TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT SAUNDERS
DEPUTY PRESIDENT WRIGHT

C2023/3737

s.604 - Appeal of decisions

Appeal by Howard
(C2023/3737)

Sydney

10.00 AM, WEDNESDAY, 23 AUGUST 2023

PN1

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

PN2

MR J TIERNEY: May it please the Commission. My name is Tierney, initial J, of counsel and I appear on behalf of the appellant and I seek permission to appear.

PN3

VICE PRESIDENT ASBURY: Thank you, Mr Tierney. (indistinct).

PN4

MR M HARMER: Harmer, initial M, solicitor. I seek permission to appear for the respondent.

PN5

VICE PRESIDENT ASBURY: I take it there is no objection by either side to being legally represented so on that basis, we grant permission - - -

PN6

MR HARMER: Thank you.

PN7

VICE PRESIDENT ASBURY: - - - for both parties to be legally represented. Thank you. Mr Tierney.

PN8

MR TIERNEY: Thank you, Vice President. The other preliminary matter is that the appellant seeks leave to rely on the amended grounds of appeal outlined in the appellant's submission. I take my learned friend's position on that matter to be neutral – that he doesn't confirm or deny or accept those amendments but we would seek leave to rely on those amended grounds, Vice President.

PN9

VICE PRESIDENT ASBURY: Okay. Mr Harmer?

PN10

MR HARMER: Yes, just confirming the position which we put in our written submission is that we neither consent nor object and we are in the hands of the Commission. We have had an opportunity, obviously, to address, in our written submissions, the amended grounds that are put forward so we certainly don't raise any objection on the grounds of prejudice or otherwise. We're in the hands of the Commission. If it pleases.

PN11

VICE PRESIDENT ASBURY: All right. Well, we'll grant permission for the appeal grounds to be amended as set out in the appellant's submissions.

PN12

MR TIERNEY: I'm grateful, Vice President. I was proposing, subject to your view, to deal with the matter as follows: to provide a very brief background,

noting that you've had the benefit of reviewing the appeal book and the submissions, then to deal with the amended grounds of appeal, and then to address the public interest issues and the application for leave to appeal at the conclusion of my submissions. I was also proposing to deal with ground 1(b) first which is the ground that the Deputy President incorrectly found that by being taken off the roster the appellant had been dismissed.

PN13

To provide a very brief summary to the Commission, the appellant is a qualified snowboarding instructor. He was engaged by the respondent as a casual employee as defined in clause 15 of the enterprise agreement. His anticipated end date for the – I should indicate I'll be using the term 'seasonal' in describing the appellant's employment, Vice President. I do that in a colloquial sense rather than by reference specifically to section 386(2)(a). But he was engaged over the winter season and was engaged each season from 2011 until 2022.

PN14

On 28 September 2022, he suffered an injury, he was removed from the roster and didn't return to work. On 31 October 2022, he received an email from the respondent which stated that they were excited to welcome him back for another great season and would love to hear some feedback from his 2022 experience. This was consistent with clause 30 of the enterprise agreement which gave priority rehiring opportunities to persons engaged under the agreement. On 7 February, the appellant received a letter from the respondent. It noted that the appellant had competed in a race while on restricted duties for his workplace injury and he was not offered an employment contract in 2023.

PN15

He made an application for unfair dismissal remedies. The respondent lodged two jurisdictional objections. Those objections were that the appellant was not dismissed because he was employed under a contract for the duration of a specified season and that the employment had terminated at the end of that season, namely 2 October, pursuant to section 386(2)(a) of the Fair Work Act. The second jurisdictional objection was that he did not complete the minimum employment period pursuant to section 382(a) of the Fair Work Act. The Deputy President found that he was dismissed on 28 September 2022 and the appellant's application for an extension of time was dismissed.

PN16

So on ground 1(b), the appellant submits that the Deputy President incorrectly found that by being taken off the roster on 28 September 2022 the appellant was dismissed, and that submission is made for the following reasons: first, because there was no evidence before the Deputy President that the employer engaged in an action on 28 September or, as the Deputy President himself described it, there was no intervening event that brought about the termination of the appellant's employment on that date. The second reason is that the surrounding circumstances to the removal of the appellant from the roster did not in any way reveal that it was the respondent's intention to dismiss the appellant on that date; and the third, the Deputy President's finding that the removal from the roster because of injury constituted dismissal was manifestly incorrect.

PN17

I want to outline the evidence given by the parties in respect of the events on 28 September 2022. Can I turn to page 337 of the appeal book, which is Mr Howard's evidence. This is Mr Howard's witness statement and I would like to start at paragraph 11 if the Commission has those pages at the ready:

PN18

On 28 September, I was working my normal shift when I became injured. It was a slight injury but it was enough to cause pain and for me to responsibly report the incident to my employer.

PN19

At paragraph 19, Mr Howard states:

PN20

On or around 31 October I received my normal 'welcome back' letter regarding my employment for the 2023 season.

PN21

I acknowledge that this does veer into submission, but he states:

PN22

As I understand it, I was not rostered for the last few days of the season but I do not believe I was terminated as of 28 September 2022.

PN23

And finally, at 24 to 26, it is stated:

PN24

From 3 November to 7 November there are only two additional emails from me to Leanne to chase up any further items needed for the WorkCover claim. I did not receive any other communication from Falls Creek until 7 February 2023. By email on 7 February 2023, I was contacted by Stephanie Tyler whereby a review had been conducted of the WorkCover claims and that factual discrepancies existed on my claim.

PN25

Can I turn now to cross-examination. This is at PN220 of the transcript. I'll just get the appeal book number in a moment. It's page 39.

PN26

VICE PRESIDENT ASBURY: Yes.

PN27

MR TIERNEY: I refer only to PN220 which states, 'And your employment ended on 28 September 2022?' Mr Howard says, 'Yes.' In my submission, this is plainly the applicant accepting that 28 September was his final day of work. It wasn't for Mr Howard to either admit or deny whether that constituted a dismissal. That was a question for the Deputy President to determine.

PN28

Then the respondent's witness, Mr Girling, gave the following evidence in his statement – and I turn to page 381 of the appeal book. At paragraph 33 he states, 'The applicant's last day of work was 28 September 2022.' He was asked about this issue in cross-examination and I return to the appeal book page 24 - PN 66 – and there Mr Girling is asked:

PN29

According to your statement, you say that the applicant's last day of work was 28 September 2022. Is that correct?

PN30

He says:

PN31

That's the date that's recorded on his leaving advice form.

PN32

Are you aware of the rostering of Mr Howard in that final week?

PN33

He says he is not. He is asked:

PN34

We have it that prior to 28 September, Mr Howard was rostered to continue until 2 October.

PN35

And he says: 'That would sound correct.' At PN71, he is asked:

PN36

Are you aware that Mr Howard had an injury on the 28th that he reported?---Yes, I am. I'm aware that he had an injury, that's correct.

PN37

To your knowledge, was he terminated because of the injury?---Not to my knowledge. As I say, the leaving advice form noted that it was the end of the season.

PN38

The only evidence before the Commission was that Mr Howard did not work after 28 September because he suffered an injury. In this case there was no evidence that the appellant was removed from the roster permanently or because the employer intended to terminate his employment.

PN39

The appellant's case below was that his employment was terminated on 7 February 2023 or, alternatively, on 12 April 2023. The respondent's case below was that the appellant had not been dismissed. Its case was that - by reference to section 386 of the Fair Work Act – Mr Howard's contract was a contract for a specified season and therefore came to an end of the conclusion of that season.

PN40

DEPUTY PRESIDENT SAUNDERS: Mr Tierney, can I just ask a question about PN73? It refers to the leaving advice form. Was that form in evidence and is there any evidence before us that the leaving advice form was communicated to the employee?

PN41

MR TIERNEY: Deputy President, I'll have to take that on notice. I don't have the leaving advice form at my fingertips but I will endeavour to find that and confirm that question with you. My apologies for not having that at hand.

PN42

DEPUTY PRESIDENT SAUNDERS: That's fine.

PN43

MR TIERNEY: If I can move to the discussion that took place between the respondent's learned representative, Mr Lorraine, and the Deputy President. This is at PN325. The Deputy President asks:

PN44

Can I ask perhaps a slightly more technical question about section 386(2)(a)? If I form the view in the evidence that Mr Howard's employment ended – and I'm using a somewhat neutral term there – before the end of the season on 2 October, and that has a consequence for falling outside of 386(2)(a), it's still the respondent's case that the date of dismissal would be 28 September for the purposes of any EOT. Is that correct?

PN45

Mr Lorraine says:

PN46

That's correct, your Honour. We've heard evidence about how there was a wind down in the numbers and if you look at the – - -

PN47

I really did not want to spend time talking about this, but again, this is established law. He's then asked at PN330:

PN48

I guess what I'm just seeking to explore is: was there an intervening event, in essence, four days earlier that meant it may not have been a termination at the end of the season but a termination, well, almost at the end of the season but for a slightly different basis?

PN49

And Mr Lorraine states:

PN50

We haven't heard any such evidence, your Honour.

PN51

Respectfully, in my submission, Mr Lorraine's final remark was completely right. There were no surrounding circumstances evidencing an intention to

terminate the appellant's employment on 28 September and – can I say as a broad proposition to the Commission, it would be a strange conclusion to reach, to determine on the basis solely of an employee going on sick leave that employment could be terminated on that basis alone without any further intervening events or any surrounding circumstances. And, for those reasons, his Honour erred in finding that dismissal occurred on 28 September. Those are my submissions on ground 1(b).

PN52

DEPUTY PRESIDENT SAUNDERS: Mr Tierney, isn't the question of whether or not there's a termination objective rather than subjective looking at the employer's intention?

PN53

MR TIERNEY: Yes, I entirely accept that, Deputy President, but what I would submit is that, viewed objectively there is no basis to find that there was what the Deputy President describes as an 'intervening event', an event precipitating the termination of the appellant's employment on that date. What happens on that date is simply that he is unable to work because of an injury.

PN54

DEPUTY PRESIDENT SAUNDERS: If you're right about that why, then, didn't the employment end on 2 October when the season came to an end in accordance with the agreement struck between the parties and as recorded in the contract of employment?

PN55

MR TIERNEY: Sorry, Deputy President, why didn't it end?

PN56

DEPUTY PRESIDENT SAUNDERS: Why didn't it end on 2 October in accordance with the terms of the contract?

PN57

MR TIERNEY: The appellant's submission would be that he was a casual employee employed on a regular and systematic basis. Now it is a somewhat unusual arrangement where that employment occurs over a winter season, but it occurred on a regular and systematic basis over the course of 11 years. It wasn't simply the case – the appellant doesn't accept that he was a casual, seasonal employee as defined in section 386(2)(a) and I'm happy to address that now, Deputy President, if that assists.

