DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman
v
Shahin Tavassoli
(C2017/4000)

COMMISSIONER CAMBRIDGE SYDNEY, 9 MARCH 2018

Appeal against decision [2017] FWC 3200 of Commissioner Riordan at Sydney on 18 July 2017 in matter number U2016/14357.

[1] On 10 October 2017, a Full Bench of the Fair Work Commission (the Commission) issued a Decision [2017] FWCFB 3941 in this matter. The Full Bench Decision was made in respect to an Appeal taken by *Bupa Aged Care Australia Pty Ltd* (Bupa) against a Decision of Riordan C [2017] FWC 3200, which involved a finding that *Shahin Tavassoli* (the applicant) had been unfairly dismissed from her employment with Bupa.

[2] In broad terms, the Full Bench Decision granted permission to Appeal and upheld Bupa's Appeal. However, a particular issue that arose from the Appeal proceedings has been referred for Re-Hearing in respect to the discrete question as to whether the applicant had been dismissed within the meaning of s. 386 (1) (a) of the *Fair Work Act 2009* (the Act). Relevantly, at paragraph [58] the Full Bench made the following Orders:

"*[58] We order as follows:*

> *(1)* *Permission to appeal is granted with respect to grounds 1-4 of the notice of appeal. Permission to appeal is otherwise refused.*
>
> *(2)* *Grounds 1-4 of the appeal are upheld.*
>
> *(3)* *The matter is referred to Commissioner Cambridge for re-hearing as to whether Ms Tavassoli was dismissed by Bupa within the meaning of s.386(1)(a) of the Fair Work Act 2009 on the basis of the evidence admitted to day* [sic] *and such further evidence as the Commissioner may determine to admit.*
>
> *(4)* *If, on the re-hearing, it is determined that Ms Tavassoli was dismissed within the meaning of s.386(1)(a), the Full Bench will then determine what further orders should be made in the appeal. If it is determined*

that that [sic] *Mr* [sic] *Tavassoli was not dismissed, her application in matter U2016/14357 will be dismissed.*

(5) The stay order made on 25 July 2017 will remain in effect until further order of the Commission."

The Re-Hearing Process

[3] In accordance with Order number (3) made by the Full Bench, the matter requiring Re-Hearing was listed for Mention and Directions proceedings on 24 October 2017. At the proceedings held on 24 October, the Parties advised that they intended to submit further evidence from individuals who were described as the key witnesses. Further, it was anticipated that the key witnesses would be called and cross-examined upon the contents of their respective witness statements. The Commission issued Directions which established a timetable for the filing and service of the foreshadowed evidentiary and other materials prior to a date for the Re-Hearing, that was fixed for 18 January 2018.

[4] Despite what was anticipated to be some considerable amount of evidence from the key witnesses, the applicant filed no further additional evidence, other than a short statement from an individual who had previously not provided any evidence. This additional statement, made by a Mr Irish was filed in reply. But it did not respond to the only additional witness statement filed by Bupa, which was a brief further statement made by Ms Lyman.

[5] Consequently, the Re-Hearing held on 18 January did not involve any additional evidence from the key witnesses, and only some brief evidence was taken from Ms Lyman who was cross-examined. The statement made by Mr Irish was admitted over the objections made on behalf of Bupa, and without Mr Irish being available for cross examination. In these circumstances, the statement of Mr Irish, (Exhibit RH-2) has been given little, if any weight, and no reliance has been placed upon it in respect to the determination required in the Re-Hearing.

[6] In the absence of any significant amount of additional evidence, the Re-Hearing primarily involved the Parties advancing their respective submissions in reliance upon the evidence that had been adduced in the proceedings at first instance before Riordan C. Although the nature and substance of the resultant Re-Hearing appeared to be somewhat at odds with what the Full Bench had identified at paragraph [56] whereby it noted that Bupa may be "*… denied the opportunity to mount an evidentiary case which addressed s.386(1)(a)*" it became apparent that, despite the concerns expressed by the Commission, the Parties were content for the Re-Hearing to amount to what was described as a largely submission based proceeding, relying almost entirely upon the evidence adduced at the first instance proceedings.

The Essential Factual Elements

[7] The factual circumstances of the applicant's dismissal have been set out in the previous Decisions of both the Full Bench and Riordan C and it is unnecessary to repeat these details. The key factual elements which arise in the Re-Hearing can be extracted for the specific purpose of the determination as directed by the Full Bench, and required in respect to s. 386 (1) (a) of the Act.

