



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT ASBURY
DEPUTY PRESIDENT COLMAN
DEPUTY PRESIDENT O'NEILL**

C2023/4482

s.604 - Appeal of decisions

**Appeal by Fihaki
(C2023/4482)**

Melbourne

10.02 AM, MONDAY, 18 SEPTEMBER 2023

PN1

VICE PRESIDENT ASBURY: Good morning, could we just start by taking the appearances, please. From the appellant? Mr Fihaki, you're representing yourself today?

PN2

MR H FIHAKI: Yes, that's right.

PN3

VICE PRESIDENT ASBURY: Thank you. I'm sorry, should I address you as 'Reverend'?

PN4

MR FIHAKI: No, Hedley is fine.

PN5

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

PN6

MR G WEAVER: Mr Grant Weaver.

PN7

MR M HINTON: And Malcolm Hinton, general counsel for the Queensland Synod of the Uniting Church of Australia.

PN8

VICE PRESIDENT ASBURY: Thank you, (indistinct words).

PN9

Mr Fihaki, would you like to speak to your application seeking permission to appeal, and your merits case, thank you.

PN10

MR FIHAKI: Yes, thank you, Commissioner. As I have already stated in my submissions, I think there are some significant errors of fact and I think I've highlighted eight of them. I'm not sure if – were you wanting me just to go through each of the dot points or - - -

PN11

VICE PRESIDENT ASBURY: You can assume we've read them but if - - -

PN12

MR FIHAKI: Okay.

PN13

VICE PRESIDENT ASBURY: You'd like to speak to them and outline anything. And are these the ones that were – this is your second submission that was sent on 22 August to the chambers of Justice Hatcher?

PN14

MR FIHAKI: Yes, that's right, yes.

PN15

VICE PRESIDENT ASBURY: Thank you.

PN16

MR FIHAKI: I guess in general terms, if I may just give a layout of what I think the issues are, I think the previous Commissioner has put ministers into, kind of a different category of being of a spiritual or a covenantor nature, suggesting – or assuming that we are in a religious category that is kind of to be understood or to be interpreted differently to all other employees or all other workers in our community or, you know, society as a whole.

PN17

I guess from the tradition from which the Uniting Church comes from, which is the reform tradition, we reject the notion that you can drive a wedge between the religious and the secular. Our denomination or, sorry, the denomination that the Uniting Church belongs to rejects the very premise that there can be two realities or two spheres, one secular and one religious.

PN18

And that's why in terms of the underlying assumptions behind the category that I've been put under, I'm just saying from the Uniting Church perspective we reject that whole notion that we should be separated into a religious category, that we ourselves don't understand ourselves in that particular way. We are all human beings, we all work and we are not wanting to be defined as a religious category.

PN19

We want to be defined as a worker like all other workers. So, that's – I guess, that's the first flaw, I guess, in the assumptions that are brought into this whole religious category in which I'm put and other religious workers, in that we kind of reject the whole – it just rejects the thinking or the philosophy that undergoes the separation of religion from the world. We don't see two realities. There is only one reality for us.

PN20

And so, if the Commission, for example wishes to define us in spiritual and religious terms then she needs to define exactly what 'spiritual' and what 'covenantor' means, which she doesn't under the previous decision. You can't just say that we belong to a religious category of being spiritual and covenantal without, herself, defining what that is and what the measuring stick is to defining that.

PN21

So, I guess that's the significant flaw, I guess I see in the whole premise of myself and all religious workers being put in this category when our own denomination and the tradition which we come from rejects such an understanding.

PN22

And I have tried to highlight that in the previous case but I'm not sure that it was kind of understood.

PN23

So, the fact that we're debating whether we're an employee or not, and the case being made that I'm not an employee on religious grounds, i.e., spiritual and covenantal, I'm just saying that – I mean, we ourselves, as the Uniting Church, I mean, well, the former – we reject that whole, you know, philosophical notion. We are not to be understood in religious terms.

PN24

There is only one reality. So, that's why I find it hard to engage, I guess, in a philosophy that's not – I mean, we kind of have to have that debate first, if you know what I'm saying, before you can put us into a religious category.

PN25

VICE PRESIDENT ASBURY: So, essentially you're saying that because the church's philosophy is that there's no distinction between religious and secular - - -

PN26

MR FIHAKI: Yes.

