. C2022/5655, section 604 appeal by Low Latency Media Trading As Frameplay & Frameplay Holdings Corporation v Mr Eric Rossi.

PN2

VICE PRESIDENT CATANZARITI: Yes, thank you. I'll take the appearance of Mr Harmer.

PN3

MR HARMER: Yes, may it please the Commission, Harmer, initial M., solicitor appearing for the appellants.

PN4

VICE PRESIDENT CATANZARITI: Thank you. Mr Rossi. We can't hear you, Mr Rossi, you're on mute.

PN5

MR ROSSI: Sorry, just myself appearing for myself.

PN6

VICE PRESIDENT CATANZARITI: Thank you. And, Mr Rossi, do you take any objection to Mr Harmer appearing, having appeared beforehand?

PN7

MR ROSSI: Actually I do. I do object. Throughout the whole hearing I haven't objected but during my submissions I noted a previous case, the (indistinct) case, where the Full Bench decided the party couldn't be represented because the respondent was self-represented. And taking into account the complexity of the matter, I don't think the complexity of this hearing is any different. I also feel it would be much more efficient for the other party or the parties involved to represent themselves.

PN8

VICE PRESIDENT CATANZARITI: Yes. Okay. Mr Harmer, what do you have to say about that, noting that extensive written submissions have been put on in this matter?

PN9

MR HARMER: Yes, please, your Honour. The Commission pleases, we did file on 15 February written submissions going to - - -

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VICE PRESIDENT CATANZARITI: We've read those, yes.

PN11

MR HARMER: And I apologise, I didn't realise it was objected to on this occasion by Mr Rossi. But we certainly do maintain that there are complex issues that the Full Bench will need to deal with. First of all going to the monetary orders and the jurisdictional issues arising. Second - - -

PN12

VICE PRESIDENT CATANZARITI: Just stopping you there, Mr Harmer. In a moment I was about to say that the issue in terms of compensation, we don't want to hear any further from you because we acknowledge the error that has occurred and we'll deal with that separately. So there's been detailed submissions put in relation to the mathematics for compensation, so that's not going to occupy the Commission's time. The main question really before the Commission is going to be the issue of reinstatement and how that interplays with it.

PN13

MR HARMER: Yes, I would have some minor things to say about reinstatement and monetary orders should reinstatement be refused. But in terms of reinstatement, your Honour, we seek to point to House v King errors in the exercise of a discretion, and also serious factual errors within the decision. The instructors of the appellant company are based in the United States of America. They're not familiar with Australian laws to the extent necessary to deal with those issues. Similarly with the unfair dismissal component, substantive and procedural issues of fairness will be addressed.

PN14

In our respectful submission, given the complexity of the matter and the fact that our instructors are both from the United States of America, the Commission would be assisted to have legal representation in this matter. In terms of fairness to Mr Rossi, he has represented himself well throughout his written submissions, they're extremely strong. Whether he's had his wife's involvement or not - and I don't seek to go there. But, in our respectful submission, he successfully represents himself and he can further do so without any unfairness on this occasion. So if it pleases, in our respectful submission, it would be appropriate to grant permission for appearance by us on this occasion.

PN15

VICE PRESIDENT CATANZARITI: Yes. We'll take a short adjournment in a moment to consider that. We do note that there are extensive written submissions in this matter, and one of the issues that we would like to consider is whether we think there is utility in having an oral hearing. We'll take a short adjournment. Thank you.

**SHORT ADJOURNMENT**

**[2.15 PM]**

**RESUMED**

**[2.17 PM]**

PN16

VICE PRESIDENT CATANZARITI: Yes, thank you, Mr Harmer and Mr Rossi. We've considered your views, Mr Rossi, in relation to representation. We think, having regard to the history of this matter, and on the basis put by Mr Harmer, that it would be more efficient to continue his representation, and we take into account the difficulties of those instructing him. We propose that he will continue to represent the appellant in relation this appeal. However, in saying so I make it very clear to you, Mr Harmer, that there are extensive written submissions that have been filed in these proceedings. I would expect the oral submissions to

be quite tight. And if I form the view that during the course of the presentation it ceases to be of use, then we can obviously withdraw representation at that point.

PN17

MR HARMER: May it please. Thank you.

PN18

VICE PRESIDENT CATANZARITI: Thank you. I will reconfirm what I said earlier to you, Mr Harmer, that we do not want to hear you on the mathematics of the compensation.

PN19

MR HARMER: Yes, your Honour. Just briefly on that issue, I don't seek to go into the mathematics. I would seek to make some brief observation, probably no more than 30 seconds on the compensation.

PN20

VICE PRESIDENT CATANZARITI: Go ahead.

PN21

MR HARMER: I'll then address reinstatement in unfair dismissal, if it pleases. Prior to proceeding, there are some housekeeping issues. There was an affidavit of Mr Will we put on, which was solely to put forward the stay hearing transcript.

PN22

VICE PRESIDENT CATANZARITI: The stay hearing transcript - Mr Rossi, there's no objection to that, is there? It's just what's already - - -

PN23

MR ROSSI: Sorry, there is an objection.

PN24

VICE PRESIDENT CATANZARITI: What's your objection to that?

PN25

MR ROSSI: The transcript for the stay hearing isn't provided by the Commission, so I can't guarantee the accuracy of it without validating it against a source, myself. I had looked for the - - -

PN26

VICE PRESIDENT CATANZARITI: (Indistinct) I must say I'd assumed that (indistinct) it was actually (indistinct). So this has been transcribed at your end, Mr Harmer. Is that right?

PN27

MR HARMER: Yes, through an independent contractor, if it pleases. We were only provided with the tape. That's why we put on the affidavit. And we're more than happy for Mr Rossi to have time to verify it subsequent to today, if he was to be given seven days or something of that nature. We certainly - - -

PN28

VICE PRESIDENT CATANZARITI: Not much is going to turn on that transcript, Mr Rossi. So if you want to (indistinct) arising from that, and you say that there's some problem with the transcription of the audio, then feel free to do so.

PN29

MR ROSSI: Sure.

PN30

MR HARMER: Second, if the Commission pleases, there was just a schedule of transcript extracts which really are just designed to cut down the time.

PN31

VICE PRESIDENT CATANZARITI: That's the appellant's schedule of factual issues.

PN32

MR HARMER: That's correct.

PN33

VICE PRESIDENT CATANZARITI: But that's in your submission, that's your document, that's - we've got that.

PN34

MR HARMER: That's - and, finally, there's a statement of Alicia Kallander which we pointed out in an email to the Commission's associate, the Vice President. There are some aspects of the outline of submissions by Mr Rossi which we will assert are factual issues, and we will, if we are successful when pointing to *House v King* error in the exercise of the discretion concerning reinstatement, we will ask the Full Bench to exercise its own discretion in relation to that issue.

