TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT DEAN
DEPUTY PRESIDENT GRAYSON

C2023/7464

s.604 - Appeal of decisions

Appeal by Jowett
(C2023/7464)

Sydney

2.25 PM, MONDAY, 12 FEBRUARY 2024

PN1

THE ASSOCIATE: C2023/7464, Trent Jowett v iDrilling Australia Proprietary Limited, for hearing.

PN2

DEPUTY PRESIDENT CLANCY: Thank you. Could I confirm appearances, please.

PN3

MR N. MAROUCHAK: Yes, Deputy President. Nicholas Marouchak and (indistinct) Asadi on behalf of the appellant.

PN4

DEPUTY PRESIDENT CLANCY: Thank you.

PN5

MR M. STUTLEY: Thank you, Deputy President. Stutley, initial M., with my colleague De Saint Jorre, initial C., for the respondent.

PN6

DEPUTY PRESIDENT CLANCY: Thank you. It's not apparent to members of the bench, but I'm just wondering why we're not speaking to the representatives all in the same location, namely the courtroom at the Commission.

PN7

MR MAROUCHAK: Deputy President, we were sent an email to say that the appellant had permission to appear via video link, and we've just chosen that.

PN8

DEPUTY PRESIDENT CLANCY: Right. But the notice of listing details that it was via video via Microsoft Teams, and it had two locations. One being the Commission in Perth and one being the Commission in Sydney.

PN9

MR MAROUCHAK: From my reading of the email, I believe it was acceptable for us to appear at this location at our office, so I - - -

PN10

DEPUTY PRESIDENT CLANCY: What email are you talking about?

PN11

MR MAROUCHAK: We're just trying to pull it up now, Deputy President. Do you have that? Yes. So it says here – I believe there was an email from chambers of Deputy President Clancy on 8 February, and if I can just read out that email?

PN12

DEPUTY PRESIDENT CLANCY: Yes.

PN13

MR MAROUCHAK: It says:

PN14

Please note –

PN15

and then the third bullet point, it says:

PN16

The appellant is to join the hearing by video using the below link from a location of their choosing. Please join the Microsoft Teams meeting no later than 10 minutes prior to the commencement.

PN17

DEPUTY PRESIDENT CLANCY: I see it says it on the notice of listing, but, all right, well, we'll proceed. The members of the bench have conferred on permission, and permission is granted to both parties. So I will hear from – unless there's any matters of any housekeeping.

PN18

MR MAROUCHAK: No matters of housekeeping from the appellant.

PN19

DEPUTY PRESIDENT CLANCY: Mr Stutley?

PN20

MR STUTLEY: No, thank you, Deputy President.

PN21

DEPUTY PRESIDENT CLANCY: For the benefit of the bench, who are we going to be hearing? Mr Marouchak, are you - - -

PN22

MR MAROUCHAK: Yes.

PN23

DEPUTY PRESIDENT CLANCY: All right. As you commence your submissions, we'd be interested in you confirming in broad terms the chronology of events in this matter.

PN24

MR MAROUCHAK: Yes. Absolutely.

PN25

DEPUTY PRESIDENT CLANCY: When I say chronology of events, it's the employment history of Mr Jowett that we're interested in. And if you could take us through that, because for my part at least, some of the references in the submissions and some of the references in the decision jump between 2022, 2021 and 2023. So as things currently stand, I'd be interested in how you say events unfolded as you commence your submissions going to the grounds of appeal. All right.

PN26

MR MAROUCHAK: Yes.

PN27

DEPUTY PRESIDENT CLANCY: Thank you.

PN28

MR MAROUCHAK: Yes, Deputy President. If I may, I'll take the bench through my submissions. I just want to confirm that the bench has got the appeal book, the digital court book and the cases that the appellant seeks to rely upon. That's all been provided. The appeal book's quite lengthy; over 1000 pages.

PN29

DEPUTY PRESIDENT CLANCY: Is there a difference between the digital court book and the appeal book?

PN30

MR MAROUCHAK: Yes.

PN31

DEPUTY PRESIDENT CLANCY: Sorry, yes, go ahead. Isn't it in the appeal book?

PN32

MR MAROUCHAK: The digital court book is just a shorter document which just contains some of the material that's been lodged in this appeal case. But the appeal book is actually quite lengthy and it contains the witness statements and the evidence that was tendered before the hearing at first instance.

PN33

DEPUTY PRESIDENT CLANCY: All right.

PN34

MR MAROUCHAK: Can I just also confirm that the bench has had a chance to read both outlines of submissions from the appellant and respondent sent to them?

PN35

DEPUTY PRESIDENT CLANCY: Yes.

PN36

DEPUTY PRESIDENT GRAYSON: Yes.

PN37

MR MAROUCHAK: Thank you. So the appellant obviously has listed five grounds that constitute error, and we will take the Commission through that. And I would like to – the central case – I'd like to start with the merits of the appeal, and then finish off by going through the issue of public interest and permission to appeal to that second limb. So the appellant has listed five categories, and they could be essentially summarised into two key classes.

PN38

The first is the Deputy President at first instance acted upon a wrong principle when applying the law in relation to repudiation. So the appeal points 1 to 4 really focus exclusively on the repudiation argument.

PN39

But the second big category of our case is that when the respondent caused the training contract to be terminated on 9 March 2023, and in fact the Department of Training and Workplace Development, also known as the Apprenticeship Office, actually terminated the contract, when that happened the provisions of section 60H of the Vocational Education and Training Act had the effect of terminating the underlying employment by operation of the law.

PN40

So our case is repudiation is the first category that if you apply the law correctly in relation to repudiation then there's a termination at the initiative of the employer. And the second argument is entirely separate to repudiation which says that because of 60H of the VET Act, if I may call it, the Vocational Education and Training Act, that automatically by operation of the law says when the training contract is terminated, the underlying employment is terminated. So, therefore, there was a dismissal automatically on 9 March.

PN41

So they're the two classes of arguments that we will be running to support the assertion that the appellant was dismissed by the respondent. So I'd like to start off by addressing the first argument, which is the repudiation argument, and I'd like to start off by taking the bench to our primary authority. Our most important authority is a High Court decision by Laurinda Proprietary Limited v Capalaba Park Shopping Centre. We have provided the text of those decisions.

PN42

DEPUTY PRESIDENT CLANCY: Are you going to give us a chronology or not?

PN43

MR MAROUCHAK: So the chronology, yes. Do you want me to take you to – yes, I can.

PN44

DEPUTY PRESIDENT CLANCY: Is it going to be touched upon during your submissions, is it?

PN45

MR MAROUCHAK: Yes. So, Deputy President, I want to mention, because my understanding of the history, everything really started to happen on – this is my understanding of the chronology at a high level. On 27 May 2022, that's when the parties entered into an apprenticeship training agreement. Before that date the appellant did work – was employed by the respondent. So there was some dates when he was working, there was a separate certificate issued, there was some casual work as well, absolutely. But everything – so on the 27th - - -

PN46

DEPUTY PRESIDENT GRAYSON: Can you be more precise than that in terms of the employment relationship proceeding May 2022, please.

PN47

MR MAROUCHAK: What was the employment before May 2022 like?

PN48

DEPUTY PRESIDENT DEAN: So it would seem in the applicant's evidence at first instance – this was a statement he made – what's the date? On 3 August, that he ceased – he had a period of employment between January and April 2021. He ceased working for iDrilling on 8 April 2021, and he performed no work between 9 April 2021 and late May 2022. Is that accurate?

PN49

MR MAROUCHAK: Is that accurate? Sorry to – just to add on those points in the timeline, in or around May 2022 the appellant was hired as a trainee driller, but part of that agreement he worked for a few months before that as a casual offsider. And that was basically just to kind of assess his performance, to assess whether or not he was fit to be a trainee driller. The period that was 2021, that was only for a few months that he was employed, and that ceased. It was around four months. So there were different periods of employment. It does seem a bit confusing, but his primary employment that was terminated, we say, started on or around May 2022, and that was a trainee driller.

PN50

DEPUTY PRESIDENT DEAN: So you – sorry, so let me be clear. So you're saying his – the employment for the purposes of us determining what we need to determine, is that he commenced in late May 2022. Is that correct?

PN51

MR MAROUCHAK: That's correct, yes.

PN52

DEPUTY PRESIDENT DEAN: Thank you.

PN53

DEPUTY PRESIDENT GRAYSON: Can I just take you to paragraph 40 of the decision of the Deputy President. So this has various dates in this paragraph. So it starts off referring to May 2022. Then in the next sentence it refers to:

PN54

> *The pay records tendered by iDrilling reveal employment from the pay period beginning 18 March 2023. In cross-examination Mr Jowett conceded that he was engaged by iDrilling from the pay period commencing 18 March 2023.*

PN55

Then in the next paragraph at 41 they revert to talking about 18 March 2022. So should we read paragraph 40 in the second and third sentence as referring to 2022, '18 March 2022' or '18 March 2023'? That will of course be a matter arising from the evidence, but it's not clear to us – to myself, whether that is intended to be 18 March 2022 or 2023.

PN56

MR MAROUCHAK: It should say 2022, rather than 2023.

PN57

DEPUTY PRESIDENT GRAYSON: All right. So is it the position of both parties that there was some employment from the pay period – setting aside this earlier period in 2021, there was some employment, casual employment as I understand it, from the pay period beginning 18 March 2022?

PN58

MR MAROUCHAK: That's right.

PN59

DEPUTY PRESIDENT GRAYSON: All right.

PN60

MR MAROUCHAK: Because the substance of our submissions today are going to focus on when the training contract was entered into in May 2022 onwards. So, Deputy Presidents, if I may please just highlight some really key passages from the High Court decision of Laurinda, and we have provided a copy of that decision in our bundle. And the decision really – there are key parts of the decision that we say - - -

PN61

DEPUTY PRESIDENT CLANCY: What page is it at, please?

PN62

MR MAROUCHAK: So if you could – those decisions - - -

PN63

DEPUTY PRESIDENT CLANCY: This is perhaps one of the worst appeal books I think I've ever seen. It's like trying to find a needle in a haystack. All you've done is loaded it up with authorities, but as for documentation which might have been useful from the first instance proceeding, it looks like we're going to be forced to go off and find it from wherever it is.

PN64

MR MAROUCHAK: We didn't actually attach Laurinda to the appeal book. It was actually sent separately by an email to your associate, the full decision, on Friday. So if you could pull up the decision of Laurinda, that's not in the appeal book, that's separate, I can take you through the parts of that decision. So and we say this will be binding when considered as a whole. So if you just let me know when everyone's got the decision. Brennan J's decision starts on page 10 of 29. And then I'll take you to Brennan J's decision first, and then I'll take you to Dean and Dawson JJ's decision later.

PN65

DEPUTY PRESIDENT CLANCY: Yes.

PN66

MR MAROUCHAK: Yes, so Deputy President, if you see that on page 10 Brennan J's decision starts, and then if you can scroll down – if you can go down to page 14, I believe, that's the first kind of part of Brennan J's decision I wish to

highlight. And when you have it, I can read it. It's just at the bottom of page – it says '14' on here, but it could be 15 on the footnote, where it says:

PN67

Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default.

PN68

You can see that?

PN69

DEPUTY PRESIDENT GRAYSON: It's on page 15.

PN70

MR MAROUCHAK: So, yes, the footnote says '15 of 29' so I'll go with the footnotes, then, Deputy President. So:

PN71

Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way.

PN72

So that's Brennan J. Another important of Brennan J's decision which is on page 16 of 29, and if I can read that over the page. It starts off with a paragraph:

PN73

The question of whether an inference of repudiation should be drawn merely from continued failure to perform requires an evaluation of the delay from the standpoint of the innocent party. Would a reasonable person in the shoes of the innocent party clearly infer that the other party would not be bound by the contract or would fulfil it only in a manner substantially inconsistent with that party's obligations and in no other way?

PN74

So Brennan J says we have to put ourselves in the shoes of the innocent party, and here the innocent party is the appellant. So we have to put ourselves in the shoes of the employee. Now, that's one judgment of Brennan J. Now, I'd like to take the court to the majority decision here of Deane and Dawson, which they also say the same thing. So Deane and Dawson's decision start on page 17 of that document. And then if we move to the part that's important, which is page – so Deane and Dawson – apologies. Let me just find that. It says – apologise, I've lost the highlight but I believe it's on – my highlights have actually gone but part of Deane and Dawson says:

PN75

An issue of repudiation turns upon objective acts and omissions and not upon uncommunicated intention. The question is what effect the lessor's conduct 'would be reasonably calculated to have upon a reasonable person.'

PN76

And then it also says:

PN77

It suffices that viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.

PN78

So that's also quoted from – and that is on page 22. So that is 22, and if you see the sentence starts with:

PN79

Lord Wright's oft-quoted admonition –

PN80

and it's hidden in that paragraph. It just wasn't highlighted. I just found it. Can the bench see that part that I just read from, from Deane and Dawson?

PN81

DEPUTY PRESIDENT DEAN: They're two separate quotes, aren't they? Is that right?

PN82

MR MAROUCHAK: Yes, they're – yes. They are two separate quotes but I've just missed the parts where it says – but still in that paragraph of, 'Lord Wright's oft-quoted', so it just says:

PN83

An issue of repudiation turns upon objective acts and omissions and not upon uncommunication intention. The question is what effect the lessor's conduct 'would be reasonably calculated to have upon a reasonable person.'

PN84

And then it quotes some law and then it says:

PN85

It's sufficient that viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.

PN86

So both Deane and Dawson's decision, and also Brennan J's decision are saying – and that would be the majority, they both said the same thing – you have to put yourself in the innocent party's shoes and view the conduct of the defaulting party from the innocent party's shoes. So that's what I would like to – we say this is

binding and this is good law that's been – this case of Laurinda has been considered in many other cases since then, so we say this is good law and that it is binding.

PN87

So the test that the Commission, the bench needs to look at, is let's have a look at what the appellant saw. I will take you through the eyes and the point of view of the appellant so we can properly judge whether there's a repudiation from his perspective.

PN88

So the starting point will be the training contract. If I can take the bench to page 12 of the appeal book, and that has a copy of the training contract in it. So this is – so page 12, we just see the apprenticeship training contract. This is the contract that was signed. Then if you go to page 14 you will see on the top of page 14 of the appeal book, if I can just read it. It says, 'Training Contract'. It says:

PN89

This contract forms a legally binding agreement between an employer and employee for the training of apprentices and trainees leading to a nationally recognised qualification.

