

[2020] FWC 4149 [Note: Appeals pursuant to s.604 (C2020/6551 & C2020/6556) were lodged against this decision - refer to Full Bench decision dated 8 October 2020 [\[\[2020\] FWCFB 5370\]](#) for result of appeal in matter (C2020/6556).]



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Sunanda Soni

v

Berwick Waters Early Learning Centre Pty Ltd
(U2020/2174)

DEPUTY PRESIDENT HAMILTON

MELBOURNE, 7 AUGUST 2020

Application for relief from unfair dismissal - jurisdiction – no dismissal, resignation - constructive dismissal alleged – application dismissed.

[1] On 26 February 2020, Ms Sunanda Soni (the applicant) lodged an application under section 394 of the *Fair Work Act 2009* (Cth) (the Act) for an unfair dismissal remedy. The respondent, Berwick Waters Early Learning Centre Pty Ltd objected to the application on the basis that there was no dismissal, rather the applicant resigned from her employment.

[2] In this matter the applicant alleged various forms of coercion. It would with respect be disappointing if a custom and practice arose of applicants making unsubstantiated allegations of bullying or general protections breaches in response to ordinary employer performance improvement, disciplinary or other action. This would be an abuse of process.

[3] I convened a conference on 13 July 2020 with the following witnesses giving sworn evidence:

- Ms Soni Sunanda;
- Mr Raman Sachdeva;
- Mr Eanna O’Duill;
- Ms Lily James; and
- Ms Kristy Clark.

[4] At the conclusion of the conference, I proposed to decide the matter on the material before me and the matters raised orally during the conference. This was agreed. It was agreed that the matter be conducted by way of determinative conference.

[5] I have had regard to all submissions and evidence.

The Act

[6] Section 385 of the Act requires there to be a dismissal for there to be jurisdiction, and s.386(1) provides that a resignation may be a dismissal if the employee was forced to resign by a course of conduct engaged in by the employer:

“385 - What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Note: For the definition of consistent with the Small Business Fair Dismissal Code : see section 388.

386 - 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) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.”

Authorities

[7] In *P. O’Meara v. Stanley Works Pty Ltd*,¹ a Full Bench of the Commission said:

“[23] In our view the full statement of reasons in *Mohazab* which we have set out together with the further explanation by Moore J in *Rheinberger* and the decisions of Full Benches of this Commission in *Pawel* and *ABB Engineering* require that there to be some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment relationship to an end. It is not simply a question of whether “*the act of the employer [resulted] directly or consequentially in the termination of the employment.*” Decisions which adopt the shorter formulation of the reasons for decision should be treated with some caution as they may not give full weight to the decision in *Mohazab*. In determining whether a termination was at the initiative of the employer an objective analysis of the employer’s conduct is required to determine whether it was of such a

¹ (2006) 58 AILR 100, [23].

nature that resignation was the probable result or that the appellant had no effective or real choice but to resign.” [citations omitted]

[8] In *Doumit v ABB Engineering Construction Pty Ltd*,² a Full Bench of the Australian Industrial Relations Commission said that the line to distinguish whether conduct leaves an employee with no choice but to resign or results in an employee resigning at their own initiative is a narrow one, but the line must nonetheless be ‘closely drawn and rigorously observed’:

“Often it will only be a narrow line that distinguishes conduct that leaves an employee no real choice but to resign employment, from conduct that cannot be held to cause a resultant resignation to be a termination at the initiative of the employer. But narrow though it be, it is important that that line be closely drawn and rigorously observed. Otherwise, the remedy against unfair termination of employment at the initiative of the employer may be too readily invoked in circumstances where it is the discretion of a resigning employee, rather than that of the employer, that gives rise to the termination ... Where it is the immediate action of the employee that causes the employment relationship to cease, it is necessary to ensure that the employer's conduct, said to have been the principal contributing factor in the resultant termination of employment, is weighed objectively. The employer's conduct may be shown to be a sufficiently operative factor in the resignation for it to be tantamount to a reason for dismissal. In such circumstances, a resignation may fairly readily be conceived to be a termination at the initiative of the employer. The validity of any associated reason for the termination by resignation is tested. Where the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary.”

