[2023] FWC 1022

The attached document replaces the document previously issued with the above code on 1 May 2023.

Citation at Footnote 28 amended.

Associate to Deputy President Anderson.

Dated 2 May 2023.

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Mary Teresa Bernadette Conlon
v
Savers Australia Pty Ltd
(U2022/12373)

DEPUTY PRESIDENT ANDERSON ADELAIDE, 1 MAY 2023

Application for an unfair dismissal remedy – jurisdiction – minimum employment period – whether "continuous service"– termination on account of incapacity – nineteen week gap in engagement – re-employment – ss 384 and 22 Fair Work Act 2009 – whether employment relationship continuous – s 18 Return to Work Act 2014 (SA) – whether recognition of past service promised – whether contractual promise created continuity of service – gap period not "service" as defined – minimum employment period not met – application dismissed

[1] On 29 December 2022 Ms Mary Teresa Bernadette (Bernadette) Conlon (Ms Conlon or the Applicant) applied to the Commission under s 394 of the *Fair Work Act 2009* (the FW Act) for an unfair dismissal remedy in relation to her dismissal by Savers Australia Pty Ltd (Savers, the employer or the Respondent). She claims to have been unfairly dismissed on 8 December 2022.

[2] She seeks reinstatement.

[3] Savers is not a small business employer. It opposes the application and raises two jurisdictional issues[1]. It submits that Ms Conlon was not a person protected from unfair dismissal under the FW Act because she had not completed the minimum employment period (of six months) required by ss 382(a) and 383. It says that Ms Conlon's service was broken by a nineteen week period of absence between 24 January 2022 and 8 June 2022.

[4] Savers also raise a second jurisdictional matter asserting that Ms Conlon was not dismissed. It submits that her employment came to an end on 8 December 2022 following its acceptance of alleged repudiation by Ms Conlon.

[5] On 27 January 2023 conciliation was conducted by a staff conciliator. The matter did not resolve.

[6] The application was initially allocated to Deputy President Hampton and re-allocated to me on 5 April 2023 due to Commission availability.

[7] Directions were issued on 21 February 2023. The matter proceeded to hearing on the first jurisdictional question (minimum employment period) as a discrete threshold issue.

[8] That issue was heard by video on 13 April 2023.

[9] By decision on 6 April 2023[2] I granted permission for Savers to be represented. Ms Conlon was self-represented, with assistance from her husband. In light of the disparity in representation, I provided Ms Conlon a measure of assistance to ensure her case was presented and that of Savers tested, consistent with my duty as an independent statutory officeholder.

[10] This decision deals only with the minimum employment period issue.

Evidence

[11] I received witness statements and heard oral evidence from both Ms Conlon[3] and Savers' Director of People Services Australia, Ms Helen Slucki.[4]

[12] The facts relevant to the minimum employment period are largely not in dispute aside from a dispute as to a conversation between Ms Conlon and a Divisional Manager Mr Spencer on 14 June 2022.

[13] On that issue, Savers did not call Mr Spencer. Savers submit that it did not do so because it considers evidence of conversations before Ms Conlon's employment recommenced on 14 June 2022 to be irrelevant. Whilst that may be so on its case, Ms Conlon's witness statement[5] put Savers on notice that this conversation was in issue. Having made a forensic decision not to call Mr Spencer, I draw a *Jones v Dunkel*[6] inference that the evidence of Mr Spencer, had he been called, would not have been helpful to the respondent's case.

[14] However, a *Jones v Dunkel* inference does not enable facts not otherwise established to be so found. It simply has the effect of creating an inference that evidence of a certain person would not have been helpful to the party that did not call that person.[7]

[15] As Ms Slucki did not witness the 14 June 2022 conversation between Ms Conlon and Mr Spencer, I am left with the evidence of Ms Conlon on that matter. I accept the general thrust of Ms Conlon's evidence as to that conversation with the caution that her specific recall of what was said in that (and other) conversations was imprecise.

[16] I make findings as to that conversation in the body of this decision.

[17] Ms Conlon gave evidence attentively and without gloss though, as noted, had some difficulty with precise recall. That is understandable given that events in question occurred up to nine and twelve months prior to giving evidence.

[18] Ms Slucki was a conscientious witness and, with one caveat concerning her response to an email of 8 June 2022 (discussed below), I consider her evidence to be a reliable basis for fact finding.

[19] To the limited extent necessary, in resolving factual disputes I apply standard tools available to first-instance decision-makers including creditworthiness, plausibility and consistency with the documentary record.