[8] Section 386 (1) (a) of the Act is in the following terms:

"*Meaning of **dismissed***

*(1) A person has been **dismissed** if:*

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b)….."

[9] Further, the Full Bench Decision at paragraph [47] provided some elaboration of circumstances which were summarised as being comprehended by both s. 386 (1) (a) and s. 386 (1) (b) of the Act. For present purposes it is only necessary to set out that part of paragraph [47] which dealt with s. 386 (1) (a) which stated:

"*(1) There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the "heat of the moment" or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although "jostling" by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.*"

[10] In this case, the applicant provided a written resignation on Wednesday, 16 November 2016. A copy of the resignation was Attachment "DB-11"[1] to the witness statement of Daniel Brice. The applicant wrote the initial version of the resignation letter while she was waiting to be called into a disciplinary meeting with Mr Brice. The resignation letter was later amended during the meeting with Mr Brice. The resignation letter was amended from providing one month's notice to having immediate effect.

[11] The meeting on 16 November 2016, during which the applicant resubmitted and then subsequently amended her resignation letter, was attended by three people; the applicant, Mr Bryce, and Ms Miriam Lyman. The applicant was upset and emotional to the point of crying[2] during the meeting on 16 November which Ms Lyman described as "*a confronting meeting*."[3]

[12] On the following day, Thursday, 17 November 2016, Mr Brice sent the applicant a letter that was incorrectly dated 17 October 2016, which relevantly advised of the confirmation of the resignation provided by the applicant on the previous day, and which was said to have been effective from that day, 16 November 2016.

[13] At approximately 9 am on the following day, Friday, 18 November 2016, the applicant attended the employer's premises for the purposes of seeking to withdraw her resignation. Mr Brice rejected the applicants attempted withdrawal of her resignation. Mr Brice advised the

applicant that he had accepted her resignation provided by her on 16 November, and that she was no longer an employee of Bupa.

[14] The Re-Hearing of this matter has essentially required the Commission to examine the circumstances that are outlined in summary above so as to determine whether the resignation that was provided by the applicant on 16 November 2016, may have been legally ineffective. Specifically, the question for determination has involved whether treating that resignation as effective on both 16 and 18 November 2016, should be characterised as termination of the applicant's employment at the initiative of the employer in accordance with the Full Bench construction given to the terms of s. 386 (1) (a) of the Act.

The Case for Bupa

[15] Mr J Darams, barrister, appeared for Bupa at the Re-Hearing, and he made oral submissions in elaboration of documentary material which was marked as "RH-Bupa 1." Mr Darams said that the question for determination in the Re-Hearing was narrow because there was no dispute that the applicant had actually resigned on 16 November 2016, and therefore the issue to be determined was whether or not that resignation was voluntary in the sense that that was what was intended.

[16] The submissions made by Mr Darams asserted that the resignation of the applicant was not given in the "heat of the moment" or when she was in a state of emotional stress or mental confusion, such that she could not reasonably be understood to have been conveying an intention to resign. Mr Darams submitted that Bupa was entitled to accept this resignation which was made in unambiguous terms, and with a true intention at the time to resign.

[17] Mr Darams made further submissions which referred to various Judgments and Decisions that had considered the question of termination of employment at the initiative of the employer. In particular, Mr Darams referred to the Full Bench consideration in this matter of the question of termination at the initiative of the employer as contemplated by s. 386 (1) (a) of the Act. It was noted by Mr Darams that the Full Bench had determined that there was no conduct on the part of Bupa which involved conduct that was intended or would have the probable result of, terminating the employment of the applicant. Therefore, according to the submissions made by Mr Darams there was no question that the resignation provided by the applicant was forced as contemplated by s. 386 (1) (b) of the Act.

[18] The further submissions made by Mr Darams referred to various decided cases which involved consideration of whether particular resignations were invalid or ineffective and which often established what was referred to as "special circumstances." Mr Darams submitted that an employer would ordinarily be able to rely upon a written resignation which was voluntarily offered in circumstances where there was no "heat of the moment." Further, the submissions made by Mr Darams noted that Bupa did not accept the written resignation when first tendered by the applicant, and it provided her with a further period of time to consider her position.