PN27

VICE PRESIDENT ASBURY: That a decision about whether you're an employee or not, should follow that philosophy?

PN28

MR FIHAKI: Yes, that's right. I mean, the Synod representatives are making the case that the case should not be heard because of religious grounds because we are defined as spiritual covenantal, but I'm saying the theology of the Uniting Church rejects that whole premise. We belong to the churches called reformed churches, as opposed for example, to the Lutheran tradition.

PN29

If you belonged to the Lutheran tradition, for example, they might have a case on those grounds but we're not Lutheran in tradition.

PN30

DEPUTY PRESIDENT COLMAN: But the Commissioner didn't conclude that all ministers were not employees, she just concluded that you weren't an employee.

PN31

MR FIHAKI: That's right, as a Uniting Church minister. So, the specific context is I was a Uniting Church minister, so you must understand where I come from is a Uniting Church minister and the tradition to which we've come.

PN32

VICE PRESIDENT ASBURY: Are there any other points you want to highlight?

PN33

MR FIHAKI: And I guess the other underlying point is my relationship as a minister to, I guess, the legal entity of the Uniting Church, which is the Uniting Church of Australia Property Trust Kew(?). There's been an argument made that there is no relationship between my calling and of the property trust.

PN34

The point that I'm trying to highlight is that you can't separate the property trust from the Queensland Synod. The United Church Australia Property Trust trades as the Uniting Church Queensland Synod and our policy as a Uniting Church requires that you understand all the different parts as one. We are an inter conciliate church and that's one of the significant and unique understandings about the Uniting Church, that we are an inter conciliate church. You cannot understand one part from the other.

PN35

Hence why I find it difficult to understand the rationale of why there is an attempt to drive a wedge between the property trust and the Queensland Synod, and the presbytery and the Synod and the assembly. It is one entity and that's kind of highlighted in the UCA Act of 1977. The property trust and the Uniting Church, in a sense, is part of the one act, not two separate entities, but just one.

PN36

So, I'm employed by the Uniting Church in Australia which came into existence by a particular act. So, I don't think it's right, or it's unnatural to try and drive a wedge between the property trust and the Synod, and the assembly. We are one entity.

PN37

DEPUTY PRESIDENT COLMAN: Mr Fihaki - - -

PN38

MR FIHAKI: Yes.

PN39

DEPUTY PRESIDENT COLMAN: The act, the 1977 act, you've established is the property trust. It doesn't establish the church. It allows the church to come together, I think it says at one point but what it establishes as an entity is the trust.

PN40

MR FIHAKI: I think before that, it says the trust is the second part, isn't it? And then in the first part it does refer to the Uniting Church. Those two are included in the act. It's not just the trust. The trust comes in later one, but the first part that the act allows is the inauguration of the Uniting Church, is kind of my reading of that.

PN41

DEPUTY PRESIDENT COLMAN: Section 6 say, 'The Uniting Churches are hereby empowered to unite in accordance with the basis of union.' And so you're right, it does refer to the church but it doesn't create the church, the Uniting Church, I think.

PN42

MR FIHAKI: Yes, I'm saying the Uniting Church would not have come into existence without that act.

PN43

DEPUTY PRESIDENT COLMAN: Pardon me?

PN44

MR FIHAKI: The Uniting Church would not have come into existence without that act. And I'm saying there's a – the Uniting Church chose to come into existence via an act, so that's a deliberate – I mean, there's arguments regarding the intention to make legal contracts. I'm saying the Uniting Church was very intentional in choosing to come into existence via an act of parliament because it highlights what I've tried to say at the start, that we don't see a split between the religious and the secular. It's just one reality for us.

PN45

So, the Uniting Church, as a church, together a (indistinct) would not have come into existence without that act. It is a strategic and intentional way the Uniting Church chose to come into existence.

PN46

DEPUTY PRESIDENT COLMAN: So, can I just check my understanding of your contention in the appeal, you say that you were employed by the trust but effectively the trust and the church should be considered to be the one entity. Is that right, or - - -

PN47

MR FIHAKI: Yes - - -

PN48

DEPUTY PRESIDENT COLMAN: Is that your - - -

PN49

MR FIHAKI: That's right.