PN90

So it says it's legally binding. Then if I can take you to page 15 of the appeal book, and to the part that says – in the middle of the page, it says:

PN91

For the employer. I agree I will employ and train the apprentice trainee as agreed in our training plan and ensure that the apprentice trainee understands the choices that he or she has regarding the training. That the employer agrees to provide the appropriate facilities and experienced people to facilitate the training and supervise the apprentice while at work. The employer agrees to make sure the apprentice trainee receives on-the-job training and assessment in accordance with the training plan.

PN92

So there's a number of obligations that the employer agreed to. So the point I'm making is the training contract and to be provided with training is a fundamental term of the employment between the appellant and the respondent. If you go to page 25 you will see that this training contract was executed on 27 May 2022. So although the appellant did work as a casual offsider for the respondent at various periods, we say when they entered in to this contract the terms of the employment changed to include a fundamental obligation on the respondent to train the appellant so the appellant can get qualified as a level 3 driller.

PN93

So the next key event that happens – and, remember, I just want to show you what the appellant saw, because that's how you make the decision according to Laurinda. Then the next key event is on 2 March, where the appellant sent an email to the respondent querying his wages. So if you go to page 7 of the appeal

book you'll see a portion of the witness statement of the appellant. So on page 7 of the appeal book. It says at paragraph 28:

PN94

On 2 March I formally emailed - - -

PN95

DEPUTY PRESIDENT CLANCY: Sorry, there just seems to be an issue with the page numbers in the appeal book. This is on page 5. It seems that - - -

PN96

MR MAROUCHAK: I apologise. We apologise for the appeal book. The numbering on the appeal book is on the top left-hand corner.

PN97

DEPUTY PRESIDENT CLANCY: What's on the bottom?

PN98

MR MAROUCHAK: The bottom is the numbering from the original digital court book at first instance. So this is why it's a bit messy.

PN99

DEPUTY PRESIDENT CLANCY: Thank you.

PN100

DEPUTY PRESIDENT DEAN: What page were you taking us to?

PN101

MR MAROUCHAK: So page 7, top left-hand corner. This is a copy of the witness statement, the first witness statement of the appellant, and it simply says on paragraph 28:

PN102

On 2 March 2023 I formally emailed iDrilling explaining how long I had not been given any work, and asked iDrilling for compensation for all the wages I had lost, as I was neither working nor getting paid. A copy of that email is attached and marked TJ5.

PN103

Then at paragraph 29 of that same page, it says:

PN104

I did not receive a response to my email sent on 2 March 2023. I did not hear back from anyone at iDrilling about the issues I raised in my email dated 2023.

PN105

Then while on that page you can see at paragraph 30 the next key event that happened from the appellant's point of view, is he gets an email on 9 March, and I'll just read it:

PN106

On 9 March 2023 the apprenticeship office informed me by email that they'd received notification from iDrilling in relation to the termination of my contract, and they had processed the termination of my contract. A copy of that email is attached and marked TJ6.

PN107

So the appellant emails, he queries his wages, and the next thing he gets is a notice of termination of his contract. So if I can take the bench to TJ5 and to TJ6, you can see for yourselves those two key emails. So TJ5 starts on page 39 of the appeal book, top left-hand corner. So this email is on 2 March, it's an email addressed to Shannon Harding. Shannon Harding was a witness for the respondent, the managing director. He's the one that gave evidence on behalf of the respondent at trial. It says, you know:

PN108

Unpaid entitlements. I'm writing to you in order to attempt to settle my claim for outstanding entitlements. I've calculated outstanding money of $48,000.

PN109

So that's the email he sent. Then if you go to the next annexure at page 41, you will see the email that was sent by the Department of Training and Workforce Development to the appellant, and this email says at TJ6, page 41:

PN110

Termination with apprentice consent of T J Jowett's training contract.

PN111

Then ID the training contract. And then it received – and then it just confirms that:

PN112

The apprenticeship office received notification in relation to the termination of your training contract, which has been processed.

PN113

On that same page it says:

PN114

Termination type – with apprentice consent. Termination approval date, 9 March 2023.

PN115

This is what the appellant sees. He sends an email asking his wages, and next thing he sees is an email from a government department, the Department of Training and Workforce Development, the one that regulates apprentices, to say his training agreement is now terminated.

PN116

DEPUTY PRESIDENT CLANCY: So what has been processed at this point? The notification or the termination?

PN117

MR MAROUCHAK: The termination has been processed.

PN118

DEPUTY PRESIDENT CLANCY: Right. So turn over the page to page 42.

PN119

MR MAROUCHAK: Yes.

PN120

DEPUTY PRESIDENT CLANCY: And it says:

PN121

If you agree to end your apprenticeship, you don't need to do anything.

PN122

MR MAROUCHAK: Yes.

PN123

DEPUTY PRESIDENT CLANCY: The next paragraph:

PN124

If the training contract termination occurred after the probation expiry date, and you did not request or agree to end your apprenticeship, please contact.

PN125

MR MAROUCHAK: Yes.

PN126

DEPUTY PRESIDENT CLANCY: Well, what's this process for?

PN127

MR MAROUCHAK: The way I understand what happened is the apprenticeship office has terminated the agreement and they've confirmed that in their email, and they're saying, 'If we got something wrong here, then notify us. If you did not agree to the end of your apprenticeship, you should contact us.' So it leaves room, an avenue, for the employee to correct any mistakes that were made. But it doesn't take away from the fact that the contract actually has been terminated in the apprenticeship office records. It actually says it's been processed; it's been terminated, it's now cancelled.

PN128

So I want to take you through what the appellant saw, and then I'll take you through what the respondent did in the background, because I respectfully submit that you have to stand in the shoes of the appellant.

PN129

So he gets this email. The next thing the appellant – so I just want to also just pause here and highlight that this email is fundamental to our case. The training contract was terminated, so what does that mean at law? We would say, firstly, this means that this is an act of renunciation by the respondent. So my understanding of the law - - -

PN130

DEPUTY PRESIDENT CLANCY: So perhaps take us to the law first. Are you saying pursuant to the Western Australian legislation?

PN131

MR MAROUCHAK: Yes, in summary I'll say two things. So the Western Australian legislation, I would say section 60H - - -

PN132

DEPUTY PRESIDENT CLANCY: What does the legislation say and have you got a copy of that within your court book – the appeal book?

PN133

MR MAROUCHAK: I haven't got a copy of the appeal book, but I can take you to section 60H of the Vocational Education and Training Act.

PN134

DEPUTY PRESIDENT CLANCY: Is that in the appeal book?

PN135

MR MAROUCHAK: I don't think so. It's in our submissions. We haven't actually put – I don't believe we put the law in the appeal book. We just put the cases.

PN136

DEPUTY PRESIDENT GRAYSON: So what page of your submissions should we be looking at to find this section?

PN137

MR MAROUCHAK: Our outline of submissions, you can have a look at – it's in there. We have quoted that 60H. Let me get that. So you can have a look at paragraph 26 of our submissions, which talks about that section of the VET Act. So the outline of submissions start on page 13 of the digital court book, and then paragraph 26 refers to 60H. Everyone can see that? So when this email is received - - -

PN138

DEPUTY PRESIDENT CLANCY: Why don't we look firstly, though, at 60G, and perhaps if you go to paragraph 95 of the decision.

PN139

MR MAROUCHAK: Absolutely, we can have a look at 60G. So paragraph 95 of the decision. Just let me get there. Yes. 60G, that's correct, terminating contracts.

PN140

DEPUTY PRESIDENT CLANCY: Yes, and I think you do refer to this in your appeal notice or something, but it says:

PN141

An employer who is party to a training –

PN142

and this is subsection (2) at the top of page 14 of the decision:

PN143

An employer who is party to a training contract, the probation period of which, if any, has expired, must not terminate unless they've consented.

PN144

And that's, on your case, not the case here and it doesn't seem to be in dispute:

PN145

Or the chief executive has approved the termination.

PN146

MR MAROUCHAK: Yes.

PN147

DEPUTY PRESIDENT CLANCY: And the Deputy President concludes that 60G(2)(b) does not apply in this case.

PN148

MR MAROUCHAK: Yes.

PN149

DEPUTY PRESIDENT CLANCY: She also – well, then how do you say under – so you say it just flows then from section 60G to H?

PN150

MR MAROUCHAK: Well, 60G is – and if you have a look at – one thing the Deputy President missed out is that under 60G it also says there's a penalty, a $10,000 fine.

PN151

DEPUTY PRESIDENT CLANCY: Yes.

PN152

MR MAROUCHAK: So 60G just puts the obligation on the respondent not to terminate without apprenticeship consent.

PN153

DEPUTY PRESIDENT CLANCY: Yes.

PN154

MR MAROUCHAK: But all that happened in this case is the respondent didn't follow the law. The respondent ignored the law, terminated anyway. The training contract was processed by the Department and terminated, so, therefore, that doesn't invalidate the termination because the Department already terminated the contract, as we saw in that email. The training contract was already terminated. So all 60G does, it says, 'Don't do it, but if you do it you get a fine', because they broke the law. But it doesn't still invalidate the termination. The training contract was terminated by the Department.

PN155

DEPUTY PRESIDENT CLANCY: So you say the mere act of someone applying to terminate has the effect of terminating?

PN156

MR MAROUCHAK: If the Department processes it and it sends you an email confirming it's been terminated, then it's been terminated. So I'll take you through the documents that they've lodged very shortly, but - - -

PN157

DEPUTY PRESIDENT CLANCY: No, so go to paragraph 94 there, it says in the training contract, it says:

PN158

Only in accordance with the requirements of the relevant state and territory legislation.

PN159

MR MAROUCHAK: Yes.

PN160

DEPUTY PRESIDENT CLANCY: Have the requirements of the relevant state and territory legislation been complied with in this case in the termination?

PN161

MR MAROUCHAK: The respondent didn't comply with it but the Department still terminated the contract at the initiative of the respondent. So the respondent is in breach again. The respondent breached the law by not complying with the VET Act. But nevertheless, remember the government still terminated the contract, so the employee gets an email saying his training contract is now terminated, he's a blue collar worker, he's not an astute lawyer. I think it's quite sensible for someone to go, 'Yes, the government's terminated it. They told me in writing it's terminated. It's terminated.'

PN162

DEPUTY PRESIDENT GRAYSON: So where is it – does it make it clear within the Act that the government can terminate a training contract, or can it only be terminated – because I'm just checking your language here.

PN163

MR MAROUCHAK: Yes.

PN164

DEPUTY PRESIDENT GRAYSON: You said the government terminated.

PN165

MR MAROUCHAK: The Department. The Department, yes.

PN166

DEPUTY PRESIDENT GRAYSON: Well, I don't mind how you describe them, but where in the act does it say that it is the role of the government to terminate or

the Department, howsoever described, to terminate this contract? That's the submission you just made, if I understood.

PN167

MR MAROUCHAK: Well, I would say that the Department regulates apprenticeship contracts, so you have to register your training contract with the Department. So they're the one that's – the Department is responsible for overseeing or regulates apprenticeships, so they control – they're the ones that control when a training contract is registered and when it's terminated.

PN168

I can't point you to a provision that says the government terminates, but it's the regulator. The government is the regulator that regulates the training of apprentices, and they're the ones that terminated the contract at the initiative of the respondent.

PN169

DEPUTY PRESIDENT GRAYSON: Well, I'll just ask you the same question again. Can you take me to a provision of the Act that says that the government, howsoever described, the regulator, the Department, terminates the contract, because 60G2 says that it's the employer who terminates the contract upon one of two events having occurred. So I just want to understand your submission.

PN170

MR MAROUCHAK: Sorry. My submission is that there was an email from the Department that confirmed that the contract has been terminated and it has been processed.

PN171

DEPUTY PRESIDENT CLANCY: Yes, but that email says, 'Termination with apprentice consent.' And it describes the termination type with apprentice consent.

PN172

MR MAROUCHAK: Correct.

PN173

DEPUTY PRESIDENT CLANCY: Your case is, well, you've got to be in the appellant's shoes, and what is he receiving? Well, he's receiving an email which says it's terminated with his consent. And his next reply is, 'I didn't agree and nor have I received anything stating my apprenticeship will be cancelled.'

PN174

MR MAROUCHAK: Yes.

PN175

DEPUTY PRESIDENT CLANCY: So you're going to his state of mind saying, well, as far as he's concerned it's cancelled, whereas his state of mind seems to be, 'Well, I didn't agree to this and I haven't received anything to that effect.' So your case seems to be, well, from that point he's proceeding on the basis that it has been terminated.

PN176

MR MAROUCHAK: Correct.

PN177

DEPUTY PRESIDENT CLANCY: And yet he's challenging it.

PN178

MR MAROUCHAK: Well, challenging. He simply wrote to the Department. He didn't write to the respondent. He wrote to the Department and just says, 'On the email basically it says that I consented to this. I didn't consent to this.' So he was simply correcting an error that appears on the face of the document.

PN179

DEPUTY PRESIDENT CLANCY: Yes.

PN180

MR MAROUCHAK: It still didn't change the fact that the contract was terminated, at least on the Department's records. Him replying to that email was simply just saying a truthful statement that, 'I just didn't give consent.' It wasn't asking for the contract to be restated. It wasn't seeking anything at all. It was just simply making an observation, but - - -

PN181

DEPUTY PRESIDENT CLANCY: He also says, 'Nor have I received anything stating that my apprenticeship will be cancelled.'

PN182

MR MAROUCHAK: Yes. Yes. So the Department has terminated – has processed in their records the termination of the training contract. So when that email was sent, the training contract was terminated. So we say that the employer should not have caused it to be terminated. The law says at section 60J that the employer shouldn't have terminated without the apprentice's consent, but they broke that law. It was still terminated.

PN183

The employer provision was actually 60H, which is actually – 60H of the VET says – 60H(1), if a training contract ceases to have effect, whether under section 60F(6) or because it is terminated, or expires or any other reason, the employment of the apprentice by the employer under the contract ceases.

PN184

So where that training contract was terminated and confirmed by the Department on 9 March, the employment of the apprentice by the respondent ceases. So, therefore, the training contract came to an end and also by operation of the law under 60H of the VET Act, the employment came to an end.

PN185

DEPUTY PRESIDENT CLANCY: So why does that then require repudiation?

PN186

MR MAROUCHAK: So that's my secondary argument, which the secondary argument is just even if you ignore all the arguments about repudiation and just don't accept that, section 60H still is an entirely separate argument to repudiation. It says still the employment was terminated. But I still am running my repudiation argument as well.

PN187

So the repudiation argument is very simply, put yourself in the shoes of the apprentice. The apprentice receives this email on 9 March. The training contract is terminated. He then lodges his proceedings, unfair dismissal proceedings.

PN188

DEPUTY PRESIDENT CLANCY: Why doesn't he contact the employer? Why doesn't he respond to the employer? Why doesn't he respond to the efforts that are said to have been made by the Department?

