



TRANSCRIPT OF PROCEEDINGS

Fair Work Act 2009

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

C2023/2254

s.604 - Appeal of decisions

**Julian Strangio v Sydney Trains
(C2023/2254)**

Melbourne

1.58 PM, TUESDAY, 6 JUNE 2023

PN1

THE ASSOCIATE: The Fair Work Commission is now in session for the matter C2254/2023 a section 604 appeal listed for hearing before the Full Bench.

PN2

VICE PRESIDENT ASBURY: Good afternoon. Could we take the appearances, please?

PN3

MR E BONCARDO: Thank you, Vice President. Boncardo - B-o-n-c-a-r-d-o, initial E, seeking permission to appear for Mr Strangio, the appellant.

PN4

VICE PRESIDENT ASBURY: Thanks, Mr Boncardo.

PN5

MR J DARAMS: May it please the Commission, Darams, D-a-r-a-m-s, initial J, I also seek permission to appear on behalf of the respondent.

PN6

VICE PRESIDENT ASBURY: Thank you. I don't know permission is an issue in this matter and to the extent we need to formally record it, we grant permission for both parties to be legally represented. Thank you.

PN7

Mr Boncardo?

PN8

MR BONCARDO: Thank you, Vice President. The Full Bench has the benefit of the parties written submissions and by way of application of those submissions today, can I deal with a number of matters that my learned friend has raised in his submissions and take the Full Bench to some aspects of the evidence that was before the Commission, to the extent that it is relevant to the three grounds of appeal that remain pressed.

PN9

Dealing, firstly, with ground 1, it does not, so far as we understand it, appear to be a matter of controversy, in light of the submissions that my learned friend makes, at paragraph 6 to 9 of his written outline, that the argument advanced by Mr Strangio below, that his breach of clause 14 of the respondent's Code of Conduct, which the Full Bench will have seen, was constituted by him failing to report the charges was explained but not excused by his reliance on his criminal solicitor, Mr Van Houten's advice, and that that was a substantial argument, in the sense described in the cases.

PN10

We've given the Full Bench the well-known case of *Soliman v University of Technology*. And can I note, I don't need to take the Full Bench to that, what the Full Court says, at paragraphs 55 to 56 of that decision, at page 99 of the book of authorities, namely, that:

PN11

A failure to take into account an argument and consider an argument that is clearly articulated will be an error of law that goes to jurisdiction.

PN12

To the extent that it is not accepted by the respondent that the argument advanced was a substantial one, can I briefly, and in elaboration of the matters set out in footnote 23 to our submission, give the Full Bench a number of references to the argument, as it was made by my instructor, Mr Hart(?), below.

PN13

Firstly, at appeal book 80, paragraph 746 of the transcript, in his final address to the Commissioner, this is at about point 2 on the page, Mr Hart sets out, in the fourth sentence of paragraph 746, that Mr Strangio relied, at all times, on the advice of a solicitor specialising in criminal law, that solicitor being someone who was an accredited specialist. Down the page, at 748, at about the third last line, the Full Bench will see Mr Hart's submission that Mr Strangio relied implicitly, trustingly, on the advice of his lawyer who had told him, 'Hold off from telling your employer until the charge is (audio malfunction)'.

PN14

Then, in closing submissions, the matter having been picked up and contested by Mr Darams, in his oral address, at appeal book 101, paragraph 948 - 942, I apologise, the second sentence, Mr Hart sets out that he, that is, 'Mr Strangio elected to rely on and his evidence was unequivocal when pressed by Mr Darams, that he chose to rely on the advice of his lawyer'.

PN15

Now, Mr Strangio's evidence that he was, at all times, relying upon his lawyers advice is found, relevantly, at appeal book 171, in his statement in response. The Full Bench will see paragraph 7 to 9, which in addition to making clear that Mr Strangio was reliant upon his solicitor, Mr Van Houten's advice also sets out the context in which that advice was provided to him, (audio malfunction) that he was extremely distressed, his world had been thrown upside down and he placed confidence and reliance on his solicitor's advice.

