



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT MILLHOUSE  
DEPUTY PRESIDENT O'KEEFFE  
COMMISSIONER LIM**

**C2020/5655**

**s.604 - Appeal of decisions**

**Chopra v Al Siraat College Inc & Arain and Others  
(C2020/5655)**

**Melbourne**

**11.00 AM, WEDNESDAY, 15 NOVEMBER 2023**

**Continued from 16/10/2020**

PN1

DEPUTY PRESIDENT MILLHOUSE: Thank you. Good morning, Dr Chopra. Can you confirm your appearance for the purposes of the record, please.

PN2

DR M CHOPRA: Yes. I'm Dr Chopra appearing for myself as the appellant in this appeal, C2020/5655.

PN3

DEPUTY PRESIDENT MILLHOUSE: Thank you, Dr Chopra. Can you confirm that you can see all members of the Full Bench today, Deputy President O'Keeffe and Commissioner Lim, as well as myself?

PN4

DR CHOPRA: Yes, I can. A bit of a surprise, I thought it was just going to be you.

PN5

DEPUTY PRESIDENT MILLHOUSE: All right. For the purposes of the record and consistent with earlier communication sent by the respondent to the appeal we note that there is no appearance by the respondent today. Dr Chopra, this interlocutory hearing has been convened before the Full Bench arising from the recusal application that you made by email on 27 October 2023. In a subsequent email of 30 October 2023 you indicated that you would decide whether you seek the recusal of myself as the presiding member of the Full Bench only, or whether your application concerned other members of the Full Bench.

PN6

Now, notwithstanding that being your stated position it's not apparent from the correspondence that you have sent to chambers after 30 October 2023 whether you clarified the question of whether your recusal application concerned individual members of the Full Bench or the Full Bench collectively.

PN7

As you were advised on 10 November 2023 the Full Bench constituted to determine your appeal application are those members that are sitting here today, Deputy President O'Keeffe, Commissioner Lim and myself.

PN8

We invite your submissions today, Dr Chopra, in relation to two particular matters. Firstly, we invite you to clarify the nature of your recusal application; that is whether the recusal application concerns individual members of the Bench or the Full Bench collectively. Secondly, we invite your oral submissions in support of that application. Thanks, Dr Chopra.

PN9

DR CHOPRA: Okay. What I want to make sure is that this hearing is not being used, going to be used as a proxy, because I have already alerted to you that I am not available on 6 December 2023. So when you're saying my email - and I'm going to speak to the (indistinct) of this factor, Commissioner and two Deputy

Presidents. I'm generally a nice guy. I'm not a bad human being, a bad person. What has happened in my life has happened in my life.

PN10

The fact of the matter is I want to make sure that things are not - you know, and English is not my first language, although I think I speak it fluently - but having a science background, sticking to the facts and not having them - words put in my mouth or what I have intended to do switched around. The only words I can use would be misrepresented or mischaracterised. And I just want to clarify that, right, because it can't be that on one instance when you've not received - when you've asked me - there's a recusal - I have made a recusal application against Deputy President Millhouse really, and then I said you haven't notified me who the two other members of the Full Bench are.

PN11

You hadn't until that point and there'd been correspondence for over a month, or a month, or whatever it was. I'm sorry I can't remember now, maybe just two or three weeks at that point. Then you told me the members' name and I told you what the reason was, and you sent that information - when I say you I mean your chambers, I'm sorry, I don't mean to be disrespectful - 3 o'clock or so one afternoon and tell me to let you know by 10 am the next day whether I want recusal against the other members or not.

PN12

That, with all due respect, is unfair, and I have been shouting from the roof tops you cannot treat us human beings like that. With all due respect you're a tribunal, not a court, number 1. However, we come to you and you're set up to help us when we are in a very vulnerable position. What I have encountered at the Fair Work Commission, other than a few members that have been very good, and I've had a hearing with his Honour Justice Ross as well, and a few other members who are very good, even this appeal, this is against Deputy President Gostencnik, when he presided over a conciliation he was awesome, right, so I have no issues with most of the members I've seen.

PN13

And Deputy President Millhouse, you have presided over a conciliation with another employer, and I think that's part of the reason that you have other information about me. That's part of the reason why this is against you as well. You were perfectly fine that day. So the issue is not that. But when I do complain about what's blatant unfairness in my eyes it should not be dismissed, right. You know, I'm a reasonably intelligent human being, I have four degrees, you know, and I have the self confidence to stand up for myself, fortunately because of my education. Many other people cannot. And now that in preparation for this, which I had no time to do, and I had to squeeze it in. I have looked at some decisions and I basically wasted time looking at decisions of Deputy President Beaumont, and I don't know how to say - I don't even know it's a male or female - Deputy President Beaumont, B-e-a-u-m-o-n-t. I think it's a her, is it, or he? Deputy President Millhouse, is that a male or a female?

PN14

DEPUTY PRESIDENT MILLHOUSE: It's a female.

PN15

DR CHOPRA: So Deputy President Beaumont, some decision in the bullying one, and I wanted to speak to that. And then the Bench got reconstituted, so all the decisions I've read of her are wasted. I mean I don't understand how this can happen. As I say this is not a court. This can't be willy nilly with all due respect. So I guess the point I'm trying to get around to - and by the way I was waiting for this - I just digress - I called you up, because it was just past 11 - I called your chambers for numbers and a voicemail then finally came on and said it will be transferred to his chambers, so I think you have to tell them you're not a his, you're a he. That's your voicemail thinking of you as a male, so you might want to get that changed.

PN16

Anyway the point I'm trying to make, ma'am, is that I will proceed, because I don't also want this thing to be delayed any longer than it already has, but I cannot appear on 6 December 2023, and that needs to be changed, and a couple of clarifications need to occur today when the Full Bench is here as well.

PN17

So I don't want this hearing - yes, that's the point I was leading up to - to become a proxy that the Full Bench has heard me and seen me, et cetera, and in a way I've gotten some kind of a de facto procedural fairness, and so forth. I have clearly not. This is just a recusal application and, you know, I would truly appreciate Deputy President O'Keeffe and Commissioner Lim making the time to be present, considering whatever little time they would have had to do this thing, that both of you are in Perth if I'm not mistaken. Is that correct? And that being the case, you know, it's quite early over there.

PN18

And that leads into one of the points which I wanted to ask Deputy President Millhouse that when the Full Bench was changed from when VP Asbury was presiding, I need an explanation of that so I can - and I think I might - I'm not sure if I'll ask you this - why did Deputy President Millhouse not just continue with the directions that were only in place when the Full Bench was just - you know, just the members were changed. Those directions were arrived after hours and hours and hours of my life, which I'm not going to get back in 2021.

PN19

And you know what Deputy President Asbury, as the Vice President was then, made a statement in July 2021, which I'm assuming the Full Bench is familiar with, and then made another decision or additional remarks on 12 July 2021. She laid out everything that this appeal was going to proceed with. Why was that part appended, which has led to again my spending tens and tens of hours being wasted. And with all due respect it seems to me, and Deputy President Millhouse can clarify, that it was given to you and you just made orders, including for extension of time.

PN20

So if I have to conclude from that is - and you, Deputy President Millhouse, did not even become familiar with the file, because you arranged for a permission to appeal and an extension of time within 30 minutes to be argued. And Vice

President Asbury has written in paragraph 14 of her statement dated 12 July 2021 that the hearing will commence at 10 am on the day that it is listed, and will conclude by no later than 4 pm on that day, and this is after weeks of correspondence, as you would have noticed. I mean do you, with all due respect, not understand how that much is a huge disrespect on us, and that's why we have to make these applications.

PN21

And if I can point this out to the other two members, who congratulations on your appointments this year, if you just read some of these anti-bullying applications, as I've just skimmed over, and I was going to raise this point later, but it's probably apropos to raise it now, 60, 70, 80 per cent of the applicants make a recusal application. I mean are we all idiots. Do we all not know what justice and fairness is. Why are 70, 80 per cent of the people applying, particularly in the anti-bullying jurisdiction, making recusal applications, and then finally giving up. And that's just wrong on its face, with all due respect.

PN22

(Audio malfunction) the objects of the Fair Work Act. And all orders that you made, including procedural orders, have to be made - whatever discretion you have has to be exercised judicially, which means unfairly and impartially and independently, which means fairly, sorry - there is a slip of the tongue - fairly, impartially. Section 3 of the Fair Work Act, section 3(e) says:

PN23

*Enabling fairness and representation at work and the prevention of discrimination by recognising the right of association - - -*

PN24

I will skip that.

PN25

*- - - protecting against unfair treatment and discrimination - - -*

PN26

I will skip that.

PN27

*- - - providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms.*

PN28

If you just look at that subsection, and I've skipped discrimination, even though that was alleged against my employer, how is it that (a) - we'll I guess come to that at some point - the moment an anti-bullying application is filed 100 per cent of them are being not heard on their merits, 100 per cent of them. It's as if you've created an absolute rule. And why is that - and this is true for my employer as well - I filed my application on 18 December 2019. The first communication that went to them was in January from Deputy President Gostencnik, and I hope I'm pronouncing it correctly, asking them what is my plan to return to work. The employer responded about my return to work and how a person has been

appointed and that the school is now closed, but as soon as it starts the week before they will engage with me on it.

PN29

And then they hired lawyers, and the lawyers can read Fair Work Commission decisions and they can read from *Shaw v ANZ* and its progeny. And all they have to - they are under an obligation to advise their client, an employer, if you don't want your dirty laundry to be washed at the Fair Work Commission and the bullying allegations heard just dismiss them.

PN30

The moment you dismiss them Fair Work Commission has created an absolute rule that it's not going to be heard, which is what my appeal is and it's in the public interest, it's not going to be heard because the employee is no longer at work, or creative ways are taken to prevent this hearing to be heard, which I will take you through the examples today, because they relate to decisions you have heard, Deputy President Millhouse, that I prepared actually only for you.

PN31

So what can happen? Bullying has occurred. The person is dismissed. At worst they can file unfair treatment and get six months salary; at worst, which rational employer will not do that, and that is what the Fair Work Commission has, in my opinion, hollowed out and made important section 789FC anti-bullying applications for a stop bullying order. And why that has been done is the reason I will go into to make an application for your recusal, Deputy President Millhouse, and I'll be leading into that.

PN32

So I've asked you why did you make that decision to completely flush down the toilet careful orders that were made by Vice President Asbury where she did not accede to a lot of other things I asked, but she acceded to no page limit, no 30 minutes limit, start at 10, but finish at 4, and it will be a permission to appeal.

PN33

But in that correspondence she acknowledged that a permission to appeal cannot be heard without the grounds of appeal being heard, and they do not need to be heard in that detail. However, they have to be heard, because ultimately your written decision if you're not granting the permission to appeal can't be a blasé decision written at a high level of generality saying, just mouthing or parroting, whatever that (indistinct) things are, that it's not in the public interest, and, you know, blah, blah - you know, it's - and I'll go into that.

PN34

You know, it doesn't meet the criteria for filing in that - what is that, what I'm looking for - just give me a second - that it doesn't raise issues of importance or general application. There's a diversity - not a diversity of decision in the first instance, it doesn't manifest (indistinct) justice, counterintuitive and so on, and legal principles, (indistinct) harmonious. So there's like five things there already that I've said.

PN35

In my case I have to speak to all five generally first, and then I have to take you to examples. Otherwise how can I say permission to appeal should be granted. That's just that one part, and I can then describe there's a difference of error of law and an error of fact, and then take you to the material that should be on my file that was filed that Deputy President Clancy did not take into account on the decision that is being appealed right now. How do I tell you? Are you going to just believe my word. I might as well just mouth them, and you take me under oath - and by the way I want to be sworn today, so that whatever factual stuff I'm saying should be taken by the Commission under oath, and I'm happy to be cross-examined by your - examined on those details.. So would you want to - will you please swear me in.