PN189

MR MAROUCHAK: So he emailed the employer and the employer didn't respond to him on 2 March.

PN190

DEPUTY PRESIDENT CLANCY: But that's before all this.

PN191

MR MAROUCHAK: If someone commits a repudiatory act, a repudiatory breach by terminating an employment contract, then the law just says the employee has a choice. The employee has a choice to either accept the repudiation - - -

PN192

DEPUTY PRESIDENT CLANCY: You're not answering the question. You're telling me what an employee can do. I'm asking you why didn't he make contact?

PN193

MR MAROUCHAK: I don't know why he didn't contact the respondent. All I can say, the inference that can be drawn from this is that he just assumed that his contract was terminated and he was out the door. He was given the boot. He doesn't need to contact them. It's all over. And the other thing is, when the Department try to contact him, again the Department – no one emailed him to say, 'Hey, that 9 March email was wrong.' The Department didn't email to say it was suspended or it was withdrawn. I know personally that I gets lots of calls on my phone - - -

PN194

DEPUTY PRESIDENT CLANCY: Well, I don't care what personally happens to you, but the email that he sends to the Department has a phone number that he leaves, and the decision records that there is attempts to contact him by Ms Smargiassi.

PN195

MR MAROUCHAK: Yes, by phone calls, but no emails.

PN196

DEPUTY PRESIDENT CLANCY: He's left a phone number. He's invited, 'You can contact me.'

PN197

MR MAROUCHAK: Yes, but there could be many number of explanations. That you see a random number on your phone and you don't call it back because you think it's a spam call. There can be a lot of explanations of why he didn't return the call, but he never spoke to Ms Smargiassi – apologies for the pronunciation – but he never spoke to her. She tried to call him. I don't know how many times she tried to call him. He missed a call. For some reason or other he didn't call her back.

PN198

But there was no written email from the Department. There was probably an attempt to try and reach him but he was uncontactable. There could be a whole number of reasons why. His phone could've been off. He could be getting a lot of spam calls, and you see a random number you don't recognise, you don't return it. There are many reasons why you don't return a phone call. But it still doesn't change the fact that his contract was incorrectly terminated. He's the innocent party.

PN199

It's not like there's an email record from anyone to say that, 'Hey, that cancellation on 9 March, we got it wrong.' From his perspective he sees the cancellation. He writes to the Department making an observable fact that he didn't agree to it. And then he hears nothing. There's no other written communication. There's no other communication from anyone. There might have been a phone call attempted but how is he supposed to know it's from Ms Smargiassi.

PN200

DEPUTY PRESIDENT CLANCY: If he's worried about who's calling him maybe next time don't leave a phone number to be called.

PN201

MR MAROUCHAK: Well, the reality is that that's - - -

PN202

DEPUTY PRESIDENT CLANCY: The reality is by this stage he's taking some instructions from your firm, and you say, 'Well, let's go straight to unfair dismissal', and you lodge that on 30 March.

PN203

MR MAROUCHAK: Well, he wasn't instructing us then, Deputy President. We basically saw him for the first time on the day that he filed.

PN204

DEPUTY PRESIDENT CLANCY: See, what's the utility of all this? On your case you say, well, he's been dismissed.

PN205

MR MAROUCHAK: Yes.

PN206

DEPUTY PRESIDENT CLANCY: And you come at that from saying, 'Well, but I accepted their repudiation.'

PN207

MR MAROUCHAK: Yes.

PN208

DEPUTY PRESIDENT CLANCY: They're saying, 'Well, we never intended to dismiss him and we didn't want to. And, moreover, we made steps and took steps to ensure that this was a repudiation that – or this was something that was processed incorrectly. We didn't want to dismiss him.' Right?

PN209

MR MAROUCHAK: Yes. Yes.

PN210

DEPUTY PRESIDENT CLANCY: You run this case through, and that's their position. And your client does not want the remedy of reinstatement.

PN211

MR MAROUCHAK: No. No.

PN212

DEPUTY PRESIDENT CLANCY: He wants compensation, and you've got a respondent saying, 'Well, we're content to have him back.' And he says, 'Well, no, I don't want to go back. I want compensation.' In those circumstances, in circumstances where his case is, 'There's no way I was going back because of the way I was treated in my employment, and I accept their repudiation', how does the Commission assess compensation for someone who his own position is, 'It was terrible working there, I don't want to work there anymore.'

PN213

MR MAROUCHAK: Well, it was terrible but if he wasn't terminated he still would have worked there, probably until the end of his training contract, which wasn't – I think it was six months after. But I think the conversation issue is a separate issue to whether there's been a dismissal.

PN214

DEPUTY PRESIDENT CLANCY: I mean, you're – anyway, look, I'll let you run your arguments. I'm just making the observation that I'm finding it hard to follow what both parties are seeking to achieve by continuing to litigate with each other around this. I mean, clearly there's a claim for underpayment which has been made here, which is probably lying behind all this, which is putting the brakes on settling an unfair dismissal case which has a series of strange aspects to it.

PN215

MR MAROUCHAK: It does.

PN216

DEPUTY PRESIDENT CLANCY: Why don't you continue with your submissions on repudiation.

PN217

MR MAROUCHAK: So when this email of 9 March was sent, there's – I've discussed his termination, his automatic termination for operation of the law, automatic dismissal by section 60H of the VET Act. If we fail on all the other repudiation arguments, we say that this one at least succeeds by operation of the law. But I'm going to go back to the repudiation argument on the 9 March email.

PN218

DEPUTY PRESIDENT GRAYSON: Just before you leave 60H, if that's what you're doing, the language of the statute at the end of 60H(1) says:

PN219

The employment of the apprentice by the employer under the contract ceases.

PN220

MR MAROUCHAK: Yes.

PN221

DEPUTY PRESIDENT GRAYSON: Now, do you say that means that there can be no ongoing employment relationship not under the contract?

PN222

MR MAROUCHAK: So - - -

PN223

DEPUTY PRESIDENT GRAYSON: That is, there was a contract of employment which was in place in some form or other before he entered into the training contract.

PN224

MR MAROUCHAK: Yes.

PN225

DEPUTY PRESIDENT CLANCY: The language of the statute specifically refers to the employment under the contract ceases. Do you say that means there cannot be ongoing employment other than under the contract after it's terminated?

PN226

MR MAROUCHAK: I mean, in this particular case I would say, no, there can't be any ongoing employment in this particular case, because when the training contract was signed, that changed the terms of employment. He might have been this irregular casual that was working, but he signed a training contract and so that changed the nature of his employment to one of training. It's in the same way that someone gets promoted or gets a pay rise or gets a higher status position in the company. They have this old position and then this new position changes. The whole training – whatever the old position was doesn't count any more. It's the new situation in place.

PN227

So where when he became a trainee, whatever work he'd done previously, that was more casual or that was more irregular. Now there's an expectation of training and once the training contract was terminated, then the underlying employment under that training contract, ceases, and there was no other underlying employment that the appellant had with the respondent in this case.

PN228

DEPUTY PRESIDENT GRAYSON: So you're saying particular to the facts in this matter that no ongoing employment would exist after this contract.

PN229

MR MAROUCHAK: No. No. So, I mean, with 60H, would it be a good time for me to actually raise some – if we're talking about it, I can also raise what Turner said about this as well. So since we're on here, I might as well raise it now for my argument. If you have a look at the decision of Turner, which we also sent through, paragraph 44 of the Turner decision makes it clear that section 60H operates to terminate the employment. So paragraph 44 of the Turner decision, where Commissioner Williams says - - -

PN230

DEPUTY PRESIDENT CLANCY: What page are we on, please?

PN231

MR MAROUCHAK: Yes.

PN232

DEPUTY PRESIDENT CLANCY: Is this in the appeal book?

PN233

MR MAROUCHAK: The Turner decision, page 5 of 6. Yes, it's at page 5 of 6. I think it is in the appeal book, but I sent these decisions separately in an email on Friday, we did. But if you go to page 5 in Turner.

PN234

DEPUTY PRESIDENT CLANCY: So is it not in the appeal book?

PN235

MR MAROUCHAK: I believe Turner is in the appeal book. The Turner decision was argued at first instance in front of the Deputy President, but I haven't got the page number in front of me, but we can get it if you like.

PN236

DEPUTY PRESIDENT CLANCY: Thank you.

PN237

MR MAROUCHAK: So Turner at paragraph 44 says that – it says:

PN238

The training agreement was cancelled in July 2011.

PN239

So here in our case – and then it says:

PN240

And the effect of the cancellation was backdated to 20 June 2011.

PN241

Then Turner says:

PN242

By virtue of section 60H(1) the applicant's employment with the respondent ceased when the training arrangement ceased to have effect.

PN243

DEPUTY PRESIDENT CLANCY: Section 60H(1) says:

PN244

The employment of the apprenticeship by the employer under the contract ceases.

PN245

MR MAROUCHAK: Yes. So and our employment under the contract was the driller work. So Turner – Commissioner Williams in Turner said as soon as the training contract is terminated, in that particular case he said by virtue of 60H, the employment terminates.

PN246

DEPUTY PRESIDENT CLANCY: Yes. All right.

PN247

MR MAROUCHAK: I also will note that the Deputy President at first instance didn't even refer to section 60H in her decision, so it wasn't considered, at least not on the decision. The other important thing in Turner as well as – since we are here and since we have commentary about 60G – if you go to paragraph 35 of the decision in Turner, this is on page 4, you'll have a look there's some commentary as well about section 60G which also addresses some of the questions that have been had. If I can read that. These are where the inconsistencies lie between Turner and this decision. In paragraph 35 it says, if I can read it:

PN248

In my view the cancellation of the training agreement occurred some time after 27 June 2011. There is no evidence that the cancellation of the training arrangement was done with the consent of Mr Turner. Rather, I am satisfied that the training arrangement was terminated by the respondent. The termination of the training arrangement was subsequently approved by the Chief Executive office as is required by section 60G of the VET ACT. This legislative requirement for the termination of the training agreement to be approved by the Chief Executive before it has effect in no way changes the conclusion that the training agreement was brought to an end on the respondent's initiative.

PN249

So it's saying that even thought section 60G makes a requirement for a respondent or for an employer to follow certain steps before it's terminated, it doesn't prevent

there to be a termination, even if that section is not complied with. Whereas the decision of Deputy President at first instance says very clearly if section 60G is not complied with, then there cannot be a termination of a training contract. Whereas Turner, the decision in Turner, is contradictory to that. It doesn't put that strict onus in place.

PN250

So they're the key points in Turner that really address 60H and 60G, and which are different to Deputy President's initial decision. So if the bench is okay for me just to go back and for me to go through the facts just to show you what the appellant saw.

PN251

So the appellant gets this email on 9 March to say his training contract was terminated by the government department. The appellant emails back to say, 'Hey, there's something wrong with this. I didn't agree to it.' He hears nothing else from the apprenticeship office. They might have tried to call him but he didn't speak to them. The respondent didn't email, didn't even communicate directly with the appellant. The respondent didn't email the appellant to say that, 'Hey, we got something wrong.' The Department didn't email to say, 'We've got something wrong.' He's heard nothing.

PN252

So the next thing he does is he lodges his unfair dismissal application, and that was lodged on 30 March 2023. So and it's not disputed here that it was lodged on 30 March; that's in the statement of agreed facts. So at this point we say when he lodged the unfair dismissal proceedings, that is the time that he accepted the respondent's repudiation and that is when the employment was terminated due to repudiation.

PN253

Now, there's also - it's also open on the facts for the respondent to say or for someone to say that, 'Hey, just because he lodges unfair dismissal proceedings doesn't mean it was communicated to the respondent, but we don't know when the respondent got the unfair dismissal application.' So the next key event that happens is on the - between 30 March and 6 April nothing happened, but on 6 April, the Fair Work Commission sent out a notice of listing.

PN254

So you can have a look at that notice of listing on page 54 of the appeal book. So on 6 April when this - if you have a look at that notice of listing, page 54, and then you can go over the page and you can see here that this when the respondent was notified - it's indeniable that this - the respondent was notified at 1.53 pm, WA time. Sorry, you can see that that - on this notice was sent on 6 April 2013 at 1.53 pm, it says on the bottom there on page 54, but I don't know whether 1.53 pm is WA time or Eastern Standard Time.

PN255

But on 6 April is the date that the respondent, at least, had knowledge of the unfair dismissal application. So this is the date that termination of the employment by way of lodging an unfair dismissal claim was communicated to the

respondent. So the respondent had knowledge - as soon as this was sent to him. So this is the latest date that the contract can come to an end by way of acceptance of the repudiation. So when the appellant lodged it on 30 March, maybe it will - he lodged it with the Fair Work Commission.

PN256

He didn't send anything to the respondent so there might have been a lag period when the Fair Work Commission sent the notice - the unfair dismissal application to the respondent, but it was sent on this date. Then after this notice was sent, he gets an email from the apprenticeship office, reversing the termination. So the statement of agreed facts has a copy of the email and on page 1788 of the appeal book, I can take the Bench to that email at 1788. (Indistinct).

PN257

DEPUTY PRESIDENT CLANCY: 1788 (indistinct).

PN258

MR MAROUCHAK: Sorry. Apologies. 1790, annexure SOAF14, statement of agreed facts. You can see that this is the email that was sent from the apprenticeship office saying, 'The termination has been reversed', and that was sent at 2.40 - 2.04 pm. So this was sent to the appellant after the respondent had notice of his unfair dismissal application. So this reversal was too late. The contract was already terminated. The employment agreement arrangement was already terminated by repudiation because the appellant had lodged the unfair dismissal proceedings. Those proceedings were communicated to the respondent.

PN259

Anything the respondent did after they received, they had knowledge of the appellant's unfair dismissal claim doesn't matter because anything that happens after a contract is terminated, it's too late. So this reversal happened after the contract was brought to an end by way of repudiation and the thing here is this is what the respondent - this is what the appellant sees. The appellant wasn't aware of all the steps the respondent took to try and fix this mistake.

PN260

All the stuff that happened in the background, frankly, it doesn't count because if you apply Laurinda you have to put yourself in the appellant's shoes and all the appellant sees is - sends an email on 2 March querying his wages, gets an email from the department terminating his training contract, fundamental term, lodges his unfair dismissal application, has confirmation of the unfair dismissal application on 6 April as sent to the respondent. That's it. Contract employment ends.

PN261

He doesn't know all the stuff that - all the phone calls between Mr Hardy, all the stuff that Mr Hardy was doing. So if you have a look at what the respondent did - so put yourself in the appellant's shoes. Laurinda, in my respectful submission, the reasonable person in the appellant's shoes will go, 'Hey, the respondent doesn't - already bound by the training contract. The respondent doesn't want to train me. The respondent doesn't want to honour a fundamental term of our arrangement.'