PN50

DEPUTY PRESIDENT COLMAN: Yes, so you say it doesn't matter whether you were employed by the trust, or that – you dispute the distinction between the trust and the church, is that right?

PN51

MR FIHAKI: Yes, I'm saying that it's one entity. If you read carefully, the act, that's what my understanding is.

PN52

DEPUTY PRESIDENT COLMAN: Thank you. Did you have any other points?

PN53

MR FIHAKI: I guess that's the two significant underlying points that under-gird the eight points that I've highlighted then.

PN54

DEPUTY PRESIDENT COLMAN: We have, of course, read your materials.

PN55

MR FIHAKI: Yes, that's right. So, I guess that – well, I can take that as read then but I'd have to go through individual points. But I think that there's significant errors. For example, if we go onto the first one I think there's a point that's been made by Uniting Church that the context determines kind of what the sentence means, but I'm – my first point I'm saying, it doesn't matter of the context, it doesn't change the sentence structure. The sentence remains the same irrespective of the context.

PN56

VICE PRESIDENT ASBURY: Sorry, which sentence is that?

PN57

MR FIHAKI: Sorry, I'm referring to my first point, fact 1.

PN58

VICE PRESIDENT ASBURY: Yes.

PN59

MR FIHAKI: Where the previous commissioner says there was no evidence of a relationship between the property trust and the applicant, other than the administrative payments made. I mean, that's a specific sentence that has a very specific meaning, irrespective of the context, as such.

PN60

I'm just saying that that's not true because I have submitted other pieces of evidence but the Commissioner has already simply said that there's only one pieces of evidence, and to suggest that there is no evidence, I'm just saying I think that – that's not – it's kind of misleading in the way that it's framed.

PN61

VICE PRESIDENT ASBURY: What were the other pieces of evidence besides the Jobkeeper documentation and the payslips that you say you submitted, Mr Fihaki that evidence employment?

PN62

MR FIHAKI: I guess I'm saying that's two pieces of evidence, the ones – the payslip, that's one; the other one was the Jobkeeper one, that's two; and three was – the other one was in regards to the signature of the Queensland Synod on my placements, one of my placements letter. So, there are three pieces of evidence but the Commissioner's statements are suggesting there's only one.

PN63

VICE PRESIDENT ASBURY: Yes.

PN64

MR FIHAKI: So, it's a false statement, however you look at it. And also, you know, the other obvious one is the suggestion that there were complaints made by my congregation. Now that was put out by the media highlighting that the congregation was the one that made the complaints against me, and my congregation were very disappointed and offended at the way that the case has

been presented that it was them, when they knew that they did not submit any complaints against me.

PN65

But yet, the decision came out in the media highlighting that fact that the Commissioner said that the complaints came from the congregation. But again, that's a significant error of fact which has led to the way it has been portrayed by the media and which has offended many members of my congregation because they knew that they absolutely did not submit any complaints against me.

PN66

So, the whole way that it's been framed is wrong. It has created anxiety and offence to members of my congregation. And the respondent is trying to say that these are not significant errors. They're significant because people are offended by the wrong suggestion that they had submitted complaints against their minister, which they did not.

PN67

Not one complaint out of the 310 complaints made by the Synod standing committee, not one complaint came from the congregation, but it has come out into the public domain that the complaints have come from the congregation and that's wrong. And that's why they're matters of significant public interest because it involves not just me but it involves the congregation.

PN68

And there is a direct link between my sacking, I guess, and the dissolution of our congregation. And we were not the first. And there was a congregation that was dissolved and it is made reference to, one year before us, the Sunnybank Uniting Church and their minister also had his recognition removed. Their congregation was dissolved. My recognition was removed, my placement was terminated.

PN69

And our congregation, too, was dissolved, the whole congregation of over a hundred people, over this particular issue. And so to suggest that it has no public relevance, I think that's wrong. If the decisions of the Uniting Church are made in regards to my employment is directly related to the decision that they then went on to do, and that is dissolve a congregation over the same issues which is - and I think it's (indistinct), the issue at stake is same sex marriage.

PN70

It's on that specific issue that they have issues with me, and why my congregation was dissolved. And in the Commissioner's finding she kind of summarises the debate by saying that on the material I had publicly departed from and significantly recanted the teachings of the Uniting Church 'in his statement to the media.'