PN36

DEPUTY PRESIDENT MILLHOUSE: That's not necessary, Dr Chopra. We can receive your submissions today, thank you, and we will take - - -

PN37

DR CHOPRA: The weight that I want you to give is not how you just take my word and Deputy President Clancy has said something or the employer has said something and you give more weight to that. That can't happen. That's the point - - -

PN38

DEPUTY PRESIDENT MILLHOUSE: Dr Chopra, consistent with what you said at the outset of the hearing today this is not by proxy, your permission to appeal hearing. It's an interlocutory hearing convened to deal with the express application that you have made for me to recuse myself. It appears from your submissions today that your recusal application is directed to me only and will proceed on that basis. The Full Bench will then consider whether it has the ongoing jurisdiction to determine your application for permission to appeal.

PN39

Now, in relation to the concerns that you have raised about the permission to appeal hearing, I can indicate to you that as the permission to appeal roster for December has been closed the Full Bench, assuming that the Full Bench determines after the hearing of your recusal application today that the Bench holds jurisdiction to proceed as constituted to determine your permission to appeal application, it will be possible in those circumstances for additional time to be allocated to your permission to appeal hearing, and that time will be a period of three hours commencing at 12 pm Victorian time on Wednesday 6 December.

PN40

So it might be that you wish to take that supplementary information into account for the purposes of delivering your submissions today. Otherwise noting that your application today is a recusal application in respect of me it's not necessary for my associate to administer an affirmation. The Full Bench has been convened to hear your submissions in support of your recusal application, and we invite those from you now, Dr Chopra.

PN41



DR CHOPRA: Well, yes, ma'am, and first of all I didn't understand your jurisdiction point, but I do want to (indistinct) what you've said. What is the jurisdiction point that you said that the Full Bench will determine whether it has jurisdiction to hear my appeal or not? Like that was not what you're hearing today, right? When you said jurisdiction all you mean is that the Full Bench as constituted; in other words whether you should recuse yourself or not?

PN42

DEPUTY PRESIDENT MILLHOUSE: The High Court has made clear, Dr Chopra, that recusal applications raise matters of ethics and jurisdiction insofar as it concerns a Full Bench that has been convened or constituted by the Commission to determine an application.

PN43

Now, in circumstances where an application or an objection has been brought by way of a recusal, such as the case here, then the party that's making that application to a member sitting is given the opportunity to make submissions to the Full Bench in support of that recusal application. The Full Bench that has been constituted to hear the appeal application sits together with any member against whom the objection is raised.

PN44

The member or members in question are required of course to determine whether they will recuse themselves, and the Full Bench as constituted will determine whether it retains jurisdiction to determine the appeal.

PN45

DR CHOPRA: That's the part I don't understand.

PN46

DEPUTY PRESIDENT MILLHOUSE: That is why your matter has proceeded to a hearing before a Full Bench today, and we urge you to focus your submissions on the recusal point. At the outset I invited you to clarify the nature of your recusal application and the basis for it, and those are the matters that the Full Bench would like to hear from you today.

PN47

DR CHOPRA: Yes, ma'am, I understand, and my question was just focused on that, and with all due respect I still don't have an answer to what I've asked. My question to you is, and maybe I'll just pass it out, if you decide that - because you never told me that it was only against one member or one or two members still the all three members would be hearing it. I was never informed of that, and I should have been informed of that. I'm a self represented person, number 1.

PN48

But having said that if you decide to recuse yourself, or if you don't decide to recuse yourself, in both those cases the hearing proceeds to the permission to appeal hearing and we'll talk about when it ought to be, because it cannot be on 6 December. I have said that flatly, I am not available. You cannot dictate to me when I have to appear when I'm not available. And you've sat on it, and I give - I let Vice President Asbury know in this July and asked for orders to be



made. Vice President Asbury did not get back to me until three months later. That's not my fault. That's the Commission.

PN49

So when the Commission can sit on stuff that's okay, but when the human being is not available for whose purpose, with all due respect, is your (indistinct). You're there to help us. We are not there, with all due respect, at your beck and call. We respect your position. We will be there to get justice. We will be on our knees making submissions and affirmations and swearing an oath. It's respect us. I don't know why you don't see that, you know.

PN50

When I've asked for - I asked for these orders and I've looked into some of these rules, which I will bring to attention. I asked for a clarification on the rule number 7, application for directions of procedure. I asked for it in July from Vice President Asbury. I don't get a reply until October. And so my question to you is when you're saying there's jurisdiction I don't even know what I'm here for then. So I just want to understand.

PN51

This word jurisdiction is a huge issue in this appeal, and with all due respect from my little knowledge it's just being bandied about like we're distributing lollies on Halloween. Jurisdiction is a serious, serious issue, and the way I little understand jurisdiction is subject matter jurisdiction, in personam jurisdiction. Jurisdiction is the ticket you punch to get into the court or the tribunal. Once the court or tribunal has jurisdiction you are in, you are being heard. Jurisdiction does not arise. What arises after that is an exercise of power. That's not an exercise of jurisdiction.

PN52

That's a huge point I want to make in this appeal under that section 789FF, whatever it is, (1)(b)(ii). And it is that, with all due respect, for the use of this word, bastardisation of the jurisdictional issue that the procedural stuff gets manipulated. Therefore we are not allowed to bring in evidence, sworn evidence, factual evidence, which is what I want to do today. If I make a recusal application, which I'm trying to clarify, I'm not limited to submissions. I can support my recusal application under oath. I could have supported it on affidavit. So I don't know why I'm being prevented from doing that. But put that aside could you please clarify what you mean by the word 'jurisdiction'. That just causes me anxiety and ties my nervous system into knots. How does a jurisdiction question arise here?

PN53

DEPUTY PRESIDENT MILLHOUSE: The issue concerns whether the Full Bench as constituted is able to continue to hear your application for permission to appeal in light of the recusal application that you have made against a member, or indeed members, it was not clear, who sits as part of that appeal Bench.

PN54

Now, there may be reasons upon hearing your submissions in support of your recusal application that gives the Full Bench a reason to consider whether as

constituted these three members are capable of going on to determine your application for permission to appeal. That is why the Full Bench has convened the interlocutory hearing today so that we can understand the nature of your recusal application and make a decision in respect of it.

PN55

DR CHOPRA: Ma'am, please can you get to the jurisdiction point. I'm asking you two questions. If you recuse yourself does the Full Bench lose jurisdiction. If you don't recuse yourself does the Full Bench - - -

PN56

DEPUTY PRESIDENT MILLHOUSE: It's not an automatic outcome, no.

PN57

DR CHOPRA: Then explain to me what the process is. If you're keeping me in the dark that's an unfair hearing. You need to tell me what the decision-making tree is. You don't have to tell me how you're going to go about it, but you've got to tell me, lead me down that path so I know what I'm arguing for.

PN58

DEPUTY PRESIDENT MILLHOUSE: I have made that clear to you, Dr Chopra. In relation to applications for a member or members of a Full Bench to recuse themselves then it is incumbent upon the member or members to whom that objection is made to determine whether they are going to recuse themselves or not. Thereafter the Full Bench as constituted has the power or the capacity to consider its own jurisdiction and whether it has formed the view that it remains seized of the capacity to go on to determine your application for permission to appeal - - -

PN59

DR CHOPRA: Based on what factors?

PN60

DEPUTY PRESIDENT MILLHOUSE: - - - and (indistinct) that decision.

PN61

DR CHOPRA: Based on what factors? You're still not telling me. Suppose you stay a part of the panel, of the Full Bench panel I guess it's called, then on what factors does it decide it retains jurisdiction? And if you are removed from this panel then on what basis does it decide it retains or doesn't retain jurisdiction? Can you help me explain that, because I don't know. (Indistinct) positive you people assist me.

PN62

DEPUTY PRESIDENT MILLHOUSE: Well, the other members of the Full Bench are entitled to know what the views of the person against whom the objection is made are. So in circumstances where your application seems to be directed solely to me the other members of the Full Bench are entitled to know what my views are in relation to that application. I might form the view that I do not consider that a fair minded lay observer might reasonably apprehend that I

might not bring an impartial mind to the determination of your application for permission to appeal.

PN63

But as members of a Full Bench as constituted the other members of the Bench have an opportunity to address whether they might hold a different view, and their views are important, because as a Full Bench we are collectively seized of jurisdiction, given the constitution of this Full Bench to determine your application for permission to appeal.

PN64

So the other members of the Full Bench have a voice. It's not only my voice that is important in the context of a recusal application that has been made in relation to a member of a Full Bench. So that is why we're all here today to hear your submissions in support of your application.

PN65

DR CHOPRA: Well, submissions I understand and statements under oath - - -

PN66

DEPUTY PRESIDENT MILLHOUSE: All right. Very well, if that's your preference, Dr Chopra, then I will invite my associate to administer an affirmation to you now.

PN67

DR CHOPRA: I would appreciate that (indistinct) onto me on this. Yes, I'm happy to take an affirmation.

PN68

DEPUTY PRESIDENT MILLHOUSE: Thank you.

PN69

THE ASSOCIATE: Good morning.

PN70

DR CHOPRA: Good morning.

PN71

THE ASSOCIATE: Can you please state your full name and your address.

PN72

DR CHOPRA: Manu Chopra, (address supplied).

**<MANU CHOPRA, AFFIRMED**

**[11.37 AM]**

**EXAMINATION-IN-CHIEF BY DEPUTY PRESIDENT  
MILLHOUSE**

**[11.37 AM]**

PN73

DEPUTY PRESIDENT MILLHOUSE: Thanks, Dr Chopra.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN74

THE WITNESS: Thank you. So obviously the Full Bench will pass out the facts that I am saying would be the truth and I'm happy to stop and clarify at any time. I'll be cross-examined on it, so to speak, and then obviously (indistinct) be submissions. Thank you for that explanation. So let me clarify my understanding. What I've heard Deputy President Millhouse say just now is that after this hearing, I have made my submissions, then I guess I will not hear your reasons for recusal or not. However there will be a discussion amongst the three members of the panel where you will announce your view, yay or nay, to continue with the panel or not, and the other two members will either agree with you or disagree with you, and so on. And then collectively a decision will be made, at which point then you will tell me, I'm assuming by email, it may be later on today, I'm not sure, if you want to point to thinking today, or I'm not sure when it will be told to me, that the Full Bench states or not. Is that what you've told me?

PN75

DEPUTY PRESIDENT MILLHOUSE: Yes. The decision will be reserved and reasons will be given to you after the hearing today once we've had an opportunity to understand the nature of your application and the basis for it.

PN76

THE WITNESS: Okay. So that was something that I would have never guessed in my life. I did not even know the three (indistinct) was coming, and I'm reasonably - you know, unfortunately not that my life, I wanted my life to turn out this way. I've been in and around the system with the Commission and the VCAT and Supreme Court or whatever for the last several years. Most people are not in that fortunate position that way, and there's no way I want to test that.

PN77

So I don't think, with all due respect, that you being the presiding member of the Full Bench you had a positive duty to explain this to me weeks ago, Deputy President Millhouse. This is not something that you hide the ball from, because I would not - I would have never guessed that the other two members of the panel need to be there, because to me a recusal, the word 'recusal' is directed generally to a tribunal, I mean to a court person, and so on, and (indistinct) it's you anyway.

PN78

So having said that what I do want to - the second part I wanted to clarify, which goes into my application, a couple of them is - and this is just perhaps a silly question, under which part in the provision, the Fair Work Act, is this recusal application being heard? I do not see, read the word 'recusal' at all in the Fair Work Act. The only thing I read is that once the Full Bench has been constituted members can be switched around for whatever reason members can - you know, can happen, et cetera, and so a new member comes in, and the Full Bench starts from that point on and it can take into account what has happened before.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN79

So what I want to know is that there was a Full Bench before, there's a Full Bench now, the Full Bench now in my opinion should have continued on from the Full

Bench before, because instead of one member being substituted three got substituted. Singular versus plural, that's not a big deal. So I do not see why the orders of VP Asbury made after weeks and weeks and hours of - I can't even call it negotiation, but it was just me pleading and listening and finally I could get medical certificates, I have to put in affidavits, were just flushed down the toilet when DP Millhouse took over. So would you please answer why did you change a six hour hearing from 10 am to 4 pm to a 30 minute hearing? Why did you ask me to present extension of time. And the third thing is under which provision of the Fair Work Act should I be looking at under which this hearing is occurring, because I don't see any provision in the Fair Work Act for a recusal hearing.