PN262

Training is - goes to the heart of an apprenticeship arrangement. You can't have an apprenticeship without the training. This is what he sees and there are two sides - perspectives. You can look at what the defaulting party sees, but that's not the correct law. The correct law is you have to see what the innocent party sees and a reasonable person in a reasonable party's shoes would see all these chain of events and go, 'Hey, clearly there's an intention here not to be bound by the contract. I'm terminating.'

PN263

And that's the - this is the key part that we say the Deputy President at first instance didn't - made the error. He confused what happens - everything is clearer in hindsight. When you look back and you see from everyone's perspective you can see everything - all this stuff that Mr Hardy was doing to fix it is where it comes across very clearly, but if it wasn't communicated to the appellant, the innocent party, it doesn't count. It doesn't count for anything. It's actually - uncommunicated intentions, uncommunicated acts are simply irrelevant. So all the stuff that the respondent did to try and fix the termination of the contract, are immaterial.

PN264

They're not worth anything if they were not communicated to the appellant. And it's also important - I'd like you now just to put yourself - put the Commission in the shoes of just what the respondent did, so the Commission has a good understanding of what happened in the background, so I'm going to look at this from the point of view of the respondent of the facts.

PN265

So if I can take the Commission to page 617 of the appeal book, you can see a copy of Mr Hardy's statement. At page 617 Mr Hardy starts talking about this. On paragraph 60 he says:

PN266

I instructed Ms Dover to proceed with preparing and submitting the termination paperwork for the training contracts that required termination. I understand Ms Dover included Mr Jowett's training contract, among others.

PN267

At 61 Mr Hardy says:

PN268

Ms Dover completed the notice of termination of training contract in respect of Trent Jowett and provided this to CCI for submission to the department on or around 8 March 2023.

PN269

I will make a point here that there's just a little bit of an error in Mr Hardy's statement. This notice of termination weren't provided to the CCI, Chamber of Commerce and Industry in WA, but they were submitted directly to the department. So it didn't go through CCI, it went from Ms Dover directly to the

department. So then if you have a look at paragraph 61, Mr Hardy refers to his annexures, SOAF6 and SOAF7.

PN270

So I can take the Commission to that as well - the Bench to that and if you go to page 1764, 1-7-6-4, you will see a copy of those two annexures in the appeal book. So at 1-7-6-4, the top left-hand corner, there is - this is the email that Ms Dover sends to the department. So again, this is the guilty parties' perspective and you can see here very clearly it says, 'Notice to terminate a training contract.' So that's what Ms Dover wrote under the instruction of Mr Hardy and then it says:

PN271

Please find attached a notice to terminate the training contract for Trent Jowett.

PN272

So she writes to the department, says:

PN273

We're going to terminate Trent Jowett's training contract. Here it is attached.

PN274

And then if you go over the page, you will see that this is the attachment at SOAF7 and you can see here, 'Notice to terminate training contract.' It's got, 'Apprentice's details: Trent J. Jowett.' It's got his address. It's got, 'Legal name, iDrilling Australia Pty Ltd.' It's got the signature of Dannielle Dover. It's dated 7 March. It's also got, 'Indicate the reasons for termination.' It's got, 'Business downturn and performance.' It's got some other reasons as well, 'Uncontactable. No driver's licence. Incidences.'

PN275

So this is clearly an intentional act. You don't have - and you can see also the training contract ID on that page, '5143119.' This is not an accident. The respondent filled out a form, listed the training contract ID, put in the appellant's name, uploaded it and sent it to the department, directly to the department. It wasn't sent to CCI, it was sent to apprenticeship office at the government email and the reason - those reasons for terminating the contract actually all relate to reasons - personal reasons which directly relate to the appellant.

PN276

Those reasons listed are, 'No driver's licence. Uncontactable.' There's an incident here. These are all reasons that relate specifically to the appellant and we have made argument and we did - we have got - in cross-examination, Mr Hardy admitted that those reasons relate to the appellant. Now, we would say just for background in our closing submissions, we have referenced some of those reasons.

PN277

If I can take the Commission to page 1-8-9-1 where - and the bottom of page 1-8-9-1 we talk about, in our closing submissions that Mr Hardy admitted,

essentially during cross-examination that the reasons on that form Ms Dover signed relate to the applicant. So 1-8-9-2, across the page, it's got stuff on (a), (b), (c) and (d) there, 57(a), (b), (c) and (d), is we say he admitted and this is the arguments we'd made to the Deputy President.

PN278

Mr Hardy admitted that he had issues with the appellant being unavailable, uncontactable during work hours. We have a timestamp of the cross-examination there. Mr Hardy admitted that he said the applicant had issues with his driver's licence. Mr Hardy said there were incidences that he referred to in his witness statement during the employment of the applicant and that the reasons at the bottom of that form were specific to the applicant, to the appellant.

PN279

So you can see all the timestamps during the recording where Mr Hardy admitted, 'Yes, the reasons that Ms Dover wrote into the form to terminate directly relate to the appellant.' Not only was his name on there and his contract ID on there, and everything else that relates to the appellant, but also very specific reasons that the respondent had with the appellant. Then the next thing from Mr Hardy's point of view is that the next material thing that happens is he gets the termination on 9 March.

PN280

So Ms Dover emailed the department on 8 March, the next day, the department terminated the contract. They just simply - they got this document from the respondent, the respondent filled it out, uploaded it, wrote everything in there about the appellant and the next day, surprise, surprise, the department terminated. So all this is happening - so remember the appellant didn't see this email from Ms Dover to the department.

PN281

And the next day Mr Hardy - and then also, Mr Hardy then has some conversations with Anne Smargiassi from the apprenticeship office where he spoke with her and said that it wasn't his intention to terminate and stuff like that. There was some discussions, but it's very important to remember that the discussion that Mr Hardy had with Anne Smargiassi from the apprenticeship office - well, he didn't have those discussions with the appellant. The appellant wasn't aware of these discussions.

PN282

All these - all the steps that Mr Hardy took to try and correct the error happened without the knowledge of the appellant. Mr Hardy not once contacted the appellant. So there were some discussions, there were some emails between Mr Hardy and Anne Smargiassi from the apprenticeship office, but they were never sent to the appellant and that's the key distinction here. How is the appellant supposed to know what happened in the background? He doesn't see this.

PN283

And then it's also clear in the decision that as soon as Mr Hardy received notice of this listing of the unfair dismissal application on 6 April, that day he took steps to call to reverse the dismissal, to reverse the termination of the training contract.

PN284

DEPUTY PRESIDENT DEAN: Well, he says he took steps before then, his evidence, I think at 62 through 69 of his first statement says that he took steps before then and he understood that there'd been a conversion to a suspension as opposed to a termination.

PN285

MR MAROUCHAK: Yes, yes. Correct. So the important thing with suspension is there was no - the respondent - the appellant wasn't notified that there was - there was no email from the department to the respondent to the appellant to say that there's a suspension. The innocent party here, the appellant, didn't know he was suspended, he was terminated.

PN286

So there was - so all Mr Hardy could have just called the apprenticeship office and had a conversation with them, but it doesn't take away from the fact that the contract was still terminated at that day and the first time that the appellant has notice that the contract termination was reversed, was on 6 April where Mr Hardy says he got the listing from Fair Work, then he contacted the apprenticeship office, then the apprenticeship office sent an email reversing the termination of the contract.

PN287

DEPUTY PRESIDENT DEAN: So do you accept that the employer took reasonable, you know, steps to cure the breach except for they were not conveyed to your client; what do you say?

PN288

MR MAROUCHAK: I don't accept there were reasonable steps, not at all. These steps fell short. This is what a reasonable step would do. A reasonable step would have been sending an email directly to the employee saying, 'Hey, this email you got is wrong. We don't intend to terminate the contract.' That's a reasonable step. Picking up the phone and calling the employee is a reasonable step. Communicating directly to your employee is a reasonable step.

PN289

What Mr Hardy took is not - he took steps to cure, but his standard fell short. It's actually - all he did was call Mr Hardy and say, 'The suspended - it's all' - he didn't even call the employee. So no, he didn't take reasonable steps, he took - his steps fell short of a reasonable person. The fact that he didn't even bother to contact the employee in question and to make sure the employee understands in his mind it wasn't the intention to terminate, that's what's important. He didn't do that.

PN290

DEPUTY PRESIDENT DEAN: In circumstances where the government, if we call them that, from earlier, was responsible, I think on your case, for reverting or suspending, or you know, and it seems that the paperwork demonstrates that, what

more - that is, he left it in the hand of the responsible entity to reverse the termination. What more could he have done there?

PN291

MR MAROUCHAK: He could have communicated - also communicated directly to the employee to let the employee know that the termination of the training contract was a mistake. That's the minimum he should have done. He should have done both. He should have contacted the department to tell them it's a mistake and he should have contacted the employee as well.

PN292

DEPUTY PRESIDENT DEAN: Thanks.

PN293

MR MAROUCHAK: So I hope that really by putting yourself in the shoes of the employee and the shoes of the employer, you can see the difference from everyone's perspective, but we say it's not the perspective of a guilty party here, or the defaulting party. That's not relevant. What's relevant is the perspective of the innocent party.

PN294

And if you look at that, any person put in the shoes of the reasonable party following Laurinda, would accept that there's not an intention by the employer to find the terms and therefore it's a repudiatory breach or it's an act of renunciation that would entitle the innocent party to terminate. So if I can then just go through the - just go through the rest of the points of the appeal in relation to the merits and then I'll get to the public interest, but I'll try go through them swiftly.

PN295

So the first ground is the Deputy President, with respect, erred in deciding the respondent's act in terminating the training contract did not amount to a clear renunciation. Well, (indistinct) will address that, we would say that when you're - Laurinda - when you're considering whether an act is - amounts to a renunciation you put yourself in the innocent party and what Deputy President did was she looked at everything from both peoples' perspective and made a decision and said, 'Well, just because the respondent tried to fix the error, that that's not a renunciation.'

PN296

But what the Deputy President, with respect, got wrong, is that she didn't actually look at what the appellant saw and heard and read. The other thing is the respondent's acts in terminating the training contract did not amount to clear renunciation. The other reason it was wrong is because the actual training contract was terminated though. The department terminated it. It came to an end, so that brought - it also meant that that reason cannot be right. We've already made the point at 60(g), it says it's just a penalty provision. If you don't follow it, Deputy President said just because 60(g) wasn't followed, the training contract didn't terminate or terminating the training contract didn't amount to renunciation because section 60(g) wasn't followed. Well, that's incorrect.

PN297

And it's also here - it's important that, you know, we don't agree with the reasoning at paragraph 87 of the decision which Deputy President said that:

PN298

The casual driller's offsider employment exists separate to, and independent to, a contractual agreement by iDrilling to provide Mr Jowett the training opportunities.

PN299

But that is fundamentally wrong. The training contract and his employment as a driller, are one and the same. You can't divide them. If the appellant was working as a cleaner one or two days of the week and then he's working as a driller, maybe you could have two separate series of employment, but under the training contract, he's working as a driller. He's trying to get his qualifications as a level 3 driller.

PN300

Then the other - working as a driller offsider is one and the same as having a training contract to train you for the driller. They're not two separate periods of employment, they're one and the same. So repudiation is an objective test looking at issues of the innocent party to decide whether the respondent did intend to terminate the training contract and at the correct application.

PN301

The other thing is the respondent actually did intend to terminate the training contract because they signed the form and uploaded the form and sent it to the government department terminating it anyway. Ground 2 which says that the Deputy President erred in finding that the appellant did not accept the respondent's alleged repudiation - - -

PN302

DEPUTY PRESIDENT CLANCY: So just on that point, you say the acceptance of their repudiatory conduct is the lodging of the unfair dismissal application on 30 March 2023.

PN303

MR MAROUCHAK: Yes, yes.

PN304

DEPUTY PRESIDENT CLANCY: And you say that the training contact and the employment as a driller are one and the same.

PN305

MR MAROUCHAK: Yes.

PN306

DEPUTY PRESIDENT CLANCY: What was the start date?

PN307

MR MAROUCHAK: Of which one?

PN308

DEPUTY PRESIDENT CLANCY: Of his employment.

PN309

MR MAROUCHAK: Well, the - if you have a look at the training contract, so if we can just go - thank you, Commissioner. Could we go to page 20 of the appeal book? Now, I'm just putting down what's written in the appeal in the training contract, so if you look at page 20 of the appeal book there is - I'm just getting to it myself.

PN310

DEPUTY PRESIDENT CLANCY: Yes.

PN311

MR MAROUCHAK: Apologies. There is - point 40, it says - so the period of previous employment, it says, '31 March 2022 until 21 May 2022.' So it's really - so there's some evidence there that shows that that was a previous set of employment.

PN312

DEPUTY PRESIDENT CLANCY: All right. But was that what you say the period of employment was though?

PN313

MR MAROUCHAK: Well, in my view, it's - yes, he was employed previously, but when he went onto this training contract, the terms of his employment changed to include a fundamental term of training.

PN314

DEPUTY PRESIDENT CLANCY: Yes, I understand, but what I'm interested in is you go along, you make submissions and you say, 'The applicant was employed for - how long.'

PN315

MR MAROUCHAK: Sorry, Deputy President? Apologies.

PN316

DEPUTY PRESIDENT CLANCY: The applicant commenced his employment with the respondent on such and such a date, what's that date? We know when it ended. When did it start?

PN317

MR MAROUCHAK: It started before this training contract was signed.

PN318

DEPUTY PRESIDENT CLANCY: All right. When?

PN319

MR MAROUCHAK: Well, we would say that when he became - entered onto this training contract, he became fulltime, so - and that's what it says in this - on paragraph - on this page, on page 39, it says, 'Fulltime.'

PN320

DEPUTY PRESIDENT CLANCY: Yes.

PN321

MR MAROUCHAK: So he was working a fulltime equivalent casual. So the work he had before then - and it goes back - I don't have that - it goes back a number of years of your really irregular employment, but when this was signed, it really turns into fulltime equivalent.

PN322

DEPUTY PRESIDENT CLANCY: All right. Well, just - what's not clear to us is there's a period of employment and he starts under this training contract and then he seems to be absent from - or not working for periods of time within the ensuing 12-month period or thereabouts and the employer says - well, it kind of says, 'We have 25 employees at the material time.' It's not sure. Is there a question of the appellant having served the minimum employment period?

PN323

MR MAROUCHAK: Yes.

PN324

DEPUTY PRESIDENT CLANCY: And has this been the subject of - the quick answer might be, 'Yes, this has been the subject of consideration between the parties and there's no issue around that.'