PN16

Now, he was cross-examined, by Mr Darams, about this and the Full Bench will see, at appeal book 25, the cross-examination from paragraph 109 through to 113 where Mr Darams put to my client that he took Mr Van Houten's advice and at 117 and then over the page to 120, that he was acting on the advice (audio malfunction). At 118 (audio malfunction) it was put to him that he could have, if he wanted to, told Sydney Trains about the matter. Mr Strangio's response is, 'Then I wouldn't be acting on the advice from my lawyer if I did that'. He does expect and we, of course, have to accept this, because it's a matter of common sense, that he could always have decided to ignore his lawyer's advice and report the matter forthwith, as the policy required him to do to his employer.

PN17

So Mr Strangio's case before the Commissioner, at the breach of policy, was one that was, in effect, inspired and caused by the advice that he has received from his

specialist criminal solicitor, in circumstances where he was facing charges of great seriousness and the potential for a custodial penalty to be imposed upon him.

PN18

Now, whether or not Mr Van Houten's advice was reasonable or sound is neither here nor there. What was relevant was the advice had been given and Mr Strangio was faced between a rock and a very hard place. He had to either adhere to his solicitor's advice or ignore that advice and report the charge to his employer.

PN19

For those reasons we contend the argument was a substantial one, given that it both explained and put in context what was otherwise uncontroversially a breach of policy which the Commissioner found at paragraphs 18, and then repeated at paragraph 33 of her decision, to be the valid reason for dismissal.

PN20

As we apprehend it, your Honours, the issue on which Mr Darams and I diverge is whether the argument, as put by Mr Hart, on behalf of Mr Strangio, was, in fact, considered and engaged with by the (audio malfunction).

PN21

Now, in terms of what consideration and engagement involves, can I give the Full Bench a reference to a decision of Walton J, in *Secretary of the Ministry of Health v Nurses and Midwives Association* [2022] Vol 320 of the Industrial reports, at page 249. It's a very long decision, to say the least, but I only need to take the Full Bench to a couple of paragraphs in it.

PN22

Can I take the Full Bench, firstly, to page 217 of the authorities book? The Full Bench will there find paragraphs 455 and 456. These follow an extensive, to say the least, analysis of the kind of error that we are agitating in ground 1 of the appeal, that is, a failure by an administrative decision maker to consider a substantial argument. At 457 his Honour explains that:

PN23

It must be remembered that this ground requires, not just a mere alluding to or passing reference to the argument by the Commission, but consideration or a response. The response must consider and engage with the argument put forward by the party.

PN24

That statement of principle is something that flows from the last sentence of paragraph 45. This case concerned dispute orders, under section 136 and 137 of the New South Wales IR Act, but it's on all fours - I withdraw that. It sets out, relevantly, the principles to be applied.

PN25

The Full Bench will see, at 455, towards the end of the paragraph, that his Honour sets out that:

PN26

In respect to a substantial argument there needs to be an active intellectual engagement with the significant arguments actually raised.

PN27

We say, for the reasons I'll come to, there was not that active intellectual argument.

PN28

Now, our learned friend's write and paraphrase the remarks of the High Court, in *Wu v Liang*(?), at paragraph 7 to their submissions, that decisions of the Commission shouldn't be read with an eye tuned to the detection or error. But, and again the Full Bench is well familiar with the principles set out in *Soliman*, at paragraph 57. But whilst that, of course, is the case, that I shouldn't be blinkered by the appellate tribunal to avoid discerning an absence of reasons or reasons entirely devoid of a consideration of essential submission of a party.

PN29

Here, in our submission, there was no proper consideration of Mr Strangio's argument. If I can take the Full Bench to the decision itself, commencing at appeal book page 11, The Full Bench will see, at paragraphs 26 through to 28, this is a matter that Mr Darams relies upon, that the Commissioner refers to this aspect of my client's case. She even describes it, at paragraph 26, as a central feature of his case. She then sets out, at paragraph 27 Mr Van Houten's evidence and at paragraph 28 Mr Darams' submissions.

