DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Scott Harrison
v
FLSmidth Pty Limited T/A FLSmidth Pty Limited
(U2018/6589)

COMMISSIONER SAUNDERS NEWCASTLE, 29 OCTOBER 2018

Application for an unfair dismissal remedy – demotion – ongoing employment relationship – whether a dismissal within the meaning of s 386 of the Fair Work Act.

[1] On 6 June 2018, Mr Scott Harrison was demoted by his employer, FLSmidth Pty Ltd (***FLS***), from the position of Service Supervisor to that of Mechanical Service Technician – Experienced (***Service Technician***). He remains employed by FLS in the position of Service Technician. This decision concerns the question of whether Mr Harrison's demotion constitutes a dismissal within the meaning of s 386 of the *Fair Work Act* 2009 (Cth) (***FW Act***).

Meaning of dismissal

[2] The journey to understand the proper construction of s 386 of the FW Act in the context of a demotion where the employee remains employed begins with *Brackenridge v Toyota Motor Corporation Australia Limited* (***Brackenridge***).[1] In that case, Ms Brackenridge sought the remedies of compensation and reinstatement in respect of what she alleged to be the unlawful termination of her employment by Toyota. Ms Brackenridge had been employed by Toyota as a chef supervisor, but was demoted to the position of canteen assistant on 3 February 1995 as the result of an investigation by Toyota into an altercation between Ms Brackenridge and Ms Law which led to Ms Law receiving a lacerated and swollen lip and several scratches. This demotion constituted the alleged termination of her employment.

[3] The Full Court of the Industrial Relations Court of Australia (Wilcox CJ, von Doussa & Marshall JJ) held that the decision by Toyota to demote Ms Brackenridge involved a termination of her contract of employment as a chef supervisor, but the question was whether Ms Brackenridge suffered a "termination of employment" within the meaning of s 170EA(1) of the *Industrial Relations Act* 1988 (Cth) (***IR Act***) (omitting references):[2]

> "There is a conceptual difference between the two situations. Ordinarily, the conceptual difference does not matter: dismissal will ordinarily terminate both the

[1] (1996) 142 ALR 99

[2] Ibid at 101

> particular contract of employment and the employment relationship. In this case, however, Ms Brackenridge continued to be employed by Toyota after 3 February 1995. The employment relationship continued albeit under a new contract of employment."

[4] At the time *Brackenridge* was decided, the IR Act did not contain any provisions dealing with a demotion, or provide a definition of termination of employment. However, central to the Full Court's interpretation of s 170EA(1) was one of the objects of Division 3 of Part VIA of the IR Act, which gave effect to the Termination of Employment Convention (***Convention***), and s 170CB within Division 3 of Part VIA of the IR Act, which provided that "an expression has the same meaning in this Division as in the Termination of Employment Convention".[3] The Full Court held that the phrase "termination of… employment" within s 170EA(1) of the IR Act was restricted by the meaning of that phrase as used in the Convention, which it interpreted to mean termination of the employment relationship.[4] Because Ms Brackenridge's demotion did not result in the termination of her employment relationship with Toyota, the Full Court held that there had been no termination of employment within the meaning of s 170EA(1) of the IR Act.

[5] In 1996, the IR Act was extensively amended and renamed the *Workplace Relations Act* 1996 (Cth) (***WR Act***). Unlike the IR Act, the constitutional validity of the WR Act did not rely so much on the external affairs power in s 51(xxix) of the Constitution but relied more on the corporations power in s 51(xx). That change in reliance had an impact on the termination of employment provisions in the WR Act. In particular, s 170CB of the former IR Act was repealed and the objects of Division 3 of Part VIA were amended to give effect to the Convention only by adopting particular procedures and "by orders made in the circumstances set out in Subdivisions D and E".[5] Further, s 170CD(2) of the WR Act only limited expressions "used in Subdivision C, D or E of this Division" to the meaning of expressions used in the Convention. Importantly, the unfair dismissal provisions of the WR Act were in Subdivision B of Division 3 of Part VIA and the WR Act defined "termination" or "termination of employment" to mean termination of employment at the initiative of the employer.[6]

[6] In 1999, a Full Bench of the Australian Industrial Relations Commission in *Bluesuits Pty Ltd v Graham* (***Bluesuits***)[7] held that there was no requirement under the WR Act, as it stood at that time, to interpret the provisions of Subdivision B by reference to the Convention.[8] Shortly after the decision in *Bluesuits*, Senior Deputy President Polites considered a circumstance in which an employee had been demoted but the employment relationship had continued in *Boo Hwa Chan v Christmas Island Administration* (***Boo Hwa Chan***)[9] and observed that the phrase "termination of employment" in the WR Act included the termination of a contract of employment and the termination of employment relationship as a result of the 1996 amendments to the IR Act, and therefore, a demotion which resulted in

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[3] Ibid at 102-3

[4] Ibid at 103-4

[5] Section 170CA(1)(e) of the WR Act

[6] Section 170CD(1) of the WR Act

[7] (1999) 101 IR 28

[8] Ibid at 32

[9] (1999) Print S1443

the termination of a contract of employment was considered to be a "termination of employment" within the meaning of the WR Act.[10]

[7] In 2001, the *Workplace Relations Amendment (Termination of Employment) Act* 2001 (Cth) (***WR Termination Amendment Act***) amended the WR Act,[11] including by inserting, for the first time, a provision (s 170CD(1B)) concerning demotions in employment:

> "(1B)
>
> For the purposes of this Division, *termination* or *termination of employment* does not include demotion in employment if:
>
> (a)
>
> the demotion does not involve a significant reduction in the remuneration or duties of the demoted employee; and
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> (b)
>
> the demoted employee remains employed with the employer who effected the demotion."

[8] The Second Reading Speech made by the Honourable Mr Peter Reith, Minister for Employment, Workplace Relations and Small Business, on 27 June 2000, gives insight into the object of the demotion provisions in the Workplace Relations Amendment (Termination of Employment) Bill 2000:

> "**Establishing certainty in jurisdiction**
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> …
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> Two other amendments in the bill aimed at ensuring certainty in jurisdiction will make it clear, firstly, that independent contractors do not have a remedy for termination of employment, consistent with the original intent of the Workplace Relations Act, and, secondly, that the demotion of an employee does not constitute termination of employment where that demotion does not result in a significant reduction in remuneration and the employee continues to work for that employer."