PN35

And we don't oppose the fact that an update on circumstances is relevant in the context, and so we don't object, per se, to what Mr Rossi has put forward, other than some aspects of it are inaccurate, and so we just put forward a brief statement that was compiled with thanks by Ms Kallander in the United States over the weekend which just corrects certain issues. And we put it no further than that. If it pleases, we'd seek to rely on it.

PN36

VICE PRESIDENT CATANZARITI: Well, I'll hear from Mr Rossi on Ms Kallander's statement because that would be in a different category. Mr Rossi, what do you say about that statement?

PN37

MR ROSSI: Just on the Alicia Kallander argument, I'm not across the evidentiary requirements, but I don't think it's fair that Alicia has sat through - she sat through the whole hearing as a representative of Mr Harmer's team. She's heard all the cross-examinations, and to be providing a witness statement a few hours before the hearing, which I haven't had a chance to review. Quite - 55 pages of new

information that's come two hours before this hearing, is quite - has made me quite flustered. And I'm not afforded an opportunity to test that evidence.

PN38

Just for the record, PN 2890 and PN 2899, on page 496, the Commissioner wasn't aware that Alicia was sitting through the whole hearing, and had given a warning as well that this information or information in the hearing should not be replayed to any of the witnesses who are attending that hearing. So I feel it's unfair. If I had known, I could have provided witnesses a few hours before the hearing, I would have probably tried to provide a few. And it's hearsay evidence, and if I can't test it, we can't ascertain the accuracy of that information.

PN39

VICE PRESIDENT CATANZARITI: All right. Just one second. No, we're not going to allow this statement in of Ms Kallander at this stage.

PN40

MR HARMER: May it please. Thank you.

PN41

VICE PRESIDENT CATANZARITI: Mr Rossi, you won't have to trouble yourself with that statement, it's not going to be before us.

PN42

MR ROSSI: Great. Thank you. I won't start reading it now.

PN43

MR HARMER: The Commission please, then I'll proceed to some very brief comments on the monetary orders. I definitely won't address the calculation which has been addressed, as we understand it, within the jurisdictional decision by the appeal bench. Just very briefly, though, the orders made we say are, with respect, all outside of the jurisdiction to the extent that they go to pre-dismissal backpay, backpays allegedly deferred, annual leave entitlements, and an adjustment to the annual leave pay to the corrected rate of 170,000 plus super.

PN44

We also, however, say in relation to the compensation ordered, where there's reference to section 3925 of the Act, it appears that there's been inappropriate reference to that section going to compensation, and there's a reference to the cap at paragraph 188 of the decision. We say that to the extent compensation can deal with loss of income, it's not contested that Mr Rossi would earn more than twice his pre-dismissal income while he was - or since he's been removed. And in that context, there is no loss and so there's no basis for that order either.

PN45

That if we are successful in the submission that there should not be reinstatement, but unsuccessful around the unfair dismissal question, and the bench was minded to make orders under section 3925, we again point to that evidence that Mr Rossi has not suffered any loss and there cannot be compensation where there is no loss, under 3925. And we refer to the strict guidelines in that context, 1998/88 IR 21 at 29. That is where there's total mitigation - indeed, double mitigation here - the

jurisdiction to order recompense under the Act. The point in the transcript where -  
- -

PN46

VICE PRESIDENT CATANZARITI: Just one second, Mr Harmer. Mr Rossi, are you following that argument that Mr Harmer is putting? Are you seeking compensation out of this appeal?

PN47

MR ROSSI: No, I'm not.

PN48

VICE PRESIDENT CATANZARITI: That's the end of that, Mr Harmer. That's the point I was trying to get you to focus on at the beginning, that that does not arise. Thank you.

PN49

MR HARMER: Thank you. I'll move briefly onto reinstatement, and what we say in brief terms here is that the Commission was required to take into account all of the circumstances before her in determining whether a relationship could be fruitfully restored. Now, in our respectful submission, there are House v King errors in the exercise of that discretion, and if the bench will bear with me I'm going to very quickly go to one aspect of evidence which we say is quite significant, that was put forward at first instance and does not receive reference at all in the decision of the Commissioner at first instance. And that's annexure C to the statement of Mr Blake, who is one of the directors of Frameplay. And that appears at appeal book 1072 to 1074 (indistinct).

PN50

VICE PRESIDENT CATANZARITI: Just one second. I'm using an electronic system here. My colleagues are still with papers though. It takes me slower electronically too.

PN51

MR HARMER: Yes.

PN52

DEPUTY PRESIDENT ASBURY: One-zero-seven-two seems to be a further submission. What's 1072 of the appeal book supposed to be?

PN53

MR HARMER: In my version it's meant to be an email from Mr Rossi dated 5 July - - -

PN54

VICE PRESIDENT CATANZARITI: One-zero-seven-two is a further submission in my electronic appeal book, but the page numbers go from - - -

PN55

DEPUTY PRESIDENT ASBURY: So it's an annexure to whose statement, Mr Harmer?

PN56

MR HARMER: Yes, I apologise, I'm working off a hard copy, that's all. Annexure C to the witness statement of Michael William Blake dated 6 February 2022.

PN57

VICE PRESIDENT CATANZARITI: Well, what page is that?

PN58

DEPUTY PRESIDENT ASBURY: One-zero-seven-two is not - so Michael William Blake, 6 February. That statement starts at page 927 of the appeal book. Yes, and so it's annexure C to that statement which is - it's an email of what date, Mr Harmer? Is it 8 July?

PN59

MR HARMER: That's the start of the email trail, if it pleases, your Honour, and if I could just take the Commission back through - and I apologise, for some reason I've got different page numbering on my appeal book.

PN60

VICE PRESIDENT CATANZARITI: I've got page 951 which is the start of the email trail in the electronic appeal book.

PN61

MR HARMER: So it's the first few in that trail. Email from Mr Rossi dated 5 July 2021 at 2.16.

PN62

VICE PRESIDENT CATANZARITI: 5 July.

PN63

DEPUTY PRESIDENT ASBURY: Which is - - -

PN64

DEPUTY PRESIDENT LAKE: Page 945.

PN65

DEPUTY PRESIDENT ASBURY: Yes, page 945. 2.16. Yes.

PN66

MR HARMER: And if I could - - -

PN67

VICE PRESIDENT CATANZARITI: Just read us which part of the email on 5 July you're referring to. There's quite a number on 5 July.

PN68

MR HARMER: Yes, so if you go to the very end of the (indistinct), the third-last paragraph commences, 'As the working relationship with Jonathon and Li Wu has broken down.'

PN69



VICE PRESIDENT CATANZARITI: Okay:

PN70

*As my working relationship with Jonathon and Li Wu has broken down, that effectively left me with no other option. I would like to negotiate my role as CTO.*

PN71

That's the paragraph you want to draw attention to?

PN72

MR HARMER: That's correct.

PN73

DEPUTY PRESIDENT ASBURY: Yes, page 947.