PN30

The analysis, in our submission, goes awry at paragraphs 29 and 30. It goes awry and our submission is that the analysis of the submission doesn't actually occur.

PN31

The Full Bench will see, at paragraph 29 on page 13 of the appeal book, that the Commissioner sets out, in the second sentence, that:

PN32

Regardless of the advice Mr Van Houten gave my client, my client's obligation, under the Code, was unambiguously, to report the charges.

PN33

That's all correct as being already determined by the Commissioner, in finding a valid reason. She then says that:

PN34

The only appropriate course would have been for him to adhere to is reporting obligation.

PN35

Again, uncontroversial, he breached the policy.

PN36

Paragraph 30, the first sentence sets out that, in the event criminal charges changed it was open to report the altered or settled charges. In the second sentence the Commissioner says:

PN37

Having regard to the mandatory language of the Code, that was not an open or appropriate course.

PN38

Again, that's uncontroversial.

PN39

She then sets out Mr Van Houten's evidence, but what the Full Bench does not see is any assessment as to whether the advice that Mr Van Houten gave to Mr Strangio, who was, with respect to him, a relatively unsophisticated individual whose formal education finished before Year 10 and he was facing very serious criminal charges, whether the advice that was given to him was advice he could reasonably have followed, in the predicament that he was in.

PN40

There is no analysis, at paragraph 29 and 30, of the gravity of the breach of the clause 14 of the Code, in light of the fact that my client (audio malfunction) given to him. There is also no (audio malfunction) of the facts that (audio malfunction).

PN41

DEPUTY PRESIDENT O'NEILL: Sorry, Mr Boncardo, you're just breaking up a little bit. Would you mind just repeating that last point?

PN42

MR BONCARDO: Sorry, yes. Relatedly, there is no analysis of where, on a spectrum of seriousness, noting, uncontroversially, that these breaches of the policy do present on a spectrum, this breach sat, in light of the fact that it was causally related to the advice Mr Strangio received from his solicitor.

PN43

In those circumstances, our submission is that the Full Bench would not accept Mr Darams' (audio malfunction) paragraph 9 to his submissions that there was real or genuine evaluation or determination of this central argument put by Mr Strangio. That, in our submission, is what is required, as Walton J sets out, at paragraph 455 and 457 of the Nurses and Midwives case, it did not occur here.

PN44

It was not, in our respectful submission, sufficient for the Commissioner to simply note the argument, which she did. We don't have a difficulty in accepting our learned friend's point that the argument is well and truly encapsulated in paragraph 26. The complaint that we made is that whilst the argument it noted and alluded to, it is not, in fact, engaged with.

PN45

DEPUTY PRESIDENT O'NEILL: Can I ask you, Mr Boncardo, in relation to the matter before McKenna C, the argument was put with the outline of submissions

at appeal book at page (audio malfunction), where it's admitted that a factor in mitigation is the reliance on the regular advice that Mr Strangio received. Other than that point, can you point to a line in the transcript where that argument was articulated in any more detail or (audio malfunction)?

PN46

MR BONCARDO: In the two items of transcript that I've taken you to, Deputy President, perhaps I can go back to them briefly. Firstly, at appeal book - sorry, appeal book 80, paragraph 746.

PN47

DEPUTY PRESIDENT O'NEILL: Yes, I have that.

PN48

MR BONCARDO: There Mr Hart sets out Mr Strangio's live was turned upside down. He was charged (audio malfunction) on the advice of his solicitor.

PN49

DEPUTY PRESIDENT O'NEILL: (Audio malfunction), in the context, but I'm looking where the position of submissions clearly articulate it.

PN50

MR BONCARDO: That is a matter in litigation and a matter that bears upon harshness. That paragraph that I've taken you to, Deputy President, is a submission, in my respectful submission, that goes to harshness, and that is clear from the context in which that submission was made. The Full Bench will see paragraph 744, on the previous page, Mr Hart is addressing there, on the question of harshness. He's setting out conventional matters that go to harshness, including that Mr Strangio, being an exemplary employee with 37 years of employment, was well regarded, et cetera. So I accept the proposition that it's not put, in terms of a matter in mitigation. But the way the submission is crafted, it's plainly been put as a matter relevant to the question of harshness.