[9] The Explanatory Memorandum to the Workplace Relations Amendment (Termination of Employment) Bill 2000 includes the following relevant material:

> "**OUTLINE**
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> This Act will amend the Workplace Relations Act 1996 (the WR Act) to:
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> …
>
> - Preclude an employee who has been demoted in his or her employment from seeking relief in respect of termination of employment where the demotion does not result in a significant reduction in remuneration and the employee continues employment with the employer who effected the demotion;
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> …
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> Item 9 - After subsection 170CD(1A)

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[10] Ibid at [13]

[11] *Visscher v Giudice* (2009) 239 CLR 361 (***Visscher***) at [37]

> 13. Item 9 proposes to insert new subsection 170CD(1B), which will provide that, for the purposes of the termination of employment provisions of the Act (Division 3 of Part VIA), the expressions 'termination', or 'termination of employment', do not include a demotion in employment if the demotion does not involve a significant reduction in the remuneration of the demoted employee, and the demoted employee remains employed with the employer who effected the demotion."

[10] It is not clear whether *Boo Hwa Chan* prompted the amendment to s 170CD of the WR Act,[12] however, it is plain from the terms of s 170CD(1B) of the WR Act, together with the Second Reading Speech and the Explanatory Memorandum, that Parliament did not intend to exclude all demoted employees who remained employed after their demotion from accessing the unfair dismissal provisions of the statute. Had that been Parliament's intention, s 170CD(1B) would simply have stated that "*termination* or *termination of employment* does not include demotion in employment if … the demoted employee remains employed with the employer who effected the demotion".

[11] In 2003, section 170CD(2), which was part of Subdivision A of Division 3 of the WR Act, was amended by inserting the words "this Subdivision" as follows:

> "(2) An expression used in <u>this Subdivision</u> or Subdivision C, D or E has the same meaning as in the Termination of Employment Convention."

[12] In *Charlton v Eastern Australia Airlines Pty Ltd* (***Charlton***),[13] a Full Bench of the Australian Industrial Relations Commission considered the impact of the 2003 amendment to s 170CD(2) of the WR Act to cases involving a demotion. After considering part of the legislative history, the Full Bench in *Charlton* summarised (at [12]) the position as follows:

> "…If the expressions 'termination' and 'termination of employment' have the same meaning as in the Termination of Employment Convention then they do not extend to a demotion where the employment relationship continues. If the construction of those expressions is unconstrained by the Convention then they refer to a termination of the contract of employment or a termination of the employment relationship and therefore extend to a demotion that involves a termination of a contract of employment even if the employment relationship continues pursuant to a new contract of employment."

[13] In *Charlton*, the Full Bench agreed with the appellant's submissions that:[14]

- "the form of s.170CD(1B) suggests that, <u>in enacting s.170CD(1B), Parliament proceeded on the premise that a demotion where employment continues can amount to a "termination of employment" and then sought to exclude particular demotions from the scope of that expression;</u>" [emphasis added] and

- "if the respondent's argument is correct then s.170CB(1B) is rendered otiose: it has no work to do because, by virtue of the decision in *Brackenridge*, the expressions "termination" and "termination of employment" will never include

[12] *Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162 (***Navitas***) at [41]

[13] (2006) 154 IR 239

[14] Ibid at [19]

> demotion in employment if those terms have the same meaning as in the Termination of Employment Convention."

[14] The Full Bench in *Charlton* then reached the following conclusions in relation to s 170CD(2) of the WR Act and the meaning of the expression "termination of employment" in the context of a demotion:[15]

> "[31] In this case there are two strongly competing interpretations. On balance we think that the true intention of Parliament in amending s.170CD(2) was not to give expressions used in Subdivision B of Part VIA the same meaning as in the Termination of Employment Convention and that s.170CD(2) should be construed accordingly, that is, as applying to the balance of Subdivision A and not to s.170CD itself. If Parliament had intended terms in the definitions in s.170CD(1) to have the same meaning as in the Termination of Employment Convention then it might be expected to have removed s.170CD(1B) at the same time it amended s.170CD(2), particularly in circumstances where s.170CD(1B) itself contains the expression "termination of employment" and the existing authorities, of which the Parliament is presumed to be aware, place demotion entirely outside the meaning of the expression "termination of employment" as used in the Convention. The fact that s.170CD(1B) remains and the fact that it deals expressly with the issue of when a demotion is not to be taken as involving a termination of employment (and does this in terms that appear to assume that, but for the provision, a demotion may involve a termination of employment) cause us to favour the construction advanced by the appellant: it produces a fairer and more convenient operation that conforms to legislative intention and avoids adopting a construction that gives s.170CD(1B) no practical effect. We perceive the operation for which the respondent contends to be unintended by the Parliament.
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> **Application of principle in the present case**
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> [32] Consistent with the decision in *Boo Hwa Chan*, a termination of employment occurs when a contract of employment is terminated. This necessarily occurs when the employment relationship comes to an end. However, it can also occur even though the employment relationship continues. Where a contract of employment has been terminated, but the employment relationship continues, this will be because a new contract of employment has come into existence. Therefore, whether the appellant's demotion involved his employment being "terminated by the employer" within the meaning of s.170CE turns on whether his contract of employment was terminated notwithstanding the continuing employment relationship. This question is answered by reference to general law principles relating to the termination of contracts of employment, unconstrained by the Convention."

[15] After *Charlton*, section 170CD(1B) of the WR Act was considered by the High Court in *Visscher*. The relevant facts of *Visscher* were summarised as follows by the majority of the Full Bench in *Navitas*:[16]

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[15] Ibid at [31]-[32]

[16] *Navitas* at [45]

> "Briefly speaking, *Visscher* concerned a ship's officer who was initially employed as a Third Mate, but in September 2001 was offered by his employer and accepted a permanent promotion to the position of Chief Officer. Shortly afterwards, the employer purported to rescind the promotion. Mr Visscher informed the employer, in writing, that he did not accept the rescission. Until January 2004, Mr Visscher continued to be assigned work, and paid, as a Chief Officer. In January 2004, Mr Visscher was informed that on his next voyage he would be required to work as a Second Mate. In February 2004 Mr Visscher wrote to his employer by email stating that he considered that he had been demoted, that this constituted a constructive termination of the contract of employment, and accordingly that he considered his employment as having been terminated by the employer. The employer's response was that Mr Visscher had not been demoted because he had been employed as a Third Mate and that it would treat his email as a resignation. Mr Visscher then applied to the AIRC for relief in respect of the termination of his employment under s 170CE of the WR Act on the ground that the termination was harsh, unjust and unreasonable. A single member of the AIRC dismissed his application on the basis that his employment had not been terminated at the initiative of the employer, and this was upheld on appeal by a Full Bench of the AIRC."