PN325

MR MAROUCHAK: Yes. Well, it hasn't been raised by the respondent at all. There's no issues of that. I believe that he hasn't served six months and he's - - -

PN326

DEPUTY PRESIDENT CLANCY: All right. But central to your argument is that his training contract and his employment is one and the same and I'm just asking you to identify when did that employment start.

PN327

MR MAROUCHAK: So he was - - -

PN328

DEPUTY PRESIDENT CLANCY: Because at page 16 of the appeal book says - at the top of the page, point 3:

PN329

Commencement date of apprenticeship traineeship, 30 May 2022.

PN330

Is that when you say the employment started or - because as you pointed out a couple of pages along, it refers to a period of previous employment between 31 March and 29 May. So is it 31 March 2022?

PN331

MR MAROUCHAK: I mean - well, we say the employment started - well, based on what is known is that - like, the employment started years before this. It just

changed, the nature of it changed. So I'm not going to say that the employment started on the date this training agreement started. He was working as a (indistinct) before then and the - - -

PN332

DEPUTY PRESIDENT CLANCY: All right. Well, maybe when it comes to Mr Stutley's submissions, he might make a submission on this. He might provide us with some information and then you can respond in your reply.

PN333

MR MAROUCHAK: All right.

PN334

DEPUTY PRESIDENT CLANCY: But it seems to me, you're just clutching around at the moment on that point and it would assist us to know what your submission is. I understand your submission to be in terms of if there's any distinction between termination of the training contract and termination of the employment relationship or not, and if there's any relevance on that point. There might not be, but it's just something that's exercising our minds at least, all right.

PN335

MR MAROUCHAK: Thank you, Deputy President. So then the second ground of the appeal is where the Deputy President erred in finding that the appellant did not accept the respondent's alleged repudiation and the Deputy President basically reached that conclusion because of the email sent on 9 March by the appellant which is - which on page 43 of the appeal book, we've seen this email already. This is where the appellant said:

PN336

I have not agreed to the termination of my contract. We have not discussed issues at all.

PN337

So this is where - and it is important to go through and just have a look at the law. Now, I've already - when a repudiation breach - when there's a repudiatory breach or when repudiation occurs, we all know that the innocent party has a choice between accepting the repudiation and terminating the contract or rejecting the termination and seeking enforcement of the contract. They're the two choices that the appellant has. So I've already kind of said that the appellant (indistinct) considered this. He's not a law student. He's not a lawyer.

PN338

He doesn't understand laws of repudiation. He basically emailed - that email just basically says, 'Hey, whatever the respondent told you that this was terminated with my consent, is wrong.' It is simply making an observation. You - he did nothing more than that. So it's incorrect to conclude that email by itself is somehow a rejection of the termination and seeking to enforce the contract because that's simply wrong, we say. The appellant didn't ask for the contract to be put back on.

PN339

He didn't ring the department and go, 'No. Reinstate the contract. I want to work under the contract.' The appellant didn't go back to the respondent and say, 'I still want to work for you.' The appellant didn't say, 'I still want my training to continue.' He didn't say any of that. That's what's needed when you're looking at deciding whether there's been acceptance or rejection of the repudiation or acceptance.

PN340

And the decision in New South Wales Trains, they have some - there's (indistinct) some good commentary on the Full Bench decision in New South Wales Trains which talks about this and if I can just raise that, at paragraph 78 - - -

PN341

DEPUTY PRESIDENT DEAN: There's a few New South Wales Trains decisions floating around.

PN342

MR MAROUCHAK: I'm sorry, yes.

PN343

DEPUTY PRESIDENT DEAN: I'm assuming you're talking about James.

PN344

MR MAROUCHAK: Yes, James. I apologise. Yes, James [2022] the one that we sent through.

PN345

DEPUTY PRESIDENT DEAN: What paragraph are you taking us to?

PN346

MR MAROUCHAK: Seventy-eight. And just on page 23, if you're looking at the bottom right-hand corner, 23. And this is where New South Wales Trains quotes just some - like commentary, from *WE Cox v Crook* and I'll just read that out, it's a bit lengthy but it really just summarises everything nicely. It says:

PN347

PN348

If one party ('the guilty party') -

PN349

DEPUTY PRESIDENT DEAN: Sorry, which paragraph of the decision? I thought you said 78 but I'm not sure that that's right.

PN350

MR MAROUCHAK: Yes, 78. And then 78 quotes two other decisions, so if you go to page 78, 78 continues over the page. Can you see where it starts with:

PN351

66. In WE Cox Toner - - -

PN352

DEPUTY PRESIDENT DEAN: Yes.

PN353

MR MAROUCHAK: Yes.

PN354

So do you see that? So this is where the Full Bench considered and adopted these principles and if I can just read the extract from - on the top of page 23 where it says, 'If one party ('the guilty party') commits' - if I can read that. So this is:

PN355

If one party ('the guilty party') commits a repudiatory breach of the contract, the other party ('the innocent party') can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible causes: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time.

PN356

Mere delay by itself (unaccompanied by any express or implied affirmation of a contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Affirmation of the contract can be implied. Thus, the innocent party - if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation.

PN357

Moreover, if the innocent party does - party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation.

PN358

But the law that comes out of this is that email that the appellant sent to say the contract (indistinct) consent is not an act which can be seen as conduct that is consistent with the continuing existence of the contract. It doesn't show an intention that he wants to be bound by the contract, so it's incorrect to rule - to find that that somehow - that email is somehow a rejection of the repudiation and demand for the contract to be enforced.

PN359

It's nothing more than highlighting an error in a process and at worst, all that email is, is basically it gives the respondent an opportunity to remedy the breach, as quoted in that passage where he says, 'Or allow the guilty party to remedy the breach.' So the appellant is doing nothing more here than to give the respondent a

chance to remedy the breach, the respondent then could have reversed the termination of the training contract.

PN360

The respondent could have - he did all these things that happened straightaway on 6 April when the notice of listing was sent, but the respondent didn't do it. And I also just want to highlight paragraph 40 of the outline of submissions that we lodged, there's a case that refers to Broadlex which is an interesting situation where - so if I can just go to paragraph 40 of the appellant's submission which is in the digital court book at page - yes, page 19 of the digital court book.

PN361

You will see that I just - New South Wales Trains also refers to a situation where it says, 'An employee can still work for an employer after repudiation has occurred without losing the right to terminate (indistinct) to start with the Federal Court's decision in Broadlex. In here, like, the employee was - had their salary cut by 40 per cent. The employee still continued to work but then later repudiated it and that was found to be all right and it wasn't found to be a rejection of the repudiation.

PN362

So this is how the - whether there's been a rejection or repudiation has to be considered and it has to be conduct which is consistent with the continued existence of a contractual term and that - simply that email is the only thing that we'd say the Deputy President relied on to reach this conclusion that somehow the appellant rejected the repudiation. We didn't.

PN363

Then ground 3, where the Deputy President stated that if there's - if the respondent made genuine attempts to cure the breach therefore there can be no repudiation because of it. That's, kind of, ground 3 where the Deputy President said at paragraph 108:

PN364

That would involve genuine attempts to cure any breach are made, there is no repudiation.

PN365

Now, first of all, we say that any genuine attempts to cure the breach have to be communicated to the innocent party. If you make genuine attempts to cure the breach and you don't communicate that, then it doesn't count. So Laurinda, the High Court authority of Laurinda actually contradicts this statement because it's not a good proposition of law to say any attempt to cure a breach, whether the innocent party knew about it or not, somehow says there's no repudiation. That's not - that's incorrect.

PN366

And the other thing we say - the other point we make is at item - at footnote 77, the Deputy President refers to a number of cases which support this conclusion that any genuine attempts to cure the breach, there's no repudiation. We've done a review of those cases - or my team has, and we just don't believe those cases

support the findings the Deputy President is saying. We think that at footnote 77 those cases that are listed do not support that conclusion, but I haven't read all those cases.

PN367

My team has and they are all - we cannot find those legal principles outlined through (indistinct).

PN368

DEPUTY PRESIDENT DEAN: So exactly what legal principles do you say they don't support?

PN369

MR MAROUCHAK: That if genuine attempts to cure any breaches are made, there is no repudiation at paragraph 108 of the decision. We don't believe that those cases at footnote 77 support that proposition, but I just - I will make a caveat that I didn't read those cases, my team did, so - - -

PN370

DEPUTY PRESIDENT DEAN: All right.

PN371

MR MAROUCHAK: In any event, Laurinda is the binding one and any cure - we accept that if the respondent communicated to the appellant that there was an error in the training agreement and they tried to fix it and they told the appellant about it, that would be a different story. Then ground 4 which is Deputy President erred in finding that the lodgement of the appellant's unfair dismissal application does not constitute clear communication of the acceptance of the respondent's alleged repudiation.

PN372

Well, that's at paragraph 9 - 109 of the decision. So that's ground 4 of our appeal point. We say this is wrong because if you have a look at *New South Wales Trains v James* [2022], the same decision that I've been referring to that I sent through, if I can take you to *New South Wales v James* at paragraph 70 and 71. I will likely take you to those two or we can see them there. So that's on page 21. Then in *New South Wales v James*, it says, on paragraph 70 on page 21, like, in the middle, it says:

PN373

> *Alternatively, the employee could elect to accept the repudiation by lodging an application under Part 3-2 of the Fair Work Act and leaving the employment or (reluctantly) continuing in employment with the employer in the demoted position under a new contract of employment, whilst pursing the unfair dismissal application.*

PN374

And paragraph 71 also just next - just down the page in the middle, it says:

PN375

While Mr James continued in employment with NSW Trains as a shift manager, he purported to accept the employer's alleged repudiatory conduct by lodging an unfair dismissal application under Part 3-2 of the Fair Work Act.

PN376

So we say that lodging an unfair dismissal application does constitute clear acceptance of the respondent's repudiation and that's supported by that decision in *New South Wales v James* of the Full Bench. And when - and the question is, all right, maybe the respondent - we understand that the unfair dismissal application has been communicated to the respondent and maybe it wasn't communicated on 30 March when it was lodged, but it was definitely communicated on 6 April when the notice of listing was sent, when the Fair Work Commission communicated with the respondent there.

PN377

So at the very least, that they have notice of that and the training contract was reinstated after that time. And ground 5 of our appeal, well, we have his general statement that the Deputy President erred in finding the appellant was not dismissed. Well, I have spent a lot of time today talking about the repudiation grounds, so that's argument 1.

PN378

But under the laws of repudiation if correctly applied, he was dismissed because there was a breach of - by terminating the training agreement there's a breach of the employment terms, the appellant accepted that breach by lodging the unfair dismissal application. Then I've also argued as an alternative, that when the training contract came to an end on 9 March, the operation of section 60H of the VET Act that automatically terminates the employment because his training contract says he's going to be trained as a driller level 3.

PN379

He's working as a driller's offsider. The work that he does for the respondent under the training contract is driller work. And I also - I've referenced this by going to Turner and (indistinct) the decision in Turner as well. So that leads me now to the public interest test which you need to pass in order to get permission to appeal. So if I can just move onto that (indistinct).

PN380

DEPUTY PRESIDENT DEAN: Just before you go there, if it's right that, you know, there's this communication in early April from the government - again, I'll just call them that, from the department that the contract had been reinstated, does it follow that the employment also recommenced, or not?

PN381

MR MAROUCHAK: No, because the appellant terminated the agreement due to accepting a repudiation. So anything that's done after the contract is terminated, that act would - it doesn't count, if I can use those words. So, in effect, that reinstatement really is probably another - a counter offer, a counter offer from the respondent to the appellant because once the contract is terminated, whatever - if you're trying to remedy the breach after it's terminated, that will need the

agreement of the employee in order to - for there to be an offer and acceptance and a new contract formed.

PN382

DEPUTY PRESIDENT DEAN: And your client didn't choose to accept (indistinct).

PN383

MR MAROUCHAK: No.

PN384

DEPUTY PRESIDENT DEAN: One week after it was dismissed, on your case.

PN385

MR MAROUCHAK: Well, he was dismissed on 9 March, we say, but, yes, on our case, the operational law might - alternatively, the termination occurred on 30 March when he filed - - -

PN386

DEPUTY PRESIDENT DEAN: When he files - yes. And then one week later he's made an offer, I think you just said, to recommence and doesn't accept it.

PN387

MR MAROUCHAK: (Indistinct). No, he doesn't. I mean, he continues on with his unfair dismissal application. So, you know, that - - -

PN388

DEPUTY PRESIDENT DEAN: All right. And the exact repudiatory act that you rely upon is the sending of the notice by the respondent to the government agency.

PN389

MR MAROUCHAK: Yes. Which had the effect of terminating the training agreement, yes. So - yes. Which caused the training agreement to be terminated.

PN390

DEPUTY PRESIDENT DEAN: Well, you keep on saying that, but when you say, 'Caused the training contract to be terminated', are you still saying it was the government who terminated that contract?

PN391

MR MAROUCHAK: I'm saying the appellant - sorry, the respondent, the employer, terminated the contract and the government updated its records to confirm it's been terminated and processed it.

PN392

DEPUTY PRESIDENT DEAN: Yes. So it was the sending of that document to the government agency.

PN393

MR MAROUCHAK: Yes, but I'll just say that the appellant wasn't aware - didn't see that in the background, all he saw was just the email from the department, so - but, yes, that's the act the respondent did in sending that email.

PN394

DEPUTY PRESIDENT DEAN: That's the repudiatory conduct. All right. Very good. Thank you.

PN395

MR MAROUCHAK: So I'll just move onto the public interest test which we have to satisfy. So the grounds will be - I think the public interest test kind of - is one of the things we can show is that there's a diversity of decisions at both instance, so guidance from an appellate court is required that would be a suitable ground to pass the public interest test and I just want to - really so it's clearer, by repeating Turner.

PN396

So the Deputy President in this decision says, in effect, that if a training contract is terminated without strict compliance to section 60G of the VET Act which says that you have to get consent from the apprentice or it has to be terminated by permission from the chief executive office provision, the Deputy President has made a decision saying if there is not strict compliance with section 60G then that does not legally count as a termination of a training contract.

PN397

That's the essence of the decision, whereas Turner - and Deputy President says that at paragraph 106 where - of the decision where Deputy President said:

PN398

The notice to terminate did not amount to a clear renunciation because it was both incomplete and ineffective at law to terminate the training contract.

PN399

So that's 106 of Deputy President's decision. Whereas Turner, paragraph 35 says:

PN400

This legislative requirement for the termination of the training agreement arrangement to be approved by the chief executive before it has effect in no way changes the conclusion that the training contract was brought to an end on the respondent's initiative.