PN80

DEPUTY PRESIDENT MILLHOUSE: The recusal hearing is being convened for an oral hearing today, Dr Chopra, at your request, as a matter of procedural fairness to follow your recusal application. That was provided in writing on 27 October. It's an interlocutory hearing. It's as part of your overarching application for permission to appeal in this matter.

PN81

In relation to the matters that you speak of regarding the directions that were issued by Vice President Asbury, those directions as was communicated to you by the Vice President were capable of being revived by the new presiding member upon the reconstitution of the Bench, and that is what has occurred.

PN82

Now, if your concern, Dr Chopra, relates to the hearing date on 6 December, which is what I'm hearing is the primary focus of your submissions today - - -

PN83

THE WITNESS: And the duration, and then we come - - -

PN84

DEPUTY PRESIDENT MILLHOUSE: The duration - - -

PN85

THE WITNESS: And then we come to (indistinct).

PN86

DEPUTY PRESIDENT MILLHOUSE: And I observe that aside from simply stating that you will not attend or that you cannot attend you don't appear to have provided the Full Bench with any basis explaining your unavailability, or any documentary evidence which supports a request for an adjournment. In those circumstances broad requests for an adjournment are not typically granted, particularly in circumstances where a Full Bench has been convened to determine your application and you have been on notice of it for a period of at least approximately six weeks. So those matters are in your hands, Dr Chopra. If you wish - - -

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN87

THE WITNESS: I'm going to stop - with all due respect I'll just stop you right there. That is what I call a complete misrepresentation. I'm so sorry to interrupt. That's what I call a misrepresentation and mischaracterisation, and now you're giving me absolute data. I've got other stuff to talk about, but just in that statement that you made - you know, again English is not my native language, so I can't - and especially when I get stressed and excited I can't come up with soft words as you might be able to mean in your native tongue. I can do it in my native tongue, and very politely.

PN88

Those are clear misrepresentations and mischaracterisations, if not, you know, false statements, with all due respect, and that then goes not just to the apprehended bias standard that you set, it was actual bias because you obviously seem to have a closed mind to objective submissions. I have not been on notice for six weeks. When you glibly said that VP Asbury made me aware of it - her email is in front of me, it was on 13 October on a Friday at 11.25 pm. That's not even - that's four weeks when she said that a different Full Bench might be appointed. She did not say will be appointed, she said might be appointed, because it will be sent to the president. So when you said I've been on notice for six weeks that's a lie, Deputy President Millhouse. I don't see after I've said all of this how I can even appeal before you.

PN89

Second, what she said it was, that she has tried to request (indistinct) to go to another Full Bench, but here's what she said.

PN90

*The Vice President is unable to meet your proposed timeline due to other commitments.*

PN91

Now, this is - she's replying on 13 October 2023 to my email sent on 27 July 2023. And in that email - the second part I vehemently disagree with what you have just said. That's a misrepresentation of the chronology of how the events have unfolded.

PN92

In July 2023 VP Asbury (indistinct) this appeal and said, 'Let's proceed', and she asked me three questions. Do I intend to proceed in the above matter? Do I seek an oral hearing, not have it determined on the papers? Do I want to file materials in addition to that's already filed? And I answered 'Yes', 'Yes', 'Yes.' And then I took the initiative and wrote a nice long email saying:

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN93

*May I also please add the following relevant piece of information. While I'm truly appreciative of the Fair Work Commission reagitating this important proceeding I'm afraid that the FWC has caught me at a really bad time, with all due respect. This is due to my schedule. I'm extremely swamped, if I may*

*be permitted this expression. I believe that you already know this, merely on the legal (indistinct) coming up, including my (indistinct) hearing.*

PN94

Blah, blah, blah. And I went on to talk about some travel coming up and so forth. Giving those reasons, that's the reasons I've already given. You've taken over from the previous Full Bench. You can't flush that down to the toilet, which is shocking to me, and that when you say you've now made 6 December I have to start all over again. It's like a ping pong ball. And I'll say 6th is not good, I'll give you reasons. You'll submit, you'll put it on the 13th. So then I go to a doctor, get another one for the 13th, then you'll put it on the 20th.

PN95

I mean is that efficient, is that respectful, or should you not just - even if you don't want to waste your time have your associate email me, I'll email her, and we'll just come up with a mutually convenient date that is convenient for the Full Bench. Maybe all three associates and I can email each other, and I'm sure between the four of us we're capable of finding a date that is suitable for all four of us. This is shocking that the Fair Work Commission, the Full Bench - if this is your practice and procedure it ought to change. No wonder 80 per cent of us file for recusal. You treat - you're dehumanising us. Our time is not at your disposal to prove to you why we are not available, because here's what I'd already written, Deputy President Millhouse. I wrote after that long paragraph to VP Asbury:

PN96

*So I would respectfully request the following proposed orders to be issued. Applicant to file written submissions by Friday 17 November 2023, hearing one day 10 am to 4 pm, to be scheduled in late November 2023 or December 2023.*

PN97

I proposed this schedule in July. Why did the Fair Work Commission go to sleep? What was the problem with my schedule? That schedule was quicker than your schedule that you're proposing. All I did was email - - -

PN98

DEPUTY PRESIDENT MILLHOUSE: Can I clarify that, Dr Chopra. Isn't that in effect what the outcome of these directions are? You've indicated that you proposed filing material on 17 November. The current - - -

PN99

THE WITNESS: Ma'am, let's not waste time because I've heard your question and I'm being very rude to you, I truly apologise, but if you were my manager and I told you - and you told me, 'By when can you get the task completed?' 'I can get the task completed by 5 pm on Thursday, this Thursday.' And I told you that Monday morning 9 am. And you came to me Thursday morning 9 am and said, 'Get it completed by 5 pm Thursday.' Is that a valid question that you ask me? Are you actually (indistinct) that's (indistinct) the reason to ask for your recusal.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE



PN100

You made a decision in Igor Grabovsky, or whatever his name is, Igor Grabovsky. Now, I've not read his submissions, but I've read what you've said he complained about. And he's complaining about the exact same thing I am complaining about, which you just dismissed, the Full Bench, and you were the presiding member. You've just misrepresented what I have said. You have just ignored what I have said. That is shocking.

PN101

And don't tell me that I don't understand English or what you just said. Yes, I don't understand it as well as you perhaps, but for you to say - and, yes, you all have training as lawyers, and I have training as a scientist, and, yes, maybe - I don't mean to say it in a bad way - a bit different in our ethics, and this is legalese. But just because you can say a sentence in English, which when stood alone without context is true, but in the context it's an absurd question. It goes to the 789, everything that you're going to be talking about hopefully whenever the final hearing is at. I can't believe that these kind of statements are made and they're, you know - I don't even want to dignify it by calling it false equivalence. It's not even false equivalence, for God's sake.

PN102

The answer is self-evident. I asked for this on 27 July 2023. VP Asbury could have just written to me on that day, or I mean her associate, and said these are the orders made, but by the way Commissioner Hunt is going to retire so we are going to substitute someone else. And the orders of July 2021 would have continued. All the hundreds of hours I spent at that time would have been respected, even though I did not get what I want, even in that.

PN103

However, the Vice President writes that - not Commissioner Hunt, I'm so sorry, we don't need to make her retire, Commissioner Booth. She says that, 'The Vice President is unable to give me your proposed timetable due to other commitments.' So other commitments are more important (indistinct). That's what I read there. So whatever her other commitments are they're more important than a human being who is alleged to have been bullied and who you all know has mental - you know, psychological issues, et cetera.

PN104

Just that sentence to me is something I would not say if I had power. I would come up with a different way, and Vice President Asbury is actually very nice. I mean even though she and I have had, you know, many discussions and so forth and exchanges. You know, this is just something which comes with power, and you guys don't even notice what you are writing. And she's writing this to me almost three months later. And then she writes this sentence:

PN105

*Further, while this matter has been in abeyance awaiting communication from you. Commissioner Booth has retired.*

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN106

Is that not a misrepresentation? I wrote on 27 July 2023, 'I am awaiting communication from VP Asbury', and she's telling me that she's waiting - the matter is in abeyance because of me. She did not say - I don't know when Commissioner Booth retired, but I'm assuming it's between July and October, because if Commissioner Booth had retired before July, well then in the interest of full disclosure it should have been told then. If that's the reason to reconvene the Full Bench then that should have been told to me in July. That's not something you hide in your back pocket. And then she writes:

PN107

*In these circumstances - - -*

PN108

But just the two sentences that I just took exception to.

PN109

*- - - the Vice President has decided to refer the matter to the president of the Commission and request that it be reallocated to the Full Bench. Your correspondence will also be forwarded to the president's chambers.*

PN110

So that's my correspondence which is now being forwarded in October.

PN111

*If the matter is reallocated - - -*

PN112

So she didn't say it will be. She said if it is reallocated. Then she says:

PN113

*- - - any procedural matters in relation to further conduct of your appeal will be a matter for the presiding member and/or Full Bench (indistinct). Further information about the next steps in relation to your appeal will be provided by the Commission in due course.*

PN114

But then you and your associate were communicating with me. The other two members were not copied, so I didn't know who they were. I don't know if the initial orders that you made were made with the Full Bench agreeing to it or just you sending them. And so my question which I started this hearing with still stands. Why did you exercise your discretion in changing a six hour hearing into a 30 minute hearing, and why did you ask me to also argue extension of time?

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN115

DEPUTY PRESIDENT MILLHOUSE: Dr Chopra, today's hearing is not about me providing you with a back and forth about administrative issues that are not relevant to your application. We're here to listen to your submissions in support of the recusal application. The correspondence that has been issued to you has explained that there was no need for you to address the reference in the directions

to the extension of time issue. That's accepted. There was no need for you to address that, and that's been made clear.

PN116

THE WITNESS: But why (indistinct)?

PN117

DEPUTY PRESIDENT MILLHOUSE: Thank you, Dr Chopra. But I don't want us to lose the opportunity to hear your submissions as they specifically relate to the recusal application today. I want you to have the opportunity to present those matters for our consideration, and I urge you to focus your submissions on those issues so that we can take them into account.

PN118

THE WITNESS: All right. So you said when I asked you this question why did you make those orders, and you said that's not relevant to the recusal application. With all due respect I beg to differ. That is the essence of my recusal application, and you're not even getting that. Why are you not getting that? Let me explain - let me explain why.

PN119

DEPUTY PRESIDENT MILLHOUSE: All right, go ahead.

PN120

THE WITNESS: So we can - I (indistinct) complete this point. This is just one little tiny prong, there's many. The very fact that you decided to do that, and now you're saying it's not even relevant, is exactly the same situation where I just said what you said was misrepresenting. I did take offence to that, I'm insulted. I want to appeal before any panel, three human beings, I will respect your position. You've been appointed by the Federal Government. You know, it's lifetime appointment. Clearly you've done something right in your lives that you've been appointed. So I respect that. But I can't respect the decision or the actions or the omission that you have done in your exercise of your discretion, which you are then unable to explain or justify.

PN121

So with all due respect the extension of time you're not explaining and answering honestly, and had I been under oath and answered like that your decision would have said the person did not give straight answers. The credibility of this witness is, you know, I don't accept, he's not credible, they were evasive, they didn't answer questions directly, they were answering questions in a self-serving manner. So (indistinct). You know with all due respect, ma'am, and I again don't understand the word, but you made a mistake, you (indistinct) up. You did not read my file before you sent out those instructions.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN122

The 2 July 2021 was when Deputy President Clancy made his decision. I filed my appeal less than 21 days later. There was no need for an extension of time. And when you said, just now when you said, your instruction said I do not need to

address that, in the spirit of full disclosure you should have said. You made a mistake. I had to point it out to you that why you are asking me to do that, and then you wrote back to me saying I don't need to do that. But I don't know if the other Full Bench members know this or not, and whether all three of you are working together in those emails. It's not fair to me. And so why is that relevant? Competence, with all due respect.