PN71

It has always been my contention and I had never, as the Uniting Church minister for nearly 22 years - I understand very clearly my ordination vows, I understand very clearly what the church believes as I've been teaching this over 20 years. I

have not – never departed nor recanted from the Uniting Church's doctrines on the issue of marriage.

PN72

And so, the Commissioner has made that statement without qualifying exactly what teachings that I have recanted. She has used the word, 'significantly recanted the teachings of the Uniting Church,' without highlighting how she has come to that particular conclusion. You know, how significantly have I recanted? And what's her measuring stick for making such a comment?

PN73

So, I'm saying, to go ahead and to make that – and I think I go back to the point where I think the respondents have highlighted that it's not an error of fact but an error of law and I think it's right in terms of – actually, it's kind of already prejudiced my case by saying that when we – we've never debated the matter regarding the reasons.

PN74

But she summarised it in that way and that is significantly flawed because I've never departed. It's always been my line, I've never departed. I know very well what I teach and what I preach because that's my job. I do it every week and I'm very clear that I am to teach from the scriptures and I'm to teach from the Uniting Church's basis of union as the boundaries of what I'm to teach and preach.

PN75

So, I have been unfairly dismissed based on that premise as highlighted by the Commissioner that I had significantly recanted, and I mean these are all religious words, recanted the teachings of the Uniting Church, when she herself did not even tell us what I recanted.

PN76

DEPUTY PRESIDENT COLMAN: Mr Fihaki m, I'm sorry to interrupt you but really your appeal is concerned with the question of whether or not you were an employee. You think that the Commissioner concluded that you were not an employee, and that's what you challenge in this appeal.

PN77

MR FIHAKI: This - - -

PN78

DEPUTY PRESIDENT COLMAN: I know the Commissioner went on to make some observations about a valid reason and you strongly disagree with those, but that's really not the focus of the appeal because that's not a decision that she made, they're just some observations. Her decision was that you were not an employee, and that's what you're challenging in this appeal.

PN79

MR FIHAKI: Yes. Thank you. And so, she's making the argument that I'm not an employee because I should, and other ministers should be put into a new category of spiritual and covenantal. That's her decision. That's one employee who knew, because as ministers we belong to a different category of religious – of

a religious nature specifically saying that our work is of a spiritual and a covenantal, and she hasn't even defined what that means.

PN80

And I'm saying, in terms of the tradition at which we belong we do not see a division between the spiritual and the secular. And does the Commissioner have the right to define our job as being spiritual and covenantal when she hasn't defined, herself, what that means? The assumption is that that can't be measured somehow, you know.

PN81

The suggestion is that by default, just because our work is spiritual and covenantal in nature that it's somehow not worked. I think that's the part where I – it's hard to fathom why a non-religious body would make a religious determination about the nature of my work without defining it as such.

PN82

VICE PRESIDENT ASBURY: Mr Fihaki, it's not that the Commissioner – isn't the argument that it's not that the Commissioner made a decision about whether or not what you were doing was or was not work, rather the decision is whether you were doing that work as an employee?

PN83

MR FIHAKI: Yes, but I just – she stated there that we are to be treated in this particular category, I think that's the word, that that's the category that we belong in and I'm rejecting, I guess, that premise that we should be put into that category.

PN84

VICE PRESIDENT ASBURY: But I don't understand the Commissioner to be saying that what you do is not work, it's that you don't do it as an employee.

PN85

MR FIHAKI: Yes, and I guess that goes down to the issue of control. So, one of the arguments that they have used for that is that I'm not an employee, for example, and the argument is – hence why they use the word, stipend, for example, that there's no control over my work in term of the hours, in terms of the specific duties and responsibilities.

PN86

It all flows on from that assumption, that because it's religious in nature, it can't be specifically measured in practical terms.

PN87

VICE PRESIDENT ASBURY: Yes, thank you. Are there any other points you want to clarify?

PN88

MR FIHAKI: Maybe just a little bit of understanding regarding the process of what we're doing here at the moment. Am I just simply putting forward my case, or will you be providing feedback on the points that I have made, whether they are

significant points to be determined? I'm not quite sure what we're trying to do at the moment and what's the process.

PN89

VICE PRESIDENT ASBURY: You've put in a written submission - - -

PN90

MR FIHAKI: Yes.