PN58

DEPUTY PRESIDENT SAUNDERS: You can if you like but I'm not so worried about the 386(2)(a) point. I'm more interested in the 386 point about whether there was a termination at the initiative of the employer in circumstances where the express terms of a contract said that he was employed on a casual basis for the winter season of 2022 only and that he should have no expectation of future employment.

PN59

MR TIERNEY: Deputy President, can I refer to the decision in Khayam, which is number 5 in our list of authorities and paragraph 75, page 32 of that decision. At paragraph 75 the majority sets out where termination at the initiative of the employer for the purpose of section 386(1)(a) will occur and it is stated that it is to be:

PN60

> *Conducted by reference to the termination of the employment relationship, not by reference to the termination of the contract of employment operative immediately before the cessation of the employment.*

PN61

Plainly, Deputy President, we accept that the contract provides for an end to the seasonal contract on 2 October and that was always the case. But that has to be seen in light of an express provision in the enterprise agreement in clause 30 that provides for priority to be given on rehiring of casual, seasonal employees employed under the EBA. But what - - -

PN62

VICE PRESIDENT ASBURY: Are you essentially saying, Mr Tierney, that the employment relationship continued between 2 October up until the point where the appellant was told he wasn't returning?

PN63

MR TIERNEY: Yes. Yes, Vice President. I am saying that, and that submission is based on the ongoing relationship that had taken place over the course of the previous 11 years and it was consistent with the relationship between the parties.

PN64

VICE PRESIDENT ASBURY: Was that argued before the Deputy President? Wasn't the argument below that, because the appellant was under direction to go to WorkCover examinations, et cetera, that he was - - -

PN65

MR TIERNEY: What was put below, Vice President, was that he was a regular and systematic casual employee. Now, plainly, this is a somewhat unusual situation where there is that extended gap in time between the conclusion of one season and the commencement of another, but that is the submission that the appellant has to rely on, effectively, that this was a regular and systematic engagement where the casual employee, Mr Howard, had a reasonable expectation of ongoing employment.

PN66

DEPUTY PRESIDENT SAUNDERS: Mr Tierney, doesn't the contract talk about the employment coming to an end? Not just the contract, but the employment, meaning the relationship?

PN67

MR TIERNEY: Well, plainly it does talk about the employment coming to an end. My submission, Deputy President, would be that the contract may say that – what is canvassed in paragraph 75 of Khayam is that the relationship can continue

following the conclusion of the contract. Now I accept, also, that this decision was reached prior to the Jamsek decision and other decisions that have given primacy to the contract. But the Full Bench's view is that you can have a series of fixed-term contracts that come to an end, but that you can have an ongoing employment relationship and really that's what providing the opportunity for casual employees to seek protection under the unfair dismissal regime is about because each casual engagement is itself a separate engagement. It's a separate contract. There has to be scope for the employment relationship to extend beyond the conclusion of the contract.

PN68

VICE PRESIDENT ASBURY: So you say what ended on 2 October was the employment contract, not the employment relationship?

PN69

MR TIERNEY: Yes. That is what I say, Vice President. Can I refer to paragraph 4 of the Khayam decision – sorry, paragraph 75, subparagraph 4:

PN70

Where the terms of an operative time-limited contract reflect a genuine agreement on the part of the employer and employee that the employment relationship will not continue after a specified date and the employment relationship comes to an end on the specified date, then, absent a vitiating or other factor of the type to which we refer to below, the employment relationship will have been terminated by reason of the agreement between the parties and there will be no termination at the initiative of the employer.

PN71

Going further down, after the reference to Griffin/Fisher:

PN72

However if the time-limited contract does not in truth represent an agreement that the employment relationship will end at a particular time, the decision not to offer a further contract will be one of the factual matters to be considered in determining whether an action on the part of the employer was the principal contributing factor which results, directly or consequentially, in the termination of this employer.

PN73

Vice President, we submit that that is this case; that there have been effectively 11 seasonal contracts between the parties and it was a reasonable expectation of the appellant that his employment relationship had not come to an end on 2 October 2022.

PN74

VICE PRESIDENT ASBURY: But D'Lima was an entirely different case. You know, D'Lima in my recollection involved a cleaner at a hospital who was just under short-form contracts, some of which were only signed after she continued to work past the end of the last one. It was a pretty specific set of circumstances. How does this - - -

PN75

MR TIERNEY: What I would say, Deputy President, what this case has in common with D'Lima is the series of outer-limits contracts that are agreed between the parties. The facts in D'Lima are distinct in that there is four fixed-term agreements and the employment relationship comes to an end by a further offer not being made immediately, so that distinction is clear. But these are unusual circumstances, I would submit, Vice President. It is, in effect, the same situation where you have a series of outer-limits contracts. It's just that there is this passage of time in which work does not take place.

PN76

VICE PRESIDENT ASBURY: So the employment ends when the appellant was advised a further contract would not be entered into?

PN77

MR TIERNEY: Yes. Yes, Vice President, that's the submission.

PN78

VICE PRESIDENT ASBURY: And the basis upon which the employment relationship continued is the fact that it had continued under a successive number of contracts over the lengthy period - - -

PN79

MR TIERNEY: Yes.

PN80

VICE PRESIDENT ASBURY: - - - (indistinct). What else kept the relationship going between 2 October up to - - -

PN81

MR TIERNEY: There is the – I can refer to clause 30 of the enterprise agreement. I'll just find the page number for you. It commences at page 385 of the appeal book and clause 30 - - -

PN82

VICE PRESIDENT ASBURY: Just bear with me for a moment, sorry. 385?

PN83

MR TIERNEY: Yes, and clause 30 is at page 405. Page 15 of the enterprise agreement.

PN84

VICE PRESIDENT ASBURY: Sorry, what page?

PN85

MR TIERNEY: Page 405 of the appeal book. There it is stated that:

PN86

The employer will advise each seasonal, part-time or casual employee prior to 10 December whether that employee will be given preference in hiring for the following season or will be asked to re-apply for his or her position the

following season. If an employee requests, the employer will provide reasons as to why he or she will not be required for the following season.

PN87

VICE PRESIDENT ASBURY: Isn't that a relevant provision which weighs against the proposition that there is a continuing relationship when the employer can say that you're not required for the following season and just provide reasons?

PN88

MR TIERNEY: It states that there must be a reason – it provides that a reason should be provided to employees. It also has to be seen in the context of the advice the appellant receives on 31 October that they're excited to welcome him back and they're planning to send staff offers out before Christmas 2022. This was plainly a situation contemplated by the parties where a relationship is ongoing in the context that this is a casual employee with no specific entitlement or expectation to ongoing employment and where each engagement is a separate engagement but that there is still protection for those employees under the Act where those employees are regular and systematic casual employees. We say that applies to the appellant irrespective of the uncertainty that he would ever be offered any future work.

PN89

DEPUTY PRESIDENT SAUNDERS: Mr Tierney, can I ask you to look at page 482 of the appeal book please?

PN90

MR TIERNEY: Yes.

PN91

DEPUTY PRESIDENT SAUNDERS: This is part of the contract of employment. The third last paragraph, it says:

PN92

I understand that this offer of employment is for a fixed period and does not amount to an offer of continuing employment in the future beyond the period specified in this employment offer.

PN93

And the period specified in the employment offer is clearly the 2022 winter season. Isn't it clear from the terms of that contract that the relationship is ending at the end of the winter season, albeit there might be a new relationship for the next year?

PN94

MR TIERNEY: Deputy President, the contract is unequivocal. That is accepted. The contract is unequivocal that the appellant is employed pursuant to that contract for a period that ends at the end of that fixed period – leaving aside questions about a limits contract – that is accepted. But it is not accepted that the effect of the terms of that contract means that Mr Howard did not have a reasonable expectation of ongoing employment and it is not accepted that he was not a regular and systematic casual employee. The fact that the contract gives no

guarantees as to his future engagement does not mean the employment relationship was at an end, in my respectful submission.

PN95

VICE PRESIDENT ASBURY: But how is that contractual term consistent with the employment relationship continuing past the end of the season? Isn't it really a promise that - that combined with the enterprise bargaining agreement – that we will give preference to employ you again in the next season without saying, 'but you're still an employee in the off season?'

PN96

MR TIERNEY: Vice President, as I state, the terms of that contract are clear that Mr Howard could have had no guarantees - no certainty - about future engagement but he would not have had that certainty in any event as a casual employee. That is explicit on its face. The appellant can only turn to the entitlements casual employees have to seek redress through the unfair dismissal legislation if they are regular and systematic employees and if they had a reasonable expectation of ongoing employment and - - -

PN97

VICE PRESIDENT ASBURY: That gives them the right to make an application and assuming – I don't know – that the appellant had been terminated before the end of the contract or something like that, and it deals with continuous service for the purposes of making an application but I don't know that it establishes that there's an employment relationship in the period between engagements.

PN98

MR TIERNEY: Vice President, my submission would be that on the basis of the 11 years of service that Mr Howard had given, on that basis – on a regular seasonal engagement, as a consequence of that, he had a reasonable expectation that the employment relationship continued in the period following the end of the winter season in 2022 and it did so because that had been what had taken place in the previous 11 years.

PN99

VICE PRESIDENT ASBURY: I understand your argument, thank you.

PN100

MR TIERNEY: Thank you, Deputy President. I'll move on, Vice President, to whether the Deputy President erred – this is ground 2(c) – whether the Deputy President erred in refusing an application for an extension of time to file an unfair dismissal remedy because he failed to consider whether the applicant had been employed for the minimum employment period under section 382 to 384 of the Act. Again, plainly, this submission is reliant on an understanding of the contract that – or, an understanding of the employment relationship that it extended beyond the 2022 winter season. So again, Vice President, you'd have to be satisfied that he was a regular and systematic employee over the course of the previous 11 years.

PN101

VICE PRESIDENT ASBURY: I don't know that that is the thing that we would have to be satisfied about. Wouldn't we have to be satisfied about the proposition that that is a factor indicating that there is a continuing employment relationship past the end of the season?

PN102

MR TIERNEY: Yes.

PN103

VICE PRESIDENT ASBURY: It is not whether the appellant has got regular and systematic employment, it's whether that employment continued past the end of the season – past 2 October.

PN104

MR TIERNEY: Yes, I accept that. I accept that, Vice President. In the appellant's submission, the fact that Mr Howard was engaged as a casual employee each winter only for the winter did not mean he wasn't employed on an ongoing basis for a period of continuing employment over the previous 11 years. He had worked for the respondent as an instructor every year since 2011. The Deputy President's decision does not consider whether Mr Howard had been employed for the minimum period of employment under section 384(2) of the Fair Work Act.

PN105

VICE PRESIDENT ASBURY: Did it need to?

PN106

MR TIERNEY: Well - - -

PN107

VICE PRESIDENT ASBURY: I mean, I accept that ground was raised in the form F(3) but did that point have any legs?