PN51

The same follows, in our submission, in respect to paragraph 755 and 756, at appeal book 81 and in relation to Mr Hart's reply submission, at paragraph 942.

PN52

If your Honour - - -

PN53

VICE PRESIDENT ASBURY: Sorry, Mr Boncardo, can I just ask, what do you say though the relevance of - do you say that the reliance on the advice was relevant to the valid reason consideration, because that wasn't pressed at first instance from - well, it seems to have been, actually, but in the submissions, if you look at appeal book 326, it seems to have been argued as part of the submissions in relation to valid reason that the respondent closed its mind to factors raised in mitigation, which really isn't relevant to valid reason, is it?

PN54

MR BONCARDO: That's not relevant to valid reason, I accept that on the authorities. It was put in the context of a 387A submission, in the written submissions which you've taken me to, which commence at 325. In respect to harshness and 387H, the Full Bench will see, at paragraph 332 of the submission, paragraph 52, Mr Hart sets out that in considering factors raised in mitigation Mr Strangio presses his reliance on advice given to him by his legal representative. So it was a factor which, I accept, was put under the head of 387A and I (audio malfunction) force in what you've put to me Vice President, about it not being a relevant matter under 387A, but it was squarely put, in my submission, under 297H and that is apparent from paragraphs 52 and then the first sentence at paragraph 53 of Mr Hart's submission, at appeal book 332.

PN55

VICE PRESIDENT ASBURY: Yes, I understand. So, essentially, you're saying that the argument that it was a significant matter, with respect to harshness was not engaged with in the decision at first instance?

PN56

MR BONCARDO: That is the point. That is the point.

PN57

Can I, finally, just deal with one matter, which I've had some exchange with my learned friend with throughout the course of the day? At paragraph 7(b) of his submissions he refers to exchanges in transcripts between the Commissioner and Mr Hart and himself, in final submissions. I understand that that submission is not pressed, on the basis that it will demonstrate engagement by the Commissioner with the argument raised but as tending to support the notion that the Commissioner was alive to the issue. We don't say that she wasn't alive to the issue, our point is, simply, that she just hasn't engaged with it properly.

PN58

In the event that ground 1 is upheld, that will entail that the Commissioner has committed an error of law and an error of law going to jurisdiction which, in our submission, would impel a ground of permission to appeal.

PN59

In respect to ground 2, I otherwise rely upon the written submissions.

PN60

Ground 3, which is an ambitious one and only arises if ground 1 or ground 2 are rejected, relies on the second category or the second limb of *House v The King* and I well appreciate, and Mr Strangio well appreciates, the very high hurdle and the difficult task which confronts any appellant who seeks to contend that a Commissioner's evaluative conclusion about fairness or otherwise of a dismissal, following a decision with full reasons, was outside the range of reasonably available outcomes.

PN61

We've given the Full Bench the well-known authority of *King v The Catholic Diocese of Parramatta*, and we note the difficulty that confronts us, as set out at paragraph 41 of that decision, which is at page 74 of the book of authorities.

PN62

I rely on the written submissions in respect to that ground but can I just - because they are matters that may be relevant to the question of the conduct of a rehearing and are, obviously, relevant to this ground, just point out a number of other aspects of the evidence which are relevant to the third ground of appeal.

PN63

I've said, in the submissions that have been filed on the appeal, and I think the Commissioner refers to this at paragraph 3 of her decision, that my client started work with the respondent's predecessor when he was 16. That, in fact, is not correct, he started when he was 15. I'm not saying anything turns on that, but the Full Bench will note that he started on 21 October 1985, having left school.