PN401

So paragraph 35 of Turner, paragraph 106 of the Deputy President at First Instance, contradict each other. Turner is law, it says it doesn't matter if you haven't complied with 60G, if the training contract is terminated, it ends the employment. Whereas the Deputy President is saying, 'The termination of a training contract doesn't count unless you strictly comply with 60G', which can cause all sort of problems in reality, because the department sent an email to the appellant to say he was terminated already. The next - - -

PN402

DEPUTY PRESIDENT DEAN: Factually it's quite a different situation in that circumstance in Williams - sorry, Turner. It's communicated to the employee directly by the employer that they're no longer required, isn't it? So there's a - can't it be distinguished on the facts?

PN403

MR MAROUCHAK: I mean, it's really a case of how the law is set out in Turner. Turner says that compliance and noncompliance with section G doesn't change the nature that its training agreement was terminated. So there might have been some statements in Turner, but the legal proposition at paragraph 35 of Turner says that strict compliance with section 60G is not required. So I accept in Turner there was some discussions, but during a mediation of some sort they had in Turner, where the employee said that, but in Turner at paragraph 85 it says:

PN404

There is no evidence that the cancellation of the training agreement - arrangement was done with the consent of Mr Turner rather I am satisfied the training arrangement was terminated by the respondent.

PN405

So I think the legal principles it sets out are the same, but when it comes to how section 60G is interpreted, I believe the principles are not the same, they're inconsistent.

PN406

DEPUTY PRESIDENT DEAN: All right. Thank you.

PN407

MR MAROUCHAK: So - and then Turner - another (indistinct) Turner is that the statement I made about section 60H of the VET Act which says that:

PN408

If a training contract is terminated the underlying employment comes to an end.

PN409

The Deputy President didn't touch on that at all in her decision and Turner at paragraph 44 makes the legal proposition that by virtue of section 60H when a training contract is terminated, the employment terminates. So by virtue of section 60H(1) the appellant's entitlements with the respondent ceased when the training arrangement ceased to have effect. So if we apply the law in Turner to this case, well, the training arrangement ceased to have effect on 9 March when the email was sent from the department, 'Your training has been ended.'

PN410

So Turner says that - if we follow Turner, it says the correct application is the (indistinct) employment ended, but Deputy President's decision contradicts that and said it didn't end. So whether you have extra statements from Turner to say that, 'We don't want you back', it doesn't - it's actually - it's not material. The law that - the reasoning that's applied and the logic and the legal logic that's applied by Commissioner Williams in Turner is applied to this case, it would lead to a very different outcome.

PN411

We also say that - the other argument for public interest test is that the Deputy President's decision is actually inconsistent with Laurinda. Laurinda wasn't even

applied by Deputy President. The Deputy President failed to consider the point of view of the appellant. What the Deputy President did was just look at all the facts from a high level and said, 'This happened this time. This happened this time. This happened this time so therefore there is no breach.'

PN412

Well, Laurinda says you can't do that. Laurinda says you have to put yourself in the shoes of the innocent party and see what they see and if they don't see it, you can't take it into account. So Deputy President, we say this is binding High Court authority that wasn't followed and that if it was followed, would lead to a far different outcome which will result in that there was a repudiatory event.

PN413

So for this reason, this decision then at first instance, manifests an injustice because binding High Court authority was not applied and would have reached a different outcome. So that's something you can take into account when deciding public interest.

PN414

DEPUTY PRESIDENT DEAN: Was the Deputy President taken to Laurinda below?

PN415

MR MAROUCHAK: No. I don't believe that - we found Laurinda after we - so that was that - we concede that.

PN416

DEPUTY PRESIDENT DEAN: All right. Mr Marouchak, let's assume for a moment your client was unfairly dismissed and the Commission was looking at the calculation of compensation as a remedy. Would it be the case in your submission, that the Commission would be limited to compensation of, at most, four weeks' pay, that being the date on which the training arrangement was terminated to the date at which there was an offer, if you want to use these words of reemployment, because he ought to have mitigated his loss.

PN417

MR MAROUCHAK: Well, we would say, with respect, no, because when it comes to reinstatement, if there's a breach - if there's a loss of trust and confidence between the parties, then that's - yes, it was very reasonable for him to reject this counteroffer of reinstating the training contract because he had lost trust and confidence in the respondent. The respondent terminated the training contract in shocking circumstances and that would have been shocking to anyone.

PN418

There was also some other incidences of safety, you know, you can see a picture of his leg being hurt and stuff, but, you know, there's, you know, if you consider all of the reasons and we kind of have dealt with that. At paragraph 45 of our closing submissions, we actually have dealt with why reinstatement is not appropriate. We say that the respondent had blatant disregard for work and health and safety laws.

PN419

We sent a records request to the respondent and it just ignored it and in cross-examination Mr Hardy said he intentionally - he just ignored it. He just intentionally broke the law there. The appellant would need to be working with the same people that dismissed him. The workplace is relatively small. So if the applicant could not have trusted the employer to properly undertake the training - so when the training contract was terminated without even speaking to him, it was reasonable – it was reasonable for the appellant to reject the counteroffer to go back to work, and instead it was reasonable for him to find somewhere else.

PN420

DEPUTY PRESIDENT DEAN: All right.

PN421

MR MAROUCHAK: We would also say that - public interest test - that this decision actually contradicts section 60H of the VET Act. So this decision is entirely contradictory to the legislation that says when a training contract is terminated the underlying employment also comes to an end.

PN422

So therefore this decision manifests an injustice, because it doesn't follow the correct interpretation of statute.

PN423

And then I'm just going to finish off by saying that, like, you know, for a public interest test you have to look beyond yourself, and, like, apprenticeships are vital to the Australian economy. They're the building blocks of Australia. They build highways, airports, they dig up the dirt in the ground that makes our tax revenue.

PN424

There are hundreds of thousands of people Australia-wide that are on this training arrangement. This is vital for someone to get qualified and to get a job. So this decision doesn't just touch personally on the appellant; it touches on all apprenticeships in Western Australia, considering the interpretation of the VET Act, but also goes further and touches upon the apprenticeships Australia-wide.

PN425

So it applies to apprenticeships in WA, but also apprenticeships in Western Australia. The apprentices build everything that keeps Australia going, so it's very important to our national infrastructure and our tax revenue, and I think also this decision can apply wider.

PN426

If Laurinda is properly applied, then there would be more guidance in relation to the point of view, and I think this was missed during the decision. It was fully missed by – it wasn't argued at first instance. To see yourself from someone else's shoes also would serve as guidance for future cases on how to interpret this repudiation issue.

PN427

DEPUTY PRESIDENT CLANCY: Thank you. Could we hear from Mr Stutley, please?

PN428

MR STUTLEY: Thank you, Deputy President. Can I just check that you can hear okay?

PN429

DEPUTY PRESIDENT CLANCY: Yes. Thank you.

PN430

MR STUTLEY: Thank you. I fear that this has all become a little bit overcomplicated. So what I would like to do is confine my reading today to the submissions, the appellant's outline of submissions, which you'll find at page 13 of the digital court book, and I will also confine it to the decision of the Deputy President below, which commences at page 35 of the digital court book.

PN431

Some opening remarks, I'll touch on the obvious starting point, which is permission to appeal, and quite clearly it's the respondent's position that permission should not be granted for this appeal to be made, and we say that there are two reasons for this.

PN432

The first is that it is not in the public interest. The reason we say that is because quite simply there is nothing disharmonious between the decision below and either of the two authorities that were relied on to this point, being Turner and NSW Trains, and there's certainly nothing inconsistent in relation to what my friend has now raised in terms of Laurinda.

PN433

As the Deputy President pointed out earlier, Turner was based on different factual circumstances. The Deputy President had consideration of those different factual circumstances; the primary difference being that in Turner the termination was originally by consent, but then it was subsequently in a meeting between Turner and the applicant in that matter that the respondent, employer, made it clear to the applicant that they no longer wanted the applicant at the workplace.

PN434

That's quite different from the situation that we find ourselves in now where the entire way through - and I'll take you to the references later - but the entire way through, the respondent has made it very clear to the appellant that they want him in the workplace, he's still employed as far as the respondent is concerned, and so factually entirely different.

PN435

Importantly, with NSW Trains, my friend seeks to point out that it's disharmonious from the decision below on the basis that NSW Trains stands for the proposition that an unfair dismissal application can amount to acceptance of repudiation. The Deputy President doesn't find otherwise, and I'll take you to that shortly as well.

PN436

In terms of Laurinda, my friend says that the Deputy President failed to consider the point of view of the appellant. This is not the case. The first and most important point to note is that the Deputy President wasn't taken to Laurinda in the decision below, or in the first instance hearing. But in any event, the Deputy President did take into account the subjective matters in relation to the appellant and the appellant's circumstances, and that is found throughout the decision, which, again, I will take you to specific references.

PN437

Most importantly, when it comes to the point of view of the appellant, and much time was spent on this in my friend's comments before, he says at the end that the point of view of the appellant was not argued at first instance. Correct. It was never put to the Deputy President.

PN438

Notwithstanding, Deputy President had consideration of all of the factors, objectively looking at the evidence and making findings that were reasonably available to the Deputy President on that evidence. So there is nothing disharmonious between the decision below and the decisions which the Full Bench has now been taken to .

PN439

In terms of any question or controversy of general application, there quite clearly is none, and this is relatively straightforward in terms of the matter that – or the question to be decided by the Deputy President. There's nothing unusual or novel about this, and in fact so much can be gleaned from the four corners of this appeal which relate to repudiation, and repudiation alone.

PN440

There is no injustice that results from the decision, because the appellant was not dismissed, and as we continue to say, and have said from the day that the respondent filed the response to the unfair dismissal application, the appellant has not been dismissed, the appellant remains an employee of the respondent, the respondent wants the appellant to return to work. It's really that easy, and there is no injustice.

PN441

Secondly, in relation to permission – so the first point was on public interest, but, importantly, the second issue here is that each of the grounds that are set out in the applicant's outline of submissions, which we will go through, must fail, and they must fail, because they either seek to challenge findings that were never made by the Deputy President or they entirely misconstrue the evidence that was before the Deputy President at first instance.

PN442

I'll take you, please, to page 13 of the digital court book, and that is the appellant's outline of submissions. Before we get to the grounds of appeal, the appellant provides that, starting at paragraph 5:

PN443

The Deputy President made this decision presumably because there was no consent by the parties, and the chief executive has not approved the termination as required under section 60G(2) of the VET Act.

PN444

Now, that is entirely incorrect. If we turn over for some context to paragraph 7, the appellant says:

PN445

These decisions are inconsistent, because the Deputy President is saying, in effect, that for the renunciation to be effective the termination of the training agreement must be approved by the chief executive.

PN446

Now, importantly, throughout those paragraphs, and there's some further examples below, the appellant relies on presumption, as opposed to taking us directly to the decision and pointing out, in its view, what the significant error is; instead relies on incorrect presumptions, and insofar as paragraph 7 is concerned, nowhere in the decision does the Deputy President say whether expressly or in effect that the renunciation to be effective must be approved by the chief executive.

PN447

In fact to the contrary, and sorry to take you to another document, but this is - starting at page 35 of the DCB, this is the decision of the Deputy President, paragraph 96. All right, obviously to the contrary, the Deputy President states:

PN448

Section 60G(2)(b) does not apply in this case.

PN449

Moving to the grounds for appeal, ground one is that:

PN450

The Deputy President erred in holding that the notice to terminate and the respondent's acts in terminating the training contract did not amount to a clear renunciation.

PN451

There is nowhere in the decision of the Deputy President where she says that the respondent terminated the training contract. The appellant then goes on to effectively cherry-pick a sequence of events that apparently led to the termination of the training contract in paragraph 17.

PN452

It's not an accurate restatement of the evidence at all. The steps that led to the termination, or the alleged termination of the training contract are all set out comprehensively in the witness statement of Shannon Harding.

PN453

At paragraph 18 of the outline of submissions, the appellant says that in paragraph 95 to 99 of the Deputy President's decision:

PN454

The Deputy President found that the termination notice was incomplete, because section 60G(2) of the VET Act has not been met, as the form was only signed by Ms Dover. The appellant respectfully submits that this is erroneous.

PN455

Now, presumably this is a reference to a significant error, which the appellant now invites this Full Bench to consider in terms of both permission to appeal and the merits of the appeal. However, there is nothing in paragraph 95 to 99 of the Deputy President's decision, which begins at the bottom of page 47 of the DCB and carries over to page 48 of the DCB - nothing in those paragraphs says that it was incomplete, the termination notice was incomplete, because section 60G(2) of the VET Act had not been met.

PN456

It is true that the Deputy President considered that the termination notice was incomplete, because it most certainly was, as a matter of fact, missing the details of the appellant, and most importantly, given it was a notice to terminate by consent, it was missing one of the most critical elements being the appellant's consent.

PN457

The appellant then regrettably through paragraph 19 and 20 entirely misstates the position under section 60G(2), an example of that being the start of paragraph 19:

PN458

Section 60G(2) simply establishes that an employer must not terminate a contract unless subsections (a) and (b) are met.

PN459

Well, it's not (a) and (b), it's (a) or (b), to begin with, and it's difficult to follow the appellant's reasoning where the legislative framework, the training contract and the notices all are consistent, in the sense that an employer must not terminate a training contract unless it is by consent or there has been the approval of the chief executive.

PN460

Now, on consent, we know that there was no consent, so it could not be terminated. On the approval of the chief executive, this is not relevant, because, as the Deputy President identified, it is not a matter which applies in this case.

PN461

I'll take you to paragraph 23 of the appellant's submission, the last sentence of that paragraph:

PN462

This means that the department deemed the respondent's actions to be sufficient to show clear renunciation.

PN463

There is absolutely, categorically, no evidence of the department's deemed view, deemed position or otherwise in relation to whether or not clear renunciation had occurred. It's entirely irrelevant.

PN464

Ultimately the appellant would have the Full Bench proceed on a presumption and then a misconstrued view of the operation of the VET Act to arrive at a position where, as it says:

PN465

The training contract was terminated and therefore section 60H(1) of the VET Act had work to do, to the extent that it provides that the employment of the appellant under the training contract ceased.

PN466

There are a multitude of issues with this, the first being that, and importantly, the training contract was not terminated. Yes, there was a notice to terminate, by consent, and upon receipt of that notice the appellant was well aware that he could either do nothing, if he had consented, or in fact he could do something, and he did do that something, which we'll talk to in a minute.

PN467

But importantly, upon becoming aware of that, that notice, being erroneously sent to the department, the respondent through its managing director directly contacted the department and had confirmed on the day, on 9 March, that the training contract was suspended, and didn't just leave it there. He made it clear that it was certainly not the intention of the respondent to terminate, he had never conveyed such an intention to the appellant, and the respondent understood from that call that the department would take this up with the appellant directly. That's where this left off.

PN468

DEPUTY PRESIDENT CLANCY: Mr Stutley, if I could just get you to engage with the decision, and in particular paragraph 106, just while you're on that point.