PN108

MR TIERNEY: Vice President, if the Full Bench accepts that termination did not take place on 28 September and accepts the respondent's contention that termination took place on 7 February then it did fall to the Deputy President to consider whether Mr Howard was a regular casual employee employed on a systematic basis and that continuing service had been established for the purpose of section 382 of the Act. Again, that is a submission that is contingent on further findings made by the Full Bench: that the appellant's argument is accepted that termination took place on 7 February and that there was an ongoing employment relationship.

PN109

DEPUTY PRESIDENT SAUNDERS: Isn't it just the case that there were two jurisdictional issues raised, one about dismissal - and that flowed through to, potentially, an extension of time issue - and the second was minimum employment period, but the Deputy President only considered the first of those two issues. He hasn't turned his mind to the second issue – that is, minimum employment period. Isn't that what happened?

PN110

MR TIERNEY: I accept that, Deputy President. I accept that that's what has taken place but it would follow from the appellant's submission that termination took place on 7 February that it then fell to the Deputy President to consider the minimum employment period in discharging the jurisdictional objection.

PN111

VICE PRESIDENT ASBURY: But why? If there had been a continuing employment relationship on your argument from the beginning of the season until February, why did that need to be considered?

PN112

MR TIERNEY: Because there was a jurisdictional objection raised by the respondent as to whether the appellant had been employed for the minimum employment period. That jurisdictional objection would have to have been discharged if it was accepted that Mr Howard was dismissed on 7 February.

PN113

VICE PRESIDENT ASBURY: Was there any issue that the respondent was a small business?

PN114

MR TIERNEY: No. Not to my knowledge, Vice President.

PN115

VICE PRESIDENT ASBURY: So I just don't understand why that would have to be discharged. Isn't it simply a matter of - that the wrong box was ticked and it just wasn't dealt with?

PN116

MR TIERNEY: Well, in essence, that's right. It wasn't dealt with. The jurisdictional objection was raised, it wasn't dealt with by the Deputy President in the decision below. If the Full Bench was otherwise to accept the appellant's submissions then that jurisdictional objection would still be there. It would still have to be canvassed and considered and either accepted or not, either in this hearing or on remitter. I don't take that argument any further. I can move on to ground 2(d) of the appellant's case.

PN117

It's submitted that the Deputy President erred in refusing he application for an extension of time because he failed to conduct a proper analysis of the merits of the applicant's unfair dismissal application. Can I state plainly the appellant faces a significant hurdle in establishing this ground. It is not sufficient that the Full Bench would simply have reached a different conclusion, the Full Bench would have to be satisfied that either the Deputy President relied on an irrelevant consideration or it was just so plainly wrong a decision that a different decision must have been reached. What I want to do is just go through the analysis that the Deputy President undertook in assessing the extension of time application. At page 8 of the appeal book, paragraph 48, the Deputy President states:

PN118

If Mr Howard was employed on 7 February 2023 then I accept that this email would have constituted dismissal by the initiative of the employer, however, consistent with the contract, the 7 February 2023 letter does not refer to dismissal or termination but instead states, 'You will not be offered a future contract.' Following receipt of this email, Mr Howard was advised by a lawyer to obtain the investigation report and the WorkCover report to address the allegations as the 2023 winter season had not yet started.

PN119

It was accepted by the Deputy President that after 7 February 2023 and before the 21-day expiry, Mr Howard sought legal advice and took active steps to challenge his dismissal. Pardon me. At paragraph 56, the extension of time considerations are set out and his Honour considers each factor. At paragraph 62 he refers to the delay and he notes the reason for the delay spans two periods of time the events prior to 7 February and the events from 7 February 2023 and he says:

PN120

In respect of the period from 7 February 2023, the reason for the delay was because Mr Howard was seeking to obtain evidence and then to provide explanation to dispel any concern the respondent had regarding the allegations against him.

PN121

That was a finding wholly in Mr Howard's favour and, in my submission, a significant one. On the question of when the applicant first became aware of the dismissal, that's canvassed in paragraph 66 of the decision where it is stated:

PN122

If, contrary to my conclusions above, the correct date of dismissal is 7 February 2023 then I find Mr Howard became aware of the dismissal on that same date although I consider he ought reasonably should have been aware the dismissal occurred on 28 September 2022.

PN123

On the question of what action was taken: as stated above, Mr Howard sought legal advice. On obtaining that advice, he sought to obtain the WorkCover file and sought a reconsideration of the decision. Again we submit this is a powerful factor in the applicant's favour. It was noted there was no prejudice to the employer. And then the Deputy President came to consider the merits of the application. At paragraph 73, he states that:

PN124

If the dismissal event was the email of 7 February 2023, then different considerations arise. Having examined the materials relating to that event, it is evident to me that the merits of that application turn on contested points of fact. In the absence of a hearing of the evidence, it is not possible to make any firm or detailed assessment of the merits.

PN125

In my submission, the Deputy President ought to have found that the underlying application for unfair dismissal was strong on the basis of a series of undisputed

facts including the fact that the appellant was dismissed by a letter without warning, he was not given a chance to respond to the allegations put against him, he wasn't dismissed in person, and was not given the right to a support person. At the very least there were very clear procedural deficiencies in the termination that weighed in the appellant's favour.

PN126

VICE PRESIDENT ASBURY: But Mr Tierney, what was the alternative? It seems like everyone has argued alternative propositions - so was it 28 September or was it 2 February and no one seems to have – unless I've missed it – put the argument that if the employment ended in accordance with the contract on 2 October then arguably, if you're going to argue that the contract was not actually a contract for a specific season because it provided for some form of termination, then why wouldn't it be argued that if the employment ended on 4 October the appellant wasn't aware that it had ended until he got the email to tell him he wouldn't come back and seeking an extension of time on the basis that the appellant wasn't aware he'd been terminated? He wasn't notified of that until 2 February – until he got the email.

PN127

MR TIERNEY: That's not how the matter was – I accept that, Deputy President. I think the reason is because, if the contract ends on 2 October, it ends by the effluxion of time and not by the termination at the employer's initiative. I can't put the submission that there was termination on 2 October and I think that's the reason for not pressing that point. We also don't press that termination occurred on 12 April.

PN128

If the contract ends on 2 October – which is contrary to our submission – then we don't submit that it was termination at the employer's initiative. So we rely wholly on the letter that is sent on 7 February as effecting the termination. And in light of the findings that there was no prejudice to the respondent, that it was accepted that there were unusual circumstances in this case, that Mr Howard took steps to challenge his dismissal, that he acted on legal advice, that there was no issue of fairness.

PN129

These issues bearing on the merits of Mr Howard's unfair dismissal application were relevant considerations that all weighed profoundly in his favour and, in my submission, in light of the merits of the application also being given short shrift by the Deputy President, he fell into error because the vast preponderance of the factors in section 394(3) pointed strongly in the appellant's favour.

PN130

Those are my submissions as to the grounds of appeal. The only other matter is the issue of public interest. We rely on our written submissions but reinforce that the decision appears to show some confusion about the application of section 386(1) and (2)(a) of the Fair Work Act and it's application to casual, seasonal workers. Although the Deputy President does not rely initially on that analysis because he finds that the appellant was dismissed on 28 September, he then goes on to say he would otherwise have found that the employment ended on 2 October

because Mr Howard was a seasonal worker within the meaning of subsection 2(a). We submit that that decision is wrong and should not stand as authority. That is why we submit that it is in the public interest the appellant be granted leave to appeal and that the appeal be allowed.

PN131

The final issue I would address is the disposition of the appeal. Our submission is that the decision should be quashed and the matter should be remitted for consideration and determination of whether the appellant was employed for the minimum employment period, the date of dismissal and whether the appellant's application for an extension of time should be granted.

PN132

Deputy President, I will endeavour to come back to you on the question of the leaving note. Otherwise I have no further submissions. Those are the submissions of the appellant.

PN133

VICE PRESIDENT ASBURY: Thanks, Mr Tierney. Mr Harmer.

PN134

MR HARMER: Yes, thank you. If the Commission pleases, if I could first briefly summarise our position and then I'd seek to go into each of the grounds of appeal in turn referring to both the evidence and the case law. The tribunal, obviously, should feel free to let me know if I'm going into undue detail given some of the points put to the appellant.

PN135

In essence, we rely on our written submissions and in those written submissions we point out that there were indeed jurisdictional issues raised by the respondent at first instance but, consistent with the Koa Storage decision, the Deputy President took the view that the issue of dismissal had to be determined before section 394 and the issue about time could be determined - section 394 referring to someone who has been dismissed.

PN136

And so the hearing at first instance proceeded on the basis of a hearing around the dismissal issue - the purposes of section 386(2)(a). It did not consider the minimum employment objection that had been raised and the Deputy President, as the tribunal is aware pursuant to section 577 of the Act, took the view that there was sufficient materials from the parties for the tribunal to nevertheless go on and determine the issue of out of time or extension of time. And I don't understand there to be any issue taken by way of procedural fairness or an instance of natural justice around that. There was more than sufficient material for the Deputy President to properly consider and determine that issue and that's exactly what occurred.

PN137

Now obviously since the appeal was lodged the grounds have adjusted and I will address each of the grounds in turn but within our written submissions we go to the test to be applied. First of all, in relation to leave, section 400 is pertinent and

there must be a public interest issue and we say there is not. And in relation to the issue of the extension of time under section 394(3), we say that the decision properly under appeal was purely one of discretion and accordingly, the House v The King principles apply and must be satisfied in relation to any ground of appeal against that exercise of discretion. And what we'd say by way of overview is that the new grounds put forward and those grounds that otherwise remain fail to meet that House v The King test. They fail to raise relevant issues which would be necessary for the tribunal to form an opinion on in order to inform the exercise of discretion under section 394 and I seek to briefly elaborate upon that in relation to each of the grounds.

PN138

By way of overview though, the vital issue of casual, seasonal employment which seems to be challenged by way of this appeal, we say, is very clear on the face of the enterprise bargaining agreement and it is clear on the face of the contract – looking at Rizzato – that expressly there was engagement solely for a season. Both contract and employment end at the end of the season and that process of end of employment and then an offer of new employment being necessary is recognised under the enterprise agreement which was negotiated with the involvement of the AWU which represents employees in this particular industry. And there is no ongoing dispute within the industry that that is the nature of engagement. It comes up solely in the (indistinct) private dispute raised by Mr Howard.

PN139

We say, therefore, that what has in fact occurred here is that Mr Howard's employment did end on 28 September or otherwise on 2 October at the end of the season and that what he is really challenging is the failure to offer him a new contract of employment for the 2023 season. That issue arose on 7 February at a time when he was no longer employed. As a non-employee, he did not qualify for unfair dismissal issues.