[16] In *Visscher*, the majority (Heydon, Crennan, Kiefel and Bell JJ) observed that:

> "Mr Visscher regarded Teekay's requirement of him to sail as a Second Mate as a repudiation of his contract of employment. On his case the termination of the employment relationship was "at the initiative of the employer". Alternatively, Teekay's requirement could be viewed as a demotion. Section 170CD(1B), by implication, treated a demotion as a termination of employment where it involved a significant reduction in the remuneration or duties of the employee. On either approach it was necessary for the AIRC to consider whether Mr Visscher was employed as a Chief Officer when the acts which resulted in the cessation of his employment occurred." [emphasis added]

[17] The majority found that Mr Visscher's contract of employment as a Chief Officer remained on foot in February 2004 and concluded (at [81]) that:

> "Teekay's notice of rescission did not automatically bring the contract appointing Mr Visscher a Chief Officer to an end. It was necessary that Mr Visscher accept the repudiation before the contract could be terminated. Nothing said in *Automatic Fire Sprinklers Pty Ltd v Watson* suggests any different contractual principle as applying to a contract of employment. In order to decide whether Teekay had repudiated Mr Visscher's contract of employment in January and February 2004 it was necessary for the AIRC to determine the true contractual position between the parties at that time. It was necessary then to determine whether what was said by Teekay at that time amounted to a repudiation such that the termination of the employment relationship could be said to be at its initiative; **or whether it amounted to a demotion within the meaning of s 170CD(1B)**. The correct legal starting point was not that Teekay had rescinded the agreement. Neither the Commissioner nor the Full Bench of the AIRC asked the correct question, as to the contract under which the parties continued after September 2001. This was an error going to jurisdiction." [emphasis added]

[18] Justice Gummow, who was in the minority and concluded that there was no termination of the employment of Mr Visscher at the initiative of the employer by reason of the terms of an industrial instrument that applied to Mr Visscher, effectively came to the same view as the majority about s 170CD(1B):[17]

> "It may be accepted that 'termination' for the purpose of s 170CE(1) may include a 'demotion in employment' which involves a significant reduction in the remuneration or duties of the demoted employee (s 170CD(1B))."

[19] In 2009, the FW Act came into force. Section 386 of the FW Act governs when a person has been dismissed. It provides that:

> "**386 Meaning of dismissed**
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> **(1) [When a person has been dismissed]**
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> 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) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engage in by his or her employer.
>
> **(2) [When a person has not been dismissed]**
>
> However, a person has not been ***dismissed*** if:
>
> (a) The person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
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> (b) the person was an employee:
>
> (i) to whom a training arrangement applied; and
>
> (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;
>
> and the employment has terminated at the end of the training arrangement; or
>
> (c) the person was demoted in employment but:
>
> (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and

[17] *Visscher* at [30]

(ii) he or she remains employed with the employer that effected the demotion.

(3) [Exception where purpose is to avoid employer's obligations]

Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part."

[20] The principal differences between the demotion provisions in the WR Act compared to those in the FW Act are as follows:

- The WR Act uses the expressions "termination" or "termination of employment", whereas the FW Act uses the expression "dismissed" and s 386 of the FW Act deals with the "meaning of dismissed", including by reference to where "the person's employment with his or her employer has been terminated on the employer's initiative" or "the person resigned from his or her employment" in particular circumstances; and

- Although there is no material difference between the two limbs dealt with in s 170CD(1B)(a) and (b) and s 386(2)(c)(i) and (ii) of the FW Act respectively, the introductory words to those limbs differ as follows:

  - The WR Act provides:

    "For the purposes of this Division, *termination* or *termination of employment* does not include demotion in employment if …" and

  - The FW Act provides:

    "However, a person has not been dismissed if … the person was demoted in employment but …"

[21] There is no suggestion in either the Second Reading Speech or the Explanatory Memoranda to the *Fair Work Bill* that Parliament intended, by enacting the FW Act, to change the categories of demoted employees, if any, who are entitled to bring an unfair dismissal claim.

[22] Following the enactment of the FW Act, s 386(2)(c) was considered by Senior Deputy President O'Callaghan in the context of a demotion of an employee who still remained employed, performing new duties.[18] The Senior Deputy President interpreted s 386(2)(c) as requiring that there be both a significant reduction in the applicant's remuneration or duties and that the applicant no longer be employed by the relevant employer in order for a demotion to constitute a dismissal.[19]

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[18] *Philip Moyle v MSS Security Pty Ltd* [2015] FWC 8330

[19] Ibid at [17]

[23] On appeal, the Full Bench of the Commission in *Phillip Moyle v MSS Security Pty Ltd* (***Moyle***)[20] overturned the decision of the Senior Deputy President and held as follows:

> "[9] Section 386(1) sets out a general definition of what constitutes a dismissal. Section 386(2) then sets out three sets of circumstances which, even if they fall within the general definition, are deemed not to be dismissals. These are, in effect, exceptions to s.386(1). The third of these exceptions, in s.386(2)(c), relates to demotions in employment. In order to fall within this exception - that is, for a demotion that otherwise constitutes a dismissal under s.386(1) to be deemed not to be a dismissal, both limbs of the exception must be satisfied, as Mr Moyle submitted. The construction adopted by the Senior Deputy President was, with respect, in error because it inverted the exception by making it necessary for an applicant to negative both limbs of the exception in order for the demotion to be a dismissal. This would have the perverse result that a demotion in employment could never constitute a dismissal, even where it is plain that the existing contract of employment has been terminated and replaced by a new and inferior contract, because the employee will necessarily have remained in employment with the employer and thus could not negative s.386(2)(c)(ii).
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> ...
>
> [12]...Whether or not the exception in s. 386(2)(c), properly construed, was applicable, it remains necessary for Mr Moyle to demonstrate at the outset that he had been "dismissed" within the meaning of s. 386(1).
>
> [13] An action taken by an employer to change the remuneration and duties of an employee could not constitute a dismissal under s. 386 (1) where the change was one authorised by the contract of employment.
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> …
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> [23] We do not consider that there was any repudiation of Mr Moyle's contract of employment by MSS, and that it continued to operate in accordance with its terms after Mr Moyle's transfer took effect. Therefore, there was no termination at the initiative of the employer under s.386(1)(a) and no dismissal."

[24] The Full Bench in *Moyle* did not consider in any detail the distinction between the termination of a contract of employment and the termination of an employment relationship, nor did it consider the correctness of the decision in *Charlton*. After the Full Bench handed down its decision in *Moyle*, another Full Bench in *Navitas* decided that the question of whether there has been a termination at the initiative of the employer for the purpose of s 386(1)(a) of the FW Act is to be conducted by reference to termination of the employment *relationship*, not by reference to the termination of the contract of employment operative immediately before the cessation of the employment.[21] In this regard, the majority in *Navitas* relied on the High Court's judgment in *Visscher* in reaching a different conclusion to the earlier Full Bench in *Charlton* in relation to whether the termination of a contract of

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[20] [2016] FWCFB 372.