PN74

MR HARMER: That was something that we relied on, as it moved from Mr Rossi (indistinct) dismissal, and it involved him acknowledging in writing the working relationship with Jonathon, the CEO of the organisation, and Li Wu, the Chief Financial Officer, had broken down. And it was in that context that he sought to negotiate certain outcomes.

PN75

Now, what we say is that in circumstances where that does not appear at all in the Commission's review of all the circumstances relevant to reinstatement, we say that's clearly - and it's a written indication from Mr Rossi that the relationship was broken down - we say that's a most relevant consideration that was not taken into account.

PN76

VICE PRESIDENT CATANZARITI: Draw our attention to where in the submissions below that was specifically drawn to the attention of the Commissioner.

PN77

MR HARMER: I'll have to give you the references.

PN78

VICE PRESIDENT CATANZARITI: So I'm assuming what you're saying is in the Commission below that was part of your closing submissions.

PN79

MR HARMER: That - and I can get the reference for that.

PN80

VICE PRESIDENT CATANZARITI: Yes.

PN81

MR HARMER: So what we will say is that the Commission then had a situation where the appellants were saying the relationship had broken down; Mr Rossi was saying in writing the relationship had broken down. There's no reference to that at

all, and the Commission came with this view that somehow the relationship could be salvaged and we say that's a material omission, a failure to take into account a relevant consideration contrary to our submissions and the evidence that was before the Commission at first instance. Secondly, there's a reference at paragraph - - -

PN82

VICE PRESIDENT CATANZARITI: Sorry, Mr Harmer, you've broken up. We can't hear you. You've broken up.

PN83

MR HARMER: I apologise. I'm going to the decision at first instance. This is a second point under reinstatement.

PN84

VICE PRESIDENT CATANZARITI: Yes, the decision at first instance. Thank you.

PN85

MR HARMER: The decision at first instance at paragraph 168. There's a reference to a submission by the appellant that:

PN86

*Reinstatement is not appropriate as this would likely lead to resignations.*

PN87

What is that again that's an extremely relevant consideration. But that if we contrast what was actually put forward, it was not just a submission but there was evidence of the potential for at least four resignations, and that is summarised in our schedule that we put forward today, just the schedule of extracts from the appeal book. And I hope the appeal book references are accurate, but item 1 in that schedule just grabs the testimony of Mr Li Wu, who was the Chief Financial Officer but also - - -

PN88

VICE PRESIDENT CATANZARITI: Just stop there. You draw our attention to paragraph 168, and you've said the respondent, on the other hand, submits that reinstatement is not appropriate as this would likely lead to resignations and a continuation in the breakdown of working relations. Why does that not mean she's not taken into account the material? You want to say that's just simply a submission; that she hasn't actually looked at the evidence to form that view? That's a big jump.

PN89

MR HARMER: It's our respectful submission that the Commission referred to it as no more than a submission, rather than going to and acknowledging the evidence of the relevant resignations which we've set out at point 1 of our schedule. And we say that that also is a House v King error, in terms of failure to take into account a relevant consideration. The third point we briefly make - - -

PN90

VICE PRESIDENT CATANZARITI: Well, has she said anywhere in there that she's rejected that submission?

PN91

MR HARMER: She simply doesn't refer - - -

PN92

VICE PRESIDENT CATANZARITI: She's acknowledged the submission that's been made based on the evidence. I don't see in the decision where she said, 'Well, that submission didn't have a foundation.' She's obviously weighed it up in a particular way.

PN93

MR HARMER: In our respectful submission, it's not apparent that she had regard to the specific evidence of the four resignations and potential - we put it no higher than that. The third point that we put forward at first instance that doesn't (indistinct) decision and discretion around reinstatement, is the fact that Mr Rossi, outside of his employment with the appellants, was earning twice the income. And, again, that's not acknowledged in relation to any issue dealing with reinstatement.

PN94

VICE PRESIDENT CATANZARITI: How does earning twice the income, where he wants his job back, relevant to the issue of reinstatement?

PN95

MR HARMER: Well, a discretionary factor that he was earning such high income outside of the role - and I'll come to submissions around his objectives in reinstatement, but we certainly maintain that that was a relevant consideration. And there's no acknowledgment of it on the face of the decision at all, in our respectful submission.

PN96

The next point we briefly make is the insolvency threat. We say that it's apparent from the annexure that we went to previously, which was annexure C to the statement of Michael Blake, that the threat was being used as leverage by Mr Rossi to exact an outcome, and obviously threatening the position of the company and the jobs of everyone concerned, and that's also, we say, relevant to take (indistinct) and something that's not properly dealt with by the Commission.

PN97

Now, having made those points, and particularly the third point where Mr Rossi's own written acknowledgement of the breakdown of the relationship is not even recorded on the face of the decision, we do say that at the very least that - although we press the combination of points I've just briefly made - demonstrate a failure to take into account relevant considerations for purposes of the reinstatement order, and a House v King error, and that that introduces the prospect for the Full Bench to exercise its discretion in relation to reinstatement.

PN98

What we say in relation to that is that it is apparent from the materials - leave aside the admission that Mr Rossi made in writing - that the relationship has broken down. We've got a very senior employee in a very small business, with intimate relationships vital to the teamwork. We say that this arises from the evidence. There's no question the relationship has been further harmed by the litigation but also the threats of putting the Australian business into insolvency.

PN99

We've got the risk to the other staff, including the four who have threatened resignation. There is also one member of staff who resigned over Mr Rossi's conduct, before the start of the hearing. We do say that there's a high potential of retaliatory conduct against employees and a high potential that there will be further issues between the parties, and that the Commission may end up dealing with the exact same problem again. That somehow Mr Rossi is removed and the issue goes back around, because the relationship clearly is incapable of being sustained.

PN100

As I say, the submissions that Mr Rossi's put forward that he would be working in Australia with no contact with others, is not correct, given the evidence as to how the various departments interplay and how vital the software engineering area is to craft development and marketing, and (indistinct) for delivery of product. It's also the case that the engineering department is located in both the United States and Australia.

PN101

And it's also the case that Mr Solarino, the young employee, who the evidence indicates - and I'll come back to this later - was broken down through an exchange with Mr Rossi. He still works in the engineering department and certainly there's evidence that was before the Commission that he, in particular, had taken on (indistinct) Rossi. For all those reasons, we say that the battle royale that was referred to the Commission in its jurisdiction decision is certainly is a realistic analogy, and that the Full Bench should exercise its discretion in favour of refusing reinstatement. And, as I said before, to the extent that's the case, there'd be no other orders appropriate.

PN102

We say in respect of leave to appeal, that the omission of such vital contention or written admission by Mr Rossi around the relationship, himself, just after the termination is a material *House v King* issue. There is a public interest in reinstatement matters being dealt with appropriately, and also there is the safety of the employees and the potential resignations that we've referred to all are matters of, we say, import that would warrant leave being granted for this appeal.

