



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT BELL
DEPUTY PRESIDENT HAMPTON**

C2023/8115

s.604 - Appeal of decisions

**Appeal by Aboud
(C2023/8115)**

Melbourne

2.05 PM, TUESDAY, 12 MARCH 2024

PN1

DEPUTY PRESIDENT GOSTENCNIK: Good afternoon, Mr Nyamirandu. You're appearing or seeking permission to appear for the appellant?

PN2

MR D NYAMIRANDU: I do, indeed, seek leave to appear for Mr Aboud.

PN3

DEPUTY PRESIDENT GOSTENCNIK: It might be easier if you just remain seated for the duration of the hearing.

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MR NYAMIRANDU: Thank you, your Honour.

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DEPUTY PRESIDENT GOSTENCNIK: Every time you stand up your head will disappear and it's probably not a good thing, but thank you.

PN6

MR NYAMIRANDU: Thank you.

PN7

DEPUTY PRESIDENT GOSTENCNIK: Mr Greig, similarly, you're seeking permission to appear for the respondent?

PN8

MR R GREIG: Yes, Deputy President, we do.

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DEPUTY PRESIDENT GOSTENCNIK: Permission to be represented is not opposed in either case?

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MR NYAMIRANDU: Not opposed, your Honour.

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DEPUTY PRESIDENT GOSTENCNIK: Thank you. We're satisfied, taking into account the complexity of the matter, that the matter will be dealt with more efficiently if we were to grant permission to the parties to be represented by lawyers, and we do so in each case.

PN12

Now, Mr Nyamirandu and Mr Greig, we have had the opportunity of reading your submissions so this afternoon is an opportunity to elaborate and perhaps explain aspects of your submissions, rather than recite them. But before we get to that, I just want to raise with the parties some documents that I caused to be sent to each of you earlier today.

PN13

You will have received an email from my Chambers attaching two pieces of email correspondence, each of which attaches an application to the Commission, a form F8, but in different states of completion. Now, parts of each of the documents are in the appeal book but both documents, a complete set, are not in the appeal book.

PN14

The reason I have caused these matters to be sent, or raised at this stage, arises from the appellant's submissions, particularly at paragraph 10 and footnote 2. Now, Mr Nyamirandu, as I understand the propositions that are being advanced there, it's being suggested, is it not, that, along with the general protections application that your client filed some time ago, at or about the same time he also filed or attempted to file an unfair dismissal application?

PN15

MR NYAMIRANDU: Yes, your Honour.

PN16

DEPUTY PRESIDENT GOSTENCNIK: And for that proposition the appellant relies on what is said by him, in his witness statement below, which can be found, just bear with me for a moment, relevantly at page 52 of the appeal book and paragraph 40 therefore, at which the appellant says that, 'On 11 November 2023 I filled what details I could, on both the F2 and form F8 -' et cetera.

PN17

Then he refers to email correspondence, which is found later in the appeal book, at page 75, wherein we find correspondence from the Perth registry of the Commission, responding to an email which subject matter is titled 'Email 2 of two application forms'. You'll see, below that, is the text of the email from the appellant, to which this email from the Commission is responding. Behind that you'll see there's an application form, invoking the Commission's general protections dismissal related dispute jurisdiction.

PN18

Now, turning to the two documents that I sent to you, earlier today, you will see that the text of the emails is the same and it corresponds with that which can be found at the bottom of page 75 of the appeal book, but the dates and the annexures are not the same. So the email sent first in time is that dated 11 November 2022, sent at 1.11 pm, it's subject matter is titled, 'WA application forms' and there is an attachment, 'Fair Work.pdf', and that document is a form F8. You will see that that document corresponds with the document that is found at page 81 - sorry, I'll say that again - page 76 through to page 83 of, or 84, sorry, of the appeal book.

PN19

The document that's sent second in time is an email sent on 12 November 2022, sent at 12.59 pm. It's subject matter byline is different, it's 'Email 2 of two application forms', which appears to be the email to which the Commission is responding and it attaches a document which is titled, 'Rare Work 1.pdf' and you'll see there is also attached a form F8, but this one is more thoroughly completed, in the sense that it provides an answer to the question that is found at 3.1 as well as identifying, at 3.2, the various provisions of the Act, which are said to have been contravened by reason of the dismissal or enacting the dismissal.

PN20

Now, we produce those documents to the parties without the Commission forming any view about them, but I examined the file of the Commission, after reading the appellant's submissions and the evidence below, just to get to the bottom of whether or not two applications were, in fact, lodged, because it wasn't clear, on the face of the material in the appeal book, that two applications were lodged. There was only one email and only one attachment, but that is what's on the file. The parties can make of it what they will, but I thought it was prudent to bring those matters to the attention of the parties. You can make some submissions about those, in due course, and, for present purposes, that's all I want to say about those matters. So, Mr Nyamirandu, you can proceed.

PN21

MR NYAMIRANDU: Thank you, your Honours.

PN22

As a matter of interest, your Honours, I'm appearing before three people. I don't have the names, I only have one. Are the other members, just for my own record here.

PN23

DEPUTY PRESIDENT GOSTENCNIK: On my left, which will be, presumably, as you're facing, on your right, is Deputy President Hampton, and on my right, presumably as you're facing, on your left, is Deputy President Bell and my name is Deputy President Gostencnik, or at least that's my title and surname.