PN91

VICE PRESIDENT ASBURY: As to why you should be granted permission to appeal and why your appeal should succeed.

PN92

MR FIHAKI: Yes.

PN93

VICE PRESIDENT ASBURY: And this is your opportunity to speak to that decision. We then hear from the respondent to speak to its submission, and you get a rely and then we reserve our decision and decide the matter on the basis of the written and oral submissions.

PN94

MR FIHAKI: Okay.

PN95

DEPUTY PRESIDENT COLMAN: I mean, you mentioned, Mr Fihaki, you mentioned before that you did understand that these materials are taken as read, and indeed we have read everything - - -

PN96

MR FIHAKI: Yes.

PN97

DEPUTY PRESIDENT COLMAN: So, you shouldn't feel that you have to cover something orally in order for it to count, so to speak. But if there's anything you want to emphasise you can do so.

PN98

MR FIHAKI: Yes, that's probably all, I guess, I'd like to emphasise and I wouldn't mind then after the respondents have responded to those points that I've made, then respond to their response if that's kind of the process. Is that fair? Or do you want all my points and then they respond?

PN99

VICE PRESIDENT ASBURY: Given that you've received their written submissions you can say – if you want to say something in response to their written submissions you can say it now, and then if they add anything orally you can respond to that, would that be easier?

PN100

MR FIHAKI: Yes. For example, in terms of their response to my point 8, for example, the error of fact number 8, I don't think they have put forth a rebuttal at all regarding the issue of control. So, I wouldn't mind hearing a response on that but it's just the very one sentence. They're just saying there's no evidence of error but haven't responded at all to the principle of control.

PN101

And I've highlighted that in fact the Uniting Church has a significant control in the manner in which I do my work and they haven't responded at all to that. They have acknowledged an error on their own part in terms of understanding the fund and I think they've highlighted that. In error fact number 7 they've made an error in interpreting that but they're arguing that it's not a significant error, simply to say it still is an error.

PN102

In regards to the error of fact – sorry, I'm just working backwards in terms of error of fact number 7, I mean that there's a statement earlier made that the property trust has no – so, the argument was made that all the costs are made by the congregation. And I did make a submission that not all the costs are made by the congregation, some of them are made by the property trust regarding the relocation costs.

PN103

And error fact number 4, I think the respondent is kind of saying that they don't quite understand that particular point, so I'm trying to connect, for example, my calling to the Synod, Queensland Synod, error of fact number 4, I think, that the signature on my letter of call – I'm trying to establish the link between the call, my calling as a minister and the property trust trading as the Queensland Synod.

PN104

In terms of the way the Uniting Church is structured, the general secretary of the Queensland Synod has responsibility for placements, hence why the signature of the general secretary must always represents that the general secretary must sign off on the letter of call. Hence why there is a signature there from the placements committee.

PN105

And it is important to note that that's the Queensland Synod placements committee. They have to sign the letter because – and I'm referring to the Synod office and reporting structure that placements come under the role of the general secretary. So, the general secretary or a representative of the general secretary must sign off on my letter of call, and that's part of the evidence that I had submitted.

PN106

But in the respondent's submissions it seems like they haven't quite grasped the meaning of that. And I highlighted some regulations saying that a placement arises from the Queensland Synod's placements committee. A placement can't arise outside that particular context, so I mean to say the Queensland Synod placement committee is the committee that determines the candidates for a particular placement.

PN107

So, the Queensland Synod, I guess, can't try and isolate or separate themselves from the call process. They can't just say it's just the presbytery and the congregation that is involved in my placement when the general secretary must sign off on that because she has the overarching responsibility for placements. Hence why the placement committee – it's the Queensland Synod placement committee that has to sign off on that.

PN108

If I'm not treated as an employee then there'd be no legal requirement for the general secretary to sign off on that, but she did sign off on my letter of calling, so the acceptance on that. So, I think that's a significant point, as well, that hasn't come through on the respondent's response. And I'm happy just to leave it there for now.

PN109

VICE PRESIDENT ASBURY: Thank you.

PN110

MR FIHAKI: I'm sorry, that's a different (indistinct) I've got there.

PN111

VICE PRESIDENT ASBURY: Thank you. Are you ready to speak to your submissions? Is it Mr Weaver who is going to do that?