PN123

If you're not reading the file before issuing directions how can even a lay minded fair observer have faith in that. A mistake's a mistake. Something that denies you procedural fairness, as you know High Court decisions and Court of Appeal decisions and some Federal Court decisions, a denial of natural justice, denial of procedural fairness is de facto, constitutes at the very least apprehended bias. Because you see when you read apprehended bias please understand there's a double might in that standard, a double might.

PN124

It's a very low threshold, and the person has to be cognisant of all facts, and when you're replying to me, yes, it may not be a back and forth, but how else can I make my submissions or my statements under oath when you're not telling me what the reason is. And if I did not press this point you would go back to them and say whatever you say and I have no chance to reply to yours. That itself is a denial of procedure fairness if the process is as you've described to me.

PN125

So you will be saying, in a way three of you are deciding - I'm not saying they're the (indistinct) votes, but Full Bench majority wins. So theoretically my submission should be to convince the two of them, not to convince you, the way I look at it. And if I convince them they can politely ask you to step aside. This is how I've understood (indistinct). If I'm mistaken you should correct me.

PN126

So the fact of the matter is a fair minded lay observer not listen to all the facts. The facts are not what is relevant in a narrow sense to you, or how Deputy President Clancy decided in that decision. I mean that's the fox guarding the chicken coop. That is the classic thing that I wrote in there which I've got in front of me, the nemo judex impasse as well, the principles against bias. It's basically no person should sit in judgment on themselves.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN127

I do not understand in a recusal application when a person is hearing it against themselves how is that even possible, and then a glib sentence you just decide the facts and then right at the end you say, 'I do not think a fair minded lay observer might decide that I might not bring an impartial mind in relation to deciding any questions against the appellant or the applicant as the case may be.' How can that ever be a true judge of what has transpired. It's not to mouth the words and then dismiss it. And a fair minded lay observer does not know all your legalese. If anything if there's a line between you and I on a spectrum the fair minded lay observer is closer to me and my judgment than closer to your judgment, with all

due respect. And I know all the facts. So even more so the lay observer is closer to me.

PN128

So my point is whatever VP Asbury did, fine. The Full Bench has been reconstituted. As I understand the Fair Work Act - and can I just make this point before I continue on, and I'll ask the Full Bench this thing as well. Because this is such an important point I was willing even then, and I would have done it then, because had I had, you know, a clarity on this issue, I respectfully say, and this is against today's submissions as well, but what the Fair Work Commission has done in its literalist interpretation of the second prong under section 789FF(b)(ii) is a serious error of principle. It cannot be the case. If that's the case then there was no point legislating stop bullying orders. End of story.

PN129

In other words if that's the correct interpretation then the legislation, the parliament of Australia made a ruling, passed a law, and created a loophole within it. With all aspects of purposive interpretation of any provision, there is no way on God's good earth that provision can ever be interpreted like that. If a little research was done by, maybe, the newer members of the panel, just look at all the anti-bullying applications made in the last five, six years, every single one was dismissed. How is that possible? How is that possible? And it was dismissed on this interpretation.

PN130

Now, I'll explain - so in other words I just started off with, the employer fires the person so that they're gone. Now, those are the ones that have been dismissed for that reason and that is the ultimate act of bullying, firing someone. One decision that I've seen and read it even had, I couldn't believe it, I don't know what to call it, the unempathetic statement, recognising that that's the ultimate act of bullying, and saying that they have no power to make - they have no jurisdiction to do it. It's the jurisdictional question that I harped on before, which causes this absurd interpretation.

PN131

How is that? Which is what has happened in the arranging of this appeal as well. The procedural order is made that a jurisdiction question is raised and because a jurisdiction question is raised, therefore you can't bring in any factual evidence or affidavit or cross-examine witnesses, because there's no factual thing to be done.

PN132

If that's the case, if there's no factual dispute, only then can section 587 be triggered, but this is the tail wagging the dog. As in my decision - - -

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN133

COMMISSIONER LIM: Dr Chopra. Dr Chopra, I'm very sorry to interrupt you but I'm very keen to understand the grounds for your recusal application, against Millhouse DP. I have read your file and the reason I'm interrupting you is that I

can tell that you are traversing, ultimately, your contentions against Clancy DP's decision.

PN134

With respect, Dr Chopra, that's not the purpose of today and I don't want you to feel that you haven't had the opportunity to make out your grounds in support of your recusal. So if I could encourage you to address and deal with the recusal grounds, because I think I have some of them, but I think you understand that you've veered around in different directions a little bit, Dr Chopra, so I'd ask you to please remain focused.

PN135

THE WITNESS: I have, ma'am, and thank you for that - for trying to focus me on that issues. If I can then submit, what I'm submitting is the first step of what is it, under the (indistinct), isn't it? Without the context, how do I explain the injustice? This is what you guys are not getting, otherwise you can flush apprehended bias down the tube as well. When there is an obvious injustice that has been done, that is the first step of what is it, because otherwise the problem is I could issue something and then everybody follows it like, I don't know, without listening, and that Ebner case was completely different, what it was was to do with stocks and securities, so it was a very clear case so that link was there.

PN136

But that link is not meant to be a very high threshold and what I'm trying to explain to you is when there is this blatant unfairness. Like, with all due respect, a first year law student should know what high threshold a summary dismissal application is. If there's a genuine issue of material fact you cannot even prepare. Should not even be allowed to apply for a summary dismissal application. But because that application has been made, factual material is not brought in yet what about the factual dispute is, is decided against the applicant and anti-bullying orders are (indistinct).

PN137

So the point I'm trying to make, in a circuitous manner is, that Clancy DP did that. Okay, so he made a mistake. However, now I'm bringing something which is such an obvious error, if that's not an error then I don't understand anything in the law, and I'll admit that gracefully, I'll graciously admit defeat. The point I was leading up to when I started this was, I want to take it to the Federal Court. All I want from this Full Bench is to tell me, under 563E, that I can make an - I can exercise this jurisdiction in the Federal Court for a writ of mandamus prohibition or injunction is sought in the Federal Court against a person holding office, under this Act.

PN138

All I wanted was clarification, two years ago, and I would have gone direction to the Federal Court and I just want to hear that because at this point I think the Fair Work Commission is too far down the road of what I'm asking it to examine by itself, (indistinct).

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN139

Now, I'm grateful that there's two fresh pairs of eyes on this, but there is 1500 decision. Having said that, there are decisions that I will point out when the permission to appeal is going to be heard, which will go to all those points, that there is disharmony and there is different decisions, you have created different classes of employees: casual versus dismissed.

PN140

So if you are a casual employee then your anti-bullying application is heard. How come? I thought your contract finishes at the end of the day, when you leave. But the Fair Work Commission, including a decision that Millhouse DP tried to chase down, casual employees anti-bullying application will be heard. Same thing with a volunteer working, Debabi(?). So there is disharmony amongst these decisions as well but the majority follow Shaw.

PN141

So my point to you is, when you are arranging just a permission to appeal, this point should be so obvious that an appeal - I should be given - that an appeal should also be heard at this point, at the same time. But even if not, I have asked for direction from the Full Bench, how can I present my permission to appeal without presenting all my grounds or all the buckets in which permission to appeal is granted, in which my grounds fit? I have to do that. And I have asked Millhouse DP, that's another reason why I want her recused, is several time that please point to me even one decision, even one decision that has been published where only a permission to appeal was heard for 30 minutes, it was granted and then an appeal was heard several days or several weeks later. It's not. There is not a single decision. I asked it to Asbury VP as well, which is why it was increased to six hours, because, otherwise, it is paying lip service to the concept of permission to appeal.

PN142

Because the Fair Work Act wants it, therefore you have to hear. You hear it, you would rather hear it on the papers and just throw it out. But because a person has to agree that an oral hearing doesn't happen, therefore you have to hear it, so what, you will give him or her 30 minutes. That's the problem with this procedure. That is what I am saying and I am saying Millhouse DP is implementing that unfair procedure, which ought to be transparent.

PN143

Now, I don't care if that's the normal practice or policy of the Fair Work Commission that, itself, is wrong. And because she is exercising that power, that is it. A lay observer, not just might, would apprehend that if only 30 minutes is being given to me, which is why it's been increased to three hours now, and I thank you it's been increased to three hours, so it can be made - written, 'We even gave three hours and that should be plenty of time'. It's not going to be plenty of time. Trust me. Even the six hours, I'm assuming there'll be a lunch break, so it's only five hours or five and a half hours, will barely be enough. I just want to be heard, just one. Just hear me out once and then decide.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE



PN144

If you decide against me and there's a way for me to (indistinct) Federal Court, I will, because this is an extremely important issue. I shouldn't have had to take on the mantle but it's because you must understand, the people that are coming to the Fair Work Commission with anti-bullying orders do not have the capacity to do it.

PN145

The union's tell them, even when this happened to me and I talked to the union guy, he said, 'No anti-bullying orders are ever made', that's what I was told, because that's what the Fair Work Commission has decided. I was given the statistic of, up until that point one was made in 50, 60 applications since it was done. So the union doesn't want to spend their money on an anti-bullying order. So you can't get the Maurice Blackburn's of the world. That is the injustice. It's an unequal battle that is being fought on this front. That's why I was asking of the Full Bench can tell me, could I just this directly, Clancy DP's decision, to the Federal Court? Let's save all of us the pain and I'll just go there, if I'm able to do that. That's what my question was.

PN146

Now, having said that, please understand, in terms of - and I wanted to say that it's not just apprehended bias, I have made all these applications and if Millhouse DP doesn't respond then her mind is closed to any objective submissions. At least she should have engaged with me, in the past three and a half weeks or so that we've been this, not six weeks, and told me this. I've had to come here today. In preparation for this I've had to spend hours of my time that I could not afford and now I'm slowly getting some answers I mean how can you not think that's unfair to me? Therein lies the injustice. If I have to go through so much trouble just to get the basic modicum of fairness then, by definition, Millhouse DP was unjust to me, let alone the double (indistinct) standard.

PN147

You see how I'm making the connection Lim C? It is in gleaning all this information I've had to bend over backwards, I shouldn't have to. I'm a self-represented litigant, I have - if you have read the material in my file, you will know the affidavit of 5 July 2021 that I submitted, and at footnote 2 of that affidavit I have put down - I have written, 'Positive assistance must be provided to the self-represented person, as mandated by the binding precedence', and you would know all of them from the High Court *McPherson v Knotts(?)*, I've got Court of Appeal decisions and Supreme Court decisions, as well as VCAT decisions. That's what I knew at that point as well.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN148

So the fact of the matter is, even this hearing is unbalanced, because I'm appearing and being told, on the spot, what it is about. Why couldn't this have been told to me a week ago, two weeks ago? Why couldn't I have been told that all three of you would be here? There's the injustice. I don't know why you don't see that. This is surprise. This is an ambush. You know, you wouldn't allow for the parties to do it. If the parties did it, you would give that other party two weeks, four weeks, to make written submissions at the end. But I have to decide now So

the moment this appeared, as a self-represented person, I should have asked for an adjournment and then we would come back.

PN149

That, by default, would get the 6 December hearing erased. Out of respect for you, and that's my cultural background, because that's where I'm showing my respect for you, the three of your time, if it was only Millhouse DP and if she had said that the two of you were going to also decide on this and I will give them the transcript, I would have asked for an adjournment. Because the three of you are here, I'm respecting all three of your time and making sure that I'm doing the best I can to do it. Does that make sense?

PN150

So my whole problem in this, Lim C, is the procedural orders undermine the substantive proceeding, in short. Because so much discretion is given at the procedural orders timeframe, then all the more reason that the Commission and the Commissioners have to be extremely careful in how they exercise their discretion, under procedural orders, because those are generally not appealable. But that's where the decision is getting made. That's where you're handcuffing it. That's what Clancy DP did to me.

PN151

Now, in going to the closed mind - sorry, I hope that was hopefully clear enough as to how I did this. But in going to the closed mind, the whole decision here is against, you know, against this process of how the Full Bench even just follows - well, the Commissioners on the Full Bench just follow this Shaw and it's progeny.