Consideration

Details of alleged bullying

[9] The allegation that the resignation by the application was a constructive dismissal is somewhat unclear in nature. In the resignation email³ the applicant made an allegation of bullying with some limited details of this:

“Hi Kristy

After all the mental harassment I received from the organisation over the past few months which includes Performance issues allegations (without any evidence) and being bullied by the Centre Director (her rough behavior towards me and yelling at me in front of the other staff members on several occasions), I have decided to resign from my position at Aspire Early Education. I tried to resolve my issues with yourself and HR however, I did not get any support. As per my Employment Contract, I am giving 4 weeks notice, my last day being 28th February 2020.

Kind regards,

² Print N6999 (9 December 1996).

³ Digital Court Book, 198.

Sunanda Soni”

[10] The applicant explained her resignation as follows:⁴

“After waiting for a couple of months that the employer would investigate my complaint of bullying and other pending matters, I realised that they would not do anything about my complaints. Therefore, I decided to resign from my position on 02.02.2020. Below is a screenshot of my email for resignation.”

[11] The allegation of ‘rough behavior towards me and yelling at me in front of the other staff members on several occasions’ does not specify any context or dates for the alleged bullying. In her witness statement⁵ the applicant made only a general account of the alleged bullying:

“Therefore, I approached the HR on 11.11.2019 explaining him that I was bullied at the workplace in the past and recently, I was called upon for a Disciplinary Meeting, which was followed with an Official Warning Letter. I also advised him that I am currently on Stress Leave because of all of this.”

[12] No attempt is made to meet the statutory definition of bullying, either in this witness statement or elsewhere.

[13] In her initiating application the applicant simply said without providing details:

“The Centre Director yelled at me in front of other staff member which is Bullying”⁶

[14] The respondent responded to the application as follows:⁷

“The applicant has simply taken extreme exception to being brought into a procedurally fair and reasonable performance meeting, being issued a first written warning and being placed on a performance management plan. Any unsubstantiated claims of harassment and bullying made after the fact are a direct result of her objection to being taken through a fair and reasonable performance management process.’

[15] The allegations were denied by Ms James. I also note that the applicant was placed on a Performance Improvement Plan on 1 November 2019, and that the allegations of bullying were made on 11 November 2019. In other words, the bullying allegations followed the Performance Improvement Plan, and the respondent alleges that there is a relationship between the two. It submits that the bullying allegations were a response to the Performance Improvement Plan, and were false in nature.

[16] In the record of the meeting held on 21 November 2019,⁸ the following exchange took place:

⁴ Ibid, 92.

⁵ Ibid, 149.

⁶ Ibid, 3.

⁷ Ibid, 36.

⁸ Ibid, 199.

“The employee claimed that, as a direct result of the performance management process, she felt she was being bullied by the Centre Director and was therefore taking an indefinite period off as stress leave. HR advised her on the definitions of what constituted bullying. She was advised that, based on the information she had presented, the actions of management in this case would not constitute bullying in that, her issues with her manager only arose in the course of a performance management process and that the actions within this process were reasonable management actions. The employee was advised that she had not outlined any specific behavior by the Centre Director that could be seen to be unreasonable or bullying or that could be linked to her health concerns or led her to take sick leave.”