[21] *Navitas* per the majority at [66]-[75] and the minority at [108]-[114] & [123]-[128]

employment could constitute a "termination of employment". The majority in *Navitas* concluded as follows in relation to this issue:

> "[50] Thus it is clear, contrary to the first proposition stated in *Lunn* to which we have earlier referred, that a termination of the employment relationship might constitute a termination at the initiative of the employer under the WR Act notwithstanding that the contract of employment remains on foot. That is, under the WR Act, termination at the initiative of the employer did not, on its ordinary meaning, refer to termination of the contract of employment. The first proposition in *Lunn* to which we have earlier referred was therefore not a correct statement of the law under the WR Act, and as a result the Full Bench's analysis in *Lunn* proceeded on the wrong premise that it was necessary to analyse whether the final employment contract was terminated at the initiative of the employer, not whether the employment relationship was terminated at the initiative of the employer. The correct position remained as stated in *Mohazab*, namely that a termination of employment at the initiative of the employer occurs where the action of the employer is the principal contributing factor which leads to the termination of the employment relationship."

[25] Having regard to the decision of the Full Bench in *Navitas*, there are two possible ways in which the words of s 386 of the FW Act may be construed according to their ordinary meaning in relation to a demotion. On one view of s 386 of the FW Act, an employee who is demoted and elects to remain employed by their employer in the demoted role is not dismissed within the meaning of s 386. The relatively simple argument supporting this construction can be summarised as follows:

- a dismissal within the meaning of s 386(1)(a) of the FW Act concerns the termination of the employment relationship, as distinct from the termination of a contract of employment;[22]

- an employee who has been demoted and who remains in employment has an ongoing employment relationship with their employer, notwithstanding the fact that one contract of employment may have been terminated and a new contract entered into;

- section 386(2) of the FW Act deals with circumstances in which an employee "has not been dismissed". It therefore narrows the meaning of "dismissed" in section 386(1).[23] Consequently, section 386(2)(c) of the FW Act cannot convert what would otherwise not be a dismissal under s 386(1) to a dismissal; and

- because a dismissal under s 386(1)(a) of the FW Act concerns the termination of the employment relationship and an employee who elects to remain employed by their employer after a demotion has an ongoing employment relationship with their employer, section 386(2)(c) cannot convert such a demotion into a dismissal within the meaning of s 386(1)(a).

[26] On another view, an employee who is demoted and elects to remain employed by their employer is "dismissed" within the meaning of s 386 in circumstances where the demotion involves a significant reduction in their remuneration or duties. For the reasons set out below,

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[22] *Navitas* per the majority at [66]-[75] and the minority at [108]-[114] & [123]-[128]

[23] Ibid at [67]

this construction is supported by the legislative purpose of s 386, as well as the context of the words within the FW Act as a whole. Context also includes the existing state of the law and the mischief the legislative provision was intended to remedy.[24]

[27] First, s 386(1) of the FW Act does not purport to define the term "dismissal" exhaustively. It identifies that a person has been dismissed if s 386(1)(a) or (b) is satisfied, but does not, in terms, limit the circumstances which may constitute a "dismissal" to only those identified in s 386(1)(a) or (b). Section 386 of the FW Act must be construed as a whole, not just by reference to subsection 386(1).

[28] Secondly, the purpose of s 386(2)(c) of the FW Act is to define the circumstances in which the demotion of an employee who remains employed by their employer will not constitute a "dismissal" within the meaning of s 386 of the FW Act.[25] Such a purpose, by implication, suggests that there will be circumstances in which the demotion of an employee who remains employed by their employer may constitute a "dismissal" within the meaning of s 386 of the FW Act.

[29] Thirdly, if a "dismissal" within the meaning of s 386 of the Act were limited to a circumstance in which the employment relationship had been terminated, then s 386(2)(c)(i) would have no work to do. That is, if the existence of an ongoing employment relationship could, in and of itself, defeat an argument that a demoted employee had been dismissed, it would never be relevant to inquire whether the person who remained in employment had suffered a significant reduction in their remuneration or duties.

[30] Fourthly, the fact that paragraphs 386(2)(c)(i) and (ii) are phrased in present tense (i.e. "the demotion *does not* involve a significant reduction…" as opposed to "the demotion *did not* involve a significant reduction…" and "he or she *remains* employed.." as opposed to "he or she *remained* employed") suggests that employees who have been demoted and (1) suffer a significant reduction in their remuneration or duties and (2) remain in employment with their employer, have access to unfair dismissal protection.

[31] Fifthly, s 386(2)(c) of the FW Act can be contrasted with ss 386(1)(a), (1)(b), (2)(a) and (2)(b), all of which are directed to circumstances in which the employment relationship has come to an end. The requirement in s 386(2)(c) that an employee "remains employed" suggests that it is addressing a quite different circumstance to the other parts of s 386 of the FW Act.

[32] Sixthly, s 386(2)(c) does not stipulate any period for which an employee must "remain employed". A demotion by its very nature does not, of itself, terminate an employment relationship. The purpose of a demotion is usually to maintain the employment relationship, rather than to terminate it. When an employee is demoted, they remain employed for at least some period of time. It may be a very short period. For example, an employee who is told they have been demoted may respond seconds later by informing their employer that they resign immediately, thereby terminating the employment relationship. Another employee who has been demoted may remain employed for a number of days, weeks or months before

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[24] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [4]; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at p. 408; *Project Blue Sky* (1998) 194 CLR 355 at [78] per McHugh, Gummow, Kirby and Hayne JJ

[25] See paragraph [10] above

deciding they are not willing to work in the demoted position and resigning from their employment. Given the absence of any period for which an employee must "remain employed" in s 386(2)(c) and the fact that every demotion results in an employee remaining employed for at least some period of time, the only sensible way to construe the expression "remain employed" in s 386(2)(c) is by interpreting it to mean that the employee "remains employed with the employer that effected the demotion" at the time they lodge an unfair dismissal application in the Commission. That is, s 386(2)(c) deals with a particular circumstance in which the employment relationship is ongoing and has not been terminated. In circumstances where an employee is demoted and the employment relationship is subsequently terminated, such an employee may contend they were dismissed, in that they were forced to resign by their employer's conduct in demoting them (s 386(1)(b)).[26]

[33] Notwithstanding the logic and initial attraction of the first construction (set out in paragraph [26] above), I am of the view that the second construction (set out in paragraph [27] above) is the correct one. That is, an employee will be "dismissed" within the meaning of s 386 of the FW Act if they are demoted in employment in circumstances where the demotion involves a significant reduction in their remuneration or duties and they remain employed by the employer that effected the demotion. Such an interpretation arises, by implication, from the terms of s 386(2)(c) considered in the context of s 386 as a whole and is supported by the textual indicators and legislative purpose set out in paragraphs [28] to [33] above.[27]

[34] In my view, this construction is also consistent with the decision of the majority of the Full Bench in *Navitas*, which, in summarising the judgment of the majority in *Visscher*, stated (emphasis added):[28]

> "In summary the majority, having carefully drawn the distinction between termination of the employment relationship and termination of the contract of employment, identified the issue arising under the WR Act as whether there was a termination of the employment relationship at the initiative of the employer (or a demotion as defined in s 170CD(1B))."