[19] Mr Darams submitted that the circumstances surrounding the resignation of the applicant did not involve "special circumstances." Mr Darams said that the resignation was a conscious and deliberate act, and it was conduct that was unambiguous. Further, Mr Darams submitted that Bupa was not alerted to any concern that the resignation was anything but a voluntary act that reflected an intention to avoid further scrutiny of the applicant's alleged

misconduct. According to the submissions made by Mr Darams, the fact that the applicant broke down during the meeting with Mr Brice and Ms Lyman did not demonstrate or reflect a mental state wherein the applicant did not know what she was doing.

[20] It was also submitted by Mr Darams that other aspects of the resignation of the applicant including issues such as the applicant's level of English language skills, and other cultural or ethnicity factors, did not establish any "special circumstances." Consequently, Mr Darams submitted that an examination of the circumstances involving both the resignation on 16 November, and the subsequent attempt to withdraw that resignation on 18 November, could not lead to a finding that the termination of the applicant's employment was at the initiative of the employer.

[21] Mr Darams also made submissions which stressed that the Commission could not lightly come to a view that an unambiguous resignation was something that wasn't an intended voluntary act. Mr Darams said that there would need to be compelling, objective evidence to demonstrate that at the time the resignation was given, the applicant was so affected that she didn't know what she was doing or she didn't intend to do what she was doing.

[22] In summary, Mr Darams submitted that the resignation of the applicant which involved a signed written letter of resignation, demonstrated an active, conscious decision on the part of the applicant. Furthermore, Mr Darams said that the conscious thought process of the applicant was demonstrated by her persistence to resign when she resubmitted the amended resignation letter after it had initially been rejected by Mr Brice. Mr Darams said that when objectively viewed, the resignation of the applicant was an intended and voluntary act and there was no evidence that would demonstrate that she was so affected mentally or emotionally that she did not know what she was doing.

[23] Consequently, Mr Darams submitted that the resignation of the applicant could not be characterised as being a dismissal at the initiative of Bupa for the purposes of s. 386 (1) (a) of the Act. Therefore Mr Darams said that as the applicant had not been dismissed the application for unfair dismissal remedy should be dismissed.

The Case for the Applicant

[24] Mr C McArdle, solicitor, appeared for the applicant at the Re-Hearing. Mr McArdle made oral submissions which referred to documentary submission materials that were respectively dated 21 November 2017, 12 January 2018 and 18 January 2018. These documentary materials were marked as "RH-A1", "RH-A2" and "RH-A3". The material provided in "RH-A3" was the subject of some disagreement between the Parties during the Re-Hearing, and on 25 January 2018, the Parties provided the Commission with documentary outlines of their respective, contested positions regarding the contents of "RH-A3."

[25] Mr McArdle made submissions which commenced by focusing upon the events of 16 November 2016. Mr McArdle said that during a period of about 2 ½ hours, the applicant, who was a long serving employee, and who had attended an unpaid training session, lost her employment. Mr McArdle said that this was not something that should be considered to have been actions of the applicant acting upon her own free will, but rather a circumstance whereby the employment came to an end at the initiative of the employer.

[26] Mr McArdle submitted that the resignation letter was not something written in what was said or could be believed to be, literate, lucid handwriting from a person not ill at ease at all, and a person completely in command of the situation. It was further submitted by Mr McArdle that the resignation letter was a "nervous, unhappy, un-thought-through document." Mr McArdle said that the applicant was upset, bewildered, distressed, surprised, muddled, and confused and she could not reasonably be understood to be conveying a real intention to resign.

[27] Mr McArdle made further submissions which criticised the actions of Bupa, and in particular Mr Brice which he said caused the applicant to panic and wonder what was going on. Particular mention was made by Mr McArdle of the applicant being isolated and having to wait for some considerable period before Mr Brice called her into the meeting at which he advised of the allegations of misconduct made against her. Mr McArdle said that the circumstances created what he said was the initial heat of the moment resignation which in circumstances where the applicant was disorientated and upset was properly rejected by Mr Brice. Mr McArdle submitted that the resubmission of the resignation was similarly made in heat of the moment circumstances which had been created by the actions of Mr Brice in particular.

[28] It was further submitted by Mr McArdle that the ill-informed and irrational resignation of the applicant needed to be considered in circumstances involving her limited English language skills, and her heightened emotional state caused by the fact that she had been forced to stay outside the premises waiting to be called into the meeting. The submissions made by Mr McArdle relied upon particular findings of fact that had been made at the initial proceedings held before Riordan C. Mr McArdle said that the applicant's flustered state had been exploited by Mr Brice, as he had already made his mind up that the applicant should be terminated for the misconduct that he had observed via the phone video footage recorded by Mr Ranjit.