[17] Mr O’Duill gave evidence to similar effect,⁹ and the applicant largely accepted the account of the meeting, with some limited disputes. With respect to the resignation email,¹⁰ Ms James submitted orally that she did not bully the applicant and that the applicant had requested to speak with her after the email was sent to Mr O’Duill and that this action could not be seen as demonstrative of the applicant possessing feelings of being scared or being bullied by Ms James.¹¹ The applicant responded to this by stating that Ms James was her manager and she had no other option at the time to contact anyone else.¹² Mr O’Duill submitted that none of the issues pertaining to bullying were raised prior to being placed on a performance improvement plan and that the applicant had stated that her feelings of being bullied were as a direct result of being placed on a performance improvement plan.¹³ The applicant acknowledged this to be the case.¹⁴ Ms James submitted that in relation to the applicant having no one else to contact, the applicant did contact the Assistant Director on 3 November and this was demonstrative of the applicant having an awareness that she did have access to contact other people within the centre.¹⁵ Ms Clark added that her contact details are made available for all staff at the centre and part of the centre’s grievance policy states that if a staff member does not feel comfortable talking to the Centre Manager or the Assistant Director that there must be another person that an aggrieved person can go to, hence why Ms Clark’s details have been made available.¹⁶ The applicant acknowledged that she did not contact Ms Clark in relation to her grievances and continued to contact Ms James.¹⁷

[18] Mr O’Duill asked the applicant for more details of the alleged bullying¹⁸ in an email dated 12 November 2019, and provided the applicant with an outline of what bullying is, and what it is not. No further detail of the alleged bullying was provided by the applicant, despite the request, and the explanation of bullying, which indicated that it is not enough simply to allege bullying in general terms. It is unfortunately easy to respond to performance or disciplinary allegations, with counter allegations of bullying, but such counter allegations have to be substantiated otherwise they may not be accepted.

⁹ Ibid, 192.

¹⁰ Ibid, 198.

¹¹ Audio Record of Mention (Part 4) dated 13 July 2020 at 4:30.

¹² Ibid, 6:20.

¹³ Ibid, 6:32.

¹⁴ Ibid, 7:35.

¹⁵ Ibid, 8:45.

¹⁶ Ibid, 9:40.

¹⁷ Ibid, 10:56.

¹⁸ Digital Court Book, 240.

[19] It would be unfortunate if the custom and practice arose of employees making such allegations because of ordinary disciplinary or similar action. In this case on the material before me I do not accept that the applicant was bullied, or that the employer acted inappropriately.

[20] The respondent submitted that:¹⁹

“The employee contacted HR to claim that, as a direct result of the performance management process, she felt she was being bullied by the Centre Director and was taking an indefinite period of time off as stress leave. HR responded to her email and advised her that, based on the very limited information she presented, that this would not constitute bullying in that, her issues with her manager only arose in the course of a performance management process and that the actions within this process were reasonable management actions.

The employee was further advised that she had not outlined any specific behavior by the Centre Director that could be seen to be unreasonable or bullying or that could be linked to her health concerns that led her to take leave. She was advised that a worker will not be able to claim for stress and any resulting psychological injury if the stress was caused by reasonable management action or the worker’s expectation that management would act in a particular way. This is also covered in legislation. The employee responded claiming the performance meeting was not conducted in a reasonable way and the due process for Performance Issues was not followed by the Centre Director.”

The issues with the applicant’s performance

[21] The applicant agreed with much of the record of allegations or conversations with her in the Event Log,²⁰ which allegations included being late for work, health and safety issues, wearing of uniforms, placing plans on the wall of events for the day, gossip, teamwork, and other issues. Ms James and Mr O’Duill gave evidence that the record was correct. The applicant disagreed with some elements of the allegations, but also said on occasion that the record might have been correct but she did not recall it, or the record was corroborated by other material.

[22] For example, when reviewing the Event Log²¹ during the conference, the applicant disagreed that a conversation was had with her from Ms James on 21 February 2019 regarding arriving on time to work.²² However, Ms James stated that she could supply (and did) a screenshot taken from a Microsoft Outlook calendar which has the following entry at 8:30 am to 9:30 am on 21 February 2019 – “Sunanda late start 9:05am no call – conversation about expectations”.²³

[23] Similarly, incidents recorded on 8 and 10 May 2019 provide that the applicant was observed sitting on a child’s stool in the nursery that had been turned on its side while feeding

¹⁹ Ibid, 72.

²⁰ Ibid, 219.

²¹ Ibid.