PN469

MR STUTLEY: Yes.

PN470

DEPUTY PRESIDENT CLANCY: The last sentence of paragraph 106 says:

PN471

The notice to terminate did not amount to clear renunciation because it was both incomplete and ineffective at law to terminate the training contract.

PN472

So if you could just distil your position on that - you agree with that and you disagree with the propositions advanced by the appellant. Do you agree with the proposition of the Deputy President it was incomplete and ineffective at law, and if so, how?

PN473

MR STUTLEY: Yes. Thank you, Deputy President. So in relation to the first part of the question, yes, we agree with the position the Deputy President has adopted in that it was not clear renunciation, because for – and this goes to some of the dangers that exist when it comes to repudiation and a party's reliance, or not, on acts of repudiation. There must be repudiatory conduct. There must be effectively clear renunciation that the breaching party is no longer – an intention to no longer be bound by the contract that's in place.

PN474

Now, here the Deputy President says, 'The fact that the form was incomplete' - by missing the important elements of consent that are required to terminate under that – 'and the fact that that meant he could not be terminated under the Act amounted to an equivocal renunciation at best.'

PN475

So it does not satisfy one of the key criteria, or the key elements for repudiatory conduct, that is, for there to be very clear renunciation i.e. a very clear view articulated to the individual, so directly to the appellant, that the respondent no longer sought to be bound by the training contract.

PN476

That certainly didn't happen. There was nothing conveyed to the appellant. There was an erroneous email to the department with the notice to terminate.

PN477

DEPUTY PRESIDENT CLANCY: Yes, but Mr Marouchak's taken quite a bit of time to tell us that you've got to step into the shoes of the appellant, and what did he receive - what did he receive from the department? He received that email on 9 March.

PN478

MR STUTLEY: Yes, and where that takes us is to a situation following the law on repudiation that an election must be made. So let's for the purpose of this exercise say that there was a form of clear renunciation, and that occurred through the notice to terminate and through the correspondence that the appellant then received from the department.

PN479

The next step would be for the appellant to either affirm i.e. continue on with the contract or to accept the repudiation. This goes to another one of the appellant's grounds - I'll talk to it now given we're there - and ultimately we have very clear affirmation, or to put it differently, a very clear rejection of repudiatory conduct where, and you'll find this at paragraph 31 of the appellant's submissions, the email that the appellant sends to the department in response to the notice on 9 March 2023:

PN480

I have recently sent my employer a breach of contract notice but have not heard back from them regarding the terms. I have not agreed to the

termination of my contract as we have not discussed the issue at all, nor have I received anything stating that my apprenticeship will be cancelled.

PN481

Those are very clear, unequivocal rejections of repudiatory conduct. To put it differently, in the language of the law on repudiation, the appellant has affirmed the training contract; it continues, and in fact that is clear objectively, because upon that email being sent to the department, and then the department speaking with the respondent, the training contract was immediately placed on suspension.

PN482

DEPUTY PRESIDENT CLANCY: That suspension, it is said, was not communicated to the appellant.

PN483

MR STUTLEY: That's true, although not through lack of trying, Deputy President. It was sought to be communicated with the appellant on a number of occasions, and that can be seen through the correspondence between Mr Harding and the department. So the department took upon itself to make contact with the appellant to confirm the position, and those attempts at communication with the appellant fell away.

PN484

Now, that's not inconsistent at all with the evidence in relation to the appellant's contactability, or lack thereof, when it comes to any matters related to work, but it certainly was, in terms of the contact that was attempted, a genuine attempt at notifying the appellant. But in any event, as a matter of fact, the department did not terminate the training contract. It was placed on suspension.

PN485

DEPUTY PRESIDENT CLANCY: Yes. But again, for the appellant to put that, it can't be a genuine attempt to cure the breach if the appellant's not aware of it, or not advised.

PN486

MR STUTLEY: Yes, that's true, Deputy President, but it's very difficult to advise an appellant who will not receive a phone call. But importantly also, it proceeds on the basis that effectively an election wasn't made on 9 March by the appellant to begin with. So steps to cure the breach could only be made before an election is made by the appellant.

PN487

Here the appellant very clearly says in his email, 'I reject it. I have not agreed to the termination of my contract.' That is very clearly an affirmation by the appellant that the training contract continues.

PN488

At that point the election is made it's irrevocable, and for the purposes that we're talking about now, even if, you know, the - if we talk about the steps taken to cure the breach from there, if we accept that that was the election, those steps become

irrelevant. If we say that that wasn't the election, then yes, the steps become relevant. But we say there were genuine steps.

PN489

Now, the genuine steps can be distinguished here from steps in other scenarios. Where there is repudiatory conduct involving parties directly, then yes, I think that's an important consideration as to whether or not those steps are being communicated.

PN490

Here we have an intervening party, who, as my friend acknowledges, is the governing body for training contracts in the state of Western Australia, and it was that governing body, the regulator, who sought to assist in resolving this matter between the parties.

PN491

Now, that is – and to the point of whether or not this is disharmonious with other decisions, that's entirely on all fours with Turner where the department was directly involved in the dispute between the parties as to the training contract.

PN492

Before I move on, Deputy President, I'll just check that there are no further questions on that point.

PN493

DEPUTY PRESIDENT CLANCY: No. I understand you – you say that the election made on the 9th is one to challenge the repudiatory conduct; that's irrevocable. Then how do you characterise the unfair dismissal application being made?

PN494

MR STUTLEY: For the unfair dismissal application it is, to the extent that the appellant says that that was acceptance of the repudiatory conduct, it would not have been an effective acceptance, because an election had already been made that was irrevocable.

PN495

If we move past that and we say that there wasn't an election made on 9 March, then yes, the filing of an unfair dismissal application can amount to acceptance of repudiatory conduct, and that's not inconsistent with the decision below, and I can take you to that when we hit that ground of appeal.

PN496

DEPUTY PRESIDENT CLANCY: All right.

PN497

MR STUTLEY: Ground two, we have sort of touched on that so I won't labour the point too much other than to take you to a couple of relevant paragraphs. This is on page 17 of the appellant's outline of submissions, commencing paragraph 30.

PN498

The appellant provides that he did not accept the alleged repudiation, because he immediately contacted the department and stated to the department that he rejected the awarded(?) termination of the training contract, and confirmed that no intention to terminate either the training contract or the employment contract had been communicated to him by the respondent.

PN499

Sorry, that's a bit of a wordful, but effectively, relying on paragraph 107 of the Deputy President's decision, the appellant says that the conclusion there is erroneous. It's unclear how the appellant could arrive at that position i.e. to say that there is such a significant error of fact being made by the Deputy President, when very clearly, on all of the evidence, and the decision, there was no communication to the appellant in relation to the termination of the training contract or otherwise, and very clearly he did accept it, because he wrote to the department.

PN500

So it's really unclear how the appellant now says there is such a significant error of fact that requires appellant intervention when on all of the evidence, and the decision, that is reasonably open to the Deputy President.

PN501

At paragraph 34 of the appellant's submissions on page 18, it provides that:

PN502

> *The appellant on 9 March did not affirm the contract and stay in the employment relationship with the respondent. The appellant only communicated that he did not agree to the termination of his contract.*

PN503

Now, Deputy President, you took me to some of the matters raised by my friend today, and it's true that much time has been spent on this subject development, but this is the first time this has occurred. This was not found in any of the three witness statements filed by the appellant in the proceeding below. It was not a matter that was put to Mr Harding, for example, in cross-examination, extensive cross-examination. It's not a matter that arises on any of the evidence that was before the Deputy President.

PN504

Irrespective of that, the Deputy President makes multiple references through the decision in relation to her consideration of all of the evidence, and importantly, objectively, what occurred between the parties during this intervening period, and it's really unclear, and we've spoken about this just earlier, how the appellant can say on one hand I have not agreed to the termination of my contract, and later for the purposes of an appeal proceeding turn that into merely making a point on whether or not it was an accurate email from the department in relation to the notice of termination being by consent.

PN505

At paragraph 38, the appellant goes on to say:

PN506

It was an error to conclude the 9 March 2023 email by the appellant was an affirmation of the employment contract. Affirmation occurs when such conduct is only consistent with the continued existence of a contractual obligation.

PN507

It's really important here to understand that there are two inconsistent options available upon the election of the innocent party. You have inconsistent option number one, affirm, or inconsistent option number two, accept the repudiation. Here, quite clearly by his conduct, the appellant has affirmed in the language of the law on repudiation – he has said, 'I have not agreed to the termination of my contract.' It does not get much clearer than that.

PN508

Ground three begins at paragraph 43 of the appellant's outline of submissions on page 19 of the DCB:

PN509

This ground provides that the Deputy President erred in finding that the respondent made genuine attempts to cure the breach, and therefore there's no repudiation because of it.

PN510

The submissions made concern me in relation to this ground, because - I take you to paragraph 45 where it says:

PN511

The only evidence we have that Mr Harding was in contact with the department before the lodgement of the unfair dismissal application by the appellant is the email Mr Harding exchanged with Ms Smargiassi on or around 29 March.

PN512

That's absolutely incorrect. We know in the witness evidence, which was subjected to excessive cross-examination, that Mr Harding made contact with the department on 9 March and spoke directly to the circumstances that led to the notice being provided, and that it was never the intention of the respondent to terminate.

PN513

I mean it is entirely incorrect to say that the only evidence was that Mr Harding contacted the department on around 20 March. 21 March was at that point the third contact. So there was contact on 9 March, there was contact on 20 March, there's contact on 21 March, and then there was further contact on 6 April. It certainly wasn't the only contact.

PN514

My friend raised I think the test for whether or not steps have been taken to cure the breach, remembering that we have to accept then that an election wasn't made on 9 March. He elevated that requirement, to cure the breach, to something to be – and I think if I have this correctly, it had to be reasonable steps, and he says that

the Deputy President erred here in finding that, in his words, reasonable steps had been taken, but in fact the Deputy President looked at genuine steps.

PN515

Now, I am unaware of an authority which says that the steps to be taken must be reasonable steps. 'Genuine' is what the Deputy President considered, and the Deputy President took into account all of the evidence.

PN516

The evidence set out very clearly that this was not communicated directly to the appellant. It was an email to the department. The department received a rejection in relation to the repudiatory conduct by the appellant. The department and the respondent engaged in relation to ways to resolve that, and then the respondent, through Mr Harding, made multiple contacts before any application for an unfair dismissal was filed.

PN517

So even if we were to accept the election was not made on 9 March, there were a multitude of steps that were undertaken, genuine steps, under a very clear instruction from Mr Harding, that the training contract was not to be terminated. There were genuine steps to cure any purported breach.

PN518

It then continues through paragraph 46, 47, 48 and 49 of the appellant's submissions on page 20, nothing short of a conspiracy of untruths – the appellant says that Mr Harding said in his witness statement that he 'communicated to Ms Smargiassi by telephone on or around 9 March that it was not the respondent's intention to terminate the appellant's training contract.'

PN519

That was the evidence, but then it goes on to say, 'This is untrue', and it's untrue based on a particular view taken by the appellant now, which could have been put to Mr Harding in cross-examination. There was extensive cross-examination on the contact.

PN520

It then goes on and it says - where it relies upon the state of mind of a department employee - where it says, 'It does not make sense that the training contract was never put on suspension', in paragraph 47.

PN521

In paragraph 48 it says that, 'It does not make sense that the department would place the appellant's training contract on suspension without notifying the appellant.' It goes on in 49, 'Additionally, the appellant was not notified by the department that his training contract was placed on suspension.' I mean, a lot of this goes to the actions of the department.

PN522

Now, the appellant was well aware of the respondent's position in relation to the training contract in the lead up to the hearing. To the extent that the appellant

took issue with any of those things, it was open to the appellant to seek orders of the Commission for Ms Smargiassi to attend and provide evidence.

PN523

That was never done, and it certainly wasn't matters put to Mr Harding, and nor would it be appropriate for Mr Harding to answer those things, because it does go to the state of mind of a department employee and not Mr Harding directly.

PN524

In paragraph 48 it says that, 'In any case there is no evidence of the department placing the appellant's training contract on suspension.' It's absolutely incorrect to say this. There is clear evidence of that. It's uncontested. It's in the witness statement of Shannon Harding that was filed in the proceeding below.

PN525

So continuing on, at paragraph 51 of the appellant's submissions on page 21 of the DCB, it says:

PN526

> *Additionally Mr Harding only communicated to the department the determination notice was sent in error on 6 April. He did not communicate this to the appellant or communicate with the appellant at all.*

PN527

Now here, the appellant is asking the Full Bench to make a finding effectively that there was no election made on 9 March, that in fact an election was made on 30 March instead, which is when the unfair dismissal application was filed, and then Mr Harding only took steps to rectify this on 6 April, which at that point made it too late.

PN528

We can see quite clearly, objectively, from the evidence this is absolutely not the case. There were multiple attempts to remedy this, and in fact, if Mr Harding had not – under what circumstance would the department have suspended the training contract if it were not for Mr Harding on 9 March making it very clear that the termination notice was sent in error.

PN529

This all relies upon these presumptions, these untruths, these statements, or the state of the mind of a department employee which has never been tested. It relies on all of these conspiracy theories coming together to arrive at a point where we can now say, well there was no election on 9 March, there was an election on 30 March, and no steps were taken in between and it's too late now, we play on.

PN530

Moving on to ground four, the appellant arrives that the Deputy President erred in finding that the lodgement of the appellant's unfair dismissal application does not constitute clear communication of the acceptance of the respondent's alleged repudiation.

PN531

Now, very little time was spent on this, relatively speaking. Ultimately, the decision of the Deputy President is entirely consistent with NSW Trains and James. NSW Trains and James, and the references that my friend took you to, stand for the proposition that the filing of an unfair dismissal application can amount to acceptance of repudiatory conduct. Correct. The Deputy President made no statement to the contrary. The Deputy President was speaking directly to communication of acceptance of that repudiatory conduct.

PN532

Now, that is another critical element, just as we spoke about clear renunciation, clear acceptance of repudiatory conduct must occur. But the Deputy President then goes on and says that:

PN533

In any event, the unfair dismissal application was filed after genuine steps were taken by the respondent to cure the breach.

PN534

There is a catch all ground at ground five, which is the Deputy President erred in finding that the appellant was not dismissed. I don't propose to go through each of those points, it's a rehash of a lot of what we've said, other than to say that the appellant has not established that the discretion exercised by the Deputy President was exercised in an erroneous manner.

PN535

The Deputy President considered all of the statutory criteria relevant to the determination about whether the appellant was dismissed. It has not been demonstrated at all that the Deputy President's consideration of this matter, or any of her conclusions, were erroneous in any way, much less that there was any significant error of fact that was made.