PN140

He did not fall within the jurisdiction and authority establishes - as we will go to within the chain of authorities surrounding Navitas English - that the failure to offer new employment is not a dismissal or a termination within the meaning of section 386(1)(a) of the Act. It is a failure to renew and, as I'll come to, it's pertinent that the relief sought by Mr Howard in his form F2 is for renewal of his contract. So his real complaint is non-renewal or no new offer of employment. It's not an unfair dismissal case at all. In fact, there's no realistic challenge to what happened around 28 September through to 2 October that brought the employment to an end. The only challenge is to the fairness or otherwise of the 7 February decision to fail to offer a new employment contract.

PN141

VICE PRESIDENT ASBURY: But that is dependent on the proposition that the appellant was employed at the time, isn't it?

PN142

MR HARMER: The issue of 7 February - we say he clearly was not employed - did not fall within unfair dismissal territory in that context and, for reasons we'll

go to, clearly was not an employee but was a prospective employee and that's a future form of employee that does have some rights under the Act. They are referred to expressly in different areas of the legislation but not in relation to unfair dismissal and that's the point that has been taken and approved in Navitas English by a Full Bench of this Commission referring to authority by courts in relation to the notion that a failure to offer new employment is not a dismissal under section 386.

PN143

So the out of time discretion then comes to be considered by the Deputy President properly in relation to time from 28 September but the Deputy President, as the tribunal has seen, nevertheless allowed for the contingency that, if employment ended on 7 February, there was still a delay - if you add 21 days to 7 February - of some 43 days until the application was lodged on 12 April.

PN144

And so the Deputy President factored in all contingencies in trying to assess and exercise discretion and came to the view that time taken by an individual to investigate their unfair dismissal case - even though they feel it's unfair from the time they learn of the non-re-employment here on 7 February – taking time to investigate rather than lodging your application and then continuing to look into it and build your case from there properly observing the 21-day limit. Here there was some 43 days taken beyond the 21 days to investigate the case, and only when that investigation by the employee was completed did he lodge, on 12 April, his unfair dismissal case, and that common knowledge is clearly set out within the Deputy President's decision.

PN145

Now properly, the Deputy President took the view that there are no exceptional circumstances in that and indeed, if that was a basis for extending time, any number of persons could ignore the 21-day limit, further explore their case, and make some decision off in the future outside of time and come before the tribunal and say, 'Well, I've now finished my own investigation so you grant me an extension.' It's clearly a proper exercise of discretion to dismiss the application as being out of time and all aspects of section 394(3) were properly considered.

PN146

And so what we say, by way of overview, is that none of the grounds of appeal – which we will come to in detail now – raise proper House v The King error for the purposes of the challenge to the exercise of the discretion under section 394(3), nor do they raise any wider public interest issue beyond the attempt of this individual - against the grain of regulation of this industry by seasonal employment - to try and find a private means back into employment. It raises no - in our respectful submission - proper basis for public interest.

PN147

Now, against that background, if we can seek to go to each of the grounds in turn and – but if I can just say, by way of overview – and I'm happy to go to the evidence that is in the appeal book on this, but just to give a flavour of – again by way of just introduction, the issue that is playing out between the parties, in reality, in the decision from the point of view of the respondent not to re-

employ. Mr Howard, who had been employed for many seasons and we say was employed solely for the 2022 season, carried a responsible role as a senior ski instructor in the snowboarding area where he would conduct both public – for groups of people – and even private – for families or others who might want to secure his services as part of their enjoyment of the resort. So he was an important face of the business.

PN148

He was in a position of trust having to deal with many customers through the course of a season. And there was a requirement for integrity in employment, (indistinct) referred to in the 7 February email as 'Do Right' and that integrity obviously required honesty.

PN149

Now the issues that appeared on the face of the investigation report into Mr Howard's worker's compensation application included: (1) whether he had in fact injured himself in the course of his employment or whether he had just taken a running injury as part of his training for a marathon which he had incurred in running and attributed that improperly to his employment; (2) there was a past tendency of Mr Howard to claim worker's compensation late in the season because thereafter he went on to other work and there could be gaps between when he took on that other work. And indeed, what in fact happened here was that he succeeded in not only having physiotherapy for his injured knee treated at the expense of insurance paid for by the premiums of the employer, but he also received some $6000 in worker's compensation payments while he had taken his family away to a holiday in Queensland.

PN150

Now the third is that, during the course of the worker's compensation investigation, he initially said he was running for the purpose of his work – to stay fit for snowboarding. He later retracted that and admitted that he was, in fact, training for the marathon event later in the year and so there was, on the surface of the investigation, some evidence of dishonesty.

PN151

And, finally, fourthly, he participated while away on leave in mid-October – so only a matter of weeks after claiming worker's compensation and while on restrictions that would prevent him from doing so – in a Spartan race which involved him carrying other individuals, leaping over obstacles, having to do burpees if he failed a particular obstacle. It was what could only be described as an extraordinarily gruelling test for anyone's knee and all of that while he was receiving worker's compensation payments and on restrictions, medically, that would preclude that sort of activity.

PN152

Now we don't raise that as a point of merit. The merits of this matter were not determined, because it centres on just the failure to re-employ, but we do say that the material in the appeal book, and I can go to it, reveals a sound basis for a lack of trust in this individual, and that's what motivated the lack of re-employment and why it has been contested by the employer.

PN153

Against that background, if we come to the grounds now on which the Deputy President's proper decision to preclude an application out of time is challenged, the first one is that, if we go to 1(a) of the amended version that's put forward at page 4 of the outline of submissions of the appellant, it's alleged that there was an incorrect finding that the applicant was a casual seasonal employee, falling within the definition of 'seasonal employee' at section 386(2)(a) of the Fair Work Act.

PN154

What we say is that the Deputy President properly considered section 386(2)(a) of the Fair Work Act, and to that end, if we can just analyse the nature of this engagement and return to the enterprise agreement at the appeal book at page 393 – I apologise (audio malfunction) so I might be a bit slow in switching pages at times, but page (audio malfunction) is where the enterprise agreement starts to play out, and if I could first go to page 397, (audio malfunction) 15 casual employees.

PN155

Clause 16 refers to ordinary hours, and in context of ordinary hours there is a reference to winter and some seasons, and the winter season is defined as running, at 16.3.1, from the Queen's Birthday weekend until the first or second Sunday in October, and it goes on to talk about full-time and part-time hours during the season.

PN156

There seems to be some suggestion within the submissions, the written submissions at least (indistinct), that casuals are not part of seasonal employment, but the tribunal has been properly taken to clause 30 of the EBA, which appears on page 405, and the tribunal would've seen that that was a clause that the Deputy President (audio malfunction) as being pertinent, because, properly read, clause 30 refers to the re-hiring of seasonal employees and it refers to 'full-time', 'part-time' and 'casual.'

PN157

So clearly within this industry it is contemplated that casual employees, even though strictly they're employed by the hour and on one view have a series of staccato engagements rather than for a seasonal, it's clearly (indistinct) contemplated here that even a casual can be a seasonal employee whose employment properly comes to the end at the end of the season, first or second Sunday of October, as was previously defined in the EBA.

PN158

What this enterprise agreement contemplates at clause 30 is that, yes, there will be advice towards the end of the season - and this is important not to protect the future employment of employees but to protect attraction and retention of future employees for the resort - that there will be, prior to 10 December in each year, some indication of whether there's going to be a preference (audio malfunction) for the following season, or whether some will be asked to reapply for their position or whether they won't be required, but clearly it is contemplated that

employment comes to an end at the end of a season and that there will be this process whereby people will be either re-employed or they will not.

PN159

At 30.2, if the employee requests, reasons have to be given as to why they will not be re-employed in the next season, and importantly at 30.3, the employee has to advise as to availability to receive an offer. And so even if there is a preference of the employer to re-employ them, give them preference or have them reapply, obviously availability has to be indicated, and so there's a process (indistinct) the agreement whereby employees indicate their availability, and then they will either receive an offer or not.

PN160

As I'll go to in the evidence, Mr Girling from our resort, Falls Creek, makes it clear that they would always consider, all the way up to offering the contract, their discretion as to whether they would offer employment to a particular employee for the next season.

PN161

That might depend on any number of circumstances going to the season, particularly during COVID where there was one season in recent years where the resort was only open for four days and Mr Howard only got three days' employment. Weather conditions and global warming otherwise impact the season, and it tapers up and tapers down, flexible with the weather; very important.

PN162

So this process of indicating preference to engage, availability indicated, and then offers of employment being issued is recognised under the enterprise bargaining agreement and the contract, which I'll now seek to come to.

PN163

And so we say that the collective agreement supports clearly the notion of casual seasonal employment, and then when one goes to the contract to which the (audio malfunction), and it starts at 476 of the appeal book – there's Annexure 4(?), Gavin Girling's statement.

PN164

If I could just go to it, and the Bench should feel free to stop me, but I just want to walk through some of the provisions, in context again of Rizzato and the importance of written contracts in determining the nature of relationships.

PN165

We say it is quite critical that not only the enterprise bargaining agreement but this contract makes it clear that employment for the 2022 (audio malfunction), at 476 you'll see in the third paragraph that this offer of employment is conditional on Falls Creek opening for the 2022 winter season. It goes on to indicate how the offer of employment can be accepted, and indeed then goes on as to how the offer of employment can be declined. So there's no suggestion of existing – pre-existing ongoing employment; it is a discretion for both the employer and the employee as to whether any offer will be taken up.

PN166

If we can then go to the top of page 477, the tribunal will observe that the offer (indistinct) sports instructor 2, which is a senior instructor, is on a casual basis for the 2022 winter season only, and I emphasise the words 'only.' It then goes on in that context to say:

PN167

As noted in clause 6 there is no guarantee of minimum or continuing work during this season.

PN168

And then the next paragraph continues:

PN169

This contract is offered on the basis that each winter season is a discrete employment arrangement and that Falls Creek is under no obligation to re-employ you for any future season. As such, any future employment will be at the discretion of Falls Creek.

PN170

The contract then notes the applicability of the enterprise agreement and the award, each of which are built around seasonal employment importantly. Down the bottom at about point 7 on that page 477:

PN171

Your start and finish dates will also be influenced by snow and weather conditions and related business demand.

PN172

That in the paragraph after noting of course the impact of COVID on the winter season (indistinct). And so it's a genuine engagement, with some flexibility (indistinct) COVID and weather in the current environment.

PN173

If I could then go to the next page 478 at number 3, 'Availability.' It's indicated that as a casual employee there's a requirement for 'full-time availability for the duration of the winter season from late June to late September.'

PN174

And then over the page at 479, under 'Hours of work', it's a gain repeated that Falls Creek cannot guarantee you a minimum number of hours or days of work per week, or continuing work on a week-by-week basis.

PN175

And then if I could go all the way over to page 482, which the tribunal's already (indistinct), in paragraph 1, 'Special conditions' under subparagraph (d), the tribunal will observe that:

PN176

You warrant that you have no expectation of ongoing employment beyond the expiry of your seasonal engagement for the 2022 winter season. You further

warrant that Falls Creek is under no obligation to re-employ you for any future season, and nor are you obligated to accept any offer of employment for a future season.