²² Audio Recording of Mention (Part 2) dated 13 July 2020, 22:33.

²³ Email from Respondent (Calendar notes screenshots) dated 13 July 2020 at 8:35 pm.

a child. Ms James explained to the applicant that turning a stool over and sitting on it was unsafe due to incorrect use and the chair was not made for adult use. The applicant acknowledged that this conversation took place on 8 May, but not on 10 May.²⁴ Ms James' Microsoft Outlook calendar depicts an entry made 8 May 2019 at 7:00 am to 8:30 am saying "Talked to Sunanda about not sitting on child stools as they are not made for adult weight", and another on 10 May 2020 which states "Sunanda on the child stool again – have asked again not to sit on this".²⁵

[24] An entry to the Event Log on 20 August 2019 details a conversation concerning a culture of gossip, mutual respect, shared decision making, team collaboration, knowledge of each other's strengths, and clear and transparent communication.²⁶ The applicant denies that this conversation took place.²⁷ In response, Ms James produced a script dated 20 August 2019 which was read from and appears to be addressed to the applicant and two other employees concerning the points listed in the Event Log.²⁸

[25] During the conference when the applicant was asked to recollect what was said during the meeting to review the performance management process utilised to date, held on 29 November 2020. The applicant largely or partly accepted the accounts recorded by Mr O'Duill in this meeting, with some limited disputes. With reference to the areas where the applicant disagreed with the record, handwritten notes taken by Mr O'Duill, or what were claimed to be such, during the meeting on 21 November 2019 generally support the employer version of events:

- In relation to the meeting record providing that Ms Soni had been previously spoken to about a number of issues, Ms Soni contends that this statement was not made during the meeting.²⁹ The handwritten notes record that the meeting was held in response to the warnings that had been issued regarding professionalism, respecting responsibilities, appropriate play spaces, decision making, uniform, and shift times.³⁰
- In relation to the meeting record providing that opportunities to respond to the issues concerning leadership and room leader expectations, shift times, uniform team collaboration, and children health and safety were provided to Ms Soni in the meeting. Ms Soni contends that she was not afforded an opportunity to respond in the meeting but did respond in writing on 5 November 2019.³¹ The handwritten notes record Ms James and Ms Clark providing the applicant with the opportunity to respond during the meeting held on 29 October verbally and the applicant's responses were read out aloud during the meeting held on 1 November;³²
- In relation to the meeting record providing employer concerns were raised about uniform, the applicant contends that Ms James did not state that other staff were

²⁴ Audio Recording of Mention (Part 2) dated 13 July 2020, 25:24.

²⁵ Email from Respondent (Calendar notes screenshots) dated 13 July 2020 at 8:35 pm.

²⁶ Digital Court Book, 221.

²⁷ Audio Recording of Mention (Part 3) dated 13 July 2020, 1:40.

²⁸ Email from Respondent (Room 1 Script 20.08.19) dated 13 July 2020 at 8:35 pm.

²⁹ Audio Recording of Mention (Part 1) dated 13 July 2020, 11:40.

³⁰ Handwritten Meeting Notes of Meeting on 21 November 2019 at 11:00 am, 1.

³¹ Audio Recording of Mention (Part 1) dated 13 July 2020, 13:23.

³² Handwritten Meeting Notes of Meeting on 21 November 2019 at 11:00 am, 2.

being spoken to in a similar manner regarding their uniforms and other staff members had been sent home in the same manner as Ms Soni and that the process was being adhered to going forward.³³ The meeting notes indicate that other staff members have been sent home on occasion and the photos produced by the applicant were taken at a time where some uniforms were not available.³⁴