PN24

MR NYAMIRANDU: Thank you very much, your Honour.

PN25

DEPUTY PRESIDENT GOSTENCNIK: That's all right. Please proceed.

PN26

MR NYAMIRANDU: Now, with regard to the issue your Honour's just raised, on page 75 of the appeal book, you referred to that email there.

PN27

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN28

MR NYAMIRANDU: I notice, on the bottom of it, that it says, and this is a message from the applicant then, now the appellant:

PN29

Hi, please find the forms I've filled. If there's any mistake please I would like to make an appointment because English is not my second language. Looking forward to hear from you.

PN30

Does your Honour - has your Honour - does that answer your Honour's concern?

PN31

DEPUTY PRESIDENT GOSTENCNIK: I don't have a particular concern about the content of the email. The reason I looked at the file was because of the submission that you make. As I understand, one of the submissions that you make is that the Deputy President below was in error because she concluded that it was not in contest that the application, the unfair dismissal application was filed late. And, as I understand, one of the submissions that is made on appeal, and below, is that the unfair dismissal application wasn't late that, in fact, together, at or about the time that the appellant filed his general protections dispute application, he also filed an unfair dismissal application, and that's what the appellant's evidence was below, at paragraph 40 of his witness statement.

PN32

So I went to search the Commission's file, to see whether I could find a second application and this is what I found. So I'm just bringing it to your attention. What you make of it is a matter for you and the submissions you make this afternoon.

PN33

MR NYAMIRANDU: Thank you, your Honour.

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DEPUTY PRESIDENT GOSTENCNIK: Of course, feel free to disabuse me of any mistake that I've made in understanding that part of your submission, if I'm wrong.

PN35

MR NYAMIRANDU: No, your Honour is quite right. We assessed, or the appellant assessed that he did file or sent two forms; one F2, one F8, at the same time.

PN36

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN37

MR NYAMIRANDU: As he said, 'Please find the forms I have filled', 'forms' in plural.

PN38

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN39

MR NYAMIRANDU: Then what he got back was that, my instructions, he got back a message saying, 'We have accepted the form 8', and that was it.

PN40

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN41

MR NYAMIRANDU: He was happy with that, 'As long as I've filed something', that is it, 'And they have accepted something, a form, an application form'. Those are my instructions and that's the evidence from the - - -

PN42

DEPUTY PRESIDENT GOSTENCNIK: Yes, I understand.

PN43

MR NYAMIRANDU: Thank you.

PN44

Now, your Honours, if I may call you your Honours, I'm just used to that, I hope you don't mind. I don't want to traverse my oral submissions again, but I will make some points.

PN45

The first thing, that regarding the identification of significant errors of fact. We must point to significant errors of fact before anything else is considered by the Bench. Thereafter, of course, we have to justify the application for this appeal, of the grant of the appeal, the public interest issue.

PN46

So I'll start, if you'll allow me, with the identification, how we identified the significant errors of fact. This was based on the *House v The King* criteria, which the Bench is very familiar with and there that it must be shown that the decision maker acted on the wrong principle, has mistaken the facts, has taken into account irrelevant consideration, has failed to take into account irrelevant consideration or has made a decision which is unreasonable or manifestly unjust. Now, the often quoted passage for these principles is, of course, the locus classicus, *House v The King*, it is to that effect.

PN47

So they are the criteria which the applicant, or the appellant, has applied in identifying the significant errors of fact. It also effects the issue of discretion, which I shall come to later on, with your permission.

PN48

But first, there's, of course, the second stage is the public interest issue. There the considerations are in the locus classicus, *GlaxoSmithKline Australia Pty Ltd v Makin*. The question there, 'Does the matter raise issues of importance and general application?'. Now, in the outline of our submissions, we put forward that (1) yes, it does raise issues of importance and general application. Ground 2, that there's a manifest injustice, and ground 3 that the result itself is counterintuitive.

PN49

If I may expand now, on the public interest grounds, I have now - I would like to refer your Honours to the convention, International Labour Organisation Convention, which, in the main, determined a number of these matters which are included in the Fair Work Act. Australia ratified that convention, back in 1993. By Article 4, 'There must be a valid reason for termination'. By Article 7, 'The worker must be provided an opportunity to defend himself against an allegation of misconduct leading to his termination'. Article 8.1, 'A worker has a right to appeal against unfair dismissal', which is what he's doing here. And, of course, in Article 8.3, 'A worker may be deemed to have waived his right to

appeal if he doesn't exercise the right within a reasonable period of time after termination'.

PN50

Now, I mentioned these articles because of the use of the words 'rights' in the inferences in Article 8.1, he has a right to appeal.

PN51

Now, by Article 9.1, this Commission is empowered to examine the reasons for the termination and determine whether the termination was justified. By Article 9.2(a), 'The burden of proving the existence of a valid reason for the termination, as defined in Article 4 of this convention, shall rest on the employer', that's the burden should be shifted to the employer, for giving a valid reason.

PN52

Now, we will submit, therefore, that if that burden shifts to - for giving a valid reason, shifts to the employer, should its shift - so should the area to even notify the worker rest - the burden should also rest on the employer. Because for one to give a valid reason for the dismissal you must either, at the same time or before that, have actually admitted that you dismissed him. So the two go hand in hand.

PN53

So if there is, as we submit, the right, implied right, for the employer to give the worker a reason for the dismissal, it follows that there's also that burden to give the worker, at least inform him that you have dismissed him. That must be a right now. That's the submission there.