PN103

To the extent that that annexure C admission by Mr Rossi is not referred to at all, we say that's a *House v King* error; but to the extent that its omission is a factual omission, we do say it's a serious one for the purposes of section 400 of the Act, not that we think we have to put it that way. So I've tried as concisely as possible to summarise why we think the Full Bench can exercise its discretion on

reinstatement. And certainly we say there's evidence that I've gone to of House v King error on the face of the decision.

PN104

Then, very briefly, unless you have any further questions on the reinstatement issue, I'd just go briefly to the valid reason and procedural fairness points. I'll be a lot briefer than I was going to be on this issue. The Commission will appreciate it's a fairly complex web of evidence but I'll try and do this in summary form. The issue that we wanted to raise again by way of House v King error in relation to valid reason, is that the Commission decided - - -

PN105

VICE PRESIDENT CATANZARITI: Sorry, you've gone on mute all of a sudden. We can't hear you. Try again.

PN106

MR HARMER: Hello?

PN107

VICE PRESIDENT CATANZARITI: We can hear you now, yes.

PN108

MR HARMER: Sorry. I apologise for that. The Commission in its decision at first instance at paragraph 68, indicated that the HR incident reports that the Chief Financial Officer, Mr Li Wu, who was doubling also as HR within the small business - you know, a growing business - came to the conclusion that they were produced for these proceedings. There were some exchanges in relation to whether those incident reports were recorded contemporaneously, and the extent of delay was because of Mr Wu's busyness, he would sometimes take one to two weeks. Others would be done immediately but up to one to two weeks. And that was the debate that occurred. And, again, I hesitate to give appeal book references but I'll give them. Mr Rossi's cross-examination on the issues are at appeal book 430, which I hope is the correct reference.

PN109

DEPUTY PRESIDENT LAKE: What was the PN number?

PN110

MR HARMER: PN number 2296 to 2298.

PN111

DEPUTY PRESIDENT LAKE: They're different in the electronic appeal book, so let us just find it first.

PN112

DEPUTY PRESIDENT ASBURY: Two-two-nine-six to 2298?

PN113

MR HARMER: Yes. Paragraph numbers 2296.

PN114

DEPUTY PRESIDENT ASBURY: Three-zero-three. Page 303.

PN115

MR HARMER: And, again, I don't seek to read through that. All I say is that there are questions around time but nothing is put to Mr Li Wu that they were fabrications for the purpose of the proceedings. And then similar there's questions put by the Commissioner, herself, at paragraph numbers 2453 through to 2458 and  
- - -

PN116

VICE PRESIDENT CATANZARITI: Sorry, I'm just trying to - go back to - you said nothing was put about time.

PN117

MR HARMER: No, sorry. There were questions about the time delay in the recording of these incident reports which spanned a couple of years. So when an incident occurred Mr Li Wu's evidence was that he would either immediately and sometimes even up to two weeks, record one of these incident reports and what had occurred. And so there's these incident reports that are annexure C to his statement, and they range of a year or more of time. And he was cross-examined about delays in putting them together including questions from the Commissioner at paragraph numbers 2453 to 2458.

PN118

But the point we make is that neither Mr Rossi nor the Commissioner put it to Mr Wu that these incident reports were fabricated for the purposes of these proceedings. And that's a very serious allegation and a very big call, to move from there was some delays at one to two weeks in recording some of them, to saying that they were fabrications. The point we make is that for that to be included in a decision of the Commission without it having even been put to the witness by either Mr Rossi or the Commission, an extremely unfair error and it should not have been made without being put to Mr Wu.

PN119

We obviously (indistinct) but just on a procedural basis there's no way that there's been procedural fairness, which goes to the Commission's jurisdiction in coming to that conclusion. So that, we say, is a *House v King* error, and it does flow through because these were the vital incident reports that underpin the conduct of Mr Rossi.

PN120

DEPUTY PRESIDENT ASBURY: Except it was put squarely to Mr Wu at 2295, that, 'There's no way to verify when the document was created, is there?'

PN121

MR HARMER: That goes to the timing and the documents do have times on them. But, again, in terms of no way to verify, that was answered but, again, it's not put to him that these were fabrications for the purposes of this proceeding, and certainly not by the Commissioner, and we would say also not by Mr Rossi.

PN122

Now, the second point we make briefly relates to the Tom Solarino issue, which was the young employee that Mr Rossi allegedly abused in giving feedback on

performance. What happened was that that occurred in August 2020 and then come April 2021 when all other employees at that level were receiving stock within the growing business, there was pressure by Mr Rossi not to allocate that employee stock, which gave rise to issues of victimisation, because the employee had complained against Mr Rossi to the CEO, to the CFO who was handling HR, and to his immediate supervisor about Mr Rossi's conduct. And that led to a counselling and warning issue between Mr Troughton, Mr Wu and Mr Rossi.

PN123

But what we say is that the Commission at first instance in dealing with that issue, at paragraphs 77 and 125 of the decision, downplays the issue tremendously. It refers not to the whole evidence around the language used, which was the c-u-n-t word. So Mr Rossi referred to the young employee as 'A useless c-u-n-t'. That evidence was given directly to Mr Li Wu in his evidence at paragraph number - it appears at annexure C (indistinct) - - -

PN124

VICE PRESIDENT CATANZARITI: You're breaking up again. Just repeat what you said.

PN125

MR HARMER: Mr Li Wu, in annexure C to his statement. (Indistinct) page number to the Commission but if I just go to his statement at annexure C are these incident - - -

PN126

DEPUTY PRESIDENT ASBURY: Page 749 is his statement - Mr Wu's statement.

PN127

MR HARMER: And I was just going to annexure C to that statement. And the first page of annexure C is the (indistinct) August 12, 2020 - - -

PN128

DEPUTY PRESIDENT ASBURY: Sorry, Mr Harmer, you're breaking up again. None of the annexures are marked. You have to look at the statement to see what the annexure is. So what is the annexure? Is it a - what is it?

PN129

MR HARMER: Frameplay Employment Incident Report, and that's largely the - - -

PN130

VICE PRESIDENT CATANZARITI: Yes, which one? There's a series of them. Which date?

PN131

MR HARMER: The first page of that annexure C. And so it's been reported by Luke Austin and the date of the report is August 12, 2020.

PN132

VICE PRESIDENT CATANZARITI: Yes.

PN133

DEPUTY PRESIDENT ASBURY: Page 654?

PN134

VICE PRESIDENT CATANZARITI: No, 767. Seven hundred and sixty-seven is the 12 August one.