- In relation to the meeting record providing references to non-completion of and display room plans, the applicant contends that Ms James did not state that staff in the room had advised her that they did not know what they were to do in the room as the plan had not been published properly and that it was through the monthly audit of the room that had brought these issues to light.³⁵ The meeting notes show that there was discussion about staff not being aware of plans and it was through a room audit that brought the issues to light.³⁶
- In relation to the meeting record providing that Ms James said that there appeared to be some confusion, the applicant contends that this was not said but acknowledged that she could be mistaken and could not recall whether it had been said or not.³⁷ The meeting notes show that there was confusion on an issue concerning the Room Leader setting a space deemed age appropriate.³⁸
- In relation to the meeting record providing that Ms James advised that there were a number of similar incidents that Ms Soni had been made aware of in terms of safety of the furniture and the set-up of the room, Ms Soni contends that this was not said during the meeting.³⁹ Regarding similar incidents that Ms Soni had been made aware of in terms of safety of the furniture and the set-up of the room, the meeting notes state that similar issues were raised concerning safety issues arising from non-consultation with staff and proper use of furniture. The meeting notes show that the applicant sets standards and staff follow.⁴⁰
- The applicant contends that she did not say that 1-week was not enough time in the performance plan to improve her performance and avoid termination.⁴¹ The meeting notes indicate that the applicant indicated “1 week not enough to fix issues”;⁴²
- Where the meeting record states the applicant was advised that there was not a requirement for her to respond in writing to the issues raised in the meeting prior to a decision being made on a written warning, that she was given the opportunity to respond verbally to the issues raised, that she was then advised that a review of her responses would be undertaken and a decision would be taken on a course of action, and given an opportunity to discuss the issues and to read the draft of the email sent

³³ Audio Recording of Mention (Part 1) dated 13 July 2020, 16:14.

³⁴ Handwritten Meeting Notes of Meeting on 21 November 2019 at 11:00 am, 3.

³⁵ Audio Recording of Mention (Part 1) dated 13 July 2020, 18:04.

³⁶ Handwritten Meeting Notes of Meeting on 21 November 2019 at 11:00 am, 5.

³⁷ Audio Recording of Mention (Part 1) dated 13 July 2020, 19:32.

³⁸ Handwritten Meeting Notes of Meeting on 21 November 2019 at 11:00 am, 5.

³⁹ Audio Recording of Mention (Part 1) dated 13 July 2020, 21:05.

⁴⁰ Handwritten Meeting Notes of Meeting on 21 November 2019 at 11:00 am, 6.

⁴¹ Audio Recording of Mention (Part 2) dated 13 July 2020, 4:20.

⁴² Handwritten Meeting Notes of Meeting on 21 November 2019 at 11:00 am, 6.

6 November during the meeting on 1 November, and that all responses both verbal and written were considered prior to the issuing of the warning, the applicant contends that none of this was said during the meeting.⁴³ The meeting notes show that no requirement to respond in writing was required and verbal responses made during the meeting on 20 October 2019 and 1 November 2019 and the written response on 6 November 2019 were considered prior to the warning being issued.⁴⁴

- The applicant stated that, contrary to what the meeting notes state, she was not advised that she has now been provided with an additional opportunity to have her responses reviewed against the validity of a written warning and performance management plan. The applicant did acknowledge that she may be mistaken though.⁴⁵ The meeting notes do not appear to make reference to this comment being made. However, this comment being said or not is superfluous given that the purpose of the meeting on 21 November 2019 was arranged as an extraordinary meeting to discuss the performance management processes utilised to date that the applicant took issue with.
- The applicant stated that the meeting did not end with comments to the effect that a break would occur to consider the outcomes, rather it was stated by Ms James that the warning would stay in place.⁴⁶ The meeting notes indicated that the meeting was concluded with a break to consider outcomes and that the applicant would be advised of the result by email.⁴⁷

[26] Much of this material appears to corroborate the employer's evidence and contradicts the applicant's objections to the Events Log. However, even if I do not rely on this corroborating material, even on the applicant's own version of events, the allegations and response by the employer were not simply a sham but had some substance. Overall I prefer the evidence of Ms James, Ms Clark and Mr O'Duill to that of the evidence of the applicant as it is internally consistent. I was given no reason to believe that it was a concoction or reason to believe that such would be concocted. It was convincing, as well as corroborated by apparently contemporaneous handwritten notes, and the typed notes also were said to be contemporaneous.