PN152

Well, Millhouse DP has been part of those decisions. So I'll mention the first one in which - well, I'll first go to this one, which Clancy DP presided, in which Millhouse DP was, I guess, the second chair, so to speak, March 2023, [2023] FWCFB 61, *Maree Liddle v The Crown in the right of New South Wales*, et cetera. On all fours is what I'm appealing, and Millhouse DP has already issued a decision on that. Similar facts. Because it's a question of law we're talking about here, right?

PN153

So if you really need to examine this, it has to be someone with an open mind. Then Millhouse DP, as recently as 18 September 2023, in [2023] FWCFB 151, *Joe Kai v Christopher Marson(?)*. Again, all of these applications that I'm citing, pretty much recusal has been asked every single time. This person didn't even appear at the hearing at all. The decision is precisely that has been made is on the same provision, same second prong, and that the employee can't return.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN154

What I'm afraid of is that in some of these decisions it's actually clear that the employee can't return. In my case, there was a huge factual dispute on that second prong, which was swept under the carpet, because of the procedural order made. Because there were two questions of law, two ways I could have

returned. Returned to work, that question has never been answered by the Fair Work bench - by the Fair Work Commission. It was just assumed that would not happen. Return to work is 12 months in which they are obligated to provide me return to work, that wasn't examined.

PN155

Then there was another one, under another Act, I can't remember, some health Act, another way, being a worker, et cetera, why that could have happened. Then the third one was my application, under the general protections, where I'm not alleging dismissal but I should be allowed to continue because that's what was promised to me, I could have returned to work.

PN156

In my case, Clancy DP just overlooked all of that. No evidence, and unsworn statement from the ex-employer, and he takes that into account, but my sworn affidavit, he doesn't. That's ridiculous. That cannot happen under a summary dismissal application. If there's a genuine dispute of material fact it has to be heard. But based on what I have just talked about, there was an application which, *BQ v The School(?)*, where Bissett C did not dismiss the anti-bullying application but stood it over until the unfair dismissal application was determined. So there is your disparity of decisions, disharmony of decisions.

PN157

Same anti-bullying, that person was dismissed, it's unfair dismissal. She said, 'No, I will not dismiss it now, let it be decided and then if it's decided against the employee then I will dismiss it'. That's the right way to go, at least it's a step in the right direction. But I say anti-bullying should be determined because then the employer will be more reluctant to continue that process. So that's one. I'm not even talking about - this is a new decision, I'm not even talking the disharmony of decisions that I pointed out in my appeal already, which is why I need to present to you new material. It will take time for me to do that. There's new factual material I want to present. It will take me time to present that.

PN158

Part of it I wrote in that affidavit on 5 July that the bullying continued, from the students, two years after even I had left. You have to take that into account that this all could happen. You cannot just not hear anti-bullying applications.

PN159

Then Millhouse DP, in [2020] FWC 2341, which is a Brett Johnson(?) one, he's a casual employee. He's not at work. But Millhouse DP did not dismiss that right away. She went out of the hearing, made calls, made calls, her associate made calls, et cetera and then, finally, they come and the sentence, in paragraph 14, was that 'There's no material before the Commission which indicates that Mr Johnson intends to return to his casual employment. In these circumstances I do not consider that there is a risk of bullying at work, by any individual or group named in this application', and she admitted to (indistinct) section 789FF(1)(b)(ii).

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN160

So you've created two different classes of employees. A casual employee gets an anti-bullying application heard, as long as he or she says I won't intend to return to work. A full-time, ongoing employee doesn't. What nonsense. Is that the interpretation that the federal government wanted, under the legislation?

PN161

The point I'm trying to say is that that's why this needs to be heard and an appeal, but, at least, for God's sake, hear it in a permission to appeal and allow me to present all of these, what are straightforward, self-evident propositions that have never been consolidated and put together to basically show to the Fair Work Commission that your current interpretation, with all due respect, of section 789FF(1)(b)(ii) has created a Frankenstein monster. Parts have been put together that do not make sense. They are not a cohesive whole.

PN162

Not allowing me to do that, by ordering a 30 minute permission to appeal an extension of time, within two weeks, she made the orders - sorry, Millhouse DP made the orders, in mid October, for me to submit my material within less than two weeks or 10 days, end of October. Appeal book, hyperlinked. What nonsense. I've asked for it in July, you wake up in October and you just tell me to submit everything as if I've got it ready, in fact that I'm a lawyer, barrister. I've already written in my email, I'm busy, I'm swamped, give me three months lead time. How is that not a respectful question? We would not be here, had you listened to me.

PN163

DEPUTY PRESIDENT O'KEEFE: Dr Chopra, I'm sorry to interrupt you, but, look, I just want to reiterate something that Lim C indicated. You're now going back over territory that you've been speaking about for an hour and a half. We are here to discuss whether or not Millhouse DP should recuse herself. What we are looking for, from you, is your reasons. Now, I understand you feel passionately about your reasons, but when you start repeating them over and over, it makes it very difficult for us to determine, in any precise manner, exactly what your objection is.

PN164

As with Lim C. I think I understand what your objections to Millhouse DP being part of this bench are, but you've certainly made that point about the 30 minute hearing a number of times before. You simply do not need to continue to press these issues that you've already raised. Your submissions, with respect, will be far more compelling if they are in a logical order and you set them out very clearly, my first objection is this. My second objection is that. When you are wandering around and revisiting things it makes it very difficult for us to get to the absolute heart of what you're trying to say.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN165

THE WITNESS: Understood, sir. So two things, one I'll reply and then I'll request a question. One is, when you are saying I'm repeating the 30 minutes thing, yes, I've brought it up several times, but with a different reason to assert

that. So, in other words, 30 minutes, because of boom, boom, boom, boom, therefore I circle back to it. So when you read the transcript, and the transcript is being made, as I understand, I hope it will be sent to me as well, what you will see is a discursive narration because I wasn't prepared to appear before a Full Bench today, I would have worn a better tie. I was prepared to appear before, you know, one person who, unfortunately, despite her position of being a Deputy President, I am being put in this position where, as part of my culture, I'm telling someone with greater power than me, I do not want you to sit in judgment over me. That's not an easy thing for me to do or say, even I might have done it to three other people, but that's always still difficult. A break up is always difficult, right? It's the same emotional trauma here. I'm trying to break up with a Commissioner, a member. You know, we have Clancy DP and we have Millhouse DP, it's not easy for me to raise it.

PN166

So the fact of the matter is that when you read the transcript you will see there's a method in my madness. However, I will qualify that by saying I am speaking extempore, from memory, from two years ago and whatever I have tried to do in the last few days. So, you know, the fact that I'm able to say something, you know, I'm pleasantly surprised. I'm getting all nervous, the grey cells are still working somewhat, but I agree with you.

PN167

Now, having said that, if you say, like Lim C, you have understood, broadly or at least a few points among the morass of whatever I have submitted, if you would be so kind to tell me the points that you have understood and therefore I will move on to the other ones.

PN168

DEPUTY PRESIDENT O'KEEFE: Certainly. So, in no particular order, as I understand you have - these are the concerns that you have with Millhouse DP. First of all, there was an issue you raised you said was competence, and you linked that to what you claimed was not reading your file before sending the directions. You said that the procedure that had been implemented by the Deputy President was not fair, for a number of reasons. You cited the fact that the hearing length that was set down as 30 minutes and you didn't think that that was an appropriate length of time. You also took issue with the date that was set, on the basis that that was something that you had discussed, some time ago, with Asbury VP and she had - you had made some suggestions about that, in July, and then what you're getting is a much shorter timeframe and you thought that that was unfair procedure.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN169

You think that the previous decisions that the Commission has been made, and you cited the Shaw case as sort of the basis for those decision, you think that those decisions are unfair, not correct and the fact that Millhouse DP has been involved in decisions that have cited that Shaw case and continue to follow its principles suggest that her mind is closed. And you've also raised a concern that in decisions that Millhouse DP has made, and you cited the case of the gentleman who was a

casual, you think there has been an artificial distinction put in place by the Deputy President, in terms of casual employees versus full-time employees.

PN170

THE WITNESS: Yes.

PN171

DEPUTY PRESIDENT O'KEEFE: So that's as I understand it.

PN172

THE WITNESS: Beautiful. I'll just address a couple of points here with that. Lim C, is there anything you would like to add to that, please?

PN173

COMMISSIONER LIM: Yes. I think O'Keefe DP has summarised my understanding of, I guess, your objections, Dr Chopra. One other - well, I guess two matters which I would add to that is that at the very start you made a comment, I don't know if it was throwaway one or not, that Millhouse DP had presided over another matter with another employer of yours - - -

PN174

THE WITNESS: Yes.

PN175

COMMISSIONER LIM: - - - and thus that she may have information from other sources, which I don't know you've expanded on at all, in your submissions.

PN176

THE WITNESS: No, I have not. No, I have not.

PN177

COMMISSIONER LIM: The other point you've made was that, as Millhouse DP has not responded to your request or applications her mind is closed. But other than that, I fully concur with the summary from O'Keefe DP.

PN178

DEPUTY PRESIDENT MILLHOUSE: The only thing that I would add to that, Dr Chopra, concerns your concern that the hearing today is unbalanced and you feel like having all three members present is an ambush.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN179

THE WITNESS: Yes. Let me just start from the background. So it was not all three members present is an ambush. I would have appreciated having three members present, I just wanted to be told about it. Not being told about it was the ambush part and not being told about why they would be present, when a recusal application, by the applicant, in a court you're normally making it against a judge. So it's against a person, unless - because that's why you specifically asked me which are the members I want to make a recusal application? I did not respond and, again, frankly speaking, it was my culture, because I did not want to say, 'Only against you and not Beaumont DP or Lim C', because then, in a way, I



single you out. So I figured, if I don't respond it's more polite, you get the message.

PN180

But you take that and you twist it as, 'You didn't say', and I assume, because you started with that, you led with that, that that's why they are present just in case I want to make an application against them as well. I didn't realise that the normal procedure would be that they ought to be present. Well, that ought to have been told to me. That's the ambush, not telling me that, so that's what I meant. I'm happy with the (indistinct).

PN181

Just going back to clarify the second point by Lim C, it's not because Millhouse DP has not responded to my submissions that her mind is closed. No, she's responded to it and said, 'No' therefore her mind is closed. So when I've asked for the 30 minutes to be changed, I have gotten several emails which don't change it, or, in a way, don't address it, that's where it goes back to her thing. I can't assume that she just changed it or she had to be told, I mean I have to be told.

PN182

So her mind is closed because - and then now I'll elaborate on that, which is where you can see, by going back to your point, O'Keefe DP, that her mind is closed, that's one reason. But then her mind is closed because she has presided over all these other decisions but also been a member of the Full Bench in those decisions and has already decided that if you are not an employee, then that doesn't accord. Well, why would she change it today? I mean the definition of insanity, you know. I mean the least a Commission does is to be consistent with its own decisions and a human being is going to be consistent with his or her own decisions. Just because suddenly Dr Chopra is speaking, you can see that Millhouse DP is coming to it with an open mind? That's impossible. I mean I shouldn't have to even say that, and that was Joseph Kai's argument, because she had presided over some other decision, which was not even on all fours, it was another decision to do with him and he said, 'Millhouse DP and two other members have already made a decision against me', this is a continuation of that, 'I don't want the same Full Bench deciding this appeal'. Well, of course it's more efficient for the Commission that the same Full Bench decides because it's aware of the facts, I get that, and that's why you're doing this, but procedural - efficiency, despite AON, does not overwhelm procedural fairness. It cannot.

PN183

That dude kept saying he was not going to appear and Millhouse DP kept telling you, 'You've got to appear, the hearing will go as continued'. On the morning they sent an email to him. He replied back, for a 9 o'clock hearing, at 8.41 am, saying, 'I'm not coming'. He did not appear. It was decided against him. What does he think of the Fair Work Commission?