PN54

Of course, the International Labour Organisation is the body that governs, well, it doesn't govern, but that convention is followed by the Commission here and in, to a large degree, is enshrined in the Fair Work Act. So that when we talk about there must be a dismissal and it must be given a valid reason, it all stems from the International Labour Organisation, that convention, which is therefore the matter becomes a matter of not just local interest, it is international interest, a matter of great public interest, I would submit.

PN55

If it is the right of a worker to be informed that he has been dismissed, be informed of the dismissal and that right is enshrined in the convention, it becomes a matter of public interest, I would say.

PN56

Secondly, we say that this matter raises another issue, and that issue is what should happen when an employer simply terminates a worker's employment without informing the worker at all. Now, I've come across - I've read a number of cases, in this jurisdiction, as a result of this particular case, I haven't come across one where the employer hasn't been told about at all, but the employer still maintains, for some reason, as in this case, that it is quite in order, by the time he, the worker, decide, for some reason, some how, discovers that, well, he has been dismissed, it is then held to be laid, that application.

PN57

Secondly, if, under Article 9.2 of the convention I mentioned, 'The burden of proving the existence of a valid reason for the termination rests on the employer', does that burden of informing the worker of his rights equally rest on the employer? Shouldn't, therefore, the employer's failure to inform the worker of his termination be decisive in the assessment of exceptional circumstances in favour of the worker, not only for the grant of an extension of time, but also for any eventual switch from one type of application, for instance, the unfair dismissal application to a general protection application, or vice versa? We would submit this is another issue in which guidance from the Bench would clear up these questions, for the first time, we submit. These are issues of importance and of general application.

PN58

Now, if I may, with your permission, generally speak about the significant errors of fact?

PN59

DEPUTY PRESIDENT GOSTENCNIK: Yes, go ahead.

PN60

MR NYAMIRANDU: We identified quite a number in the outline of our submissions. We stand by them. They were identified on the basis on *House v The King* principles. They were very instrumental, if not mostly wholly instrumental in the decision not to grant the appellant the extension of time.

PN61

But I may also comment on some of the responses, in the respondent's outline of submissions. Paragraph 4 of the respondent's outline of submissions, the respondent cites the case of *Fox v Percy* as authority, that's in footnote 4 or paragraph 4 of the respondent's outline of submissions. We say that that authority has been misapplied. In fact, it's not relevant to this case at all.

PN62

That decision related to questions of credibility and credit, where a witness gives evidence, in court, which is not what happened in this case. There are no issues of credibility, therefore, *Fox v Percy* does not stand for the proposition, in paragraph 4 of the respondent's outline of submissions, which therefore leaves the Commission free to proceed to examine, by way of a rehearing, limited rehearing, but a rehearing nevertheless, of how the decision was made.

PN63

At paragraph 6 of the respondent's outline of submissions the respondent states, quite rightly, that the decision to grant an application out of time is a discretionary decision. Yes, it is. It is, in fact, quite so. But as with every discretion it must be exercised judicially and, as I elaborated in the appellant's outline of submissions, and also I have supplied, in the list of authorities, the cases with which the Bench is very familiar, that that discretion is not wholly unfettered.

PN64

Where, for instance, it appears, in the end, quite apart from the other conditions there, if it appears - if it doesn't appear clearly how the decision was made, on what grounds, then it must be inferred that a wrong decision was made, according to the cases, because it will show then that it is plainly unjust, in the terminology of the locus classicus, in this sense, *House v The King*.

PN65

So, in relation to paragraph 9 of the respondent's outline of submissions, we say that this is a (indistinct) issue, in which the employer failed to notify the worker of the dismissal or the termination totally. We've dealt with that already so I won't bore the Bench with that again.

PN66

Elsewhere in the respondent's outline of submissions not only does - is it asserted that the applicant hasn't been able to identify any error at all, of fact, let alone a significant error of fact. We say that we have identified those one, those nine or 10 ones in there, which are very significant and certainly there are quite a number of them. Chances are that, on a proper assessment of them, perhaps in a matter where no actual evidence was taken in court, one has to say that there are a number of significant errors, at the very least.

PN67

That, added to the fact that the public interest is agitated, we say that this court should grant permission for this leave to appeal.

PN68

In the end, we conclude that the discretion here was used quite excessively and it therefore miscarries, according to the principles in *House v The King*, even where it appears - if it doesn't appear, and it doesn't in the decision, it doesn't appear how the Deputy President arrived at the decision, apart from the fact, from the statement that the whole reason why the appellant tried for, or converted from the F8 to the F2 was simply because they thought he was trying to avoid the matter from going to elsewhere. He was entitled to do not just that, but he had every right to do that.

PN69

The Deputy President should have looked at all the circumstances in this matter, when considering the exceptional circumstances. It only takes one exceptional circumstance to find, as it has been in other cases, it doesn't have to be unique and it can only be one, it can be a combination of them.

PN70

Now, we say that the exceptional circumstances existed, when you look at all this. That the appellant - (1) the appellant was not told that he had been that he had been dismissed, at all at the time. (2) that he was only told that he had been suspended, suspended, pending investigation. There is another circumstance, he had been charged with a very serious offence, which he was defending. He was found not guilty at a trial before a jury, but even then the respondent had still not communicated to him that it had dismissed him. But not having been told of the date of the dismissal he (indistinct) and contacted the Fair Work Commission

who, as we say, provided him with two application forms, or they told him there are two forms, and he submitted both, F2 and F8.