PN64

He was born on 12 November 1968, so he started just before he turned 16. He'd had a substantial and, in these days, perhaps unprecedented, relatively unprecedented period of service of 37 years. That period of service was unblemished and give the Full Bench a reference to Mr Walsh's cross-examination. Mr Walsh was a witness called by the respondent and at appeal book 67, paragraph 605, Mr Walsh accepts that my client's (audio malfunction) unblemished. That is that 'To the best of your knowledge, Mr Strangio's employment record was unblemished for 37 years?', he says, 'Yes' to that.

PN65

No evidence was called from my client's direct managers but Ms Clark and Mr Walsh both attested to him being a strong and reliable performer, based upon what had been said to them by those managers. Ms Clark's evidence, in that regard, is found at appeal book 50, paragraph 426 - I'm sorry, that point - that goes to another issue which is that there was no disciplinary action ever taken against my client and, I'm sorry, his supervisor's report that he was a strong and reliable performer.

PN66

At 449, paragraph 440, appeal book 53, there is reference to my client apologising, unreservedly, for his conduct. That apology itself is found in appeal book in a letter that his union (audio malfunction) at appeal book 241 to 242. At 242 the apology is found at the last paragraph of the letter where, amongst other things, Mr Hart, writing on behalf of Mr Strangio, sets out that he takes the opportunity to wholly and unreservedly apologise for his error and omission.

PN67

There's also reference, in the appeal book, to Mr Strangio having no performance management issues. Mr Walsh gave that evidence at appeal book 65, paragraph numbers 581 to 582 and 590 to 591.

PN68

I wanted to draw the Full Bench to those matters, in addition to the matters set out at paragraph 22 to our submissions, to make the (audio malfunction) at the conclusion that a failure to report, in circumstances where Mr Strangio as reliant upon the advice of his solicitor, in light of that context, and the context provided

by his age, his length of service and his impeccable service record, entail that the Commissioner's decision was, in our submission, not reasonably open to her.

PN69

Your Honours, we otherwise rely upon the written submissions. If permission to appeal is upheld and the decision is quashed and the Full Bench determines to rehear the matter and finds the dismissal to be unfair, then our submission is that the appropriate course is for the matter to be remitted to the Commissioner for hearing on the question of remedy. The Full Bench would see that the question of remedy was canvassed by the parties, but given the Commissioner's conclusion there was no analysis of that matter.

PN70

Unless the Full Bench had any questions, those were the submissions.

PN71

VICE PRESIDENT ASBURY: No, thank you, Mr Boncardo.

PN72

Mr Darams?

PN73

MR DARAMS: May it please. Could I start with - - -

PN74

VICE PRESIDENT ASBURY: No, you're mute.

PN75

MR DARAMS: Can you hear me now?

PN76

VICE PRESIDENT ASBURY: Yes.

PN77

MR DARAMS: Sorry about that, there might have been just a slight delay, I apologise.

PN78

Could I start with the proposition that the substance of the argument that the appellant ran below, about the legal advice or the information from his criminal law solicitor, if I can describe that person that way, was that his dismissal was harsh because he relied upon that information given to him by his criminal law solicitor.

PN79

The Full Bench will recall that that submission was, effectively, that which is set out in or captured in paragraph 52, I think, of his written submissions, that is, at appeal book page 332.

PN80

I don't wish to go back to the written submissions that address that issue, but the observation I make is that when one considers those oral submissions they weren't

set out in any more fulsome detail. In my submission, the explanation for that was because it was a relatively, in my submission, uncomplicated proposition which was being advanced by Mr Strangio, the appellant.

PN81

In addition to that, and the other reason why we submit it wasn't relatively complicated, is because there was no contest below, factually, that Mr Strangio had received some advice or information from his criminal law solicitor as to a suggestion of what he should do, in terms of reporting the criminal charges to his employer.

PN82

It's also relevant, in my submission, that this matter wasn't controversial before the Commissioner, and that is Mr Strangio understood what his obligation was, under the Code of Conduct.