PN112

MR HINTON: If it please the Full Bench, we might actually take turns, that are deciding (indistinct) who might address what particular issue and hopefully that causes no inconvenience.

PN113

VICE PRESIDENT ASBURY: Okay.

PN114

MR HINTON: In relation to the first point of the Full Bench the decision, the original decision, if I take up Dr Fihaki's first point which is the categorisation and the issues he has with the Commission's decision as to how the relationship is categorised, I think the simple point to be made is that the issue before the Commission was simply that, whether or not Dr Fihaki was a common law employee or an employee within the meaning of the act.

PN115

And that simply required the Commission to attempt to identify the true legal nature of the relationship that existed between Dr Fihaki and the employer, the property trust, and in that regard the respondent's position is that the essential issue is that the finding brought both factually and legally is correct in that Dr Fihaki is not a common law employee of the respondent, and if one takes that even further, and the church or any of the entities of the church.

PN116

In relation to the church's philosophy with regards to there being no two separate spheres or no distinction between the religious and the secular, I think that just indicates, with all due respect to Dr Fihaki, a misunderstanding of the Commission's decision at first instance which was simply of having to determine what is the nature of the relationship between Dr Fihaki and the putative employer.

PN117

And in context, it is actually consistent with other decisions in relation to the - if one wants to call it a categorisation of the relationship. It doesn't inherently say or imply that there's a distinction between the spiritual and the religious and the secular world, it's simply attempting to describe the nature of the relationship.

PN118

In relation to the submissions concerning whether there is just one entity, as I understand, Dr Fihaki's position it is that the church and the property trust is all simply one entity, one legal entity. In that regard the respondent's position is simply that in fact that's not the case, legally.

PN119

The Uniting Church of Australia Act of 1977 by section 6 authorised or empowered, to use the words of the statute – the various Uniting Churches to unite in accordance with the basis of union. It did not actually create the Uniting Church in Australia.

PN120

As a matter of fact, we do agree that the nature of the church is an inter-conciliatory body. It's literally made up of hundreds, if not thousands, of unincorporated associations, and that the Act of Parliament was necessary to create a legal vehicle through which the various bodies of the church could operate in the secular world. Hence the creation of the property trust with very specific responsibilities and functions in relation to the (indistinct), if I could call it, property and the trust properties.

PN121

The creation of the property trust was dealt with in sections 11 and 12 of the Act; membership in section 13 through to 18; and the functions dealt with, in particular at section 23 of the Act.

PN122

So, in short it should be legally correct to say that the (indistinct words) is in fact just the property trust under the church regulations and the assembly is a council of the church, the same as a Synod, the same as a presbytery and the same as congregations, they are all simply councils. Each obviously has their own area of responsibility, powers and functions. So, it is not a hierarchal structure as such and as I said, the property trust was created to provide the legal vehicle through which those various entities can operate in the secular world.

PN123

In relation to payslips and the Jobkeeper and the signature on the placements letter, the respondent has addressed each of those in relation to the alleged error of

fact number one. It is with interest to note that if one, for example, looked at the Jobkeeper legislation, and this is apparent on the face of the record that states to qualify as such the previous practitioner could not be an employee of the institution to qualify for that payment under the extended provisions that were put in place were put into force. Once again, that's addressed in the respondent's submissions.

PN124

In relation to (indistinct) example the signature on the placements letter, once again the respondent's position is in relation to that, what's evidenced on the basis of the record is the fact that the property trust, the respondent, is not a signatory to that letter, and – sorry, yes - - -

PN125

VICE PRESIDENT ASBURY: Yes?

PN126

MR WEAVER: If it pleases the Full Bench, in particular to that letter there it certainly has a number of signatures on that letter of call, including the secretary of the placements committee. The placements committee is actually formed under the regulations of the church and it is a body that has a number of functions, but apart from the actual signatures on the letter there's a whole process that sits behind that before that actual letter is issued.

PN127

The letter is – one of the signatories is the secretary of the placements committee which is the general secretary or their delegate. In fact, the current secretary of the placements committee currently is not the general secretary. But in our regulations of the church, regulation 266 – 266(m) describes the process that actually happens within the church before the actual letter is issued.