PN71

DEPUTY PRESIDENT BELL: Sorry, I just want to ask a question about that, where's the F2, in any of the material?

PN72

MR NYAMIRANDU: I do have it.

PN73

DEPUTY PRESIDENT BELL: I'll put it another way, Gostencnik DP took everyone to two emails before, 11 November 2022, and the attached F8 and the 12 November 2022 email, with an attached F8. Are you saying there's a different document somewhere around?

PN74

MR NYAMIRANDU: Well, as I recall, and I'll check on this, in the material before the Deputy President I pointed to the two forms where he had written, in his own handwriting, and I commented on this, you can see that in this form, form F2, he said - this is what he wrote. In form F8, this is what he wrote. Two forms. F2 and F8.

PN75

DEPUTY PRESIDENT GOSTENCNIK: That's in your submissions below, and I have read that. I think Bell DP's question goes to a more fundamental issue and that is, we don't have, in any of the materials, a form F2. It's part of the appellant's evidence below that he completed an F2 and in your submissions you say that one of the reasons he had difficulty filling in an F2 was, amongst others, that he didn't have a date that his dismissal took effect, and he couldn't complete the section which asked him for the reasons for dismissal, because he didn't know.

PN76

MR NYAMIRANDU: Yes.

PN77

DEPUTY PRESIDENT GOSTENCNIK: So that's the submission that you made below, coupled with the appellant's evidence that he filed an F2 but we don't have, in the materials that you filed below, at least that which has made its way to the appeal book which you prepared, any document which is an F2. That's why I had occasion to look at the file that the Commission has and the two documents, there are two applications, but they are invoking the same jurisdiction, that is the general protections jurisdiction. It's just that one elaborates more fulsomely on the alleged contravention than the other. But I haven't been able to locate an F2, other than the one that is the subject of the decision made by Beaumont DP, which was filed on the same day as a notice of discontinuance, in relation to the general protections matter, was filed.

PN78

So if you've got it and you haven't included it in the appeal book, now would be the time to produce it.

PN79

DEPUTY PRESIDENT BELL: Or can I perhaps ask this way, and this is by reference to paragraph 36 of your appeal submissions and this is at the digital court book 25, where you say, 'The applicant has consistently maintained that he intended to pursue an unfair dismissal claim but ended up using a wrong form, form F8 for general protections'. Is it the case that we're talking about the wrong form was filed or are you saying, in fact, that the correct form, a form F2, was, in fact, filed?

PN80

MR NYAMIRANDU: Yes. We are saying - yes, we are saying that he filed two forms, one form F2 one form F8. The F8 was the one that was accepted.

PN81

DEPUTY PRESIDENT BELL: Can I ask, where's the evidence that a form F2 was ever filed?

PN82

MR NYAMIRANDU: This is where I was referring your Honours to the material before the Deputy President, in which I said, at the time I elaborated on the difference, on the two forms, the form F2 and form F8, both were filed in similar terms.

PN83

DEPUTY PRESIDENT BELL: Yes, and I understand that. But, as Gostencnik DP pointed out, that's what you were submitting. Where's the actual piece of paper with F2 on the top of it, in the evidence, because I don't believe it's in there.

PN84

MR NYAMIRANDU: I see. That must be some omission on my part, I think.

PN85

DEPUTY PRESIDENT BELL: If it assists, appeal book 52 and paragraph 40 says, 'On that day I filled what details I could on both form F2 and form F8'. Then it says, 'See five email to FWC' Fair Work Commission, 'showing About filed two applications'. That email does not contain a form F2.

PN86

MR NYAMIRANDU: Can I check on that, perhaps, later on?

PN87

DEPUTY PRESIDENT GOSTENCNIK: What are you proposing? Do you want this matter stood down for a minute to look for it, or do you want to provide a note at some stage after we conclude the hearing. What is it that you proposed?

PN88

MR NYAMIRANDU: I think, maybe, I could provide it, find it, I was convinced that that was the case, afterwards. After the hearing, if the Bench is so minded.

PN89

DEPUTY PRESIDENT GOSTENCNIK: Well, if you have a copy of the document I'd certainly be interested in seeing it. As I said, I've looked at the time and there isn't one on the Commission's file. That's not to say that - I'm not suggesting it wasn't sent, but it might be the case that the appellant was mistaken in what he actually filed, because he did file two applications, that was my point earlier. He did file two applications, it's just that they were both the same application, one more detailed than the other but, in substance, the same application.

PN90

But if you want to look for it and if you can locate it and provide it to us. We will discuss how that might occur, perhaps at the end of the proceeding today and after we hear from Mr Greig about that issue.

PN91

In the meantime, continue.

PN92

MR NYAMIRANDU: Your Honours touching on that issue, in any case, this other submission was that what he intended was to file for unfair dismissal, that was it. That he ended up filing an F2 application it would have been clear, from the contents that he really intended an unfair dismissal claim, simpliciter.