PN177

And so again it's not only express conditions of the contract, but indeed a warrant be required of the employee in relation to those issues, and so when it comes to formal acceptance the third paragraph under that heading on page 482, 'I accept the short-term employment offer', in clause 4, which as we've seen is quite limited, and three paragraphs down, as the Deputy President has already adverted to:

PN178

I understand that this offer of employment is for a fixed period and does not amount to an offer of continuing employment in the future beyond the period specified in the employment offer.

PN179

Which is not for a period per se but for a season, which itself fluctuates with weather and may have to taper down, and as I'll come to, that has been recognised in seasonal employment, not just in the snow industry, but in fruit picking and other areas that casual tapering work may be important because of vagaries of the season, and it's very important to this industry.

PN180

So not only the enterprise bargaining agreement, but clearly and expressly consistent with the Rizzato, the relationship is clearly defined in an express contract, and Mr Howard in his cross-examination conceded all of that.

PN181

Mr Lorraine - and if I can go to appeal book at pages 38 to 39, and I think my learned friend started with this issue, because he's obviously concerned, but if we go to page 38 of the appeal book and paragraph number 212 of the transcript, Mr Lorraine takes Mr Howard as the applicant through his contract and puts at 212 that the position was for the 2022 winter season – 'Yes', and it was casual employment – 'Yes.' 'The contract says for the winter season only' - 'Yes', 'with no guarantee of minimum continuing work during the season' – 'Yes', and that 'each winter season is a discrete employment arrangement' – 'Yes', and that 'Falls Creek is under no obligation to re-employ you for any future season' – 'Yes', and that 'any future employment will be at the discretion of Falls Creek' – 'Yes.'

PN182

And then over the page on 39, and then moving through the contract, it talks about anticipated dates of employment, anticipated because it's seasonal work to conclude no later than 2 October – 'Yes', and 'your employment ended on 28 September 2022' – 'Yes.'

PN183

All of that obviously, and we take the point that's made - all we put is that certainly Mr Howard in terms of his expectations reasonably understood the limitations of the express contract and understood when his employment ended.

PN184

So when we go then to the case analysis that the tribunal was taken to of Navitas English, there's a necessity to distinguish the situation that applies here, because as I think the tribunal has already pointed out, Navitas English involved a situation of contiguous employment in an educational context, and the notion of continuing employment or the employment relationship was assessed by the Full Bench there in relation to a whole series of contiguous set term contracts, and as the tribunal has also pointed out, so was the case in D'Lima where there was a series of very short term contracts, which has been pointed out, some of which were not even signed off before they were well underway, in that specific context.

PN185

Now, we included some three cases that properly distinguish the issue of seasonal employment in context of the Navitas English test – well I should say, sorry, that the Wilmar Sugar case makes that distinction, but if I could just start with case number 10 in our set of authorities, which is *Alfred Ochieng v MercyCare Community Services Inc T/A MercyCare* [2014] FWC 2749, that that particular case - - -

PN186

VICE PRESIDENT ASBURY: Sorry, Mr Harmer, can you just give me that reference again in your cases? Which number?

PN187

MR HARMER: Sorry. It's case number 10, and I'll just briefly refer to what's established by each of these cases. That particular case at paragraph 16, which I might just go to, deals with the issue of – at the potential anomaly, if you like, of casual employment and engagement for a season for the purposes of section 386(2)(a) of the Act, and this is what I went to before, that if one recognises casual employment as being engagement by the hour per se, then there is some inconsistency with the notion of seasonal employment.

PN188

But in this particular case, seasonal employment for a casual was recognised as being capable of falling under section 386(2)(a), and it's pointed out in the second last sentence at paragraph 16 that for a seasonal employee it would be usual that the contract would be casual and that presented no bar to the application of section 386(2), concluding in that particular matter the application under unfair dismissal.

PN189

Then the next decision that we'd seek to briefly go to is Como Glassware, which is tab 11 of our (audio malfunction), and this decision comes up in a fruit-picking context, and again involves at paragraph 30 reference to seasonal employees and reference to the explanatory memorandum behind section 386(2) at paragraph 31.

PN190

It's noted within the explanatory memorandum at paragraph 1535 that the very reference to seasonal work within section 386(2)(a) was intended to apply in situations where employees are gradually reduced in number towards the end of the season. This is that tapering that might occur in fruit-picking, but certainly

occurs in the snow industry because of employees being gradually reduced because the season is diminishing, if you like, in terms of demand for product, in this case being skiing.

PN191

And so even though employees might be gradually tapered down to suit the exigencies of the industry, as is described on the facts here, you will have seen in the factual scenario that there were up to 140 snow instructors engaged at Falls Creek, and by the time we reach the last week leading up to 2 October the evidence was that there were only 20 to 30 left, of whom Mr Howard was one, because he was a respected senior instructor.

PN192

So 386(2)(a) was recognised in this case and consistent with the explanatory memorandum at paragraph 32 there as applicable to seasonal workers for the very reason that casual seasonal work does involve this tapering and that that's an important part of industries reliant on seasonal work.

PN193

The final case we go to just briefly is Wilmar Sugar, which does within its terms adopt Navitas English and the principles set out at paragraph 74 of Navitas English as being appropriate to apply, even to seasonal work, but it then makes the important distinction within those principles – if I can just go to paragraph 47 of that decision and just make one distinction myself.

PN194

At 47 the Full Bench in that case, which is dealing with sugar-crushing, another area of seasonal work - and here again I should note that an employee was finished at the end of the season and then was told they would not be re-employed for a particular reason, and was of course found not to be capable of bringing forward an unfair dismissal case in that circumstance, a similar circumstance as here - but at 47, Navitas stands for the proposition that the analysis of whether there has been a termination at the initiative of the employer for the purpose of 386(1) – and I emphasise we're now in 386(1)(a) ground, not (2) – is to be conducted by reference to the termination of the employment relationship.

PN195

Now, I would just introduce my own qualifier there. I've included within our authorities at tab 2, but have not gone to it, and I don't seek to unless the Bench requires me to – sorry, it's at tab 3 – that the NSW Trains v James case, which of course recognised that not only the employment relationship (indistinct) but also the finish of the contract of employment can be captured within the scope of section 386(1) of the Act, and indeed that recognition by the Full Bench in that particular decision was based upon accommodating the sort of exigencies that are contemplated in section 386(2) of the Act.

PN196

So I just notice that even that qualification doesn't necessarily strictly apply, but importantly at 48, the distinguishing factor of seasonal work is pointed out that in this case there was an end to the employment relationship as a consequence of the seasonal nature of the work.

PN197

Unlike in Navitas, here the work ends at the end of a season, and work in the next season or subsequent seasons is no guaranteed, and this is that distinction between a series of set term contracts which are contiguous versus seasonal work here where clearly one falls off the end of a season. In the ski industry for up to nine months there is no work. There's no ongoing relationship, and for very good reason.

PN198

Tailored to the exigencies of the industry, the history of award regulation, and indeed the enterprise agreement covering Falls Creek is tailored to cater for seasonal work only as a discrete engagement, not only a contract, but employment finishes, as is apparent from the contract and the EBA, and in this particular case, the distinction was made that it's different when you're dealing with seasonal employment, because there is no contiguous ongoing contract to contract to contract with ongoing employment.

PN199

All we say is that the Deputy President was correct at first instance to at least consider section 386(2)(a) in context. It went against us, and so in that context the appeal, we say, arguably is not (audio malfunction) to warrant leave.

PN200

But to suggest that in context of an extension of time discretion there was an error in having regard to 386(2)(a), even though it went against us, we say no, that was quite a proper consideration, but it did go against us, and formation of an opinion on that issue did not adversely affect the discretion exercised around extension of time, particularly in circumstances where the Deputy President considered not only 28 September but also 7 February, time in that context, and so catered for the fact that there was a long gap where Mr Howard did not know he was not going to be reengaged, and we properly would concede that it was difficult for him to raise great concern if he didn't know that he wasn't coming back, but that just emphasises that his concern was no re-employment for future season, it was not worth his dismissal, and that's very important we say in context of leave here. There's no real issue with the dismissal per se.

PN201

So that's ground 1(a), and I'll come to another case in this industry where again the seasonal nature of the employment was brought about, but a result this time under 386(1)(a) in relation to Kosciuszko Thredbo, but I'll come to that under another ground.

PN202

Could I then move to what's amended paragraph 1(b) at paragraph 24 of the outline of submissions, which reads:

PN203

incorrectly found that by being taken off the roster on 28 September 2022 the applicant had been dismissed.

PN204

Now, there's some suggestion that nothing happened much on 28 September 2022 other than there was an injury and so someone couldn't complete their shifts. What the evidence reveals is that a HR manager at Baw Resort when receiving the notification of an incident whereby Mr Howard maintained that he had injured (audio malfunction) while teaching snowboarding, and the statement along with his right leg (audio malfunction) he injured his leg in that context.

PN205

There were steps taken by that HR manager not only to take Mr Howard off the roster, but they also removed his ski pass, which is the pass that allows you to, you know, access lifts up the mountain and get involved on the mountain, and taking him off the roster and removing his ski pass were done, yes, to protect his safety, but it had the effect of ending his employment for that season, which only had limited time to run. Indeed, the evidence is he only had one more roster to fulfil.

PN206

So employment was going to end clearly under the contract in any event on 2 October, which is when operations finished, where only I think four shifts before that Mr Howard was working teaching children, had one (indistinct) shift that he was rostered for. He was removed from the roster and his pass was taken away so he could not work at all for the rest of the season, that being the response to him notifying an injury.

PN207

Now, he could've raised a complaint about that if he wanted to, but his complaint is not really about that per se, but that is what was found properly by the Deputy President to bring the engagement to an end.

PN208

Can I just say in relation to that point, and I'll come to some authorities which we say support that finding by the Deputy President, but can I just say on the facts, it's asserted within the written submissions of the appellant that the parties at first instance did not press 28 September, that somehow the Deputy President came up with this notion himself.

PN209

Now, we say that in fact all parties referred to 28 September as the end of employment, and I won't – I'll just summarise some of that evidence. I'm happy to take the tribunal to each and every piece, but (audio malfunction) I just summarise for now rather than going to every point in the appeal book.

PN210

But just by way of brief summary, the respondent presses the issue at paragraph 4.1 of its form F3. Secondly, the respondent presses 28 September as the end of employment at paragraphs 15, 20 and 28 of its schedule to its form F3. Thirdly, at paragraph 30 of the witness statement of Gavin Girling at first instance, the last day is stated as being 28 September 2022, and then paragraph PN66 of the transcript, Mr Girling again deposed that the last day at work was 28 September 2022.