PN135

MR HARMER: So if the Commission has annexure C you'll see there an incident description where in the second line the language used towards this employee is referred to. This is the employee who has since, allegedly on the evidence, had to get psychological counselling over treatment by Mr Rossi. And then there's an update, April 22, 2021. This is Mr Wu, the Chief Financial Officer of the corporation:

PN136

*Following a standard stock option granting process Eric refuses to grant Tom stock -*

PN137

so that's Tom Solarino, the employee -

PN138

*despite all other employees in the same position receiving stock option grants.*

PN139

And the company raised this as a potential exposure to litigation in terms of an employee who complained about his treatment by Mr Rossi, then is the only employee at the level that Mr Rossi wants to decline stock options to. And then so potentially an act of victimisation was the apprehension.

PN140

Now, the Commission when dealing with that issue at paragraph 125 of the decision, says there's no evidence that the employee was entitled to stock options. Well, this document, as I just took the Commission to, annexure C, is recorded by the Chief Financial Officer of the company and indicates that all other employees in that same position received stock options and that the employee was entitled. Secondly, the Commission refers to the board composition at the time as being just the two co-founders. That's - - -

PN141

VICE PRESIDENT CATANZARITI: One (indistinct) is these documents which allegedly have got dates on them, seem to be amended within the documents, so - yes, the date of the report is August 12, 2020, but it clearly refers to stuff after it. And there were issues about authenticity about how these things come together, in the proceedings below. You can't have an incident report updated this way. It could be self-serving. It's not an incident report, Mr Harmer, the way it's described.



PN142

MR HARMER: (Indistinct) but I take the point, your Honour. Certainly Mr Wu's evidence was that he updated this incident report based on what then occurred in April.

PN143

VICE PRESIDENT CATANZARITI: But you've got the Commissioner also saying that in relation to the particular conversation that Mr Austin I think says something like he couldn't be sure that he actually did say those things.

PN144

MR HARMER: Yes.

PN145

VICE PRESIDENT CATANZARITI: So it's a bit confusing, to say the least.

PN146

MR HARMER: But the evidence is that Mr Solarino complained directly to Mr Li Wu, to Mr - to the CEO, in relation to this particular issue. And so our respectful submission is that - - -

PN147

VICE PRESIDENT CATANZARITI: Well, the issue is what is the issue, because Mr Austin doesn't recall using the word but said that the behaviour was not good enough, as distinct from - you know, it might be something else that happened, as distinct from the use of the word. And there's quite a significant difference between what actually happened in that particular incident.

PN148

MR HARMER: Yes, I'm having trouble hearing your Honour but I think I caught the gist of that. As we say, the use of the word and the treatment was reported directly to Mr Li Wu, and to the CEO over and above Mr Austin. And the issue we say is that the question that there's no evidence that the employee was entitled to stock options when the Chief Financial Officer of the company is indicating that that was the case, and that all other employees at that level received it, in our respectful submission is not an appropriate conclusion around an act of victimisation, and that was a serious issue that was relevant as a valid reason for termination. So we say there's error in relation to the conclusions on that matter.

PN149

Another brief example - very briefly - was the Gustavo incident. If the Commission goes to - I'll be very brief in this - ground 10 of our appeal document, we've summarised what was involved there, and we've elaborated upon that evidence through extraction, and we can look at items 4 and 8 of our - of extracts from the appeal book.

PN150

Now, the Commission, in effect dramatically understates the relevant conduct in the decision at paragraphs 73 and 95. But in relation to Ms Mancino who (indistinct) and it's summarised at paragraph 10 there, the conduct of Mr Rossi during the meeting which was witnessed not only by Ms Mancino but also by Ms

(indistinct) and Mr Gurney. And so there's three witnesses to the conduct, set out in summary form there at ground 10 of the appeal.

PN151

And that did lead to the resignation of Gustavo and Ms Tilds clarifies that and we've put that evidence in, in our schedule. On the last page of the schedule there's the cross-examination of Ms Tilds where she makes it abundantly clear that the designer who received that treatment - we say, with respect, appalling treatment - resigned rather than put up with that treatment from Mr Rossi. Mr Rossi then did go and question Ms Mancino who was just in her second week of employment (indistinct).

PN152

And what I sought to do was to go and contrast the conclusions reached about Ms Mancino's evidence by the Commission at paragraph 95 of the decision at first instance - I just want to contrast that conclusion (indistinct) 98. The Commission summarises - talks about, in the third-last line of 95, Mr Rossi's body language, and then a comment at the end of that sentence about colours clashing, but doesn't have any of the other numerous concerns raised by Ms Mancino in relation to that meeting that brought about the resignation of the designer. But then at paragraph 96 the Commission - - -

PN153

VICE PRESIDENT CATANZARITI: Sorry, you've broken up again, Mr Harmer. Please go back to where you started on paragraph 96.

PN154

MR HARMER: Yes. At paragraph 96 the Commission questions the value of Ms Mancino's evidence because she only had the one confrontation and suggests that that was because Ms Mancino was shielded from Mr Rossi. And she says towards - the Commissioner says towards the end of that paragraph that the communications were filtered from the commencement of her employment and raises questions in terms of why that would be the case.

PN155

Now, if I can just go to the statement of Ms Mancino where she deals with these issues, at paragraphs 20 through to 41, and I won't give a page number of my appeal book because I seem to have different numbering. But if I could ask you to go to the statement of Ms Mancino, it's only a four-page statement. And it's the last few pages of that four-page statement where Ms Mancino gives her evidence about what happened and then why - - -

PN156

VICE PRESIDENT CATANZARITI: Page 922 in the appeal book is Mancino's statement. Yes, whereabouts? Whereabouts in that statement?

PN157

MR HARMER: It's the last two pages. Paragraph 20, under the heading '31 March 2021'.

PN158

VICE PRESIDENT CATANZARITI: Yes.

PN159

MR HARMER: Ms Mancino describes what happened at paragraphs 20 through to 27. And then at 28 that the designer Gustavo resigned. And then Mr Rossi questioning Ms Mancino when Gustavo resigned, or why did he resign. Now, it goes over the page and she talks about how uncomfortable she was as a very new employee and a junior employee in that meeting with that line of questioning. But at paragraph 37 she said:

PN160

*Fortunately for me, Ms Tilds did a great job of strategically putting herself between me and Mr Rossi for future matters that required communication, but it shouldn't be like that.*

PN161

So the protection that the Commission is questioning at the paragraph of her decision that I just went to, paragraph 96, she seems to be raising or dealing with that as a matter of suspicion was put in place in consequence of the one meeting that this employee had with Mr Rossi. And she was one of a number of employees who were protected from Mr Rossi's impact during employment. And so what we say is that the casting of suspicion upon this employee, and the fact she had just the one encounter and then supposedly was protected from encounters from the start of her employment - which is inaccurate based on paragraph 37 - is inappropriate, unfair. The Commission dramatically understates what occurred in that particular incident. And again this is March '21, the Solarino issue I just went to was April '21.