[20] Some evidence (and in particular Ms Slucki's statement in reply[8] concerning the 14 June 2022 conversation between Ms Conlon and Mr Spencer) is hearsay. I give little weight to hearsay (unless not contested). I have noted that I generally accept Ms Conlon's evidence of the 14 June 2022 conversation subject to the caution about her specific recall.

Facts

[21] Savers is a global thrift retailer selling used clothing, accessories and household goods.

The first employment period - November 2014 to 24 January 2022

[22] In November 2014, after a short period of training, Ms Conlon was first employed by Savers as a production team employee working at Savers' Kilburn store in suburban Adelaide.

[23] At all relevant times Ms Conlon was employed under the *General Retail Industry Award 2010*.[9]

[24] In January 2015 a fresh employment contract was entered into consequent on changes to her working arrangements.

[25] In December 2016 Ms Conlon sustained a workplace injury to her shoulder. Following the injury she moved from production to sales, working in the jewellery department. This change was reflected in a further fresh employment contract in July 2017 whereupon Ms Conlon became a permanent part time employee working approximately 36.5 hours per week.

[26] A workers' compensation claim was made under South Australian law.

[27] Ms Conlon periodically experienced problems with the shoulder injury in 2019, 2020 and 2021 resulting in periods on lighter and different duties.

[28] On or about 23 December 2021, Savers obtained a medical opinion regarding Ms Conlon's ability to undertake jewellery and shoe section duties. The opinion advised that:

(a) Ms Conlon's shoulder injury was long-standing, and it could flare up on occasions;

(b) Ms Conlon was not able to perform her pre-injury duties in the jewellery section and without the risk of flare-up or aggravation; and

(c) Ms Conlon was not able to perform duties in the shoe department unrestricted and without the risk of flare-up or aggravation.

[29] On 12 January 2022, Ms Slucki, along with the Store Manager and District Manager (Mr Spencer), met with Ms Conlon and her representative from the Shop, Distributive and Allied Employees' Association (SDA) to discuss Ms Conlon's capacity to perform work.

During the meeting, Ms Conlon said she wanted to undertake bagging duties and Savers agreed to undertake a 'reaching' assessment. Following the 12 January 2022 meeting, Savers undertook a reaching assessment of the bagging duties, and a number of other duties, and determined that the assessed duties were not appropriate because they involved more reaching than the jewellery duties for which Savers had been advised that Ms Conlon was unfit.

[30] Savers decided to terminate Ms Conlon's employment on the basis that she was unable to perform the inherent requirements of her role without the risk of continued flare ups of the shoulder injury and risks to her health and safety.

[31] On 24 January 2022, Ms Slucki met with Ms Conlon and communicated the decision. Ms Slucki provided Ms Conlon with a letter confirming the termination of employment.[10] It read:

> "Dear Bernie
>
> **RE: Termination of Employment**
>
> As discussed today with your store manager Shanna Farinola, your District Manager Troy Spencer and me, I am writing to confirm that as you are unable to perform the inherent requirements of your role, your employment will be terminated effective today, January 24, 2022.
>
> You will be paid 5 weeks in lieu of notice, your annual leave entitlements and pro-rata long service leave entitlements.
>
> Bernie, we recognize that this may be a difficult time for you and want to remind you that you can contact out Employee Assistance Program on 1300 737 403 for free confidential support.
>
> Wishing you all the very best in your future endeavours.
>
> Kind regards,
>
> Helen Slucki
> **People & Culture Manager**" (emphasis in original)

[32] Savers paid Ms Conlon five weeks' salary in lieu of notice, as well as annual leave entitlements and pro-rata long service leave.

[33] Ms Conlon did not attend the workplace or perform work for Savers in the period immediately following 24 January 2022. She did not express an intention to return to work at Savers until 5 April 2022, and did not become employed again by Savers until 14 June 2022.

Request to return to work – 5 April 2022

[34] In the weeks following her employment being terminated, Ms Conlon consulted the SDA. Ms Conlon was advised that Savers should not have terminated her employment because

it had a duty under South Australian workers' compensation laws to provide work so far as was reasonably practicable.

[35] On 16 March 2022 a workers' compensation claim for aggravation of the shoulder injury was made by Ms Conlon, as well as for a psychological injury.

[36] On 5 April 2022, a legal officer of the SDA (Ms Ormesher) wrote to Savers notifying that Ms Conlon was making a request under s 18 of the *Return to Work Act 2014* (SA) (Return to Work Act) for a return to suitable duties, and foreshadowing proceedings in the South Australian Employment Tribunal (SAET) if this was not agreed.[11]

[37] Due to Ms Conlon's history of shoulder problems, Ms Slucki considered it appropriate to organise a worksite assessment and independent medical examination (IME) to identify whether Ms Conlon was fit for her pre-injury role or any other suitable employment.