PN211

Next, I've already taken the tribunal to the reference in transcript where Mr Howard admitted that his last day of employment was 28 September 2022, and then at paragraph number 325 of the transcript the Deputy President confirmed with the respondent that it was pressing that the last day was 28 September 2022.

PN212

Now, over and above that, the advocate for Mr Howard at first instance also seems to press – and I will go to this reference because we haven't been to it before – at transcript paragraph number (indistinct) – I think this is at the appeal book at page 50. There are submissions being made by Ms Appelhans that – this is at page 50 of the appeal book, transcript paragraph number 37, which starts at the top of page 50, if the tribunal has that.

PN213

So this is the advocate for the lawyer for Mr Howard. We do go back to 28 September, and again, to terminate him on the 28th when he was rostered through to the 2nd does explicitly meet the (indistinct) that he was working during that time.

PN214

And then in the next paragraph, third last line, his certificate of capacity said he was 'able to return to work, so a little bit of jumping the gun to take him off the roster.' And then at paragraph PN341:

PN215

My concern at this point though is that he was terminated apparently for reporting an injury, which is in and of itself –

PN216

At the end of paragraph 341 he was rostered till October 2, and on the 28th when he reported injury he was removed from the roster. And then the next paragraph 342, 'That would definitely meet the special memorandum as far as a casual employee being covered by the unfair dismissal.'

PN217

Now, if we then go to paragraph number 354 across the page, the Deputy President notes that 'there's no evidence that he performed any work, paid or otherwise, after the 28th, not after October 2, correct.' And Ms Appelhans at the next paragraph, 'or after the 28th, but, yes, he was rostered to continue work and then unrostered.'

PN218

In terms of that issue could I just then compare that to some case authorities? It seems, in my respectful submission, even the solicitor for, or the legal advocate for Mr Howard had a concern that (indistinct) just reporting an injury he was taken off and effectively his employment finished, and as I say, there were additional steps, that is, indeed his (audio malfunction) means by which any employee accesses the mountain to undertake the sort of work that Mr Howard did.

PN219

So there were a couple of steps. It wasn't just de-rostering. It was removing the very means to work. So effectively he was finished some four days earlier than would otherwise have been the case, and in context where his employment was imminently to finish in any event.

PN220

Now, we've included just a couple of authorities, and again I don't - subject to questions from the tribunal, I don't seek to go to them in great detail, but at tabs 4 and 5 of our authorities, I'll just note two decisions.

PN221

The first one is Zucco in relation to a particular patisserie, and in this particular matter rostering for this particularly occurred through a WhatsApp, so if you were on a WhatsApp connection you were told of the roster, and this particular employee had some health issues and it came to the point where, and this plays out at paragraphs 45 through to 47 of the decision of Millhouse DP in this matter, that the employer, the patisserie, took the step of removing this employee from the WhatsApp connection such that they could not be allocated any further shifts as an employee, and that was taken as constituting a dismissal in that particular context, and so similar to taking away the lift pass here and de-rostering in context of health, that brought about the end of employment in effect at the initiative of the employer. Whether that's right or wrong or indifferent, the employer reacted to an issue of health by removing.

PN222

The next matter at tab 5, *Hudson v The PJ Sourris Family Trust & James P & Christopher P Sourris T/A Aspley 10 Pin Bowl* [2021] FWC 2227. This involved a gentleman who was involved in engineering support in maintenance running to keep the 10 pin bowl running when inevitably people got their pins jammed and that sort of thing, and in this particular case, again there was a step taken to remove the employee concerned, Mr Hudson, from the roster.

PN223

That's referred to at paragraph 51 by Simpson C in that matter, whether removal of him from the roster in context of the circumstances of that case - I must admit these are all obviously - in some ways depend on their own facts, but the removal of the roster was interpreted as in reality constituting the dismissal in that particular matter.

PN224

Again, acknowledging that every case depends on its own circumstances, we have a situation here where the Deputy President and indeed the respondent in its submissions at first instance would say that, look, if employment just ran to the end of a season, it's clear under the contract and even though it was seasonal casual employment that 386(2)(a) would have been invoked properly, but there were steps taken by the employer here rather than allowing employment to continue to the end of a season, to de-roster, to take away the lift pass, despite a certificate of competency in a workers comp sense saying that there was fitness to work, and that initiative of the employer, rightly or wrongly, effectively brought employment to an end for that reason.

PN225

VICE PRESIDENT ASBURY: Mr Harmer, where was the appellant while all this was happening? Was he still in the employer's premises?

PN226

MR HARMER: The appellant lived in Falls Creek, as I understand it, and was in the immediate vicinity – well was within the resort of the employer, conducted by the employer, within a particular area of land under legislation governed by the Victorian government, but allocated to operate ski lifts at this particular resort, and so he was in the immediate vicinity. He put in his notification and his certificate under workers comp. He was then de-rostered and had his lift removed unilaterally by the employer.

PN227

VICE PRESIDENT ASBURY: So that's what you're relying on to say that there was a dismissal on 28 September?

PN228

MR HARMER: That's correct, and at first instance that's what the Deputy President relied upon.

PN229

VICE PRESIDENT ASBURY: Did anyone argue it ended on 4 October?

PN230

MR HARMER: We were initially arguing 2 October, which was the last day - - -

PN231

VICE PRESIDENT ASBURY: Sorry, 2 October.

PN232

MR HARMER: Yes. So we were arguing that, so that if it ended on 2 October, we say 386(2)(a) kicked in, despite it being seasonal or casual employment, and so we were pressing that as a basis, contrary to our submissions and against our case that based upon evidence that was before the tribunal, which pointed to us de-listing from the roster and removing the lift pass, and in the face of those objections raised by the advocate for Mr Howard about how that happened, the Deputy President found that we were not correct, that employment didn't end on 2 October but rather ended on 28 September at our initiative.

PN233

Now, we have not appealed against that decision. We have not tried to force the issue. What we say is that the Deputy President then, having found jurisdiction in that context and a dismissal such that he could properly go on and determine an extension of time issue, he properly confirmed it and it is not material whether it was 28 September or 2 October in that context.

PN234

He also goes on to cover the contingency of 7 February, but properly concluded that that was not an issue of dismissal; it was a failure of re-offer.

PN235

So all we say in relation to this amended ground now put forward in their submissions by the appellant is that the notion that there was some fundamental error in forming the exercise of the discretion in section 394, in the form of his finding of dismissal on 28 September as opposed to 2 October. So it's a matter of that context, of 175-day delay.

PN236

We would say that, first of all, it was available on the facts. Secondly, it was consistent with authority, even though it went against us. Thirdly, to the extent there's any error, it only amounts to three or four days to 2 October, and then how does that inform the formation, if you like, of an opinion on a matter that would properly inform the exercise of the discretion around time. We say it's immaterial, even if this ground was correct.

PN237

In our respectful submission, it doesn't point to any House and King error. It's available on the facts. It's available on the authorities. One may or may not agree with it. We certainly disagreed at first instance, but what difference in a few days in context of a 175-day delay, or even 43 as the tribunal properly considered, while someone goes off and investigates their own case before they'll decide to put an unfair dismissal in.

PN238

Now, we simply say, in context of grounds for appeal, no House and King error is revealed in context of leave. It's very specific facts, very nuanced. It has no implications for anyone other than a discretion around time for Mr Howard, and doesn't meet the public interest requirement, and we say the same thoughts about paragraph (a), as I'll come back to, 1(a).

PN239

Sorry, I meant to go to one more piece of evidence just briefly on that point, and this is at appeal book page 144, just to indicate what some of the material that the Deputy President was potentially relying on, other than the fact that cross-examination was allowed by the Deputy President to extend into aspects of the time issue and some aspects of the merits, even though the only issue being properly dealt with on the day of the hearing was the jurisdictional issue.

PN240

Page 144 of the appeal book the tribunal will observe is a statement which appears in the context of the workers compensation insurer's report into issues about Mr Howard's conduct during the investigation, and if I can just refer to paragraphs 17 to 20 of the statement of Amy Hodge, who is employed by Falls Creek as a resort services manager, and it was her that introduced some restrictions on the employment.

PN241

At paragraph 16 she notes that under the WorkCover certificate Mr Howard was to avoid skating on his right leg or other activities that would increase pain, and he was referred to the doctor to receive physiotherapy. And then at 17:

PN242

Due to restrictions on the WorkCover certificates stating he was to avoid skating on his right leg, Zac was not able to continue taking lessons as it's not possible to skate on the ski board when taking that lesson. I stood him down from work and blocked his ski lift pass in order to protect his knee and further injury and aggravation. After blocking his lift pass, Zac was not able to perform his normal duties taking snowboard lessons, and as a casual employee is not able to receive any pay for the time off.

PN243

And then she goes on to indicate at paragraph 20 that he lost only one day following the report of his injury. So that's just some of the material that indicated what happened and why.

PN244

Again, one can take issue, but as a matter of fact and as proper legal contention as to whether that was appropriate conduct to bring the employment to an end, or whether as we asserted it in fact continued to 2 October, all we say is that there was sufficient factual material for the Deputy President in the face of the advocate's objections to that, that I've taken the tribunal to, that is, the advocate for Mr Howard was protesting that he was taken off roster and treated that way and that he was effectively terminated, I've taken the tribunal to those submissions.

PN245

So it was available to the Deputy President on the facts. I've pointed to other authorities that are consistent with de-rostering being found to be a dismissal in certain circumstances I acknowledge. We just say there's no apparent House and King error as a matter of principle or on the facts.

PN246

That's 1(b). 1(e) of – not an amended version, but asserts that there's a failure to find that the applicant's employment was terminated at the employer's initiative by the respondent on 7 February 2023.

PN247

Now, the Deputy President properly found that Mr Howard, consistent with the enterprise bargaining agreement and the contract that we've gone to, was clearly not an employee on 7 February. His employment had finished back within the season, and therefore there was just an unhappiness with the new offer.

PN248

If I go to the transcript again at paragraph number 170 to 171, that's just Mr Girling confirming that there was no contract of employment post 28 September and there was no offer made. And so the issue on the evidence was clearly that there was to be no further offer made, and that was what was communicated on the evidence on 7 February to Mr Howard.

PN249

We just make the point in relation to this, apart from the reliance which we clearly place upon the clear terms of the enterprise agreement and its contemplation, but

the express terms of the contract (audio malfunction) as a matter of principle note that – if I can just go to the authorities again – I refer to item 7, but I don't seek to go to it, or rather it hasn't been (indistinct). I'll go the summary of its meaning as adopted by the Full Bench in Khayam v Navitas English, but we've referred to the decision of Griffin v The Australian Postal Corporation at item 7, and if I can just seek the indulgence of going to item 1, which is Khayam v Navitas English, and within that particular decision.