PN162

And one other aspect of the decision I might just go to briefly, this time in relation to fairness of the process, is paragraph 115 of the Commission's decision. And I'll round off with this, it will be my final point. The description at 115 of the Commissioner's decision (indistinct) Mr Troughton, at line 4, providing a warning to Mr Rossi in relation to alleged undermining conduct that occurred in front of other executives:

PN163

*He states that Mr Rossi screamed at him words to the effect of 'I'll speak to you however the fuck I want'.*

PN164

And then that continues over the page, and it's described by the Commissioner as a heated conversation between the two founders, which demonstrates a robust disagreement. What the evidence is, is that that was the way Mr Rossi reacted when one raised warnings or counselling with him. He reacted aggressively and Mr Troughton's evidence was that because he got that sort of reaction, having raised these issues, and he raised the Solarino issue, that's in evidence, but, yes, he stopped and moved to termination.

PN165

And then even on 2 July when the termination was raised, Mr Rossi so commenced attacking Mr Troughton in front of Mr Wu and Mr Blake who were both on the call, and that again, that discussion broke down. So what we say in terms of procedural fairness is that the warnings that were in existence, and then I think there's some point in the decision I'll come back to, where the Commission says there was no evidence of warning. Well, here she certainly seems to accept that there was a warning and a reaction - - -

PN166

VICE PRESIDENT CATANZARITI: You've broken up again, Mr Harmer. Please go back to where the Commission is accepting - or words to that effect.

PN167

MR HARMER: Yes, I apologise. What we put in terms of process, in terms of procedural fairness outside of the valid reason substantive issues - a couple of which I've just gone to - is that the warnings that were provided or the counselling provided, received this reactive aggression from Mr Rossi. And so there were warnings throughout the course of the engagement, and opportunities for Mr Rossi to deal with his conduct.

PN168

But it was this aggressive reaction that brought the conclusion on top of the Solarino incident and the Gustavo incident, that termination had to be moved to. And, as I say, even on the day of the termination Mr Rossi reacted so aggressively to what was happening that discussion of the various reasons were not possible. And so whilst we acknowledge that the process was far from ideal, in the specific circumstances of Mr Rossi and his inability to take on feedback, it would have been of utility to go through further process because of the way Mr Rossi reacted, and the lack of procedural fairness made no difference to the appropriate outcome, given the valid reason.

PN169

So that's all we have to say on unfair dismissal. And just to summarise, we've dealt with the monetary orders. We acknowledge that on unfair dismissal we are challenged, and we rely on the written submissions and what I've just put. We do say strongly on reinstatement that there has clearly been an error in failing to deal with Mr Rossi's own admission around the relationship having broken down.

PN170

And we also say that that puts the Full Bench in a position to exercise its own discretion, and that should be against reinstatement and against just recreating this (indistinct) and just producing further potential litigation and trouble between the parties. The Commission pleases, if I could just have a moment.

PN171

If the Commission pleases, just on a housekeeping issue, Mr Will is just pointing out to me that we updated the appeal book for the jurisdictional appeal material, and so there's an appeal book that was provided on 23 September with 41 indexed items, that contain both the jurisdictional appeal and the merits appeal material. And that's the appeal book we've been working off. We apprehend

Mr Rossi may also be working off that version. He's nodding. So I just wanted to point out that's why we're not coinciding on pages, and I apologise for that.

PN172

VICE PRESIDENT CATANZARITI: Yes, thank you. Thank you, Mr Rossi.

PN173

MR ROSSI: I'm not sure how to address all of those points without doing another five-day hearing. I didn't take notes of all those, so I've lost track. I have responded to all of those points in my outline of submissions dated 27 February 2022, page 1167 of the appeal book, so I won't go through all of those again. I'm not sure what else. A lot of - I do have a question for the Full Bench, just for my understanding.

PN174

A lot of these arguments weren't in the initial schedule of notice to appeal. I think some of them - and I have to go through and spend some time - aren't even in the outline of submissions. I just want to understand is that something common, allowed or fair. If the schedule of notice to appeal, which the stay decision is based on, and then the further submissions don't align with those appeal points, is that normally how it operates and that's okay?

PN175

DEPUTY PRESIDENT ASBURY: Well, why don't they align? All they've done is collected them together into four bases, as I understand it, Mr Rossi. I don't think there's anything new. What do you say is new? They've just collected them together under four themes, rather than as they previously were. But I don't think there's anything new there.

PN176

MR ROSSI: Well, as an example, I put it in my submissions, an argument of Jonathon being tired was in an outline of submissions. That wasn't in the original notice to appeal. I'm not sure what four categories that falls under. So that's just one example. I've provided and spent a lot of time on my submissions, and I've got specific examples, but that is one example of an argument in the submissions that one of the witnesses was tired, and the Commissioner did not take that into account. That's not in the notice of appeal. Now, I'm not sure what bucket that falls under. So, yes, I'm just trying to understand, is this usually how it works, it's okay for this to happen?

PN177

DEPUTY PRESIDENT ASBURY: You've highlighted those matters in your submission, Mr Rossi?

PN178

MR ROSSI: Yes, yes, I have.

PN179

DEPUTY PRESIDENT ASBURY: Well, we'll have regard to that. And, no, it shouldn't be - the submission shouldn't be advanced and it's not relevant to a ground of appeal.

PN180

MR ROSSI: Okay. Sure. That's what I just wanted to understand. So, like I said, I don't know how I can answer all of Harmer's points. I've lost track of them. It's just hearing the same evidence over again. I've responded in that to my - I've already responded to that in my previous submissions and I've just - on page 1167. And without doing another hearing again and hearing all the facts, I don't know what else to say. I guess a new allegation is the email that's been presented of why I said a relationship broke down.

PN181

VICE PRESIDENT CATANZARITI: Well, Mr Rossi, I've asked Mr Harmer to draw my attention as to how that was dealt with at the hearing below because (indistinct) so he's going to no doubt get a reply and tell us how that was dealt with in the hearing below.

PN182

DEPUTY PRESIDENT ASBURY: But it was in evidence in the hearing below, Mr Rossi, wasn't it? It was appended to somebody's witness statement.

PN183

MR ROSSI: So what - are we talking about the - which one are we talking about?

PN184

DEPUTY PRESIDENT ASBURY: The email you were just referring to. It was appended to a witness statement that was in the hearing below.

PN185

MR ROSSI: Yes, it was. That's right, it was. I haven't had a chance to explain that and it seems that I have an opportunity now.

PN186

VICE PRESIDENT CATANZARITI: No.

PN187

MR ROSSI: No?

PN188

VICE PRESIDENT CATANZARITI: The point that the Deputy President is making, is that material attached to a witness statement was before the Commissioner below. The question that I raised was to draw my attention as to how it was dealt with below. It is not an opportunity on appeal for either side to now decide they're going to run it differently on appeal. But what Mr Harmer is asserting is that it was dealt with below (indistinct) specifically. So I'm asking for our attention to be drawn to it in that way.

PN189

MR ROSSI: Yes, I don't - - -

PN190

VICE PRESIDENT CATANZARITI: The transcript below will speak for itself when it's drawn to our attention, as to where that actually is dealt with in that particular way.