PN93

I pointed to certain cases, in particular I think it was Rowan Hedger where it cites Hambridge in there, but it is the intention of the party, or the applicant, to govern what application he intended, and it will seem clear that he wanted an unfair dismissal. That could have been - it was no so much the form itself, it's the substance of the form, the contents of the form, what do they indicate. We say that - - -

PN94

DEPUTY PRESIDENT GOSTENCNIK: Mr Nyamirandu, let's assume, for a moment, that that was right at the time that the appellant made the general protections application. But at some point in time, along that path, he engaged solicitors and was involved in negotiating a settlement. The settlement didn't eventuate. A certificate was issued. He discharged his lawyers and engaged you and you then asked Mr Greig's consent to an arbitration. All under the umbrella not of an unfair dismissal application but a general protections application. So whether that was his intention when he lodged, isn't it apparent, on the facts, that at some point in time he intended to proceed with his general protections application, because he asked, through you, asked Mr Greig to consent to an arbitration of the general protections claim?

PN95

MR NYAMIRANDU: Yes, but if I may be allowed to take a step back, first of all
- - -

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DEPUTY PRESIDENT GOSTENCNIK: Yes, go on.

PN97

MR NYAMIRANDU: - - - and say this. That, yes, he did engage - when he made the application he didn't have any legal representation or a lawyer. He then engaged, later on, lawyers who - they didn't tell him the effect of that application, form F8, that it would result in what came to pass.

PN98

DEPUTY PRESIDENT GOSTENCNIK: Just on that, the only - such evidence, as there is, is evidence of the applicant. The solicitors themselves weren't called to give evidence. So it's a fairly big step to take to be making adverse assessments about the advice that may or may not have been given by solicitors, when propositions haven't been put to them. But I understand the point you make, for present purposes, you say the applicant wasn't advised as to the consequences or the processes involved in the general protections application. But when you got the matter, did you advise him?

PN99

MR NYAMIRANDU: I advised him about the possibility of changing - abandoning that particular application and applying for unfair dismissal. That possibility had not been explained to him at all, understood it, and the matter proceeded on that footing.

PN100

DEPUTY PRESIDENT GOSTENCNIK: I suppose, on one view, it might be said that you were hedging your bets. That is, you might have been discussing with the applicant abandoning the unfair dismissal - the general protections application and lodging an unfair dismissal application. But, at the same time, asking the respondent to agree to a consent arbitration of the very application you were considering abandoning.

PN101

MR NYAMIRANDU: Because, as I understand it, with that particular arbitration it could have resolved a number of matters, in spite of the fact that this was a form F8 application, in form, on the substance of it, as I understand it, the member arbitrator settled the matter as if this had been an unfair dismissal application. So there was that possibility that it could have been resolved as if this were. Meaning that the remedy, the ones in an unfair dismissal application, had succeeded this arbitration.

PN102

DEPUTY PRESIDENT GOSTENCNIK: Yes, but it's not arbitration without rules. The member determined the matter in the same way as a court would. The purpose of the arbitration or the consent requirement, is that the Commission is prohibited from exercising judicial power, so it exercises, by consent, arbitral power but, in that sense, determines the legal rights and obligations of the parties, within the confines of the nature of the application. The only difference between an arbitration here and a judicial determination by a court is that the Commission isn't empowered, in an arbitration, to impose a penalty, but it otherwise would be travelling beyond the scope of its authority if it sought to determine the matter on a basis other than whether or not there was a contravention of the general protections provisions, in effecting the dismissal.

PN103

So any hope that you might have had that the Commission might determine this matter by references to fairness was a misconceived one, respectfully.

PN104

In any event, there was no application, at any time, was there, for the Commission to consider treating the application which was made on 11 or 12 November, on a form F8, as though it was an unfair dismissal form. So, for example, asking the Commission to exercise power to correct the application by waiving the irregularity in the form or manner in which the application was made?

PN105

So if, for example, the applicant maintained that he intended to bring an unfair dismissal application, there's nothing in the material to suggest that anyone sought the Commission correct the form in which that application, being an unfair dismissal application, was made.

PN106

MR NYAMIRANDU: No, there wasn't. That's the point that the applicant is making, that he wasn't told that that was possible or that his lawyer suggested that at all. It wasn't suggested.

PN107

DEPUTY PRESIDENT GOSTENCNIK: Well, it wasn't suggested. I don't know whether it was suggested by his former lawyers, but it wasn't suggested by you either, was it?

PN108

MR NYAMIRANDU: Sorry, your Honour?

PN109

DEPUTY PRESIDENT GOSTENCNIK: I don't know whether it was suggested by his former lawyers, but was it suggested by you? You were his lawyer at the time that he discontinued his application. Did you advise him that he might ask the Commission to treat his earlier application as an unfair dismissal application and waive the irregularity in the form in which the application was made?

PN110

MR NYAMIRANDU: No, I didn't. I did not, because I didn't think that, at that stage, that was possible anymore.

PN111

DEPUTY PRESIDENT GOSTENCNIK: Yes, all right. In any event, sorry, we have interrupted you. Is there anything else you want to say, in relation to the substantive appeal?

PN112

MR NYAMIRANDU: I was enumerating the circumstances of this matter and I hadn't finished, quite finished.

PN113

DEPUTY PRESIDENT GOSTENCNIK: Continue.

PN114

MR NYAMIRANDU: He hadn't been told of the date of the dismissal. He contacted the FWC. He, according to my instructions then, as I understood it, two forms, F2 and F8. He didn't have legal advice at the time. He submitted both application forms.