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN184

I mean with all due respect, you're going down the path of the AAT, at some point. The problem is, you guys are way more important than that because you



decide salaries and all these EBAs and stuff all the time, so there is no (indistinct) seriously. This is what the public thinks.

PN185

I'm sorry, I'm making that connection, I make that connection. Yes, this is - this is, again, not a great thing to say, but I have - even before, you will see my submissions were in 2021 and so on, and the Labor government came into power in 2022 and they have talked about it. And this is something I haven't heard of before, and so on, but they talk about, I'm sorry, where has it got? I can't - I guess, the point basically was that - here's the one. This is a political attack as well, that's why I do get that, because once you guys have taken the oath you will do your job impartially and stuff. You take an oath to do that. So I don't fully subscribe to Minister Tony Burke's words here, but he calls it the coalition's shameless stack and therefore they're trying to balance the Fair Work Commission.

PN186

I mean the fact that this has to be said, and the public gets to know this, I mean if the Minister, who is a much better lawyer than I would ever - not a lawyer, but you know. I mean if they are saying this, I'm sorry, but then even I even note at that point, without realising all of this, about the ideology and so on, about why that had been - that (indistinct) had been followed and these decisions are being made, which are benefiting the employers.

PN187

Well, there's your reason for that. How is that not proof positive? That's in the public domain of ideology of the fact that perhaps, perhaps Millhouse DP may not being an impartial mind to deciding a case on which she has already ruled has been part of employers and so on. I mean that, just that sentence, I think, meets the double (indistinct) standard, which is a very low standard. It's not a high standard. He problem is, no one recuses themselves so by default it becomes a high standard. It's meant to be a low standard. Appearance of justice is probably more important than justice. You give me the appearance of justice, I'll bow down and take whatever decision you do. That's the problem.

PN188

The Commission starts with a appearance of non justice and therefore it doesn't matter whether you do the right decision, we don't buy it. So I'm saying that that is another reason for this one.

PN189

COMMISSIONER LIM: Dr Chopra, just so I understand your point, is your submission that because members of the Commission are appointed by the government that that gives rise to an apprehension of bias? Is that it, in a nutshell?

PN190

THE WITNESS: If that was my only submission then - - -

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN191

COMMISSIONER LIM: I appreciate that - - -

PN192

THE WITNESS: (Indistinct) believe that, and not all - - -

PN193

COMMISSIONER LIM: I appreciate there's multiple items, Dr Chopra, I'm just - I don't want to have to keep going back, traversing back and forth, so I'm asking the question now, before you move on to your next point, is your submission, in a nutshell, and I appreciate it's more nuanced than that, but, in a nutshell, is it that because members of the Commission are government appointees that there is an apprehension of bias?

PN194

THE WITNESS: I don't know what - with all due respect, I think you're trying to summarise it fine, but I think you've made it into like the three letter attack kind of things, you know, stop the boats. I mean it's not that simplistic, right? Just because they're appointed by a government they are biased, well, that means all of you are biased. Clearly, that would be an absurd reading of what I've said. That couldn't be it. It depends on the point, right? It depends on a point.

PN195

I'll give you one example, if you don't mind my saying so. Read some extension of time decisions by certain other members, do that research, from three or four years ago, right, in the unfair dismissal or whatever, and read a couple of decisions of O'Keefe C, sorry, O'Keefe DP, I'm so sorry, sir, I demoted you already, O'Keefe DP.

PN196

O'Keefe DP also decides extension of time is not going to be granted, but he'll look at the expansive way he goes about parsing out every factor. Therein lies the different. And that's the point I'm trying to make. You have to abide by the law. So if Shaw is correct, if Progeny(?) is correct, I expect all three of you to abide by it. That's the whole point of law. If law could be distorted by government appointed people, then, you know, we are just as bad as the Supreme Court of the US. I mean, come on. You don't have to tell me the arguments, you just tell me what the question is and I'll tell you how the US Supreme Court will decide. That's what has become of the Fair Work Commission. That shouldn't happen. That just cannot happen.

PN197

So I just have to look where is a member is appointed before 2022, between 2013 and 2022, I can probably guess 90 per cent of the decisions. That should not happen. That's wrong. So if you are saying that's my submission, please don't make me out to be a conspiracy theorist or whatever, do your research. You know, Ms Grose, is your associate, she had some weekend stuff to do. If I am wrong, tell me.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN198

Your answer to what you ask me is in the data, go read those decisions then you can tell me if - my submission should be a little bit more. What I was trying to say there was that a minister of the federal government has said these words, that, 'There's more work to do to correct the coalition's shameless stack'.

PN199

You guys, if as I understand it, correct me if I's wrong, are a tribunal. So you are actually an executive - arm of the executive. What more do you want me to say? But you can't pretend to be judge, like all the decisions write about presidents and the court does this. The court does the double might and all that, that standard holds for a court. That's the point I'm trying to make because at a court a judge, generally, 99 per cent of the time, one would hope, is randomly assigned, the case is randomly assigned to their docket. And because it is randomly assigned then it needs to take a high threshold to remove that judge because why should the judge recuse himself or herself? You guys are not randomly assigned. That's the point I'm making. You're not drawn out of a hat, so to speak, or whoever's court case finishes and whoever has time on the thing gets assigned.

PN200

So for you to apply the Ebner standard to yourself is, by itself, in my opinion, diluting the Ebner standard, in circumstances where you don't have to follow rules of evidence, you can make up certain procedure. Because you've been given so much freedom all the more reason you have to exercise it with even more discretion. Your discretion has to be exercised with even more discretion. That's what I'm saying the trouble starts, right at the front.

PN201

Here the back end is wrong, but to prove the back end wrong, the front end is where the issues start, and that's where the stack part comes in and you know. Anyways, going back up to preside over that other employer, I'll come to that, but just to wrap up what O'Keefe DP said, that the casual - artificial distinction, or the casual distinction, so it is not just an artificial distinction by Millhouse DP, O'Keefe DP, that's not what my submission was. In one of her cases that's the sentence she wrote, as I've cited it, why doesn't she just - it's a casual employee.

PN202

Casual employee means, by definition, that's what the whole big fight that happened a year or two ago, you don't have any rights. You leave the factory, you're done, unless I offer you another shift, you're not my employee. As far as I'm concerned, that should be a cleaner saying, there's no right for that person to come back, therefore there's no risk of bullying, if you want to go by the second prong.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN203

But it's not just Millhouse DP, there are other decisions that I have cited in my submissions, which was from three or four years ago, I can't remember the case, I

haven't read my submissions properly because I didn't have the time in the last few days, where that same distinction has been made. I believe it might have even gone to the Full Bench and that's where I picked it up. Millhouse DP has only added to it, but I need to cite them to make my point.

PN204

So you can't say that the second prong, that there is no risk of bullying for a casual employee versus a permanent employee. So that distinction could not be there, but that's how your current cases are interpreting it and therefore there is a disharmony in decisions. This could not have been intended by the parliament, an appeal should be heard, but please give me the chance to hear my permission to appeal in a fulsome manner. That's the point I'm making. And because I'm being prevented from doing that, what, to me, are such self-evident, obvious points, is why I'm calling - I'm saying Millhouse DP has a closed mind.

PN205

Because I've said this to her, I've said this to Asbury DP. I mean you guys are 20 plus, 30 plus years of workplace and employment law, industrial relations law, I should get to half of my sentence and you probably should be able to finish it. Why am I having to write pages upon pages of this and think like I'm speaking to a wall? I know I'm not, you know, I'm not experienced in this, but I'm not dumb, I can read English. So that's what I mean by not telling me.

PN206

Now, going back also to the - so I hope that explained that point, O'Keefe DP, and then also saying, what was it, that I also made - the unfair procedures are there, which ought to have been transparent, that previous decisions made by the Commission are not correct, which Millhouse DP has presided, not just presided but being the second chair and so on, and presided in a Full Bench. She's actually presided in a Full Bench, that's what is very disconcerting to me, so she's already done this before. Then she's presided in the second chair and then she's made decisions as a single member as well, because she's quite experienced, I think, she joined in 2016 or something, she's had a lot of time on this.

PN207

But the next point that you said, O'Keefe DP, when you said, there are (indistinct) and they are following those principles and those are wrong. I want to make this point very clear, there is a small beef that I do have with Shaw, which I've actually membered to Gostencnik DP at the first conciliation anyway, which is why I asked him not to continue presiding, because I was going to take exception to his case, to his judgment, and I was very nave, this was like March 2020, I think I'm a little bit more nuanced now.

PN208

My argument now is going to be, which is why I need to change it, that even if you think Shaw is right, what you're doing is wrong. Okay. So even if the decision says that Shaw is correct, but I will argue why Shaw is not correct, because you can't read words into a provision, which is what has been done.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN209

If the parliament, the change to whatever the procedure, Act is, was made because of the Migration Act, was made in 2005 or '06. Fair Work Act was passed in 2009. If parliament wanted the same words for section 587 to apply they could have just put it in, they didn't. How on earth are you saying they're the same? You can't use the same standard of section 31A of that and say, 'Even if that is not there, we're still going to interpret that', that's the beef I have with Shaw.

PN210

But I say, even if you don't go down that path and you say what Shaw is saying, because Gostencnik DP is a very good writer, okay. He does not - he does not directly say what I have said. Shaw does not read exactly like that, but it means that. Because he goes on to then say, 'These difference in words I think mean that the standard of manifestly hopeless need not be as high as it was earlier'. But the problem is, you don't have the words in the Fair Work Act, so why are you even bringing it in? The only reason he did that is so that he could piggyback or pull in section 587 to make it what you guys call a jurisdiction question, when I say it's not.

PN211

So because of that argument in Shaw, a jurisdictional question has been raised by lawyers. Because that jurisdictional question has been raised by lawyers, because the standard is not that - because, you see, what Gostencnik DP did was decided that part of section 587 and 31A, in the context of an anti-bullying application. Had he not done that, we wouldn't be here. If he had done that for something else and said, 'You can bring a summary dismissal application for something else, unfair dismissal or whatever', we wouldn't do it. The problem is, he tied it in to that second prong.

PN212

So what I'm saying is, that first tie that he did is not correct on the law. But the second tie is still, because he's careful, he still doesn't say the standard is fully lowered, he just says, you know, it could be a real prospect of success.

PN213

But then comes what I call the illogical leap because that second prong, just because someone is not an employee and is being asserted by the employer is not an employee, doesn't make it a jurisdictional question, it's a factual dispute. Just because they (indistinct) something and they can't make a section 587 application, I would say costs should be ordered against them if that application fails. Theoretically, under section 587, as a question of law, you shouldn't be hearing factual disputes under a jurisdictional question, so I agree with it, that they don't hear factual disputes. But then how are you creating a hearing under it?

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN214

So my argument, and this is even written in decisions where I will even - you know, this is where I asked for Clancy DP to stand down because he said that in my mention. The moment he said it, that, 'This is a jurisdictional hearing so I'm

not going to allow evidence in', I was like boom, done, there is no way you can give me this thing. So I'm now talking about [2023] FWCFB 61, that's the one I've already cited, where Clancy DP presided over a Full Bench and Millhouse DP was there, and in paragraph 31, just hear this, it's just amazing, it says:

PN215

*Ground 13 also alleges bias and is a complaint that the Commissioner did not require the respondent to produce material at the request of the appellant such that the Commissioner determined the matter for the application without all the facts being presented. However, material going to the merits of the application was not relevant to the question of jurisdiction and would not have impacted the determination the Commissioner was required to make.*

PN216

And dismisses ground of appeal.

PN217

Do you see how circular that argument is? It's saying, jurisdiction question raised. Cannot bring in material. The poor appellant like me, I was smart enough still to submit a sworn affidavit and so on, saying that what has been written by them is wrong. But they're saying, 'It's a jurisdiction question. The question really is, can we make that order under section 789. We don't have to resolve the facts.' So getting any of the factual material, which will show that there's a dispute is not relevant to the question of jurisdiction. It's not a jurisdictional question, it goes to the exercise of power. Jurisdiction can be defined as function, duty, power and so on, yes. But a jurisdictional question is threshold question. It's whether you can make an application or stop putting orders or not.