[35] Clearly, in coming to their decision, the majority of the Full Bench in *Navitas* saw the distinction between a dismissal involving a termination of the employment relationship at the initiative of the employer under s 386(1)(a) of the FW Act and a dismissal involving a demotion of the type defined in s 386(2)(c) of the FW Act (the equivalent of s 170CD(1B) of the WR Act).

[36] What, then, is the relevance, if any, of whether the demotion was or was not authorised by the employee's contract of employment? In previous cases, the terms of a demoted employee's contract of employment were considered relevant because it was believed that a termination of employment occurred when a contract of employment was terminated, regardless of whether the employment relationship continued,[29] and if the employment contract contained a term which authorised the demotion, then the contract remained on foot after the demotion and there was no termination at the initiative of the

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[26] *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli* [2017] FWCFB 3941 at [47]

[27] *Visscher* at [37]

[28] *Navitas* at [49]

[29] *Charlton* at [31]-[32]

employer.[30] In light of the decision of the Full Bench in *Navitas*, the termination of a contract of employment at the initiative of the employer does not, of itself, constitute a dismissal; s 386(1)(a) requires a termination of the employment relationship. Insofar as the previous authorities have considered whether the demotion was at the employer's initiative, the focus has been on the expression "terminated on the employer's initiative" in s 386(1)(a). However, there is no indication in the text of s 386(2)(c) that a demotion must be at the initiative of the employer in order to constitute a dismissal. It might be argued that reading s 386 as a whole, and in particular in light of when "a person has been dismissed" in s 386(1)(a), requires the demotion to be at the initiative of the employer. But it would be odd to construe s 386(2)(c) by picking up part of s 386(1)(a) (namely, the requirement of termination at the initiative of the employer) and then to ignore another central element of s 386(1)(a) (namely, the fact that it addresses termination of the employment relationship, which does not take place in the case of a demotion of an ongoing employee). The better construction, in my view, is to treat s 386 as dealing with two types of dismissals: first, a dismissal in which the employment relationship is terminated; and secondly, a demotion as defined in s 386(2)(c). As the majority of the High Court held in *Visscher*, s 170CD(1B) of the WR Act (now 386(2)(c) of the FW Act), by implication, treats a demotion of an ongoing employee as a dismissal where it involves a significant reduction in the remuneration or duties of the employee.

[37] It follows from the conclusions I have reached that it is not necessary to demonstrate at the outset that an employee has been "dismissed" within the meaning of s 386(1) before determining whether or not s 386(2)(c) is applicable, as was the approach taken in cases such as *Moyle*.[31] Nor is it necessary to find whether changes to remuneration or duties imposed by an employer on a demoted employee are authorised by a contract of employment, or alternatively, result in the existing contract being terminated and replaced by a new contract.

[38] In order for a person who has been demoted to have been dismissed within the meaning of s 386 of the FW Act, the test is whether the demotion involved a significant reduction in the employee's remuneration or duties (whether or not the reduction was authorised by the contract) and they remain employed by the employer that effected the demotion. If so, the person is taken to have been dismissed.

[39] This type of distinction between contractual rights and obligations, on the one hand, and rights and obligations imposed or governed by statute, on the other hand, is not unusual in the field of employment law. For example, a contract of employment may authorise an employer to terminate an employee's employment, at any time, on four weeks' notice for any or no reason. The exercise of such a right by an employer will be sufficient to bring the contract of employment to an end, but it will not have any bearing on whether the dismissal was harsh, unjust or unreasonable. That is a different question.

[40] If a demotion involving a significant reduction in remuneration or duties was authorised by a contract of employment, submissions could be made as to the fairness of the dismissal. However, the existence of such a contractual right is irrelevant to the question of whether an employee who has been demoted and remains employed has been "dismissed" within the meaning of the FW Act.

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[30] *Moyle* at [23]

[31] See also *Singh v MSS Security Pty Ltd* [2016] FWCFB 3546

Consideration

[41] In light of the above analysis and the undisputed fact that Mr Harrison remains employed by FLS, it is only necessary for me consider whether the demotion involved a significant reduction in Mr Harrison's remuneration or duties in determining the question of whether Mr Harrison's demotion constitutes a dismissal within the meaning of s 386 of the FW Act. However, in any event, I will address all of FLS's submissions below.

Did the demotion involve a significant reduction in Mr Harrison's remuneration or duties?

[42] Mr Harrison was employed in the role of Service Supervisor for about three and a half years prior to his demotion. Mr Harrison's demotion resulted in a reduction of $4.05 per hour to his base hourly rate of pay; it was reduced from $43.50 to $39.45, a reduction of 9.3%. In addition, the reduction in Mr Harrison's base hourly rate of pay reduced his hourly overtime rate of pay from $53.50 to $49.45 per hour, which is material in circumstances where Mr Harrison performs about six hours of overtime a week. The reduction in Mr Harrison's rate of pay has also reduced the superannuation contributions FLS is required to make on Mr Harrison's behalf. In the circumstances of this case, I am satisfied that Mr Harrison's demotion, which resulted in a 9.3% reduction in his base hourly rate of pay and other consequential reductions in his entitlements, has involved a significant reduction in Mr Harrison's remuneration.

[43] In his role of Service Supervisor, Mr Harrison's duties were of a supervisory and organisational nature. He spent most of his time in the office or on site. His time in the office consisted of telephone calls and emails with clients and other management staff as well as meetings with other FLS management or supervisors. Mr Harrison's time on site primarily consisted of supervising the FLS technician team and meetings with the client. Mr Harrison was responsible for the supervision of about eight technicians. I accept Mr Harrison's evidence that, as a result of his demotion, he is no longer responsible for the supervision of other FLS employees, he has no direct contact with clients and he does not have an office but is instead based in the FLS workshop working "on the tools". I am therefore satisfied that Mr Harrison's demotion has involved a significant reduction in his duties.

Contract of employment

[44] FLS contends that the changes to Mr Harrison's remuneration and duties are authorised by his employment contract with FLS (***Contract***), so the changes cannot, and do not, constitute a dismissal under s 386(1) of the FW Act.