PN128

So, there's actually a process in there where there's a recommendation that the joint nominating committee, which is the committee that discerns whether a person will be issued with a call, it has to get approval of the presbytery. It also has to get approval of the actual congregation, so there's actually a recommendation at the meeting of the congregation to verify that they are comfortable for that person to be issued the call.

PN129

There's actually a meeting of the presbytery that also is a recommendation that the call be issued, and then those approvals then go to the placements committee for them to actually issue the call. So, again in that particular process the mere fact that there's letters on that particular letter – if the congregation does not agree with that person being issued with the call, or if the presbytery does not agree that that person be issued as the call, then the call is not issued, irrespective of what the placements committee believes.

PN130

So, again, that's why there's a number of signatures that appear on the letter of call because it reflects the process involved in getting various councils of the church's approval for the for the call to be issued.

PN131

MR HINTON: If it please the Bench, in relation to Dr Fihaki's error of facts number five, which is there being no complaint by the congregation, obviously the respondent relies upon the written submission. And it does not change the reality that it is totally immaterial as to who the complainant actually was, because that has no direct bearing upon the question of the nature of the relationship between Dr Fihaki and the stated employer.

PN132

It concerns more a subsequent issue. Plus on the basis of the record it's clear that at 119 of the original decision that in fact Commissioner Spencer identifies that the complaint was from the general secretary. So, the respondent simply repeats and relies upon its written submissions in that regard.

PN133

In relation to the submissions concerning the dissolution of the congregation, and I'll talk the Mooloolaba congregation that Dr Fihaki is referring to, and the dissolution of the Sunnybank congregation and the recognition of the minister for the Sunnybank congregation's recognition being withdrawn, the respondent's position is simply they are all irrelevant to a determination of the issue which is what is the key nature of the relationship between the respondent and the putative employer.

PN134

There's also then Dr Fihaki's submissions concerning the outcome of the disciplinary proceedings and Commissioner Spencer's comments in relation to that aspect, and I think it's correctly identified previously. Once again, it's not relevant to the issue for determination in this appeal.

PN135

In response to Dr Fihaki's submissions that the respondent has not responded at all to error of fact number eight, the respondent is simply repeating it relies on its submissions. The respondent's submission remains as outlined in those submissions which have been addressed, and I don't think there's anything more useful that could be added to that.

PN136

That would be the extent of the respondent's submissions in reply to Dr Fihaki's oral submissions today. Thank you.

PN137

VICE PRESIDENT ASBURY: Thanks. Mr Fihaki, do you have anything you'd like to say in response to the oral submissions?

PN138

MR FIHAKI: Yes, maybe just to comment – I think the argument has been made that the issues regarding the termination of my placement and the removal of my

recognition is not tied to the question of me being an employee. I think one of the things that I had to satisfy was whether this was of public interest or not.

PN139

See, one of the points, for example, of the respondent's submission is that the decision at first instance, for example, does not manifest an injustice. So, I'm taking it that I have to prove somehow that there is a significant injustice in this case to warrant it being of significant public interest, I guess.

PN140

And I'm saying the specific issue at stake is – what I'm trying to highlight is that there is a significant injustice in what the Uniting Church has done in terms of a significant matter of principle regarding same sex marriage because that – I think it is important to understand that's the context. This is what the debate is over and this debate is continually raging within the public domain.

PN141

So, it is of significant public interest regarding what the church does to ministers who do not accept matters such as same sex marriage, which I'm saying is of public interest because there is a significant injustice regarding significant matters of principle, such as, can a minister or anyone reject same sex marriage as being incompatible with the church's own teachings.

PN142

But it seems to be from the respondent's submission that there's no manifest matters of injustice that's been highlighted, but I'm saying there is injustice. And the injustice is to say that I'm not an employee based on legal rights and therefore we shouldn't tackle this matter. But I'm saying we should tackle this matter and should not allow a secondary matter regarding whether I'm an employee or not, to prevent us from tackling the issue of injustice. I'm not sure I've articulated that well.

PN143

If the Commissioner can say, for example, that should I be classified as an employee then she thinks there is grounds that warrant my dismissal, if she can make a comment like that then in terms of natural justice we should have debated that matter first before discussing the employee issue. Does that make sense?

PN144

VICE PRESIDENT ASBURY: I understand your submission but the respondent's response to that is that it was really comments that the Commissioner made that do not determine whether or not your relationship was one of an employee or not. And distressing as those comments may be to you, they were not determinative of the main issue, which is whether or not you are an employee.