PN115

The respondent objected to the application, on jurisdictional grounds. He then engaged a lawyer, the lawyers, previous lawyers. He had legal representation then. There was a private hearing, before Snyder C. the conciliation process commenced. Settlement could not be reached. Then the legal representatives ceased acting. In the meanwhile of course, we say, and the appellant says, he hadn't been informed at all that his lawyers could do certain things, such as what your Honour has just advised me about, to amend. Whether that would have been possible is another matter, because - - -

PN116

DEPUTY PRESIDENT GOSTENCNIK: Just to be clear, I'm not suggesting an amendment. What I understood your submission to be is that the applicant, on or about 11 or 12 November, when he filed his applications, or the two forms, intended to file an unfair dismissal application and that one should overlook the form in which that application was made and look at its substance. That was your submission, yes?

PN117

MR NYAMIRANDU: Yes.

PN118

DEPUTY PRESIDENT GOSTENCNIK: All I'm saying is that it's within the power of the Commission to waive any irregularity in the form or the manner in which an application is made. That's got nothing to do with amending or correcting an application, which is a different issue. This is about looking at the substance of the application that's made and whether or not the Commission should waive an irregularity which attaches to the substance of the application that was actually made. Completing a wrong form might be one example of that. That's what I'm alerting you to, and it's a different proposition to amending an application where it changes the character of the application actually made to another application. There's Full Bench authority to the effect that that can't be done, but that's a separate question to whether or not an application made in a particular form, which is not consistent with the form required, whether that irregularity should be waived. The point that I simply asked is whether his earlier lawyers and/or you advised him of that and so far as you're concerned, you didn't advise him of that.

PN119

MR NYAMIRANDU: No, I didn't.

PN120

DEPUTY PRESIDENT GOSTENCNIK: We don't know who the former lawyers are, but presumably this much might be said. If such advice was given it wasn't enacted on or, alternatively, it wasn't given at all, those are the two possibilities.

PN121

But, in any event, I'm not talking about an amendment, I'm talking about waiving an irregularity which flows from the nature of the submission that you make, that is, 'My client intended to file an unfair dismissal application, he just used the wrong from'.

PN122

MR NYAMIRANDU: I understand, your Honour.

PN123

DEPUTY PRESIDENT GOSTENCNIK: Yes.

PN124

MR NYAMIRANDU: But he wasn't advised about that at all.

PN125

DEPUTY PRESIDENT GOSTENCNIK: I understand that.

PN126

MR NYAMIRANDU: So conciliation process commenced. Settlement couldn't be reached. This is all the circumstances surrounding this case. He says he wasn't told by anybody, at any stage, that he could abandon the application and commence an unfair dismissal application. But he says there's no other evidence to suggest otherwise.

PN127

He then sought to - the then engaged us, we informed him of the possibility of withdrawing the application and commencing the unfair dismissal claim. In the meanwhile, of course, it went on ahead and they sought to continue with the arbitration. First of all to exhaust all other steps, in our opinion, before abandoning it.

PN128

Of course the respondent refused to consent to arbitration. Then it was decided we'd have to make the formal abandonment of the - withdraw - rather, withdraw the general protection application and commence the unfair dismissal. But that was - it wasn't within his power or his knowledge to have made these decisions on legal procedure. If anybody was at fault it was previous lawyers and if I was at fault, I will have to - it is not his fault. This is what makes this case uncommon. Because, from the start, it started wrong and that is referable, in the main, to the fact that he hadn't been told that he had been dismissed at all, for a long time.

PN129

Now, before the circumstances have been taken into consideration, while assessing the requirement or criteria, under section 394(2) and (3), we say that the decision should have been different. The exceptional circumstances were there

and to now deny him the chance to proceed with his unfair dismissal application, when it wasn't his fault, or throughout it wasn't actually his fault, does tend to suggest that, or in fact it would be quite unjust for him because he really wasn't at fault, in the sense of - in the sense that he did have the knowledge to do all these things. He relied on lawyers. He relied on me to ask and I may have been deficient in that, if that was the case.

PN130

As for the grounds, in section 364, on the merits of the case, yes, we understand there was - you can't go fully into the merits of the case at that stage. However, that criterion of the merits of the case was put there for a reason, that it has some obligation. And where it appears that there's an arguable case, in the substantive case itself, and that's what it requires, is there an arguable case there, then that criterion is satisfied, or should be satisfied, otherwise that criterion would have no effect whatsoever. Be there just for what? You must (indistinct) somehow that there's an arguable case. It doesn't go any higher than that, that is sufficient. We say that it is sufficient because there are really no other - if an appeal is granted and we go back to the substantive case, what really is there, in the substantive case, that remains to be done, after those very matters had been aired throughout the process of the general protection application anyway.

PN131

It will still remain the case that he had not been given any reason whatsoever for the dismissal. It will still remain the case that - wasn't given any valid reason because he wasn't given any - he didn't even know that he had been dismissed at the time. He wasn't even told what grounds he had been dismissed, no reason. All he was told was that he was under suspension. So what other issues would remain in the unfair dismissal application? So to deny him that we say reeks of injustice for him. But, as I say, we have addressed most of these, if not all of these matters, in the outline of submissions.

PN132

I shall seek - well, to find the form F2 application, which I referred to, before - in the court below. Unless your Honour has any other questions, I think - - -

PN133

DEPUTY PRESIDENT GOSTENCNIK: I just have one further question, if I may?