PN250

If I could refer to paragraphs 72 to 74, which is just before the Full Bench's more prominent paragraph 75 when they set out the conclusion principles. At the top of paragraph 72, so this is in our – this is item 1, and starts at about page 37 I think of our list of authorities. Paragraph 72 at the top:

PN251

However it should be made clear that the mere fact that an employer has decided not to offer a new contract of employment at the end of a time-limited contract which represents a genuine agreement by the parties that the employment relationship should come to an end not later than a specified date will not by itself constitute a termination at the initiative of the employer.

PN252

And then there's reference to the Industrial Relations Full Court in Griffin v Australian Postal Corporation. And then at the top of 73:

PN253

Justice Spender also found (at 373) that a refusal to re-employ an employee after the employee's employment had ended was not a termination at the initiative of the employer.

PN254

And then at paragraph 74, about 10 lines up from the end of that paragraph, there's reference to:

PN255

Griffin (and Fisher) demonstrate that where the employment relationship has come to an end on a specified date by genuine agreement of the employer and employee, any decision by the employer not to offer further employment is to be treated as separate and distinct from the termination of employment.

PN256

We would simply say that applies a fortiori for the reasons that I went to before when we were looking at seasonal employment and particularly that sugarcane-crushing case, which was the last case in our set of authorities, that where you have a situation where the season ends and there's a gap of nine months, and so clearly contract of employment had come to an end on the basis, we say, of both the enterprise agreement and the contract.

PN257

Clearly a decision in between seasons not to re-employ, it is just that, but that is not a dismissal, and a complaint about that as a prospective employee has a

standing elsewhere under the Act, but not under the unfair dismissal provisions. I just reinforce that point.

PN258

If I can just refer to the appeal book at page 62, and I did mention this in opening? At page 62, one has the unfair dismissal application of Mr Howard, the form F2, and at page 62 of the appeal book under item 2, 'Remedy: What outcome are you seeking by lodging this application', and the answer is, 'My contract renewed for the 2023 winter season.'

PN259

Again, look, we can't put huge weight on that I appreciate, but we simply say, consistent with his knowledge and understanding of the contract that his 2022 employment had come to an end, even if there was a new contract for the 2023 season, in the context of this industry the enterprise agreement and the contract make it clear that that would be a new employment.

PN260

What we'd say briefly to reinforce that is, if I can just go to another decision in this industry, and this is at item 8 of our set of authorities, it deals with the Kosciuszko Thredbo Resort in NSW on this occasion. So if I could just go to item 8?

PN261

There's a decision of Kovacic DP in 2017 handed down in Canberra dealing with the Thredbo resort, and in this particular case, again a gentleman who had been employed for many seasons, as I'll come to, some 13 winter seasons, was notified that he would not be re-employed for a 14th season, and that issue that he had re-employment for a future season was found not to constitute dismissal, this time under 386(1)(a).

PN262

At item 2 it's pointed out that the form F3 of the employer in that matter saw - Kosciuszko Thredbo again - that he was employed on a seasonal basis and that his employment expired on 3 October, and he was not employed at the date of his alleged dismissal when he was later told he wouldn't get a new contract.

PN263

At paragraph 5 in the introduction, the Deputy President there indicates that 'I found that Mr Bosley was not dismissed.' By way of background he says that he was – this is at paragraph 6, sorry – he was a full time seasonal employee within the respondent's ski patrol team, which is a specialist function that assists people on the slopes if they have any health issues, health and safety issues, for some 13 consecutive winters.

PN264

At 7, his contract of employment for the 2016 is quoted, and again it's specific to seasonal employment, you'll see in the third line of the quote.

PN265

At paragraph 8, he actually worked an additional day beyond the season in this case, so there was a nuance, if you like, and on 21 October 2016, so well after the end of the season, which occurred on 3 October, he was advised that because of his malcontent within the team and impact on the team he would not be offered a new contract.

PN266

There was a refusal at the bottom of that page, at the end of paragraph 9, to re-employ you for 2017 and future seasons. And so, again, he then lodged an unfair dismissal application.

PN267

The respondent then, at 11, claimed a seasonal basis for employment, and went on and made arguments. There's reference to the evidence of a couple of witnesses there.

PN268

Over the page then at paragraph 18, the decision in the applicant's case. He maintained that he was employed every season on a regular and systematic basis, similar to some of the issues that have been raised here perhaps, and then at paragraph 20, he was also encouraged that he'd be coming back next year, but then the decision was taken in the interim not to re-employ him, for the reasons that I've outlined.

PN269

The Deputy President at 22 looks at the statutory framework and sets out 386 amongst other sections, and then considers the issues from 23 on, and at paragraph 24:

PN270

While I accept that Mr Bosley expected to be re-employed for the 2017 ski season given that he had worked as part of the Respondent's ski patrol team for at least 13 consecutive seasons, the evidence before the Commission indicates that the Respondent's practice was to email its previous season employees to either advise that they would not be re-engaged or, alternatively, to offer re-employment. If re-employment was offered and the former employee was interested in re-employment, the email also requested that the former employee complete and return the attached documentation. Importantly, Mr Bosley confirmed that practice in his evidence.

PN271

At 26 that's been reinforced by the terms of the applicable award for the industry, and at 28 on the final page of the decision:

PN272

The Respondent submitted at the hearing that there was no dismissal at its initiative. This issue was considered by the Full Court of the then Industrial Relations Court of Australia in -

PN273

The Mohazab test is set out in terms of the role of the employer in initiating the end of the employment. But at 29, in applying the Mohazab test -

PN274

the material before the Commission in this case does not point to any act on the part of the Respondent which resulted directly or consequentially in the termination of Mr Bosley's employment. To the contrary, the material before the Commission points to Mr Bosley's seasonal employment being extended by agreement by one day and simply coming to an end on 4 October 2016. This supports a finding that there was no dismissal at the initiative of the Respondent -

PN275

in that particular case under 386(1)(a).

PN276

So what we say is that this notion that employment didn't end at the end of the season but rather went on to 7 February was correctly concluded by the Deputy President, consistent with the enterprise agreement, the underlying award, the contract, and also consistent with past authority in this industry; whether decided, as in this case, and in that particular Kosciuszko Thredbo precedent under 386(1)(a), or otherwise if someone reached the end of the season and didn't have an extension, as was the case in that KT case.

PN277

That's all we seek to say on that particular ground, and again we say that there's no House and King error identified and that the specific exigencies of the application of the facts and the relevant principles to Mr Howard's case don't warrant public interest as would lead to the granting of leave in relation to a ground which lacked in any event merit if leave was to be granted.

PN278

That does extend to the next amended ground, which is 2(c) in the outline of submissions at paragraph 24, which reads, 'Fail to consider whether the applicant had deployed the minimum employment period under section 382 to 384 of the Fair Work Act.'

PN279

Look, I'll be fairly brief on this, because I think it was adequately addressed in questions addressed to the appellant, but we would say that that particular ground is again irrelevant in terms of something that the Deputy President would need to have formed an opinion on, keeping in mind that members of the tribunal cannot determine these matters legally, but they can form an opinion on that legal issue so as to inform the exercise of discretion on an extension of time under section 394 of the Act.

PN280

Here, not only is that issue irrelevant in circumstances where, as I'll come to, the Deputy President properly (audio malfunction) issues under 394, and that issue would not have made any material difference. It was recognised by the Deputy President that employment seasonally had gone back all the way to

2011. He then took all the factors into account and came to a proper exercise of discretion.

PN281

But over and above that, as has already been pointed out with respect - by questions from the Bench, sections 382 to 384 of the Fair Work Act operate as a matter of law solely to determine eligible standing to bring a fair dismissal application through someone who has sufficient continuous service to meet the minimum employment requirements of that jurisdiction.

PN282

It has no other standing at all to deem that employment continues beyond a seasonal contract. It doesn't deem employment continuing. It merely (audio malfunction), and that is the sole purpose.

PN283

That has been confirmed by a decision of the Commission in Smiths Snackfood, which is case number 9 in our set of authorities, which I'll just go to, if I may, briefly. This is *Shortland v The Smiths Snackfood Co Ltd* [2010] FWAFB 5709 at tab 9. If I can just turn very briefly to that decision, which is of a Full Bench of the Commission when it was Fair Work Australia, and if I could just go briefly to paragraph 12 of that decision, and very briefly. The Full Bench points out that:

PN284

> *it is more than tolerably clear that s.384 is concerned with how an employee's period of employment is calculated for the purposes of s.382(a).*

PN285

And the Full Bench then goes through to dissect 384 and distinctions between periods of service and periods of employment, and then reinforces in the last sentence of that paragraph:

PN286

> *Section 384(2) is concerned only with determining which periods of service in such a contiguous series count toward the employee's period of employment with the employer for the purposes of s.382(a).*

PN287

And we say that's obvious as a matter of statutory interpretation of the relevant provisions, but it's there confirmed by a Full Bench.

PN288

What we further say is that we did raise in our form F3 that as an issue. It hasn't been determined, but even if it were determined against us, it does not relevantly inform the discretion here under appeal, and it does not point to any House and King error, and we'd say in any event that there's a misconception in the way that it's been proven(?) by the appellant.

PN289

And again, it simply does not raise merit, and in House and King it does not warrant leave given that it really is an attempted application of that particular

issue to Mr Howard for the purposes of testing this discretion, and that is not something that should in the public interest require dealing with.

PN290

And as has been conceded by the appellant, if the Full Bench was to concede the appeal here and revert, as is now applied for, back to the Deputy President for the matter to be further dealt with, that issue would have to be dealt with.

PN291

The Deputy President then compelled that a cold storage case to determine the dismissal jurisdictional issue, and having found that in favour of the appellant took the view that he could properly determine the discretion, and that removed - even assuming jurisdiction, removes the need, if you like, for that matter to be determined, unless it's referred back.

PN292

So that issue would then go back as a live issue to be further contested. It's not warranted. It doesn't have merit in the House and King sense, and it should not be the subject of leave. It'll just cause further time, investment of resources in this matter, which really is a contest over a failure to re-employ, which has standing elsewhere under the Fair Work Act. For whatever reason, that's not been the issue, but it doesn't have standing here, and should not take up further time of the tribunal through granting relief in the way that has been put forward.

PN293

So that's briefly 2(c). Then if I can just go back to the final ground of appeal that appears in paragraph 24 of the submissions of the appellant. I apologise, I'm just struggling to go back and forth because of the folders, but if I can just go back to the submissions of the appellant at paragraph 24.

PN294

The final ground of appeal that's pressed comes to the core issue of section 394(3)(e) and reads:

PN295

> *Failure to conduct proper analysis of the merits of the applicant's unfair dismissal application pursuant to section 394(3)(e) of the Fair Work Act.*

PN296

This matter, as with all the other matters, needs to raise House and King's error. As I have taken the Bench to, one will observe from a perusal of the appeal book that there was a huge amount of information before the Deputy President about what had transpired here, because Mr Howard put forward his material not just going to the jurisdictional issue but also to the out of time issue, and to that end some aspects of the merits.