[27] The applicant was, with respect, somewhat reluctant on occasion to admit fault, and only did so when pressed. For example, the Event Log records an incident on the week ending 15 September 2019 - "Discussion regarding arrival time on early shift – reports of families and staff waiting in the car park for Sunanda who was responsible person. Discussed leadership and responsible person duties. Explained if continued would need to be removed from early shift."⁴⁸ During the conference, the applicant was asked whether this account was an accurate and truthful record of what had occurred, with the applicant stating that it never happened. I questioned the applicant and suggested that she may simply not remember it occurring, however the applicant was adamant that it did not occur.⁴⁹ Ms James responded to

⁴³ Audio Recording of Mention (Part 2) dated 13 July 2020, 5:25.

⁴⁴ Handwritten Meeting Notes of Meeting on 21 November 2019 at 11:00 am, 7.

⁴⁵ Audio Recording of Mention (Part 2) dated 13 July 2020, 8:30.

⁴⁶ Ibid, 10:20.

⁴⁷ Handwritten Meeting Notes of Meeting on 21 November 2019 at 11:00 am, 7.

⁴⁸ Digital Court Book, 221.

⁴⁹ Audio Recording of Mention (Part 3) dated 13 July 2020, 3:38.

this by stating that a conversation was had with the applicant expressing concern with her ability to setup the centre with limited time. It was explained to the applicant that the shift commenced at 6:30 am and her arrival was recorded as 6:35 am and as it was the first shift of the day that the applicant may need to be moved to a later shift as it was impacting on families dropping off their children.⁵⁰ The applicant again denied that this event had happened. The respondent said that they could produce records of sign-in times and CCTV footage if needed.⁵¹ I asked the applicant whether she would concede the point of being late for this incident, or whether further evidence would need to be produced from Ms James on the issue. The applicant responded by saying that she could have been late on that day, which is an admission that this allegation was at least partly true. However, she said there was never a time where parents were waiting in the carpark on her arrival to the centre.⁵²

[28] Similarly, the Event Log contained an entry for the week ending 20 October 2019 stating “EL addressed with Sunanda that there was no program on display in her room when asked about this Sunanda said that she had not had programming time for that week. Roster shows that programming time was allocated.”⁵³ The applicant stated that this never occurred.⁵⁴ Ms James explained in oral evidence that childhood educators are required to record their programming time and the applicant had initialled on a programming sign-in sheet that she had received programming time for that particular work week. Ms James also presented the programming sign-in sheet which shows the applicant was provided planning time to complete her plan for the room.⁵⁵ The applicant stated during the conference that the event may have occurred but nothing was ever discussed, nor had she had a meeting with anyone about the issue.⁵⁶

[29] Overall, I prefer the evidence of Ms James and Mr O’Duill about the conduct and content of the meeting. On their account, the employer raised a range of matters with the applicant, the applicant was given an opportunity to respond, and did respond. This evidence correlates with handwritten meetings notes and other material. With respect, the meeting does not provide evidence of coercion or similar conduct which might lead to a conclusion of constructive dismissal.

Underpayments

[30] The applicant made complaints of alleged underpayments, and of various other circumstances which the applicant found unpleasant that were raised during the extraordinary meeting on 29 November 2020.⁵⁷ I am unable to conclude on the limited material before me that there were underpayments, although there appears to have been a dispute between the parties about:

- “• Only providing 2 Shirts as a uniform;

⁵⁰ Ibid, 3:56.

⁵¹ Ibid, 5:35.

⁵² Ibid, 6:49.

⁵³ Digital Court Book, 222.

⁵⁴ Audio Recording of Mention (Part 3) dated 13 July 2020, 8:30.

⁵⁵ Email from Respondent (Programming sign-in sheet 23.10.19) dated 13 July 2020 at 8:35 pm.

⁵⁶ Audio Recording of Mention (Part 3) dated 13 July 2020, 11:30.