PN536

The grounds of appeal must fail. They do not disclose any error in the exercise of the Deputy President's decision, in her discretion, or otherwise any other error, and it's not the task of the Full Bench now, as the appellant now seeks, to reconsider questions that arose for determination before the Deputy President in the absence of any of those errors.

PN537

Subject to any questions from Deputy Presidents, those are the submissions of the respondent.

PN538

DEPUTY PRESIDENT CLANCY: Thank you. I just wanted you to engage with the proposition that was put, of the appellant, around the training contract constituting a new and separate employment relationship.

PN539

MR STUTLEY: Thank you, Deputy President, and apologies, I did miss that. Look, there was a bit of confusion about the employment arrangement. Quite clearly, if you break it up into three separate periods for ease

of reference, we have 2021. That's when the appellant was first employed by the respondent, and I'm going to take you to paragraph references in the decision to make this abundantly clear.

PN540

Paragraph 88 of the decision below which begins at page 46 of the DCB.

PN541

2 January 2021 is the commencement of employment. The employment was for work as an offsider. It was only in around April 2021 upon request of the appellant that a separation certificate be issued presumably here to allow him to access Centrelink entitlements.

PN542

And that you will find at 89 of the decision.

PN543

Importantly, that was expressed to be a mutual separation and then there was no employment or no engagement - I should say, correctly, - no engagement or no shifts worked between April 2021 and March 22. On 18 March 2022, approximately two months before the training contract, the appellant was offered shifts and accepted those shifts and was paid for those shifts.

PN544

That was all the evidence put before the Deputy President in the first instance hearing and that went unchallenged. On the 27 March, the training contract was entered into. I did pick up - - -

PN545

DEPUTY PRESIDENT CLANCY: Sorry, 27 March or 27 May?

PN546

MR STUTLEY: Sorry, 27 May, my apologies. 27 May, training contract was entered into. Now, the evidence again, uncontested is that the training contracts are offered two employees of the respondent as a means to act as an incentive to further develop the respondent's employees in the career path that they chose and this was one such example where the appellant indicated a desire to undertake the training requirements to allow him to reach the level of attainment for a driller.

PN547

Now, before he gets there, he needs to undertake, effectively nationally recognised training which was the subject of the training contract and this supplemented the employment arrangement that had already been in place for the two month prior – at the very minimum, the two month prior, but on the Deputy President's decision here, at least going right back to 2021. Now, the Deputy President, considered the entire employment history between the appellant and the respondent in paragraphs 88, 89, 90, and 91 and 92.

PN548

Importantly, in paragraph 92, the Deputy President makes a finding which is reasonably available to her based on the evidence that and I am going to take you to the fourth line from the bottom,

PN549

The evidence of Mr Harding, was that Mr Jowett was required to perform additional duties, than those set out in the training contract. It is apparent from Mr Jowett's correspondence with the department, that he understood that this employment would ideally in the training contract was separate when he stated - - -

PN550

And it goes on. It's quite clear that there were components of his engagement which were relevant to the training contract but he also performed (indistinct) duties of his substantive employment as an offsider. During the time that he performed the work between 27 May 2022, 27 March 23.

PN551

And it is on that basis that we say correctly the Deputy President finds that the training contract did not create a separate employment relationship. It was a – it was a contract of the provision of training to upskill the appellant in the occupation of a driller.

PN552

DEPUTY PRESIDENT CLANCY: So the – is your position that if it was accepted that the training contract was terminated, that the employment nonetheless continue?

PN553

MR STUTLEY: Correct. So to expand upon that a little further, the VET Act in this state at least and a number of the decisions support this including Turner, provides for circumstances where apprentices may be engaged in the training contract alone. The training contract is what creates the employment relationship. Here there was an employment relationship that existed before the training contract and if you read for example, section 60(h) of the VET Act in the way that it describes as I think the Deputy President pointed out, this clear distinction that where the training contract comes to an end, the employment under that contract, comes to an end. And that may be the end of the story, where you have only got employment connected directly to the training contract. However, here, there was a pre-existing, a subsisting employment relationship which had continued since 2021. Or at a very minimum, from March 22.

PN554

DEPUTY PRESIDENT CLANCY: Thank you. Thank you, anything in reply, thank you?

PN555

MR MAROUCHAK: Thank you. Yes, Deputy President, thank you. So I think that with the training contract that I was starting the last issue that yes, there was work that the appellant did before the respondent. As a driller before the training

contract was entered into. But we say that when the training contract was entered into, that should be treated in the same way as someone who gets a promotion at work. Or gets a pay rise. They get this additional benefit such as higher duties, higher status job, or they get more money. When that happens, there's an extra benefit that's afforded to the employee. Therefore, the terms of the contract that existed before the training arrangement actually become more generous for the employee when the training arrangement was entered into.

PN556

So when the training arrangement was entered into, at that point, you still have that training contract forms the terms of the employment, that's a fundamental term. So by terminating the training of agreement later on, you're basically breaching a fundamental term of the employment agreement. The employment relationship which is a term to provide training which the appellant didn't have before, but now it has. So by breaching a fundamental term by terminating the training agreement, that entitles the respondent or the appellant, apologies, to terminate. Based on the laws of repudiation.

PN557

So that's what we say. We say there can't be – the other thing is about this, is the work that the appellant was doing before he started it, being a driller, and then the work that he does under the training contract are one and the same. They both involve drilling work, the training contract provides him to be – it's not – they can't be separated. It's not like a training contract somehow gives the appellant – the appellant's working as a driller before the training contract and then the training contract is becoming – getting a geologist qualification.

PN558

He's getting the same qualification – he's getting the same qualification he was doing when he was recording employment relationship before the training contract started. So that's why you can't separate them into different periods of employment. It's – the employment, you know, you started working before March 2022 – before May 2022 and in March 2022, he was working. They gave him additional benefit and that became a new chance from that point onwards. From May 2022 onwards.

PN559

So when the training contract was made, it does say it's full time, but he got the additional benefit and when that was terminated, it's wrong to say that somehow he still has other employment that's not connected to the training agreement, considering that the training agreement basically – he was doing the same work. It's not like he was – it's too fine of a line. If he was doing jobs (indistinct) entirely different (indistinct) training contract like as a cleaner, and then he's worked as a training – it's – you can wear two different hats there. But here you can't separate the two.

PN560

The second point I have raised is – when it comes to that email on the 9 March that our client, that the appellant respondent are saying they don't agree with the termination – the - I didn't – I didn't give my agreement, that one? So I have

already made submissions on why that doesn't count as a rejection of the repudiation.

PN561

So I have made the submissions and I will just refer to them again, that that – saying – letting the Department know that I didn't consent to this, is not inconsistent with the – does not somehow say that – is not consistent with the continuation of the performance. Does not insist by performance from the respondent. There are – there is – if you want to do a rejection of a repudiation it has to be an Act that's consistent with a continuation of the employment arrangement. And that wasn't the case.

PN562

And the other thing I will say about in our argument is that when the training contract was – so when the training contract was terminated, we say it automatically terminated under section 90(h) of the VET Act, 90(h) and therefore, by our secondary argument which is not only a repudiation, a secondary argument which says that it automatically terminated, it doesn't even matter whether you hold – whether there's an election or rejection by the appellant.

PN563

So if the contract was automatically terminated by provision of section 90(h), apologies – not 90(h) – 60(h), I am getting this wrong, I apologise. If the contract automatically came to an end by virtue of section 60(h), then it doesn't matter if there's an election or not an election. It automatically came to an end. The election issue only arises in our other argument when it comes to repudiation, so we're only two arguments to signify that – that the business occurred.

PN564

Then I will say briefly that I think there's also like – there's plenty of evidence to say when it comes to the Laurinda argument that I ostensibly talked about, about point of view of the appellant. There's already evidence in that nothing was communicated to the appellant. It's – I mean, Mr Harding, says that so much in his evidence that nothing was communicated. The only evidence of communication was an attempted phone call by Anne Smargiassi from the Department, where she says she couldn't get hold of the appellant. That's the only contact that was made between the respondent and the appellant. I think it's clear in Mr Harding's witness statement that he says – he says that in paragraph 63 to 69 of his witness statement. So that's all – and it's also in the decision as well, where there's – there wasn't any evidence of communication. So it didn't need to be put to Mr Harding. The fact that it wasn't discussed with Mr Harding, it's not material at cross-examination, the evidence already says that there's no communication on his evidence alone.

PN565

And I can take you the Bench to his evidence to say that he didn't communicate with the appellant. Would you like me to take that evidence or is that - - -

PN566

DEPUTY PRESIDENT CLANCY: It's up to you.

PN567

MR MAROUCHAK: So, okay, I will take you to page 619 of the witness statement then, please. Of Mr Harding. 618, apologies. Top right hand corner of the appeal book. I apologise, I am trying to get there.

PN568

So this is the main evidence is - - -

PN569

DEPUTY PRESIDENT CLANCY: Starts from (indistinct)?

PN570

MR MAROUCHAK: Yes. So – so six one – just the page before. So paragraph 62, Mr Harding says:

PN571

On 9 March, I received a phone call from Anne Smargiassi (indistinct) apprenticeship office of compliance and the Department actually advised me and Mr Jowett that I have agree to a termination.

PN572

And Mr Harding says,

PN573

I was surprised by this call and I told Ms Smargiassi that it was not (indistinct) intention to terminate.

PN574

Then he talks about his reasons. Then at 65 said,

PN575

In response, Ms Smargiassi told me that she would reach out to Mr Jowett directly to confirm his intentions in respect of the training contract. In the meantime, we will place under suspension.

PN576

There's some discussions between – on 66 – between him and Ms Smargiassi. 67:

PN577

On that basis, understood the training contract was suspended and while Ms Smargiassi took steps to get in touch with Mr Jowett's determinate preference for the way forward.

PN578

68:

PN579

I did not hear anything from Ms Smargiassi and Mr Jowett, so on 20 March 23, I reached out to Ms Smargiassi by email to get an update.

PN580

Again, there's no communication there.

PN581

69:

PN582

On 21 March, Ms Smargiassi replied to the email to advise that she had been unable to reach Mr Jowett.

PN583

Then on Mr Harding's own evidence:

PN584

He did nothing until 6 April 2023 when he was served a copy of the unfair dismissal application.

PN585

On 71:

PN586

This was the first communication I received in relation to Mr Jowett, excluding my multiple communication to the Department.

PN587

And then he, at 72, says, he's surprised. Seventy-three, says, he reached out by telephone after he gets the unfair dismissal application to Ms Smargiassi. They have a further chat. And then basically at 74 and 75, the training contract is reinstated. So – and the only evidence that we have of any contact between the Department and – so that there's no contact there during the critical period when a training contract was terminated and when an unfair dismissal application was lodged between Mr Harding. The evidence there and then there is a little bit of evidence or attempt at communication by Anne Smargiassi which you can just see at – in an email chain between them on page 1771, which is annexure SAF10.

PN588

Sorry, just 1771 (indistinct) email between Anne Smargiassi and Shannon Harding and there's just:

PN589

Hi Shannon, I reached out to Trent. At this stage, he has not returned any of my phone calls.

PN590

So you're getting that on 29 March, so you can see here, that this is just like – there's clear evidence that no one from the Department spoke to Trent and the respondent - - -

PN591

DEPUTY PRESIDENT CLANCY: That wasn't for lack of effort though, was it?

PN592

MR MAROUCHAK: Well, they tried a phone call, fine. But obviously they didn't email. So, it wasn't enough effort. It's Trent – the appellant responded on 9 March - - -

PN593

DEPUTY PRESIDENT CLANCY: Straight away.

PN594

MR MAROUCHAK: When he got the – by email when he got the notice of termination of contract. Well, Ms Anne should have just emailed him. 'Hey I am trying to get hold of you, I can't get hold of you, can you please –', you know. So that's the other thing. So that's the other thing I will say. That it's – a simple email could have done the job.

PN595

So that's kind of in the evidence that there isn't that crucial point that when you're looking at Laurinda and the point of view, you have got to look at it from the appellant's shoes and he didn't see all this stuff in the background that happened. And effort or not, I mean, I say they didn't put enough effort in, but also, he's the innocent party here. It's on them to contact him. To make more effort to contact him. So if they send an email they would have done the job.

PN596

The other point is the – just the decision – when we say – when my friend displays the proposition that we interpret Deputy President, the decision at first instance, that it stands for the proposition that if a training contract is terminated which is not in compliance with section 60(g), that part, I just want to – I think that's where the – I think I will take the – if I take you to the decision at page 100 – or paragraph 106 of the decision. So just to clarify how we interpreted the decision so there's just no misunderstanding. (Indistinct) where the Deputy President said, at paragraph 106 of her decision:

PN597

> *The notice to terminate did not amount to clear enunciation because it was both incomplete and ineffective at law to terminate the training agreement.*

PN598

Well, the only conclusion you can reach from the statements ineffective at law is that the Deputy President reached the conclusion that the notice to terminate did not amount to clear enunciation because it was ineffective at law, it was because Deputy President said that 60(g) was not complied with. That must be the only – she didn't' expressly say it in her decision that, '60(g) wasn't complied with, that's why I have reached the conclusion that it was ineffective at law'. But 60(g) has said that you can't terminate without the consent of the apprentice. So that's what we – based on that wording, that's how we interpreted her decision, and her proposition.

PN599

DEPUTY PRESIDENT GRAYSON: So you infer that based upon something else in her decision?

PN600

MR MAROUCHAK: Well, the Deputy President at paragraphs - she starts talking about notify all the background history of the VET Act. And how at

paragraph 95 she mentions that 60(g) terminating a training contract, Deputy President says that – she refers to that section and says it can only be terminated:

PN601

An employer must not terminate unless the apprenticeship has consented or the Chief Executive Officer approved termination.

PN602

Deputy President correctly says that the Chief Executive Officer had not approved and then through her further reasoning below, at 106, she makes the statement that:

PN603

The notice to terminate was in effective at law.

PN604

And the only way you can include it is – she doesn't say why it was ineffective at law, but based on her reasoning it appears very strongly, that it was ineffective because consent wasn't obtained. And – but that doesn't take away from the fact that the Department still actually processed the termination.

PN605

So whether it's effective or not, it's still actually (indistinct) the effect of bringing that training to an end.

PN606

So that's kind of our – that's the points I have noted, thank you.

PN607

DEPUTY PRESIDENT CLANCY: Okay. Thank you. Full Bench thanks the parties for their material and their submissions today. The decision of the appeal will be reserved. A decision in writing will be prepared and emailed to the parties when it's completed. And there being nothing further, we will now adjourn the Commission.

ADJOURNED INDEFINITELY **[5.34 PM]**