PN297

And so the detailed report of the workers comp insurer, statements from more than one employee of our client, the employer, statements from Mr Howard, the evidence. The cross-examination enabled all aspects of the chronology of the delay to be properly set out by the Deputy President, and the Deputy President,

again properly, consistent with authority, if one looks at his decision, he refers to the decision of Nulty, at footnote 6, as clarifying that it was not necessary for him to finalise, if you like, a position – I must apologise, that's at footnote 7; it's at paragraph 73 – it was not for the tribunal, the last three lines there:

PN298

to resolve contested issues of fact going to the ultimate merits for the purposes of taking account of the matter in s.366(2)(d) –

PN299

and the Deputy President properly said that the same applies to section 394(3)(e), with 366(2)(d) being the exact corresponding provision that would apply in a general protection application taken to the Commission out of time.

PN300

So authority on that was relied on. He did not have to determine ultimately the facts. He wasn't in the position to do so. But he certainly had a wealth of material, and in our respectful submission more than enough material to come to the view that he did on the available evidence. There was a strong contest around whether this gentleman, Mr Howard, should have been re-employed or not.

PN301

Obviously there are the issues of merit going to when the dismissal occurred, but when one gets to the issue of should re-employment have been offered or not, one runs into those issues that I went to before around integrity, and the four questions that I went to, which again just very briefly, which (indistinct) could go to evidence that is in the detail of the brief that the Deputy President read, through the appeal book at the first instance.

PN302

The issue of whether the injury came from running training or work; secondly, a past tendency to claim workers comp at the end of a season so as to get employment – sorry, payment while not actually engaged; thirdly, a retraction on what was the purpose of the (indistinct) some evidence of a retraction of information put forward by Mr Howard during the course of the investigation; and fourthly, restrictions on his movement then being flouted during (indistinct), and all of that adding up to a lack of trust and integrity as seen by the employer.

PN303

Again, we don't press that as other than allegations in relation to our case, because it wasn't properly tested, but we do say, in a House and King sense, there is nothing to suggest that the Deputy President erred in assessing the facts to conclude that there was a fierce contest and that that should be a neutral factor, and in our respectful submission, there's nothing put forward that would bring about a contrary result.

PN304

Now, I would go in that regard to the oracle executive summary and series of statements in evidence that appear in their report in the appeal book at pages 120, 122, 130, and at 45 is a statement. I don't think I need to walk the tribunal through all that material. I don't think sufficient has been put through to suggest

that there was a strong error of fact or some House and King error in the way in which the Deputy President concluded that there was at least a fierce contest around what had occurred.

PN305

If one goes through the decision of the Deputy President, he clearly, based on all the material, sets out quite a comprehensive chronology of what had occurred. He clearly had reviewed the material himself in some detail. In addition he had fresh statements from Mr Howard and from Baw Resort before him, and we have already traversed some cross-examination around the issue, but just to perhaps demonstrate that it was touched on, if I just go, for example, to the transcript again at paragraph number 262.

PN306

Over and above that, extensive workers compensation material and other evidence. There was also cross-examination around the issue of the self-investigation by Mr Howard and why it took till 12 April, et cetera, and there was also extensive material, as I say, going to the underlying merits of the claim. That was addressed by the employer in its form F3. There was an addressing of the underlying merit and the extension of time issue by the employer in the form F3, apart from the two jurisdictional issues, and that is at appeal book at 367, which again I don't seek to go to.

PN307

So all we would say in relation to this aspect of the case is that he Deputy President clearly had a strong grip of the chronology of events. The Deputy President applied those facts properly to each of the paragraphs of section 394(3), indeed from paragraph 56 of his decision on where he quotes those paragraphs, even thereafter correlates to a subparagraph of the requirements, and he quite comprehensively deals with them.

PN308

And when it comes to the merits of the application at 394(3)(e), the Deputy President, as I say, properly without any apparent House and King error, and noting the Nulty decision which did not require him to finalise any view on the merits, took the view that there was a strong contest on the available evidence and that this was a neutral factor.

PN309

For the appellant, absent any additional material, to assert that that in some way followed the House and King error, in our respectful submission, just doesn't add up. It just involves the appellant disagreeing with the exercise of a discretion, and with respect, even if the Full Bench so disagreed, that's not enough under House and King principles to warrant the unsettling of that particular 394(3)(e) finding.

PN310

So in our respectful submission, that ground also fails as a ground of appeal, because it does not point to any House and King error based on the written submissions, the material or the oral submissions to date, and again, as a matter of leave in particular, that is an argument with a discretion by one individual with no public interest implications whatsoever.

PN311

By way of conclusion, what we say, for the reasons we've gone through, is that each of the grounds of appeal, as amended, lacks merit in a House and King sense, and there is no House and King error identified, and each of them in and of themselves applicable to this private dispute of Mr Howard and his (indistinct) employment, lacks public interest, in circumstances where there is standing to otherwise challenge such an issue under the legislation but not under unfair dismissal.

PN312

Unless there's any questions from the Bench, that's all we intended to submit at least.

PN313

VICE PRESIDENT ASBURY: Thanks, Mr Harmer.

PN314

MR HARMER: Thank you.

PN315

VICE PRESIDENT ASBURY: Mr Tierney, anything in reply?

PN316

MR TIERNEY: Thank you, Vice President. Just a few matters briefly. First, in respect of the allegations in respect of integrity that were raised by Mr Harmer, none of those matters were put to Mr Howard. They were not the subject – they were not (indistinct) and we would submit that they should be disregarded as having no bearing on this application.

PN317

On the question of section 386(2)(a), my learned friend referred to the Deputy President having given that proper consideration. In his written submissions my learned friend submits reasonably that it was a relevant consideration given the finding made that the dismissal took place on 28 September, but the appellant presses that the consideration given by the Deputy President to section 36(2)(a) was incorrect, and it was incorrect because of what the Full Bench in Khayam found. If I can take your Honours to paragraph 82 of that decision?

PN318

VICE PRESIDENT ASBURY: Yes.

PN319

MR TIERNEY: It may be noted -

PN320

It may be noted that the interpretation adopted in Andersen of the expression 'contract of employment for a specified period of time' was ultimately based on the ordinary meaning of the words used in that expression. Further the reason made it clear that it was only where an unqualified right to terminate existed that a time-limited contract of employment would not be one for a specified

period of time, and that if there was simply a right to terminate for breach the position would not necessarily be the same.

PN321

Then further on at paragraph 93, in this paragraph the majority is referring to the explanatory memorandum, which is relied on in the Como Glassware case in respect of what is covered under section 386(2)(a), and as stated there:

PN322

It may be accepted that the emphasised sentence in the above passage may, on one reading, be understood as meaning that s 386(2)(a) is intended to apply notwithstanding that a time-limited contract of employment allows for a right of termination exercisable prior to the expiry of the time limit. However the passage does not demonstrate any unambiguous intention to widen the scope of the exclusion as compared to the preceding legislative exclusion upon which it is so clearly based, nor does make it clear whether it is merely maintaining the previous position whereby the capacity to terminate a time-limited contract early for breach did not take the contract outside the scope of the exclusion or whether it was intended to extend the exclusion to encompass time-limited contracts with an unqualified right of early termination.

PN323

What's submitted in our written submissions, Vice President, is that where an extensively time-limited contract provides for an unqualified right of early termination, section 386(2)(a) does not apply, and that is what the majority found in Khayam and Navitas at paragraph 96. It was stated that:

PN324

The final contract of employment between Mr Khayam and Navitas, embodied in the letter of offer set out in paragraph [5] above, provided for an unqualified right for either party to terminate the contract on four weeks' written notice or for Navitas to terminate on the provision of four weeks' pay in lieu of notice. The contract was therefore not a contract of employment for a specified period, and the exclusion in s 386(2)(a) did not apply.

PN325

We say that if the Full Bunch accepts that termination took place on 28 September, it does not fall to consider the application of section 386(2)(a), but if otherwise, then the Deputy President's analysis comes into full focus and it should be noted that that analysis was incorrect.

PN326

On the submissions raised by my learned friend with respect to dismissal, my learned friend referred to the issue of the lift pass. What's stated there is that the removal of the lift pass is a protection measure for an injured employee. It should not be taken as an indication that -evincing an intention to terminate Mr Howard's employment, and to refer to the earlier question you raised, Saunders DP, the leaving note does not appear to have been in evidence at first instance, and unless my learned friend is able to indicate otherwise, my understanding is that it was not received by the applicant.

PN327

Finally, on the issue of dismissal, I just want to refer briefly to the decisions raised by my learned friend. These were first instance decisions. The matter of Zucco I would refer to first. I'll just come to my learned friend's list of authorities. It's tab 4 in the list of the respondent's authorities, and I would refer to paragraphs 19 to 21.

PN328

VICE PRESIDENT ASBURY: Have we got a page number, Mr Tierney?

PN329

MR TIERNEY: It's page 125.

PN330

VICE PRESIDENT ASBURY: Thanks.

PN331

MR TIERNEY: In this case the applicant had had discussions with the employer about previously not attending work and being unwell. At 19 it's stated:

PN332

It's not in dispute that the applicant did not attend the workplace to meet with Ms (Indistinct) at any time on 27 June 2022 and did not respond to her text message that day which stated, 'You didn't come.' Ms (Indistinct) gave evidence the applicant stopped turning up for work and had ceased communicating with me.

PN333

And at 21:

PN334

On 2 July 2022 the applicant was removed from the respondent's WhatsApp group. Mr Alkhouri(?) gave evidence that he removed the applicant from the group at the same time as he removed three other persons who were no longer employed by the respondent.

PN335

We say this case is plainly distinguishable from the circumstances here where what is contemplated on 28 September is the appellant not attending because he was injured. There's no suggestion that there were other misconduct issues or absentee issues that might have warranted a termination, and so the reasoning in Zucco simply doesn't apply.

PN336

I would also refer to the decision of Hudson, which is tab 5 of the respondent's authorities. It commences at page 132 and I would refer to paragraph 35, which is on page 142:

PN337

Mr Hudson's evidence was to the effect that he received a phone call from Mr Sourris on 6 January 2021, who advised that his rostered shifts for the rest of

January 2021 were now cancelled and he would get a call if needed. Mr Hudson said during this call, Mr Sourris stated it was because of 'business being slow and there was not enough shifts to go around'.

PN338

Again there is an inciting event, there's an intervening event, and here it's the lack of work available to provide shifts to the applicant. Again it's a case that's plainly distinguishable from the matter at hand. Those are the only other matters I wished to raise in reply, Vice President.

PN339

VICE PRESIDENT ASBURY: Thank you for that. Thanks to the parties for your submissions. We'll indicate that we will reserve our decision and issue it in due course.

ADJOURNED INDEFINITELY **[12.21 PM]**