PN191

MR ROSSI: Yes. Sure. I don't know how to answer that. I'm not - - -

PN192

VICE PRESIDENT CATANZARITI: No, no, but I'm assuming that you have no recollection of it actually being part of the witness statement, being traversed below. That's - - -

PN193

MR ROSSI: Yes, that's correct.

PN194

VICE PRESIDENT CATANZARITI: And your point is you want to try to address it now, I understand that, but you don't have to address it now. In one sense it either was addressed below or it was not. The transcript will show that.

PN195

MR ROSSI: Sure, I understand. So it wasn't - - -

PN196

VICE PRESIDENT CATANZARITI: All right. Anything else you want to raise, Mr Rossi?

PN197

MR ROSSI: I guess I just got a few notes here, since I have the opportunity. I'm not going to go through my submissions. I want to understand if, though, that further 18 pages that was emailed two hours before this hearing is accepted. Again, like I said, the directions were for each party to present 10 pages. There was now 18 pages of reference to factual issues, three hours before the hearing.

PN198

VICE PRESIDENT CATANZARITI: Yes, that's a summary document. If you're talking about the document headed, 'Factual Issues', that's Mr Harmer simply - and the bench can look at this itself. He is simply drawing our attention to the transcript and the evidence of what he says. Right. So that's - so it either is or it isn't, really. I mean, we'll be looking at that.

PN199

MR ROSSI: Yes, sure. Like I said, I haven't had time to look at - - -

PN200

VICE PRESIDENT CATANZARITI: It's not new evidence. It's not new evidence. It's him looking at the evidence below and making a comment about it.

PN201

DEPUTY PRESIDENT ASBURY: He's just directing our attention to particular evidence in the hearing below, Mr Rossi, and when we look at it, we'll look at what else was said about that as well.

PN202

MR ROSSI: Yes, I'm just - - -

PN203

DEPUTY PRESIDENT ASBURY: The transcript.

PN204

MR ROSSI: Yes, I'm just questioning the fairness of that because shouldn't that have been done in the submissions? You've now given two more weeks to be able to go through, wait till I've responded, where I say you haven't provided any evidence of the facts and now I've had his team, you've lodged him behind a couple of hours before the meeting go through and now I cross-check everything. I'm not sure - - -

PN205

DEPUTY PRESIDENT ASBURY: We could do that ourselves, Mr Rossi, without the document. If you say there was no evidence of something, the Full Bench could go through the transcript and we would in any event and see if that's correct for ourselves.

PN206

MR ROSSI: Sure – I thought it was up to the other party to point your attention to the actual facts, rather than just saying, 'The facts are wrong', and then it's up to the Full Bench to go through and determine and look through what all the facts are. Are you still there? I think we lost them.

PN207

VICE PRESIDENT CATANZARITI: No, you're back now, Mr Rossi.

PN208

MR ROSSI: Okay.

PN209

DEPUTY PRESIDENT ASBURY: Mr Rossi, if you made an assertion that something wasn't dealt with in the hearing below we would look at that ourselves in any event. If you said there was no evidence about this, we go through and search the transcript ourselves anyway and see if that was correct or not.

PN210

MR ROSSI: No, I – yes, I understand. I think I was trying to get to the point that the blanket statement, 'The facts are wrong', and then you have to go and determine what facts are, I thought that's not right. I thought it's up to them to say the facts are wrong, 'Facts A, B, C, D are wrong and here are those facts', rather than – any appeal would just say the facts are wrong, the Full Bench, you can decide which ones are wrong.

PN211



VICE PRESIDENT CATANZARITI: The point is right. It's not the plaintiff stating the facts are wrong. But this document prepared by Mr Harmer is not evidence, right? It's not like it's evidence. They have drawn our attention to particular paragraphs. We have to go back and satisfy ourselves as to what the (indistinct words) is.

PN212

MR ROSSI: That's fine. I haven't read it, I don't know what exactly it is. It was just something that was thrown at me a couple of hours before the meeting.

PN213

VICE PRESIDENT CATANZARITI: Well, you got within your (indistinct) seven days to respond to something else early today. If you want to respond to that document, we'll certainly allow you to respond if you wish to respond to it.

PN214

MR ROSSI: Yes, I think I should, definitely – I should have that opportunity, absolutely.

PN215

VICE PRESIDENT CATANZARITI: We're going to give you the opportunity but so you know that – it is somebody has gone through, right – so the (indistinct) is saying the Commission has said this, here's a reference of that, right? And goes through each of the things for the staff. That's all it is. What he actually means is a different question. That's (indistinct). You should feel free, we'll give you seven days to respond to that.

PN216

MR ROSSI: I appreciate that, thank you.

PN217

VICE PRESIDENT CATANZARITI: Is there anything else from you, Mr Rossi?

PN218

MR ROSSI: I don't think so, no.

PN219

VICE PRESIDENT CATANZARITI: Mr Harmer, anything in reply?

PN220

MR HARMER: Yes, if the Commission pleases. First of all, in relation to that question of where was annexure C to Mr Blake's statement, referred to in the first-instance case, (indistinct) to Mr Will, it starts are paragraph no.4048 and extends through all the way - - -

PN221

VICE PRESIDENT CATANZARITI: You're talking about the transcript reference for that, are you?

PN222

MR HARMER: I'm going to appeal book page numbers just because we've got different appeal books, for which I apologise. But paragraph no.4048, all of the

way through to paragraph no.4056 - their submission made out that admission for the breakdown.

PN223

DEPUTY PRESIDENT ASBURY: But was the respondent cross-examined about it, Mr Harmer?

PN224

MR HARMER: I reckon that he was – the reference has gone to a – more the submission. I'll just - - -

PN225

DEPUTY PRESIDENT ASBURY: Right.

PN226

VICE PRESIDENT CATANZARITI: We're really – really, what was the cross-examination in relation to that document?

PN227

MR HARMER: I'll have to find that reference and forward it to the Commission unless Mr Will comes up with it quickly.

PN228

MR WILL: PN 4141, the Commissioner cross-examined Mr Rossi herself.

PN229

MR HARMER: Paragraph no.4141, the Commissioner asked questions about the relationship with Mr Troughton and Mr Will and referred to that breakdown and Mr Rossi gave a response at 4142 and continuing.

PN230

DEPUTY PRESIDENT ASBURY: Okay.

PN231

VICE PRESIDENT CATANZARITI: So (indistinct words) you're relying upon the Commissioner's questioning, asking about whether the relationship was broken down, which is you say (indistinct) the document and you then say that he explains why it hasn't broken down? That's as high as it gets.