[29] The submissions made by Mr McArdle indicated that the matter to be decided in the Re-Hearing was straightforward as the facts were not in dispute. Mr McArdle stressed that the circumstances involving the applicant presenting and then resubmitting her resignation should recognise that these actions were taken during an afternoon of emotion, distress and confrontation. According to Mr McArdle, the applicant was in a state of emotional distress and mental confusion such that the employer could not reasonably understand the applicant was conveying a real intention to resign.

[30] In summary, Mr McArdle submitted that the actions of the applicant in providing her written resignation on 16 November 2016, were not rational or reasoned actions of a person providing a clear intention to resign. Mr McArdle submitted that the applicant had been dismissed by Mr Brice and that the termination of the employment was at the initiative of Bupa. Mr McArdle submitted that the applicant's dismissal was unfair and that the findings and specific remedy provided by Riordan C should be confirmed.

Consideration

[31] The Re-Hearing of this matter has been specifically directed by the Full Bench so as to avoid any denial of procedural fairness that might arise if either Party was denied the opportunity to mount an evidentiary case which addressed s. 386 (1) (a) of the Act.[4] The Re-Hearing has involved little in the way of the introduction of further evidence. Instead, the Re-

Hearing has primarily included additional, detailed submissions which have examined the Full Bench Decision, and applied the principles that can be distilled from that Decision to the broadly uncontested factual circumstances established by the evidence that was presented during the first instance proceedings held before Riordan C.

Termination of Employment without Overt Dismissal

[32] Although the determination that has been required by way of the Re-Hearing has been properly identified to be a fairly narrow or confined point, this matter has traversed an area of employment law which has been the subject of considerable conjecture over many decades. Over time, various Judgements and Decisions have applied particular legislative terminology to circumstances where employment has come to an end without there being unambiguous action on the part of the employer to dismiss the employee, i.e. no overt dismissal. In dealing with the specific circumstances of the applicant in this case, it is helpful to provide some broad perspective and observations about the more general approach to termination of employment circumstances which involve the absence of overt action of dismissal by an employer.

[33] The legislative terminology that has been used in various unfair dismissal/termination of employment provisions has been applied with varying levels of success, to circumstances that involved the absence of an overt dismissal. Both the Full Bench Decision and the first instance Decision of Riordan C refer to most of the significant decided cases that have dealt with unfair dismissal claims in circumstances where there was an absence of overt action of dismissal by the employer. Some of the difficulties associated with the construction that has been provided for the particular legislative terminology have arisen from the identification of the distinction that can be made between termination of the contract of employment, and termination of the employment relationship. The distinction between the contract of employment and the employment relationship appears to have been resolved for the purposes of s. 386 of the Act, as confirmed by the Full Bench decision in *Khayam v Navitas.*[5]

[34] The Full Bench Decision in this matter has provided authoritative guidance on what it described as "*the bifurcation in the definition of "dismissal" established in s.386(1) of the FW Act.*"[6] Interestingly, the Full Bench has provided some clarification of a question that has been identified by the authors of the frequently quoted book, *Macken's Law of Employment* [7] and the following passage from that book is relevant:

> "*The statutory enhancement in s 386(1)(b) requires that the person was "forced to" resign. What of the situation where the employee resigns as a result of the conduct, or a course of conduct of the employer, but the employee cannot be said to have been "forced" to resign for the purposes of s 386(1)(b)? Can the termination be said to be at the employer's initiative?*"[8]

[35] Notwithstanding the guidance that has been provided by the Full Bench Decision, I believe it is important to recognise that a dismissal within what the Full Bench described as the "first limb" of the definition in s. 386 (1) (a) of the Act, without overt action of dismissal by the employer, would not be confined to a resignation that was given in the "heat of the moment" and/or which involved other factors that rendered the resignation as legally ineffective. In my view, there are numerous different circumstances which involve the absence of overt action of dismissal by the employer but which nevertheless, when properly analysed, may be held to have been termination of employment on the employer's initiative.

[36] There are many circumstances where employment comes to an end without any overt action of dismissal by the employer. Putting to one side the end of employment circumstances that arise from uncontested resignation, mutual agreement, frustration, specific contract or task, bankruptcy, et cetera, there are other instances which involve a resignation provided by the employee either verbally or in writing, and which is alleged to have been "forced" because of conduct of the employer. These "forced" resignation circumstances, which are clearly comprehended by s. 386 (1) (b) of the Act, are often described as a "constructive dismissal." As mentioned in the Full Bench Decision[9] the term "constructive dismissal" is not clearly defined either in statute or under common law and it can create confusion.