[45] I have already found that whether changes imposed by an employer on an employee are authorised by a contract of employment is not relevant to the question of whether an employee was "dismissed" for the purposes of s 386(2)(c). In any event, I find, for the reasons set out below, that the Contract does not authorise the changes made to Mr Harrison's remuneration and duties. The relevant express terms of the Contract provide:

"**Employment Terms and Conditions**

Clause Title	**Description**
Position	Service Supervisor
Reports to	You will report to Mark Flanagan, Regional Coordinator

Classification	PERMANENT FULL TIME
Commencement Date	Your new terms and conditions of employment will be effective from 17th November 2014. For the purposes of all leave entitlements, including Long Service Leave, your commencement date is 21 September 1989.
Remuneration	Your remuneration as set out in Appendix A will be comprised of: • Hourly rate • Additional hours rate • Site allowance • Night shift allowance • Travel time • Superannuation Any other remuneration other than those specified above will be at the sole discretion FLSmidth Pty Limited.
Location	Your position is based at our premises in Warners Bay – NSW. However, to meet the Company's business opportunities from time to time, during the course of your employment with the Company, you may be required to: (a) work in other operating locations, interstate or overseas; (b) be assigned to work for other business units/divisions of the Company; and/or (c) be required to perform other duties and assume other responsibilities, and/or (d) perform a different role. Any change, [sic] be it on a long or short term basis or on an assignment based arrangement. While any requirement for work related visas is the Company's responsibility, employees are responsible for ensuring that if required for work purposes, their passport is current. Passport costs incurred by the employee are not reimbursable by the Company.

[46] FLS contends that it was authorised to demote Mr Harrison from the position of Service Supervisor to Service Technician by the "Location" clause in the Contract. In particular, FLS relies on the following parts of that clause [emphasis added by FLS]:

> "Your position is based at our premises in Warners Bay – NSW. However, to meet the Company's business opportunities from time to time, during the course of your employment with the Company, you may be required to:
> …
> (c) … perform other duties and assume other responsibilities; and/or
> (d) perform a different role."

[47] The proper approach in construing commercial contracts was set out by the High Court (French CJ, Nettle and Gordon JJ) in *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited*:[32]

> "[46] The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.
>
> [47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
>
> [48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.
>
> [49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
>
> [50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.
>
> [51] Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties ... intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".
>
> [52] These observations are not intended to state any departure from the law as set out in Codelfa Construction Pty Ltd v State Rail Authority of New South Wales and Electricity Generation Corporation v Woodside Energy Ltd. We agree with the

[32] (2015) 256 CLR 104

observations of Kiefel and Keane JJ with respect to Western Export Services Inc v Jireh International Pty Ltd." (citations omitted)

[48] The provision relied on by FLS to unilaterally demote Mr Harrison forms part of the "Location" clause in the Contract. This is a relevant contextual matter. There is no suggestion in this case that the demotion imposed on Mr Harrison by FLS involved any change to his location of work.

[49] Importantly, the right conferred by the "Location" clause on FLS to "require" Mr Harrison to do various things such as "perform a different role" is not unqualified. The right can only be exercised "to meet the Company's business opportunities from time to time". That is, the basis for the change must be a business opportunity which FLS has taken up or is seeking to pursue. Demoting an employee to "perform a different role" as a means of taking disciplinary action against the employee for misconduct is quite different to making a change to meet a business opportunity.

[50] There is no doubt in the present case that FLS demoted Mr Harrison to the role of Service Technician as a means of disciplining him, not to meet a business opportunity. So much is clear from the letter from FLS to Mr Harrison dated 6 June 2018. It provides (in part):

"**First and Final Warning**

Dear Scott

Thank you for your response to our show cause request which we received on 5 June, sent to us on your behalf from Leah Johnson, of the Rethink Group. We have taken this into consideration during a deliberation of any actions that will be taken to the serious allegations and evidence that was presented to you.

…Incident 22 February 2017

I provided verbal guidance to you at the time regarding the impact of this incident on our reputation with this client. I also provided email guidance (13 March 2017 and 16 May 2017) to the East Coast Site Service leadership team including yourself which clearly outlined the risks of reputational damage should any of our personnel register above the 0.00 BAC threshold at client sites. As a direct response to this incident further Drug and Alcohol training was developed by WHS Manager Ron Groenland and provided to all East Coast Site Service personnel who regularly attend site, to eliminate the risk of employees entering a site with a BAC reading exceeding the clients limit…

We acknowledge that the … matter was dealt with at the time however the intent of the training afterward was to ensure that all employees and Supervisors were fully aware of the importance of monitoring their alcohol consumption and to not put their safety (or others) at risk nor put the reputation of FLSmidth at risk. Supervisors were expected to test the BAC levels of all team members before commencing travel to site to remove any doubt of a breach to health and safety regulations.

… 2018

> More detailed information was provided by Camden Valley Inn yesterday … which clearly identifies that 29 drinks were ordered and consumed by yourself and two others in your team during the course of the evening between the hours of 6:30pm and 10:00pm. According to the training you had undertaken this should have been identified by you as a significant risk level of consumption.
> The failure by you in your position as Supervisor to carry out BAC testing prior to commencing the journey to site, especially given the amount of alcohol that was consumed is unacceptable and does not meet our expectation of the level of responsibility that a Supervisor is accountable for in relation to health and safety of employees and the reputation of FLSmidth.
>
> Based on the above please note the following;
>
> 1. This letter is a first and final warning for you to adhere to FLSmidth health and safety policies and procedures.
>
> 2. Based on the level of responsibilities of your current position as Service Supervisor and the circumstances surrounding the investigation we would look to demoting you to a Mechanical Service Technician – Experienced position effective immediately.
>
> 3. Based on the level of alcohol consumed by the team over the three day period and the lack of monitoring of their fitness for work using the BAC test kit provided there will be restriction imposed on all East Coast Site Service employees travelling to perform work on sites to no more than 2 alcoholic beverages to be consumed per evening with the evening meal.
>
> 4. I remind you of your obligation to follow all FLSmidth policies and procedures diligently and to act with honesty and a high level of professionalism at all times.
>
> 5. My expectation is for you to actively support any new Supervisor appointed to the NSW Site Service team and to work in a positive and supportive way with all other members of the NSW Site Service team at all times.
>
> Failure to improve your current unsatisfactory performance may lead to **further disciplinary action**, up to and including termination of your employment." [emphasis added]

[51] Even though the 6 June 2018 letter says that FLS "would look to demoting you to a Mechanical Service Technician – Experienced position effective immediately", there is no dispute that the demotion took place on or about 6 June 2018.

[52] Further, the Contract deals expressly with the subject of "Remuneration" and sets out in Appendix A the remuneration to which Mr Harrison was entitled. The Contract was made in November 2014. At that time, Mr Harrison's hourly rate of pay was $40 per hour.[33] There

[33] Appendix A to the Contract

is no dispute that on 1 July of each year since the Contract was made, Mr Harrison received a pay rise, which resulted in the rates of remuneration in Appendix A to the Contract being varied. By the time of the demotion in June 2018, Mr Harrison's base hourly rate of pay was $43.50 per hour.