PN83

Now, I'll come back to this in a moment, because it's borne out in the submissions, but part of the questioning or part of the arguments on behalf of my client below, was that in the circumstances Mr Strangio was faced with a decision and the decision was, 'You've been given some information or advice from your criminal law solicitor', and the reasons that you were given that were explained to him, that is, the evidence was that his criminal law solicitor was going to negotiate or try and negotiate some of the charges with the police. They also had the option to disclose, consistent with his obligation under the Code of Conduct, the fact that the criminal charge had actually been laid, and I'll come back to the importance of that in a moment.

PN84

But just back to the submission that was advanced, it was not relatively complicated in that respect. Secondly, it was advanced in respect of those matters under section 387H.

PN85

Now, the Full Bench is right to observe there was some reference in the written submissions as to whether or not it was relying upon the advice was relevant to the valid reason, that, ultimately, wasn't the case that was articulated and I just observe there's no challenge, on appeal, to the finding that there was a valid reason, in the circumstances.

PN86

But I want to go now to the decision, and some paragraphs in the decision, which you've already been taken to and I'll go to them in a moment, but before I do that, could I just ask the Full Bench to go to the decision of (indistinct) Industries. It's in our list of authorities. Sorry, *Sharp v BCS*, I apologise, and it's at our list of authorities at page 36. It's paragraph 38 of the judgment, to draw your attention to what the Full Bench said in that case.

PN87

One can see from this the Full Bench is considering an appeal point based upon a challenge to the harshness finding and the process that was undertaken by the

Vice President in that case, I believe it was Catanzariti VP. One can note, from this paragraph, the Full Bench says, at paragraphs 15 to 23 of the decision:

PN88

The Vice President summarised, in detail, Mr Sharp's case, which included, at paragraph 15, a list of all the mitigating factors upon which he relied to demonstrate his dismissal was harsh.

PN89

And at paragraph 23 to the reference of Mr Sharp's length and quality of service:

PN90

(Indistinct) a decision of (audio malfunction) these aspects of Mr Sharp's case.

PN91

Can I just pause there for a moment, the Full Bench will appreciate there was an alleged ground of appeal that was being advanced that the Commissioner didn't take into account the factors which were specifically or additionally advanced by Mr Strangio below, but that's now been abandoned. I'll come back to the importance of that when I address the fourth ground. But just noting that there's now no challenge to that process that was undertaken by the Commissioner to then just back to this paragraph.

PN92

That it did not make a specific finding about each of these matters raised by Mr Sharp does not mean that he did not take them into account.

PN93

And this is the important part:

PN94

Given that the consideration of whether the dismissal was harsh involved making a finding of a global nature placed on the way of a range of competing considerations.

PN95

Stopping there, I won't go to the judgment, then this paragraph then follows, more so to the second limb of *House v King*, but, in my respectful submission, in the paragraph I come to in a moment, the decision, the Commissioner undertook precisely what the Commissioner was required to do in the exercise of her discretion, in this case, in weighing up competing (indistinct).

PN96

Now, can I make that submission good by going to the decision and could I ask the Full Bench just to go to page 11 of the appeal book, paragraph 26. In paragraph 26 the Full Bench would note what the Commissioner says here, where she says:

PN97

A central feature of the applicant's case was his failure to report the May 2021 charges that arose against the background that legal advice was given to him.

PN98

Then, as the applicant put matters at all times, 'I was acting under the legal advice' -

PN99

I continue there:

PN100

The applicant advanced, by way of mitigation, that acting on legal advice and fully intended to inform the respondent of the pending charges.

PN101

So the Commissioner is engaging, in my respectful submission, with the substance of the submission that was advanced below.

PN102

Then, in paragraph 27, the Commissioner sets out the evidence of the criminal law solicitor, and I don't need to take you, in any detail, to that but just to note that she was obviously - sorry, the Commissioner was obviously alive to that evidence.

PN103

Then paragraph 28 sets out part of my client's submissions below, where she sets out in (indistinct) and I just want to draw a couple of these matters to the Full Bench's attention. Our submissions were:

PN104

To the extent that it's based on a submission the applicant relied upon the advice of his criminal lawyer to not report the 10 May 2021 charge, Sydney Train says -

PN105

Picking up the end:

PN106

There was a choice made by the applicant and (indistinct) freely exercise whether alternatives existed. (Indistinct) no evidence in (indistinct) disclosing that he'd been charge but was in receipt of advice not to presently disclose to Sydney Trains.