[37] In my view, the term "constructive dismissal" has become something of a generic description which broadly encompasses any contested circumstance where employment has come to an end without overt action of dismissal by an employer, and excluding other end of employment circumstances that arise from mutual agreement, frustration, specific contract or task, bankruptcy, et cetera. Consequently the term "constructive dismissal" has tended to comprehend a variety of circumstances all of which have the common characteristic of there being an absence of overt action of dismissal by the employer, and many of which, but by no means all, involve an alleged "forced" resignation.

[38] If the term "constructive dismissal" is disregarded, I find it helpful to firstly conceptualise contested termination of employment circumstances into two primary categories; those that involve overt dismissal, and those that do not display any overt dismissal action on the part of the employer. Obviously, the first category involving overt dismissal action requires no further examination, and the circumstances undeniably represent termination of employment on the employer's initiative, and in satisfaction of the terms of s. 386 (1) (a) of the Act.

[39] The second category, termination of employment circumstances without any overt dismissal action on the part of the employer, can encompass a wide variety of circumstances. Once again, putting aside end of employment circumstances that arise from mutual agreement, frustration, specific contract or task, bankruptcy, et cetera, the most commonly encountered circumstances in this category are those that involve what is described as a "forced" resignation. As mentioned above, the "forced" resignation circumstance is clearly contemplated by s. 386 (1) (b) of the Act.

[40] There are two other frequently encountered circumstances which fall within the second category of termination of employment without any overt dismissal action on the part of the employer, but which nevertheless may be found to have been termination of employment on the employer's initiative.

[41] One such circumstance is that of a "heat of the moment" resignation whereby because of special circumstances and/or a combination of other factors, it was unreasonable for the employer to assume that the resignation was genuinely intended. In these circumstances, if an employer accepts the resignation forthwith, and acts upon it, it may be held to be have been a legally ineffective resignation and the actions of accepting the resignation establish that the employment was terminated on the employee's initiative, and in satisfaction of the terms of s. 386 (1) (a) of the Act.

[42] Another frequently encountered termination of employment circumstance which is absent any overt dismissal action on the part of the employer, but which nevertheless may be found to have been termination of employment on the employer's initiative, involves what may be referred to as repudiatory conduct. Circumstances in this category involve the unilateral imposition of a term or terms which are inconsistent with continuation of the employment as was reasonably comprehended by the employment. For instance, if an employer imposed a significant reduction in the number of shifts that had regularly and systematically been part of the employment, the employee could refuse to accept such a significant change as it represented a repudiation of the established terms of the employment.

[43] In this example, the employee may not provide verbal or written resignation but simply hand in their uniform or office keys indicating that they cannot accept the changed terms of the employment. Such circumstances would involve no overt dismissal action on the part of the employer, who continued to offer employment under the altered terms, nor is there a "forced" or "heat of the moment" resignation, but nevertheless, the repudiatory conduct would be found to represent termination of the employment on the employer's initiative, and in satisfaction of the terms of s. 386 (1) (a) of the Act.

The Resignation of the Applicant

[44] Returning to the circumstances in this case, upon Re-Hearing, the Commission has been required to examine the circumstances of the termination of the applicant's employment which involved her providing a written resignation on 16 November 2016, and her subsequent attempt to withdraw that resignation, on 18 November, so as to determine whether that resignation was legally effective so that it did validly operate to terminate the employment. Or alternatively, if special circumstances and other factors operated so that it was unreasonable for Bupa to have assumed the resignation was genuinely intended, and by accepting it, and further acting upon it, Bupa terminated the applicant's employment on its initiative.

[45] The applicant provided the initial version of her resignation[10] to Mr Brice about an hour before the disciplinary meeting was anticipated to commence. The applicant had written the words "*Time 3.pm*" on the top of the resignation letter which was addressed, "*To whom this may cocern.* [sic]" Mr Brice scanned the letter, and then he handed it back to the applicant, and told her that he was not accepting the resignation.