[53] The Contract does not confer on FLS any express right to unilaterally reduce Mr Harrison's remuneration. Yet that is what FLS did when it demoted Mr Harrison from the role of Service Supervisor to Service Technician; it reduced his base hourly rate of pay from $43.50 to $39.45, a reduction of $4.05 per hour. If the parties had objectively intended for the "Location" term to be able to be used by FLS to impose a unilateral demotion (involving a reduction in pay) on Mr Harrison, it could reasonably be expected that the "Location" term, or some other clause in the Contract, would have conferred on FLS an express right to reduce Mr Harrison's remuneration to a level commensurate with the role into which he had been demoted.

[54] Having regard to the matters set out above, I am satisfied that a reasonable person would not have understood the "Location" term in the Contract to mean that FLS could unilaterally demote Mr Harrison to a position with a lower remuneration as a means of disciplining him for misconduct. In my view, the "Location" term, on its proper construction, permits FLS to make changes such as "requiring" Mr Harrison to "perform a different role" at the same level of remuneration, in order to "meet the Company's business opportunities from time to time". That is not what happened in this case.

FLS's alternative arguments re terms of the Contract

[55] In its reply submissions, FLS contends that:

- it was an unwritten, express term of employment, as an FLS Service Supervisor, that the incumbent may be demoted, by unilateral decision of FLS, without a termination at the instigation of FLS; and

- by implication, it was a term of Mr Harrison's contract of employment as an FLS Service Supervisor, that FLS could demote Mr Harrison, by unilateral decision of FLS, without a termination of his employment at the instigation of FLS.

[56] In the alternative to its reliance on the "Location" clause of the Contract, FLS submits that the term of Mr Harrison's Contract that allowed demotion, by unilateral decision by FLS, without a termination at the instigation of FLS, was:

(a) partly written, in the form of the "Location" clause of the Contract, and partly unwritten, in the form of an express unwritten term, established by custom and practice, which qualified or explained the practical operation of the "Location" clause, which allowed FLS to demote a Service Supervisor, and in this case, Mr Harrison, by unilateral decision of FLS, without a termination at the instigation of FLS, in response to conduct or behaviour concerns; or

(b) an entirely unwritten, express term of the Contract, established by custom and practice, which:

(i) arises because:

(A) the "Location" clause of the Contract does not expressly authorise demotion (noting that it is FLS's primary position that this clause does authorise demotion); and

(B) Mr Harrison was aware of, and accepted by his course of conduct, FLS's contractual right to demote a Service Supervisor, by unilateral decision of FLS, without a termination at the instigation of FLS, in response to conduct or behaviour concerns; and

(ii) allowed FLS to demote a Service Supervisor, and in this case, Mr Harrison, by unilateral decision of FLS, without a termination at instigation of FLS, as it did in response to Mr Harrison's suggestion to utilise that express term of his employment contract and demote him, by unilateral decision of FLS.

[57] FLS submits that custom and practice may result in the incorporation of an express term into a contract by a course of dealing, or result in a term being implied into a contract, for example, by reason of a custom or usage in the market, trade or industry. The term relied on by FLS is, so FLS submits, the result of incorporation of an express, notorious and unwritten term into a contract by course of dealing between FLS and Supervisors and Team Leaders including Mr Harrison. FLS says Mr Harrison was aware of, and accepted, FLS's custom and practice.

[58] In support of its course of dealing argument,[34] FLS says that "demotion is available at FLSmidth on a case by case basis, considering the merits of the case in all the circumstances".[35] Two specific examples were given by FLS of demotions in its workforce: first, a Service Supervisor in June 2016; and secondly, another Supervisor in the "last twelve months".[36] The contracts of employment for those demoted employees included a term similar to the "Location" term in Mr Harrison's Contract and, as is the case with Mr Harrison's Contract, did not contain an express term permitting FLS to unilaterally reduce the remuneration paid to those employees. FLS reduced the remuneration of one of those demoted employees at the time of their demotion, but exercised its discretion to maintain the other employee's rate of pay "until the other technician's rate caught up to it".[37] FLS also relies on Mr Harrison's evidence that he is aware that one of the two demoted employees, Mr Andrew Bennett, was demoted from the role of Service Supervisor to a technician role.[38] Mr Harrison is, and was at the time of his demotion, aware that Mr Bennett did not have his remuneration decreased at the time of his demotion.[39]

[34] FLS's reply submissions dated 22 August 2018 at [19], footnote 14.

[35] Exhibit R4 at [3]

[36] Exhibit R4 at [3]-[13]

[37] Exhibit R4 at [11]

[38] FLS's reply submissions dated 22 August 2018 at [19], footnote 14; exhibit A1 at [27]

[39] Exhibit A1 at [27]

[59] In *James v Royal Bank of Scotland; McKeith v Royal Bank of Scotland*,[40] Justice McDougall summarised (at [83] to [97]) a number of relevant principles in relation to incorporation of terms by a course of dealings:

> "The classic case of incorporation by a course of dealings occurs where parties have had numerous contractual dealings over a period of time, with each dealing effected by a separate contract. The circumstances may give rise to an inference that the parties intended or accepted that documents given by one to the other, at or shortly after the time each contract was made, were to have contractual effect. In those circumstances, it may be concluded that the terms stated in those documents should be incorporated into the parties' contracts. That is clear from the leading English case, *Henry Kendall and Sons v William Lillico and Sons Ltd* [1968] UKHL 3; [1969] 2 AC 31.
>
> In that case, the parties had had a long history of contractual dealings. The contracts were made orally in each case. After each oral contract was concluded, one party sent to the other a document containing what it said were the terms governing the contract that had just been made. The failure of the recipient to object to those terms, as terms of the contract, justified the inference that they were incorporated into the individual oral contracts.
>
> Lord Morris of Borth-y-Gest (at 90) stated the consequences with his customary clarity:
>
> > Over the course of a long period prior to the three oral contracts which are now in question [the purchaser] knew that when [the vendor] sold they did so on the terms that they had continuously made known to [the purchaser]. In those circumstances it is reasonable to hold that when [the purchaser] placed an order to buy they did so on the basis and with the knowledge that an acceptance of the order by [the vendor] and their agreement to sell would be on the terms and conditions set out on their contract notes to the extent to which they were applicable.
>
> Lord Guest spoke to similar effect at 104.
>
> Thus, in Carter, Peden and Tolhurst, *Contract Law in Australia* (LexisNexis, Fifth Edition, 2007), the authors say at [10-18] that:
>
> > A course of dealing occurs when the contract at issue between the parties is preceded by a series of transactions over time. Such a course of dealing may have the effect of incorporating terms into a contract.
>
> A similar approach was taken in *Hays Personnel Services (Australia) Pty Ltd v Motorline Pty Ltd* [2008] QCA 375. Holmes JA, with whom Keane JA and McMeekin J agreed, said at [18] that time sheets provided by one party to the other, as part of their course of dealing prior to making the contract on which the plaintiff sued, could be regarded as