PN218

So, for example, if you were already an ex-employee or something like that, at that point in time, like Gostencnik DP said, maybe you can say you can't make an application because you're not even an employee, a worker. But once you have made an application and you are in, then that (i) whether there is bullying that has occurred, and (ii) the risk (indistinct), if the prong 2 is not met, then that - all that the Commission has to say is, 'We don't have the power to make the orders'. You are already exercising your jurisdiction by considering section 789FF. That is an exercise of your jurisdiction already, how can it be a jurisdictional question?

PN219

DEPUTY PRESIDENT MILLHOUSE: Dr Chopra, it's coming to a period of two hours since the hearing has been convened today. With the assistance of the members of the Full Bench we've been able to articulate seven particular concerns that you have raised, which we understand constitute the basis for your recusal application, insofar as it concerns me, as the presiding member of this Full Bench.

PN220

You've taken the time since those matters were first raised by O'Keefe DP, half an hour ago, to clarify or add to any of those matters, as you considered necessary to do so.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN221

We will now ask you to clarify for us whether there are any additional concerns that you would like to raise, to supplement the seven reasons that you have given, in support of your recusal application, and if those matters, those seven matters, amount to the sum total of your particular concern, and therein the submissions in support of your recusal application, we'd invite you to make your closing submissions, in relation to what you're seeking as an outcome of this application today.

PN222

THE WITNESS: Thank you, Millhouse DP. Just give me one second.

PN223

Okay. So I guess the points summarised by O'Keefe DP and added to by Lim C I completely agree with, thank you. And the point that you also added, Millhouse DP, I completely agree with. And I'm coming to the stuff that I've just opened, but just to complete the point that Lim C asked me to do, one is, I hope I've explained what I meant by that is that not just because you're appointed by a certain - by the Liberal Party or the Labor Party automatically means you're biased, no. Just as one would do a social experiment or a scientific experiment, look at your track record and you cannot say that's an artificial argument that just because you have taken an oath then somehow you become non human and you can compartmentalise everything and each time you're going to re-learn the law on every case, that's just not going to happen. So that's the point I'm making. If you don't - appointment by a government, particular colour of government, red or blue, perhaps colours what your starting point might be. If I have to place a guess I'll say, in fairness of all of you, whether it's 50/50 or 51/49, one could place one's bets. That much leaning.

PN224

But then you have a track record. So with O'Keefe DP or Lim C, it's just a handful of cases, just a few cases that one has a track record of. But with Millhouse DP, you know, she seems to be quite efficient at dealing with her cases, there's a bunch. There is a bunch in this particular point as well.

PN225

So I would say, when the two other members of the panel are going to look into that particular submission, because I don't have time to go into all of that, you need to look at Millhouse DP's cases, your associates can easily find them, you guys know how to do it, and you just look at the cases, what the facts were, what the decision was and basically 80 or 90 per cent of those cases are on all fours with the facts of my case. Why would she decide differently?

PN226

I know there's a Victorian Charter of Human Rights, I think there's a Federal Charter of Human Rights as well, and if the sections are the same, I'm entitled, in any civil hearing, to a competent and impartial decision maker.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN227



That impartiality standard, at best, could be Ebner, which is a double bind, it's a very low threshold. Do you see the link I'm making, Lim C, in that submission?

PN228

COMMISSIONER LIM: Yes, I hear what you're saying, Dr Chopra.

PN229

THE WITNESS: But it looks like you're not agreeing. So If you're not agreeing tell me and I can try and elaborate. In my mind there is a link and you are to explore what I am saying, versus saying, 'Yes, I've heard but I don't agree'. I think your duty is to engage with me and - - -

PN230

COMMISSIONER LIM: Dr Chopra, I haven't made any determinations as to anything that you have raised, because that would be improper. I'm sure you appreciate that - - -

PN231

THE WITNESS: No, but I - - -

PN232

COMMISSIONER LIM: Yes. I'm sure what you appreciate is that after this the members will obviously reserve their judgment. We'll review your submissions and I'll make a judgment accordingly. Please don't take my resting face as an indication of agreement or disagreement with any of your submissions.

PN233

THE WITNESS: No, not your resting face, I'm talking about you're not engaging with me, speaking with me. Because another worse form of injustice, which if I may be allowed to say so, is you going back and then putting in a decision a point you didn't raise with me, or you disagreed with me. So you can't say that you listened to my submission, I mean you all are very smart people, you're deciding, as I'm speaking, whether you're agreeing with it or not, or at least filing it away in a maybe bucket.

PN234

My point is, if it's a yes I don't need you to clarify with me, unless you want Millhouse DP to hear my argument again, but if it's a no or a maybe, I say it's your duty, as an impartial decision maker, to ask me, on the spot, not go back and then write about it and I have no chance to speak against it. That is clear denial of natural justice. Because when you say, 'An opportunity to provide submissions', that's me speaking but not to the points you are deciding on. That's what I keep saying, you're a tribunal, you cannot be a passive listener, like a - like a judge, you've got to engage with me. That's the difference between a tribunal and a court. That's the point I'm making. So if you do disagree with something, I say it's your duty to engage with me, otherwise I do take it as agreement. Don't fault me on that, that's human nature.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN235

COMMISSIONER LIM: Dr Chopra, you have ears as well, I have just said to you, don't take silence or lack of response as agreement. We haven't made our minds up as of yet.

PN236

One point I just want to clarify, Dr Chopra, before we close today, is that I've raised it that at the beginning of today's proceeding you raised an objection - - -

PN237

THE WITNESS: (Indistinct).

PN238

COMMISSIONER LIM: Yes, and in the interests of - - -

PN239

THE WITNESS: The other employer, I'm coming to that. I'm coming to that. That was the next point I was on.

PN240

COMMISSIONER LIM: Yes, I think you should address that now, thank you.

PN241

THE WITNESS: Yes, I'm happy to address that, but I would really sincerely appreciate you engaging with me, for the reasons I have mentioned.

PN242

What, Millhouse DP at that point was, on 12 February 2020, Millhouse DP presided over a - I don't know, I think it's still called a conciliation, so it was done by (indistinct) before, but then it comes to a member and I think it's still called a conciliation. It was quite a long conciliation, it was with a different employer and those employments happened within a short time, which is why I feel very - we don't have to go into the details today why I'm very aggrieved, because those employments and a previous one cast a long shadow over what I have suffered.

PN243

The facts raised there, including in that particular one, which I don't want to get into at the moment because it's quite personal, were quite negative against me. That information hadn't been communicated by the ex-employer, that ex-employer to me, whereas they were claiming they've sent it. In fact, Millhouse DP had to make an order for them to email her Chambers and me and stood the conciliation down for about half an hour until that, and so on. So those facts are quite negative and they're completely separate from this.

PN244

So, to me, that's information that Millhouse DP is privy to, and that's just in that hearing but my whole allegation against that employer and what had happened and what then they responded, Millhouse DP is privy to.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN245

COMMISSIONER LIM: Dr Chopra, without going into the facts of the matter, what was the type of matter? Was it a stop bullying order application, was it an unfair dismissal, for example?

PN246

THE WITNESS: It was, I'm trying to remember, I believe it was a general protections application, however - however, it's the facts alleged in that, and what I was alleged to have done is extremely negative, and I deny it, and we are in a different proceedings on that still. At the moment I can also tell you that employer - this matter I can tell, but employer did settle for six figures, as did this employer. That's the point I'm trying to make. So it's not like throwaway money. However, they still communicated that negative part which is still coming to haunt me and that other stuff, which point is, as far as Millhouse DP is concerned, she knows all this extra information about me which I don't feel comfortable with.

PN247

DEPUTY PRESIDENT MILLHOUSE: Can I assist, to allay your concerns somewhat, in that respect, Dr Chopra? I recall a conciliation conference that was attended by you, over which I conciliated a matter involving a former employer of yours, but I don't recall the specifics of the allegations that were raised or the specific nature of that application.

PN248

As I recall, that was many years ago and you would appreciate that there have been many such conciliation conferences since that time. So if part of your concerns involves particular information that you are concerned I have information about, concerning that particular proceeding, then I can assure you that that's not front of my mind or, indeed, something that I can draw upon, with any recollection, about those specific matters.

PN249

THE WITNESS: I understand, ma'am, but that in saying, that's the point and, once again, that was unusual because in a conciliation it doesn't often happen that a lawyer on the other side is saying they sent a document and I'm saying they haven't. They can't prove that they have and therefore they are required to send it and that contained pretty damning findings on a non existent investigation which they claimed to have done and we are fighting over that, and it was sent to your thing. So that was a pretty unusual occurrence. I mean it should have left a mark on your mind and I might even accept that you may not remember the details but that doesn't matter, it's the impression that counts, in terms of credibility, one.

PN250

And, you know, I'll just also say, at this point, before I forget this, so I am very, very concerned about that as well because when you say there are many other matters which come in, et cetera, with all due respect, there's so many other Commissioners and Deputy Presidents. I mean why does it have to be Millhouse DP?

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN251

Because I'm asking for a 10 to 4 hearing, you know, the fact that you're in Melbourne and the other two, Commissioner and Deputy President, are in Perth, makes it a bit difficult. So I say all three members should be in Perth, for example. I'm happy to start at their time and go past my time, I'm okay with that, finishing at 6 or whatever, my time. But I say all three should be in one location.

PN252

Now, you know, you're a countrywide organisation but you don't have to prove it with every Full Bench constituted, you know. So to me, you know, all three members could have been here, or something, but here we have a majority of members there. I think Beaumont DP was also in Perth, if I'm not mistaken. I can't remember now. But the fact is, just give it to another Deputy President at Perth, end of story.

PN253

I don't understand why Fair Work Commission is spending all these taxpayer resources on this little fault, I don't get it. My time, your time, three members' time, associate's time. I mean that's a lot of money that's been wasted in this hearing, on this simple point of six hours, which was already ordered. Basically we're arguing about what was already ordered. If I tried to relitigate a point you guys will jump up and down. But as far as I'm concerned, where I sit, with all due respect, just your making me relitigate a point or you guys are relitigating the point which Asbury VP has already made orders on. That's unfair.

PN254

To me it is all coloured by the fact of all these other things that I have been saying, which I hope you don't think I am rambling on, because they do make a connection in my head. All these little points added together, you know, you're appointed by a certain party, you are in the same office as Clancy DP, Coleman DP, Gostencnik DP, and these are the three I've already encountered in this case. I mean, come on. You are telling me you have had lunches with them? I'm sure you're not discussing me but, you know, they're your colleagues. I mean it should have a complete appearance of no bias.

PN255

Now, O'Keefe DP obviously talks to Gostencnik DP and Clancy DP, so does Lim C, and I'm sure you all associate with each other, but at least I can say there is the safety, the buffer of distance. You don't run into each other in the hallway doing high fives every day, you know, so there is - I mean I don't see why I have to even make these arguments. They should be completely self-evidence so when Asbury VP was in Brisbane and I think the others were also in Brisbane, makes sense, right? They could have time, they can talk to each other - how do I know, because at that time you guys were in different places, time deferred by half an hour or something, with Queensland, that's how I came to know. So my point is, that's what should happen.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN256

Now, with all those points that we have talked over, that you have talked about, the biggest - one of the biggest points I'm trying to say, which again goes back to - so that's actual bias, right? So it is, if you will give me a second. This is that Igor Grabovsky's case, that I mentioned, which was decided by Millhouse DP, presiding over a Full Bench, [2020] FWCFB 5995. In this, and all the other's I've cited, all of them (indistinct) recusal, by the way. I'm socked. That's just - I mean how much time has been wasted on recusal applications by the Fair Work Commission? I don't get it.

PN257

But in this one, he alleged actual bias and apprehended bias. The only reason I'm citing this as well is because Millhouse DP has cited cases in this and basically, in paragraph 10, she says:

PN258

*A claim of actual bias includes proof that the decision maker approached the issues with a closed mind.*

PN259

That's all I've been arguing the whole time. If you read the transcript again, read it with that fact that what I'm saying is that here is what was decided by Asbury VP, here's what Millhouse DP has decided and she ignored everything that I'd submitted to Asbury VP, she ignored everything that was submitted in July, made these, I still submitted to her and nothing has been changed before today.