⁵⁷ Digital Court Book, 308.

- Payment for uniform laundry costs;
- Her husband removing their children from care at the centre;
- Rates of pay for after-hours meetings;
- Pay for involvement in voluntary events held at the centre.⁵⁸

[31] These above matters were addressed by the Ms Clark after the extraordinary meeting on 29 November 2019, with the applicant being advised.⁵⁹

- Providing 2 Shirts as a uniform was adequate for the obligations the Centre has for staff and that purchasing uniforms was not a requirement, but an option if she felt she did not have enough;
- Payment for laundry costs is only required under the Award if the uniform is not provided by the business;
- The applicant's husband removing their children from care at the centre was unrelated to any performance improvement process;
- Higher rates of pay for after-hours meetings was mitigated by provision of a meal, however the applicant was offered compensation for previous meetings attended; and
- Pay for involvement in voluntary events held at the centre was not available as it constituted attendance at open day events that were entirely voluntary.

[32] I accept that such discussions can be unpleasant, but they are common and necessary, and do not constitute bullying or inappropriate conduct, on the evidence and submissions before me. Nor am I able to ascertain the truth or otherwise of the allegations. That would have to be dealt with elsewhere.

Procedural unfairness

[33] The applicant complained about the conduct of two meetings held on 29 October 2019 and 21 November 2019, namely at the first meeting she was not given time to prepare and to find a support person, and was not able to respond to allegations. Ms James and Ms Clark gave evidence that she did respond to the allegations made. Even if this is not correct or fully correct, the applicant responded in writing on 5 November 2019.⁶⁰ Further, the applicant did respond to the allegations at some length in the meeting held on 21 November 2019, as agreed or largely agreed by the applicant in giving oral evidence.⁶¹ In any event, for reasons set out below I prefer the evidence given by Ms James, Ms Clark and Mr O'Duill to that of the applicant. In my view the meetings were properly conducted.

⁵⁸ Ibid.

⁵⁹ Ibid, 308-9.

⁶⁰ Ibid, 255.

⁶¹ Audio Recording of Mention (Part 4) dated 13 July 2020, 15:03, Digital Court Book, 199.

[34] There was some dispute about an incident involving the applicant's husband, Mr. Sachdeva, speaking to her in a foreign language at some length. Mr Sachdeva stated that during the meeting on 21 November 2019, he was appointed as a support person for the applicant. During the meeting he stated that he was attempting to provide emotional support to the applicant and he was denied this opportunity and was told that he could not speak in a non-English language with the applicant.⁶² Mr O'Duill stated that during the extraordinary meeting, he observed that when the applicant was asked questions she would turn to Mr Sachdeva who would then speak to the applicant at length in a non-English language with the applicant then responding to the question asked of her. Mr O'Duill added that Ms Clark's suggestion of impropriety on part of Mr Sachdeva was to remind him that his role in the meeting was that of a support person and not an advocate and was requested to speak in the English language.⁶³ I accept the evidence given by Mr O'Duill in relation to this issue. I see nothing wrong with his approach to the issue.

Conclusion

[35] I have taken account of all submissions and evidence in the court book, and given orally during the conference. It is agreed that the applicant resigned on 2 February 2020. On the submissions and material before me I am not satisfied that the applicant was constructively dismissed within s.386(1)(b), i.e. that she resigned from her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by her employer.

[36] I am therefore required to dismiss the application. An order is contained in PR721635.



DEPUTY PRESIDENT

Appearances:

Ms Soni Sunanda, *Applicant*

Mr Raman Sachdeva, *on behalf of the Applicant*

Mr Eanna O'Duill, *on behalf of the Respondent*

Ms Lily James, *Respondent*

Ms Kristy Clark, *Respondent*

Hearing details:

2020.

Melbourne (via Telephone).

13 July.

⁶² Audio Recording of Mention (Part 4) dated 13 July 2020, 29:02.

⁶³ Audio Recording of Mention (Part 5) dated 13 July 2020, 3:40.

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