[46] After about an hour the applicant returned to Mr Brice's office and the meeting commenced. The allegations of misconduct made against the applicant were read to her and the applicant became "*visibly and understandably upset by the allegations.*"[11] The applicant was crying although not hysterical.[12] However, strangely, Mr Brice said that; "*At no stage during the meeting was Ms Tavassoli tearful or upset*."[13]

[47] Mr Brice had a very different recollection to Ms Lyman of the emotional state of the applicant during the meeting. It is difficult to comprehend how Mr Brice could have failed to notice that the applicant was crying during the meeting. Mr Brice clearly failed to appreciate the level of emotional distress that the applicant was experiencing during the meeting on 16 November 2016.

[48] Consequently, when the applicant persisted with her apparent intention to resign, Mr Brice significantly misjudged the mental state of the applicant and he failed to recognise that the applicant was acting irrationally as a result of her disturbed state of mind. In the

circumstances, the resignation that was amended and resubmitted by the applicant was not given freely, deliberately and as a result of any reasoned deliberation.

[49] The level of confusion of the applicant was reflected by her writing the wrong day of the week on the resignation letter. Further, the irrationality of the applicant's behaviour was reflected in her impulsive preparedness to resign with immediate effect, and that decision was conveyed by her scribbling out that part of the resignation letter which contained words indicating that she was providing one month's notice. Frankly, when all of the circumstances of the meeting of 16 November are carefully examined there would seem to have been every prospect that if Mr Brice had suggested that the applicant pay to Bupa some amount of money in respect to a notice period, she probably would have agreed to do so. Such was the level of her irrational behaviour at that time.

[50] It is also relevant to note that the irrational behaviour of the applicant can, in part, be attributed to ethnic and cultural factors, associated with the shame that allegations which she thought involved theft would bring upon her. The applicant said that she did not want the humiliation of being dismissed for stealing beer,[14] although she was never accused of stealing beer. During cross-examination the applicant provided some seemingly contradictory and confused evidence[15] about the question of being accused of stealing beer. However, she did seem to ultimately verify the level of anxiety that she felt regarding any suggestion that she was a thief when she stated that she was "out of my mind"[16] and "in panic mode"[17] and that she "just wanted to go and be underground."[18]

[51] The resubmitted resignation that was amended by way of the notice period having been scribbled over, was provided by the applicant when she was in a state of emotional distress. The level of the applicant's emotional distress was not recognised by Mr Brice. Further, the applicant was exhibiting irrational behaviour and that irrational behaviour was not appreciated or considered by Mr Brice when he immediately accepted the applicant's resignation as being "*effective today*."[19]

[52] The resignation of the applicant should not have been accepted in these circumstances. Particularly when one has regard for the applicant's lack of English language skills and certain ethnic and cultural factors, I am compelled to conclude that special circumstances existed such that the resignation of the applicant was legally ineffective.

[53] Consequently, I find that the applicant was dismissed on the employer's initiative and in satisfaction of the meaning of dismissed provided by s. 386 (1) (a) of the Act. Therefore, the file shall be returned to the Full Bench, so that it can determine what further Orders should be made in accordance with Order number (4) of the Full Bench Decision issued on 10 October 2017.

<u>COMMISSIONER</u>

Appearances:

Mr J Darams of Counsel with *Ms A Malon* from Bupa Aged Care Australia appeared for the Appellant.

Mr C McArdle, Solicitor appeared for the Respondent, *Shahin Tavassoli.*

Hearing details:

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[1] Appeal book - page 447.

[2] Appeal book – page 235.

[3] Transcript of Re-Hearing proceedings (18 January 2018) @ PN173.

[4] Full Bench Decision [2017] FWCFB 3941 @ [56].

[5] Saeid Khayam v Navitas English Pty Ltd t/a Navitas English [2017] FWCFB 5162, see in particular, paragraph [75].

[6] Full Bench Decision [2017] FWCFB 3941 @ [47].

[7] *Macken's Law of Employment* , [Sappideen et al,] Eighth edition, Lawbook Co. 2016.

[8] Ibid @ [13.110] page 525.

[9] Ibid @ paragraphs [49] and [50].

[10] Appeal book - page 440.

[11] Appeal book - page 495.

[12] Transcript of Re-Hearing proceedings (18 January 2018) @ PN170.

[13] Appeal book - page 327, paragraph 49.

[14] Appeal book - page 554, paragraph 25.

[15] See for example Appeal book - page 59, PN420 to PN424.

[16] Appeal book - page 61 @ PN447.

[17] Appeal book - page 65 @ PN501.

[18] Appeal book - page 70 @ PN567.

[19] Appeal book - page 326 @ paragraph 46..