PN260

Just because that little change has happened doesn't mean she doesn't have a closed mind and (indistinct) to her, kicking, dragging and screaming, so to speak, that doesn't prove that Millhouse DP is capable of changing her mind.

PN261

Has she prejudged the matter? That's the next step for an actual bias. How could she not have? If you can legally - she swears on the Bible she hasn't, okay, we'll believe her. But are you telling me that, as a human being and someone with, you know, a rational mind, that she has presided over decisions, including the one I'm citing from, 'A person is not employed', that's what she's decided that she will not decide my case the same way? I mean it will be shocking. That would be inconsistency amongst the tribunal. At least I know your decisions are not binding unless there's a Full Bench and you follow it, but it's at least in comity, you have to at least decide that. You've got to be in comity with yourself. I mean, come on, that's prejudgment. 'Or could not be swayed by the evidence', I mean that's all I've been shouting.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN262

That's why I went into some details of my submissions from the cases, so when - I'm just saying that point, when Millhouse DP said, 'We are here to listen to your submissions' and then later on added 'affirmations about the recusal', and the other two members of the Full Bench also tried to direct my focus on that question. What are your specific arguments against the narrow question of

recusal? How can I argue that without the context? That's what I've been trying to give you. Because that is where the recusal thing comes from, it just doesn't come from, 'She hates me', come on. It is because of all these facts that I'm providing, which a person in her position ought to know. Despite what I'm arguing, she has already decided the opposite.

PN263

Now she doesn't want to give me even a chance to be heard for six hours. She just wants me to say on 30 minutes. That's the point I'm making. So that's actual bias. So when she says:

PN264

*However, Mr Grabovsky has not advanced any evidence to support his contention of actual bias.*

PN265

That's why I went under oath. What I've provided is evidence, because I've spoken under oath today. That's evidence. So it is not how Millhouse DP dismissed Mr Grabovsky by saying that, 'Mr Grabovsky's mere suspicion that the Full Bench would prejudge the particular', or whatever. No, I'm fine with Lim C and O'Keefe DP, why? Not because they were appointed recently. You could give me any member, who was appointed by the Liberal Party but who hasn't decided a section 789FF case. That's my criteria.

PN266

I know both of you haven't, because I didn't have much time into looking in the thing, but Lim C has been doing a lot of other stuff that I couldn't even understand so I did not read all those cases. I did understand a couple of things that O'Keefe DP has done, that's why I cited one. But what I do know, from my little research, and please tell me, please - I could have missed it because I did it very quickly, I am assuming that neither one of you has had - has decided, either singly or as part of a Full Bench, any anti-bullying, stop bullying application or a Full Bench application of 789 of the Act, correct?

PN267

COMMISSIONER LIM: That's correct, Dr Chopra.

PN268

DEPUTY PRESIDENT O'KEEFE: That's correct. I haven't decided any.

PN269

THE WITNESS: Same thing with the sexual harassment, the equivalent one of 527 or whatever.

PN270

COMMISSIONER LIM: Yes, that's correct.

PN271

DEPUTY PRESIDENT O'KEEFE: That's correct.

PN272

THE WITNESS: Good. So that's it, so you both qualify.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN273

DEPUTY PRESIDENT MILLHOUSE: So in my circumstances, Dr Chopra - - -

PN274

THE WITNESS: That's all I want.

PN275

DEPUTY PRESIDENT MILLHOUSE: In those circumstances then I think that you've identified the reasons in support of your recusal application now, with some specificity and we thank you for that. It's clear, also, that you're comfortable that the recusal application concerns me only, as the presiding member, and is not directed to either O'Keefe DP and Lim C. It also seems to be clear, having regard to the submissions that you've just made and circling back to some matters that you've already discussed as part of the submissions and evidence that you've given under your affirmation today, that it appears that you've addressed all of the matters that you'd like to raise, in support of those seven reasons that form the basis for your recusal application.

PN276

So on that basis, I would invite you to make any final closing submissions before the Full Bench adjourns by 1.30 today.

PN277

THE WITNESS: Yes. That's plenty of time and I appreciate you giving me this much time, much appreciated.

PN278

The one point I do want to make which I'm trying to put in the back of mind, the orders that I'm seeking require, with all due respect, Millhouse DP, for you to not constitute the Full Bench, which would allow me the opportunity to be heard from 10 am to 4 pm Perth time, which will be, I think 1 o'clock my time to 7 o'clock my time. I'm okay with that. There's a three hour difference, there's a two hour - I think it's a three hour difference now.

PN279

So I'm happy to go from 1 pm to 7 pm, my time, with, I'm presuming, a lunch break. That's the key order I want.

PN280

Second, the time, 6 December, cannot work and the point I'm coming to is because now you have heard me speak to some other submissions so I can see, Lim C, with, as she said, her listening face or stoic face, wouldn't understand a bunch of what I was saying but there was hopefully a few things I said which isn't there, and I need to go and revamp it.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN281



I'm not sure if the Full Bench was given the appeal book that I prepared for an appeal, which was Clancy DP's decision, appeal under Clancy DP's decision and asked for a referral to the Federal Court, but Coleman DP was appointed by the President to hear that and he did the exact same thing, no hearing, no (indistinct) I have not got (indistinct) on this at all. I mean that's shocking and that couldn't be just a 30 minute one, that's what I'm saying. He did the same thing and therefore I could appeal his.

PN282

So there were two appeals on foot against Clancy DP and Coleman DP, and I prepared an appeal book for that, in which I included some of this file. I don't think the Full Bench has seen that, have you?

PN283

DEPUTY PRESIDENT MILLHOUSE: Yes, that's all part of the Commission file, Dr Chopra.

PN284

THE WITNESS: Okay. So if that is there then you would have seen some submissions from me where I raised a bunch of questions of law. Some of them have to be reformulated, but they were a lot of questions of law I raised, for the benefit of the Federal Court. Some of them go to this as well.

PN285

So the point I'm trying to make is that what was given to Clancy DP was a small part of a bit picture, because he didn't let other stuff come in. What I will need to provide for this appeal is additional material, as Asbury VP had asked, and I guess I'm allowed to do that, under the Fair Work Act as well, where I would put in some more factual material and try and make my submissions a little bit more tight, this thing, versus what they were three years ago. I think I'm a little bit better now than I was three years ago, so I might be able to - which is why I asked for time, which was in October, now we're in November and you see all this time gets wasted because I've now spent so much on this, that I could work over the Christmas holidays, which I didn't want to, and try to get a mental break from everything I've been doing.

PN286

But what I'm requesting also is proposed orders is that a date for submission of my written submissions, or whatever, appeal book or whatever I can do, that would assist the Full Bench, be end of January, early Feb or something and then a hearing happens for a full day. That, to me, is ideal.

PN287

Now, to make use of what we have done today, because it will kind of happen on that day anyway, the Full Bench has to make the decision on all the material in front of it and, in a way, I have transgressed, digressed, in both - into some of my substantive arguments, as you probably all have realised, and so I would also appreciate, to give even more value to today's hearing, that the Full Bench orders that not only the permission to appeal but the appeal can be heard at the same time, therefore it would be, you know, something that does get heard, rather than you deciding the narrow question of permission to appeal when, in a way, I will

be going in - I don't know how else to do it, which is why I was saying I opened up the - sorry, let me just stop this.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN288

That, you know, for the permission to appeal to be granted to going over public interest and all those other factors, diversity, try to - try to make it a bit more organised and going over the grounds of appeal for the correct (indistinct) standard, et cetera, discretion standard that you guys have in your stop bullying Bench book and then that paragraph which is it's own (indistinct) buckets.

PN289

There is a lot that I can speak to and perhaps thinking through it, now that I've spoken about it after two plus years, you know, I can see how I can rejig it a bit more and put it in a format that you all may like. If the Full Bench can assist me - sorry, it will take time, so that's the third order I'm asking is, that the hearing is not just about permission to appeal but also appeal heard at the same time.

PN290

Then the fourth order that I'm looking for is because I would like three sets of fresh eyes, it doesn't have to be with these orders but could say that those would follow and some time in the next month or so, before Christmas, if the Full Bench somehow has had time to look into the decisions that I've cited and pretty much every decision that has been made after 2020 that has not been cited in anti-bullying just assume it was decided in the manner that I predicted. Every single one has been decided in that manner.

PN291

If the Full Bench could then lay out three, four, five questions that it considers relevant so my submissions could be written and all could be just limited to that. Because, really, what we are talking about is that there is Shaw, there is Progeny, but a couple of - and we don't have to go into that other tangent that happened that got interim orders under the anti-bullying, we don't have to go into that fork in the road. What we are focussed on is that under Shaw and Progeny there is a diversity of decision, in my opinion, at the Full Bench thing, where majority are saying that there's no risk of the employer - you know, that second prong. But then there's, I think, Bibawi, which is different, I believe, if I follow correctly.

PN292

Then I've also said that there is also this distinction between casual and so on. Plus the interpretation of the section 587, whether just because an application is made there does it raise a jurisdictional question and then who determines if there's a factual dispute. You can't just presume there isn't.

PN293

So the point I'm trying to make is, this is the way I understand it. However, the Full Bench would be able to create maybe devil's advocate questions, but create the three, four, five questions which basically undercut my questions or what I'm arguing and frame it in such a manner that is, you know, it challenges me to

answer those. If you're able to do that, then I think, you know, the hearing might even be - my submissions might be more precise and the hearing might be easily done, in the five hours, if not even earlier.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN294

That would be really helpful because, ultimately, you know, either I've had a huge brain fade and I'm out in this left field all by myself, or - which I, despite all the things I've gone through, still have a decent ego, I don't think so. And if that's not the case then, with all due respect, the Fair Work Commission has been making serious errors of principle for several years on this issue.

PN295

So, in other words, you have enough submissions from me to frame those questions and say, 'These are the three, five, seven questions we want you to answer in your submissions'. So those four points: duration, date, the constitution should be everyone in Perth, you know, and, you know, give me a heads up, you know. So the point of that being - so the point of that being, which is, again, something which, as a scientist, I always just wonder, but maybe in law they think differently. To me it should be raising permission to appeal to be granted, and I don't see how you do that without the grounds of appeal.

PN296

It should just be, put down your grounds of appeal, they can be decided on the paper or on the hearing. If we don't agree with your grounds of appeal, none of them, automatically it is dismissed. If we agree with two of them, then we'll look whether it's in the public interest or not, or if there's any issue of principle and if not, dismissed. It should be the other way round. I mean I don't know why there's this intermediate step.

PN297

DEPUTY PRESIDENT MILLHOUSE: We understand that part of the order that you seek, that the matter is not listed for permission to appeal only, but an appeal hearing that also addresses the merits of your appeal of Clancy DP's decision.

PN298

We'll take those proposed orders that you have identified into account. You're excused from your affirmation, Dr Chopra.

<THE WITNESS WITHDREW

[1.31 PM]

PN299

DEPUTY PRESIDENT MILLHOUSE: We will reserve our decision and the Full Bench will consider both the submissions and the evidence that you've given today, in support of your recusal application. You'll be apprised of the Full Bench's decision as soon as we possibly can, following the conclusion of today's hearing.

PN300

We thank you for your time and thank the members for their time and we'll adjourn on that basis. Thank you.

PN301

DR CHOPRA: Thank you.

\*\*\* MANU CHOPRA

XN DEPUTY PRESIDENT MILLHOUSE

PN302

DEPUTY PRESIDENT MILLHOUSE: Good afternoon, Dr Chopra.

PN303

DR CHOPRA: Good afternoon.

**ADJOURNED INDEFINITELY**

**[1.32 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**MANU CHOPRA, AFFIRMED ..... PN72**  
**EXAMINATION-IN-CHIEF BY DEPUTY PRESIDENT MILLHOUSE ..... PN72**  
**THE WITNESS WITHDREW ..... PN298**