PN107

We also made a submission that demonstrates he placed his own interest above those of Sydney Trains and (indistinct) other matters.

PN108

Then the (indistinct) that was advanced below, orally as well, in support of this, and I'll come back to the point I mentioned before that in the circumstances that faced Mr Strangio he was provided with an option and the option to disclose, in accordance with his obligations under the Code of Conduct was something he could have done but still have received the advantage or the benefit of what his criminal law was doing.

PN109

Putting it this way, the fact that he disclosed the charges - if he had disclosed the charges to my client, that wouldn't have prevented his solicitor from continuing to negotiate with the police over the charges.

PN110

These were arguments that were put in advance by my client which, in my respectful submission, the Commissioner had to evaluate in coming to this overall consideration of whether, in the circumstances, the dismissal was harsh. In my submission that's precisely what the Commissioner's doing, in paragraph 29 and 30.

PN111

The Full Bench will see, in the first sentence of paragraph 30, where the Commissioner is, in effect, accepting a submission that was put that if and when the initial criminal charges changed it would have been open, as an appropriate course, to update the relevant manager of the respondent, accordingly, after the initial report concerning the May 2021 charges being made by the applicant.

PN112

Then obviously the Commissioner, in this overall evaluation that she's undertaking, and we say required to undertake, she is observing the obligations, under the Code of Conduct and observes, quite correctly, the obligatory nature of the obligation and then assessing what, in her consideration and evaluation would have been the appropriate course to adopt.

PN113

Now, in my submission, that is, as we've set out in writing, that is precisely the type of consideration and evaluation which is entrusted to the Commissioner, under section 387H.

PN114

In my submission, what this boils down to is that there were alternatives open to the Commissioner on this issue. One of them was accepting the submissions on the evidence advanced by my client, or accepting the submissions advanced on behalf of the applicant, on his evidence. But the fact that the Commissioner has chosen one over the other doesn't demonstrate error in what is, in my submission, clearly a discretionary decision making process. Again, this is probably trite, the fact that the Full Bench might have come to a different decision, in this circumstance, doesn't demonstrate error.

PN115

So when one considers the grounds of appeal that these propositions follow, it's clear that the Commissioner did clearly understand the gravamen of the submission that was put forward by the applicant on this issue. It's also clear, from the judgment, that the Commissioner engaged in that consideration. What follows, though, is that the Commissioner didn't accept, in the circumstances, all of the circumstances, that it rendered the dismissal unfair.

PN116

So, in my respectful submission, none of the alleged errors in grounds 1 or 2 are made out on a fair reading of the judgment of the Commissioner.

PN117

I want to now just move on, very briefly, to the ground 4, but there's one matter I did want to clarify. Mr Boncardo did refer to this in his submissions.

PN118

What we say in paragraph 7(b) is we're not suggesting that the exchanges between the Commissioner and myself and the appellant's representative at first instance amounted to the giving or reasons in the judgment. What we are submitting is that when, as a matter of context, you consider, when you go away and consider these submissions, when you consider the ground of appeal that the Commissioner had misapprehended or, in effect, misunderstood the case that was being advanced, in my respectful submission, that can't be made out. That provides exchanges between the Commissioner and myself and Mr Hart established that the Commissioner was fully understanding the case that was being advanced, on this particular issue.

PN119

I just want to move briefly onto ground 4, sorry, unless there were any questions on that particular submission? Thank you.

PN120

If I could just ask the Full Bench to go to our list of authorities again, and to the decision of King. Could I ask the Full Bench to go to page 16 of the authorities and - I won't read it all out but could I just draw the Full Bench's attention to what that Full Bench, in King, said in paragraph 39, by way of a reference to *House v King* and the manifest injustice point.