PN232

MR HARMER: That was his evidence and all we say is that having put forward that evidence of annexure C – and we went to it in those paragraph numbers of our oral submission - - -

PN233

VICE PRESIDENT CATANZARITI: Yes, (indistinct) your criticism she refers specifically to annexure C? Because she has certainly referred to it in the decision as to her view as to whether, weighing it all up, whether the relationship was broken down or not. I mean, what is the extent of your criticism? Not relying on - - -

PN234

DEPUTY PRESIDENT ASBURY: The Commissioner has put squarely to Mr Rossi, 'You've said the relationship has broken down', and he's responded and clearly, the Commissioner has accepted his response, there not being any cross-examination in relation to the matter.

PN235

MR HARMER: In our respectful submission, the failure to refer to that specific document with the Rossi - - -

PN236

VICE PRESIDENT CATANZARITI: Hold on, Mr Harmer – we understand what the point is. It's a failure to refer to a document, okay. Anything else?

PN237

MR HARMER: (Indistinct words).

PN238

VICE PRESIDENT CATANZARITI: Just a second – you're breaking up again, unfortunately. Slow down and start again.

PN239

MR HARMER: I apologise, your Honour.

PN240

VICE PRESIDENT CATANZARITI: We don't know what's happened to the technology today so just start again.

PN241

MR HARMER: Yes. (Indistinct) around being tired, we obviously don't press that in terms of the day decision - - -

PN242

VICE PRESIDENT CATANZARITI: Just so Mr Rossi just heard that – you heard that, Mr Rossi? The issue about being tired is not pressed.

PN243

MR ROSSI: Okay.

PN244

VICE PRESIDENT CATANZARITI: So do not trouble yourself when you're going through this to (indistinct words) in light of it.

PN245

MR ROSSI: Okay, sure.

PN246

VICE PRESIDENT CATANZARITI: Yes, Mr Harmer.

PN247

MR HARMER: The schedule that we provided the Commission will have appeal book references. We're happy to provide one with the appeal book (indistinct words) using, if that would assist. The only other minor point is that rushing

through what I was going to say, I didn't make reference to the stay decision and stay transcript. Very briefly and (indistinct) we have no objection to Mr Rossi further addressing on this point so I did skip over it. We just – when Mr Rossi at paragraph 59 of his outline of submissions questions a submission we made about him having certain corporate objectives around share options and things of that nature, he rejected paragraph 59 of his submissions. We say the stay decision at paragraphs 11, 12 and 15 and the stay transcript, which I won't go to, contains Mr Rossi pointing out the importance of re-instatement as a means to share options, et cetera.

PN248

DEPUTY PRESIDENT ASBURY: Mr Harmer, what's the problem with that fundamentally? Because there are some employees for whom reinstatement is the only way they can get back to the position that they would have otherwise been in. It is the only way they can clear their name, they're a professional person and in this case it is – I accept it's somewhat unusual but Mr Rossi is the co-founder of this company and he – that was the position he was in when he was dismissed so why should it count against him that his objective is reinstatement back to the position he was in before he was dismissed? Why is that something, that he has other objectives? They're not objectives that didn't attach to his employment in the first place. They're things that attach to his employment. So why should he be – why should we have any less regard for those than we do for somebody who just wants their job back so they can earn money?

PN249

MR HARMER: Look, I put it no higher than during the stay hearing Mr Rossi acknowledged in response to questions from the Deputy President that reinstatement would make no difference to securing that (indistinct words) were at the discretion of a board and having talked for some pages in his submissions about that being one of – his key objective of reinstatement, so that's the only issue - - -

PN250

DEPUTY PRESIDENT ASBURY: And be that as it may, Mr Rossi still wants reinstatement because he says, 'This is a company that I've put my heart and soul into', as I understand it, 'because I was co-founder of it', and I don't see why that – his claim should be any less regarded because of those circumstances than somebody who – who was an employee of a company and hadn't been a co-founder.

PN251

MR HARMER: Yes, look, we put it in the context of – if we had been successful in pointing to error in the reinstatement expression at first instance and the Full Bench is to exercise its own discretion, we merely point out that those submissions as to Mr Rossi's rationale for reinstatement are not capable of (indistinct words) but we put it no higher than that.

PN252

VICE PRESIDENT CATANZARITI: Mr Rossi, is there anything you want to say in response to what you've just heard or do you want to reserve your position and put something further in writing?

PN253

MR ROSSI: I'll reserve my position and put something further in writing.

PN254

VICE PRESIDENT CATANZARITI: What I might do, Mr Rossi, is extend the seven days to 14 days to enable you to do what you need to do in writing.

PN255

MR ROSSI: Sure, thank you. Just one more point I didn't raise – I understand that the witness statement from Alicia, I'm not sure if you accept it, but there was one concerning paragraph - - -

PN256

DEPUTY PRESIDENT ASBURY: We didn't accept it, Mr Rossi.

PN257

VICE PRESIDENT CATANZARITI: We didn't.

PN258

DEPUTY PRESIDENT ASBURY: We're not going to have regard to it.

PN259

MR ROSSI: No, sorry, but there was just a concerning paragraph about the financial viability - - -

PN260

VICE PRESIDENT CATANZARITI: We don't have that document.

PN261

DEPUTY PRESIDENT ASBURY: We're not considering the document.

PN262

VICE PRESIDENT CATANZARITI: It doesn't exist, we don't go back and surreptitiously read something we've rejected.

PN263

MR ROSSI: I understand. So I guess my question is with the (indistinct) when you grant the stay, and obviously there's interest paid on the money, is that money held in trust? So what happens if the company is not viable enough to pay that? Should that money be held in a trust? I just want to make sure. I wasn't sure if the stay order implies that it's going to the trust.

PN264

DEPUTY PRESIDENT ASBURY: There's an undertaking being given to the Commission that you'll be paid the financial amounts ordered by the Commissioner with interest. There's an undertaking been given and if the decision stands, then the order will be that it's paid and if the company can't pay it, well, that's a matter you take up at the appropriate time.

PN265

MR ROSSI: Yes, sure – I think I was just trying to clarify is it just normal practice? I know with other hearings I think I read in some hearings that they

were put in a trust to show – I just wanted to know is that usually just the case, it's implied. If it doesn't say – if it didn't come to the conclusion it goes to a trust, it's not in a trust? I just wanted to confirm that.

PN266

DEPUTY PRESIDENT ASBURY: No, it's not. There's an undertaking been given and no issue was raised about it being in trust or not, as I recall. It's an undertaking that's been given and if the decision – I recall, Mr Rossi, you were pretty much unconcerned with the compensation part of it in any event, so - - -

PN267

MR ROSSI: Correct – I'm not (indistinct words) - - -

PN268

DEPUTY PRESIDENT ASBURY: So if the decision stands, the compensation – whatever it is – gets paid with interest.

PN269

MR ROSSI: No, I understand. I'm not raising an issue. I just didn't know if it was held in trust or not implied, that's fine. That was just my question.

PN270

VICE PRESIDENT CATANZARITI: All right, thank you. The decision is reserved and the Commission is adjourned.

**ADJOURNED INDEFINITELY**

**[3.29 PM]**