PN134

MR NYAMIRANDU: Yes, your Honour.

PN135

DEPUTY PRESIDENT GOSTENCNIK: At page 28 of the appeal book, it has paragraphs of your submissions made below, can I just take you to paragraph 51? You submit there that:

PN136

If he, that is the appellant, applicant below, had have known that he could have abandoned his F8 application earlier and applied for a more appropriate

remedy for unfair dismissal he would have done so. The option was not mentioned to him at any time.

PN137

I have to say, I'm having some difficulty reconciling that with a submission that he did, in fact, file an F2 at the time.

PN138

MR NYAMIRANDU: What he is saying is this. That when the F8 application started and they went through conciliation, it was still on the F8. Now, had he known earlier, or at any time after that, that it was simply that we say that what was intended was really a form F2, the unfair dismissal. Had he known that, he would have done so, but he didn't know because he didn't know the law regarding this.

PN139

DEPUTY PRESIDENT GOSTENCNIK: When did the appellant tell you that he'd filed an F2 with his F8?

PN140

MR NYAMIRANDU: When? On 11 November 2022, wasn't it, at that time.

PN141

DEPUTY PRESIDENT GOSTENCNIK: Did he tell his former solicitors that he had made such an application?

PN142

MR NYAMIRANDU: Because the one that was accepted by the Commission was simply the form F8.

PN143

DEPUTY PRESIDENT GOSTENCNIK: I understand - well, you say 'accepted', on one view that's the only application received, as things presently stand, but we'll wait to see whether you can turn up that F2. But if one files two applications, when giving instruction to lawyers, doesn't one alert them to that, that, 'I've made two applications'?

PN144

MR NYAMIRANDU: No, he didn't have lawyers at the time.

PN145

DEPUTY PRESIDENT GOSTENCNIK: Well, he did have lawyers before he had you.

PN146

MR NYAMIRANDU: Yes.

PN147

DEPUTY PRESIDENT GOSTENCNIK: And I'm asking whether he told those lawyers that he had made two applications, at the time?

PN148

MR NYAMIRANDU: I'm not sure about that.

PN149

DEPUTY PRESIDENT GOSTENCNIK: Yes. All right. In any event, there doesn't appear to be any evidence about any of that. All right.

PN150

DEPUTY PRESIDENT BELL: Just one more. Just to be clear, at least from my perspective, the forms that I'm aware of and the evidence below shows have been submitted are only an F8 form. And going back to the two forms that - well, the two emails that Gostencnik DP circulated earlier, one an email on 11 November 2022 and on the 12th, I've been looking at that form and the second form, that is the one filed on the 12th, appears to be the identical form to the one filed the day before, and I mean identical, other than parts 3.1 and 3.2 have been completed. So it was the same pieces of paper. If you look at where the handwriting is, the words, the full stops, everything appears identical, so it appears that the second form is just a more complete version of the one that was filed the other day, but certainly not an F2.

PN151

MR NYAMIRANDU: I see. I shall seek clarification on this.

PN152

DEPUTY PRESIDENT BELL: Yes, thank you.

PN153

DEPUTY PRESIDENT GOSTENCNIK: All right, is there anything else?

PN154

MR NYAMIRANDU: No, that's our submission. These are only just oral submissions as to clarify a few points, but the appellant stands by - - -

PN155

DEPUTY PRESIDENT GOSTENCNIK: The written submissions. Yes, I understand that.

PN156

MR NYAMIRANDU: - - - the written submissions and what was before the Deputy President, in the court below.

PN157

DEPUTY PRESIDENT GOSTENCNIK: Yes, thank you.

PN158

MR NYAMIRANDU: Thank you.

PN159

DEPUTY PRESIDENT GOSTENCNIK: Mr Greig?

PN160

MR GREIG: Thank you very much.

PN161

I only wish to make a few opening statements and then I'll respond to a couple of things - - -

PN162

DEPUTY PRESIDENT GOSTENCNIK: Mr Greig, just hold on for a moment, you're - the volume is very echoey, from our end.

PN163

THE ASSOCIATE: Mr Greig, could you please try speaking again?

PN164

MR GREIG: Yes.

PN165

DEPUTY PRESIDENT GOSTENCNIK: Can we mute Adelaide, the courtroom? Try again, Mr Greig.

PN166

MR GREIG: Thank you, Deputy President. Is that better?

PN167

DEPUTY PRESIDENT GOSTENCNIK: Not really, but we're going to have to muddle through it, I'm afraid. Your submissions might be very impactful because we'll hear them twice.

PN168

MR GREIG: I was only intending to be very brief, and I'll be even briefer.

PN169

In short, we submit that there's been no significant error of fact and that Beaumont DP has carefully considered the details.

PN170

DEPUTY PRESIDENT GOSTENCNIK: Mr Greig, I'm sorry, is there - you're on speaker, are you, at your end?

PN171

MR GREIG: Yes.

PN172

DEPUTY PRESIDENT GOSTENCNIK: Is there any chance that you might have a headset available and proceed that way?

PN173

MR GREIG: I don't, actually.

PN174

DEPUTY PRESIDENT GOSTENCNIK: We might try one more thing. Just turn the volume down. Let's try that, Mr Greig.

PN175

MR GREIG: How are we going?

PN176

DEPUTY PRESIDENT GOSTENCNIK: It's still echoey, but it won't be as disruptive, I don't think with the volume turned down a bit. We'll see how we go. Yes, Mr Greig.