[40] [2015] NSWSC 243; there was no criticism of these principles by the New South Wales Court of Appeal in the appeal from Justice McDougall's judgment (*McKeith v Royal Bank of Scotland Group PLC; Royal Bank of Scotland Group PLC v James* [2016] NSWCA 36)

> incorporated into that contract. See also, to similar effect, McLure P in *La Rosa v Nudrill Pty Ltd* [2013] WASCA 18 at [35], [43], and Buss JA in the same case at [68].
>
> ...
>
> In *La Rosa*, McLure P said at [43] that incorporation based on prior dealings is not the same as implication in fact or implication based on trade custom or usage. What is involved is, rather, inference based on prior conduct."

[60] I reject FLS's contention that a term was incorporated, by a course of dealing, into the Contract which permitted FLS to unilaterally demote him from the position of Service Supervisor. First, there is no suggestion that such a term was included in any of the "several [prior] contracts of employment" made by FLS and Mr Harrison,[41] nor is there evidence of any such representation being made to Mr Harrison. Secondly, although Mr Harrison was aware of the demotion of Mr Bennett without any consequent reduction in remuneration, there is no evidence that he was aware of the terms of any contract of employment made between FLS and any other employee it has demoted. Thirdly, the terms of the contracts made between FLS and the two particular employees it gave evidence of having demoted did not give FLS the unilateral right to demote the employee to a position with a reduced remuneration. Fourthly, FLS has not proved any relevant course of conduct from which it can be inferred that the term for which it contends was incorporated into Mr Harrison's Contract.

[61] Although FLS's primary argument concerning custom and practice was focused on an alleged course of dealing, some submissions were made in relation to the implication of a term by custom or usage. I will therefore address that issue.

[62] Terms implied by custom or usage constitute a special class of terms implied in fact. The existence of a custom is a question of fact.[42] Actual knowledge of the custom is not required.[43] The custom need not be universally accepted, but there must be evidence that it is so well known and acquiesced in that everyone making a contract in that situation can be reasonably presumed to have imported that term into the contract.[44] The custom itself must be "uniform, notorious, reasonable and certain".[45] The question is always whether the general notoriety of the custom makes it reasonable to assume that the parties contracted with reference to the custom.[46] Put at its highest, the evidence shows that Mr Bennett's demotion is and was well-known throughout the East Coast Site Services part of FLS's business.[47] This is clearly an insufficient basis on which to find the existence of custom and usage, and from which it may be concluded that a term of unilateral demotion should be implied into the Contract. Mr Bennett's demotion occurred in June 2016. The Contract was made in November 2014. Accordingly, Mr Bennett's demotion does not provide a basis to assume that the FLS and Mr Harrison contracted with reference to the alleged custom.

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[41] Exhibit A1 at [8]

[42] *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 236

[43] Ibid

[44] Ibid

[45] *AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd (In liq)* (2006) 225 CLR 331 at [60]

[46] *Byrne v Australian Airlines Ltd* (1995) 131 ALR 422 at 442

[47] Ex R4 at [10]

[63] In short, the evidence does not establish the existence of a custom of the type contended for by FLS, nor does it establish that the alleged custom is so well known and acquiesced in that everyone making a contract in that situation can be reasonably presumed to have imported that term into the contract. I reject the claim that a term was implied by custom or usage into the Contract.

Termination at the initiative of FLS

[64] FLS contends that it made the change to Mr Harrison's remuneration and duties at Mr Harrison's suggestion or request, as an alternative to terminate his employment and to avoid terminating employment, and so the change was not at FLS's initiative and does not constitute a dismissal under s 386(1) of the Act.

[65] I have already found that whether the demotion was at the initiative of FLS is not relevant in relation to s 386(2)(c) and is only relevant in relation to whether there has been a termination of the employment relationship at initiative of employer under s386(1). In any event, I do not accept that Mr Harrison's demotion was at his initiative. For the reasons set out below, action on the part of the FLS was the principal contributing factor which resulted in the demotion.[48]

[66] I accept Mr Harrison's evidence that in the course of his meeting with Mr Riordan on 4 June 2018, after Mr Riordan had provided Mr Harrison with a letter inviting him to show cause as to why his employment should not be terminated, Mr Harrison made a number of suggestions, including asking whether there was any chance he could "step down into a technician role", offering to undertake further training, and offering to "do anything to convince you that I can continue". There was no discussion about what, if any, reduction would be made to Mr Harrison's remuneration if he did "step down into a technician role".

[67] Following the meeting on 4 June 2018, Mr Harrison provided a written response dated 5 June 2018 (from his lawyers) to the show cause letter in which he expressed a hope that the matter could be "resolved on an amicable basis" and informed FLS that he was "open to engaging in further training and development courses".

[68] Mr Harrison then attended a meeting with FLS on 6 June 2018, which time he was handed the 6 June 2018 letter (see paragraph [48] above).

[69] Although it is true that Mr Harrison floated a number of ideas at the 4 June 2018 meeting, one of which was demotion, there was no discussion of any reduced pay that might be associated with any such demotion. Mr Harrison did not make any offer of demotion capable of acceptance, because there was no certainty of the terms on which the demotion would occur. It follows that it was not open to FLS to simply accept Mr Harrison's offer of demotion.

[70] The proper characterisation of events is one in which FLS made a number of allegations against Mr Harrison and asked him to show cause as to why his employment should not be terminated, Mr Harrison responded by floating a number of ideas (including demotion) in an effort to remain in employment with FLS, and FLS then decided to demote

[48] *Navitas* at [50] and [75(2)]

Mr Harrison and issue him with a written warning. It is therefore apparent that the action of FLS was the principal contributing factor which led to Mr Harrison's demotion. The demotion was at FLS's initiative, not Mr Harrison's.

Conclusion

[71] Mr Harrison remains employed by FLS following his demotion. There is no doubt that the demotion involved a significant reduction in Mr Harrison's remuneration and duties. Accordingly, Mr Harrison's demotion in his employment with FLS constitutes a dismissal within the meaning of s 386 of the FW Act. I therefore reject FLS's jurisdictional objection. The matter will be listed shortly for directions to deal with the merits of the dismissal.

COMMISSIONER

Appearances:

Ms B Herring, solicitor, on behalf Mr Harrison

Mr A Cardell-Ree, solicitor, on behalf of FLS

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Newcastle:

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