PN145

MR FIHAKI: Yes, and again, I think the significant point of view that needs to be highlighted is that we have been categorised as spiritual and covenantal, and I think the church's own theology rejects that premise. And the number of - - -

PN146

VICE PRESIDENT ASBURY: I understand that, yes. And you also say, as I understand it, that a mechanism of control is controlling what you can or cannot say. I understand that submission but the issue is whether the observations of the Commissioner in relation to the reason for your removal from your ministry are relevant to the issue of whether or not you were an employee.

PN147

MR FIHAKI: Yes. Yes, I guess what I'm troubling with is because Fair Work Australia is there for those who believe they've been unfairly dismissed. And so, I think my understanding is Fair Work should determine whether I am being unfairly dismissed or not.

PN148

VICE PRESIDENT ASBURY: Well, the issue - - -

PN149

MR FIHAKI: And to suggest - - -

PN150

VICE PRESIDENT ASBURY: Sorry to interrupt you but the issue is Fair Work first has to determine whether you are an employee or not, because if you are not an employee then you cannot be dismissed unfairly or otherwise.

PN151

MR FIHAKI: Yes.

PN152

VICE PRESIDENT ASBURY: That's really the issue.

PN153

MR FIHAKI: And then my problem then is that the categorisation of my work as a religious practitioner, specifically spiritual and covenantal, I think that is not correct based on our own understanding of that. For example, Mr Hinton, a couple of times referred to the fact that the Uniting Church was set up in this way so that we can operate in the secular world. He said that a couple of times in his statement.

PN154

But we didn't set ourselves up in that way so that we can operate in the secular world. We set ourselves up because we knew and understood we can only be operating in the world – there's no – what is the alternative to a secular world that Mr Hinton is referring to? See, there is no two categories. So, the Uniting Church was set up to operate like all other businesses, like all other organisations.

PN155

The inclusion of the word, 'secular', in his comments highlights the significant flaw in the foundation in which they're coming from. He should not have added the word, 'secular', because we didn't intentionally set up in this way so that we can operate in the secular sphere, no, no. Every organisation has to set up in this way so that it can operate legally, if you know what I'm saying.

PN156

To highlight 'secular', Mr Hinton has already created a division which is unnatural. And, I guess, that's the point I'm struggling with to understand because that's never been my understanding of the way the Uniting Church is set up. We didn't just set up the property trust so that you can operate in the secular world, no, no. There is only one reality. We set up like all other operations, just so we can operate legally in the world. And so, to make the suggestion that we should be categorised in spiritual term, that in my understanding is the point that I'm not sure that respectfully, you've got.

PN157

VICE PRESIDENT ASBURY: We understand your submission, thank you.

PN158

MR FIHAKI: Thank you.

PN159

VICE PRESIDENT ASBURY: Is there anything else you wanted to add?

PN160

MR FIHAKI: Yes, and the other thing is regarding the property trust. I submitted a document, 'Policy statement of Queensland Synod use of church property for purposes related to same gender marriages.' What that policy statement is highlighting is what I'm, I guess, trying to articulate again, that there is a direct relationship between what we believe and the property trust and how we use our property.

PN161

Hence why you can't drive a edge naturally between the property trust and a minister's calling of what he teaches and what he preaches. What we believe in terms of same sex marriage directly relates to how we use our property. So, we have every right to reject the use of property based on what it is that we believe. What I'm trying to say is, I guess, that there is a direct link to the minister's calling and the property trust, because we as congregations, are the beneficial owners of the property.

PN162

Our property is simply held in the property trust for the use of the congregation and no other entity, so I just want to, I guess, highlight that important link, that the property trust is directly linked to my calling and what it is I preach and teach, and how the congregation and myself lead that out practically in the world. That's probably the only other point I wished to highlight. The policy statement on the relationship between same sex marriage and the use of property.

PN163

VICE PRESIDENT ASBURY: And that document is in the materials before the commission?

PN164

MR FIHAKI: Yes, Yes, that's right.

PN165

VICE PRESIDENT ASBURY: Thank you. All right, thank you for your submissions. We'll indicate that we will reserve our decision. Thank you, we'll adjourn.

ADJOURNED INDEFINITELY

[10.56 AM]