PN177

MR GREIG: So our view is that the Deputy President hasn't made any error of fact or law and that she has carefully considered the evidence put forward to her.

PN178

We note that the evidence was that of the applicant, who has submitted all of the documents that are relevant and that we, as the respondent, actually haven't filed any evidence in the journey. We have presented the F3 response and submissions. We say that the Deputy President has considered the documentary evidence and made fair and reasonable decisions on that basis.

PN179

There's been a number of discussions around the dates and the times and the decision made was all referenced around the decision of Snyder C to grant that the date the dismissal was communicated was the date of the application of 12 November and is therefore 311 days late from that point.

PN180

So we say that she has carefully considered all of those and the facts raised by the appellant are evidenced in the decision that she made that she has carefully, fairly considered those. So we don't believe there has been sufficient evidence disclosed that would warrant granting an appeal.

PN181

I want to turn briefly to the three matters that have been raise, in relation to this F2 and F8. We have no record of an F2 being filed. I note, in the F8 that was sent through this morning, that both of those tick the box that says, 'No other application has been made'. That may be evidence that there was no F2 filed separately.

PN182

In relation to the matters raised around the ILO convention, we say that all focuses around challenging a dismissal and that that relates to the period from April 2021 and November 2022, when the application was made, and that those things complained of were remedied by Snyder C granting permission to appeal, in relation to the general protections and, therefore, there's been no transgression in that sense of the ILO in that way.

PN183

We've made some comments in the submissions to day that these are two very separate applications. An unfair dismissal and a general protections are different and there is no right to convert or transfer one to the other but to end one and start another, with almost the universal process that one of those will be out of time.

PN184

We say that substance and form need to be considered together. It's not for the respondent or the Commission to be reinventing what the applicant actually submits, in the basis of his form. Given how difficult this is with the echo, I think I'll conclude there and we rely on what we've put in writing to respond.

PN185

DEPUTY PRESIDENT GOSTENCNIK: Mr Greig, do you have any objection to the appellant filing a copy of an F2, if he can locate it, which he says was lodged, together with evidence, I suppose, or supporting material that it was lodged. For example an email or something. We'll obviously give you an opportunity to make some short submissions in reply, should that happen.

PN186

MR GREIG: Deputy President, I'm happy for the appellant to do so and that you will grant it sufficient weight in your considerations of the Bench.

PN187

DEPUTY PRESIDENT GOSTENCNIK: Thank you. Anything in reply? Sorry, Adelaide is on mute. Sorry, Mr Nyamirandu, we're trying to get you off mute. We'll have to restart. We might have to just adjourn for a few moments to enable the system to be restarted, there's some difficulty with the Adelaide connection. We're unable to, at this stage, manually remove the mute, so we'll adjourn for five or 10 minutes to allow our IT people to have a look at it. Hopefully we won't be too long. Apologies. We're adjourned for 10 minutes or so. Thank you.

SHORT ADJOURNMENT

[2.33 PM]

RESUMED

[3.46 PM]

PN188

DEPUTY PRESIDENT GOSTENCNIK: Yes, thank you, and apologies for that little glitch. Mr Nyamirandu, anything in reply?

PN189

MR NYAMIRANDU: Yes, during the break Mr Williams had a chance to speak to Mr Aboud about the form issue, the two forms. He says that he put in two forms, but it was the same form, as your Honour have rightly pointed out. He just thought put two forms. One was - but it was - both of them were form F8, intending, of course, all along, if he had known exactly about the forms, what he wanted was simply an unfair dismissal, that's it. But in putting that form F8 twice.

PN190

DEPUTY PRESIDENT GOSTENCNIK: Yes. Anything else in reply? Mr Nyamirandu, can you hear me?

PN191

MR NYAMIRANDU: Yes, I can hear you, your Honour.

PN192

DEPUTY PRESIDENT GOSTENCNIK: Yes. Is there anything else you wish to say in reply?

PN193

MR NYAMIRANDU: Not really. All that had to be said was outlined in the applicant's outline of submissions and I have elaborated on these issues. There's that issue about the filing of the two form F8s, when what he really wanted was just an unfair dismissal application. Somehow, because he didn't know, he just filled both forms. One was accepted, the other one wasn't. I would simply repeat that had he known better, of course, he would simply have done a form F2 right from the start. That he ended up doing this, we say that the Commission can look at it and say, what he really intended was, in terms of the remedy that he wanted, was an unfair dismissal claim and simply treat it as such.

PN194

I have nothing else further to say, apart from just repeating, once again, that he doesn't seem to have been at fault at all throughout all of this, when you look at the circumstances from the beginning to the end. Mistakes might have been made by legal representatives through, perhaps, inaction, but that can't be laid at his feet, he didn't know. Not knowing the law is a good ground to consider, a circumstance to consider for an appellant or an applicant. Not knowing the law about time limits is a different matter, that's unacceptable. But he doesn't say he didn't know about time limits. How could he have known at the time when he didn't even know that he had been dismissed.

PN195

So I will rest the appellant's case there, your Honours.

PN196

DEPUTY PRESIDENT GOSTENCNIK: Yes. All right. Thank you very much. Thank you to the parties for their written and oral submissions. We propose to reserve our decision and publish our decision in due course. Adjourn the Commission.

ADJOURNED INDEFINITELY

[3.52 PM]