PN121

But then can I go to paragraph 40, where the Full Bench sets out this other part of *House v King* and where they cite this:

PN122

It may not appear how the primary judge has reached the result embodied in his order but if, upon the facts, it's unreasonable or plainly unjust, the appellant court may infer -

PN123

So we've got inferential reasoning being applied here that in some way there's been a failure properly to exercise a discretion which the law opposes in the court at first instance.

PN124

So this ground 4, which I think Mr Boncardo described as ambitious, and I would embrace that to the extent that we needed to, but it's really a submission that you would infer, after having a consideration of the reasons, in my respectful submission, you could say detailed reasons but they are reasons of dealing with all of these matters that eh Commissioner was required to deal with, under section 387 of the Act. This is where, importantly, those express matters which Mr Strangio said below or relied upon below, which are now abandoned, the appeal has now abandoned, include the consideration of all those. The submission is

really, you'll infer it somehow, notwithstanding the detailed reasons, is some error.

PN125

Now, in our submission, this is not one of those rare cases where this error, the second limb of *House v King*, is exposed. In our submission, the finding of harshness or lack of finding of harshness, was a matter that was open to the Commissioner. It was open to the Commissioner on an evaluation of all the facts and the circumstances that go into this type of discretionary decision making. And the final point is that we're now back, in my respectful submission, to the proposition that I advanced, in relation to grounds 1 or 2, what the appellant is really saying, on appeal, is that, and this is our submission, the decision - this decision was one that was open to the Commissioner but we ask the Full Bench to say that the other decision, that was also open to her, should have been made, that is the dismissal was harsh. In my submission, that doesn't expose error of the kind that the High Court was talking about in *House v King*, in that second limb.

PN126

Unless there was anything further, we otherwise rely upon the matters that are set out in our written submissions.

PN127

VICE PRESIDENT ASBURY: Nothing further, thank you, Mr Darams.

PN128

Mr Boncardo, did you have anything in reply?

PN129

MR BONCARDO: Just four very short points.

PN130

Firstly, in respect to ground 4 and the manifest injustice limb, my learned friend took you to paragraphs 39 and 40 of *King*. Can I take the Full Bench, and I alluded to this in my initial submissions, to paragraph 41. We are not relying upon an inference that something has not been taken into account. Our contention, in ground 4, is outcome focused and we rely, in that regard, on the analysis in the second last and the last sentences of paragraph 41 in *King*, that is, that the outcome is wholly outside the range of outcomes reasonably available, in the circumstances.

PN131

We obviously accept the point made in the final sentence that that will, in an unfair dismissal context, would not generally be rare, but it is important to understand, in our respectful submission, that we are not contending that the Full Bench should infer that the matter has or hasn't been properly taken into account. The outcome is what we rely upon and we contend it is beyond the realms of that reasonably available in the circumstances.

PN132

The second matter I wanted to was that BCF Infrastructure case that my learned friend took the Full Bench to concerned a *House v King* error, based on a failure

to take into account a relevant consideration. That is not what ground 1 of the appeal relates to.

PN133

The third matter is, my friend made a point of taking the Full Bench to his submissions and contending that they were, in effect, accepted by the Commissioner, at paragraphs 29 and 30 of the judgment. That does not, in our respectful submission, answer the point that we raise, which is that the Commissioner just did not engage with the fact that Mr Strangio breached the Code because his solicitor gave him, rightly or wrongly, certain advice.

PN134

Finally, it was put by my learned friend that what we are doing, in effect, is complaining that another reasonably available outcome ought be endorsed by this Full Bench. That is not what the grounds of appeal are directed to at all. The first ground of appeal, in particular, is one premised on a significant aspect of my client's case not being properly engaged with by the Commissioner.

PN135

We otherwise rely on the written submissions, unless the Full Bench has any further questions.

PN136

VICE PRESIDENT ASBURY: Thank you. Thank you to the parties for your submissions, they've been very comprehensive and we'll indicate that we'll reserve our decision and issue it in due course. Thank you. We'll adjourn.

PN137

MR DARAMS: May it please.

ADJOURNED INDEFINITELY

[2.51 PM]