[38] On 14 April 2022, Ms Slucki wrote to the SDA indicating that Savers was prepared to arrange a worksite assessment and for Ms Conlon to participate in an IME.[12]

[39] A worksite assessment occurred on 28 April 2022 and Ms Conlon attended the IME on 24 May 2022.

[40] Upon considering the medical evidence from the practitioner who conducted the IME, the worksite assessment and the duties listed in the SDA's letter of 5 April 2022 (which included "operation of a cash register" as a suitable duty for Ms Conlon to return to), Savers identified that it could create a permanently adjusted operations role of Sales Assistant (Registers) to accommodate Ms Conlon's return to work.

Return to work - 14 June 2022

[41] Between 2 and 9 June 2022, Ms Slucki exchanged emails with the SDA which were directed at returning Ms Conlon to work in the Sales Assistant (Registers) role under a new contract of employment.[13]

[42] On 3 June 2023, and in light of a statutory deadline, proceedings on behalf of Ms Conlon were commenced in the SAET.[14]

[43] By email that same day (3 June) on behalf of Ms Conlon,[15] the SDA among other things indicated that Ms Conlon was seeking a commitment to the continuation of her service with Savers, specifically:

- reinstatement of her entire sick (personal) leave balance, which had been about seven days of leave as at 24 January 2022;

- reinstatement of the leave she had accrued for long service leave, annual leave and sick leave entitlements for the period of time that she had been off work between 24 January 2022 and her return date; and

- a commitment to honour two weeks of annual leave that Ms Conlon had scheduled for December 2022.

[44] In response[16], Ms Slucki stated:

"**Treatment of leave**

Upon termination of Ms Conlon's employment in January, Ms Conlon received payments in respect of her accrued but untaken annual leave and long service leave as was required.

To further support Ms Conlon's return, we are willing to credit Ms Conlon's leave balance:

- the amount of accrued personal leave Ms Conlon had as at 24 January 2022; and

- the amount of personal leave, annual leave and long service leave that would have accrued in the period between 24 January 2022 to Ms Conlon's recommencement had she been employed during this period.

In respect of the approved annual leave mentioned, we no longer have this in our system. We propose to deal with this matter by Ms Conlon making a further application for the leave upon her recommencement."

[45] On behalf of Ms Conlon, the SDA replied on 8 June 2022:[17]

"Thank you for acknowledging that Ms Conlon's service with Savers will be recognised, that her personal leave balance will be reinstated and her personal leave, annual leave and long service leave accruals from 24 January to date will be allocated to her.

I can now confirm that Ms Conlon is agreeable to returning to work at savers in the proposed register role…"

[46] Ms Slucki's evidence was that she then proceeded to draft a new contract of employment (adjusted from a pro-forma). I accept this evidence. However Ms Slucki went on to say that she also considered the SDA's 8 June reply to contain an incorrect understanding of Savers' position with respect to the recognition of Ms Conlon's prior service. I approach this evidence with some caution as Ms Slucki did not raise that concern with the SDA at the time (or at all) but instead proceeded to draft a contract for signing. I find it more likely than not that Ms Slucki interpreted the 8 June 2022 email as meaning what she subsequently included in the proposed new employment contract rather than forming a view at the time that part of it (the email reply) was incorrect.

[47] On 9 June 2022, under cover of a letter of that date, Ms Slucki emailed Ms Conlon a new contract for the Sales Assistant (Registers) role, with her preferred roster (Contract).[18]

[48] Ms Conlon did not respond to Ms Slucki's 9 June 2022 email. On 13 June 2022, Ms Slucki sent a further email to Ms Conlon. Ms Conlon then responded on 13 June 2022 stating that the SDA was looking through the Contract, but that because 13 June 2022 was a public holiday, she would not hear anything back until the following day.

[49] Clauses 2.1, 2.2 and 2.3 of the Contract provided:[19]

> **"2. Appointment and Term**
>
> 2.1 The Employer appoints you, and you agree to serve, in the Part Time permanent position specified in Schedule 1, or such other position agreed between the parties in writing from time to time.
>
> 2.2 Your employment will commence on the commencement date specified in Schedule 1 (or such other date as advised by the Employer in writing) and continue until terminated in accordance with this Agreement.
>
> 2.3 Upon commencement your leave balance will be credited with the following:
>
> (a) 64.8232 hours personal leave;
>
> (b) 54.3746 hours annual leave;
>
> (c) 17.6750 hours long service leave."

[50] Schedule 1 relevantly provided:

> "**Commencement Date**: 14 June 2022"

[51] On 14 June 2022, Ms Conlon attended Savers' Kilburn store with an unsigned copy of the 9 June 2022 Contract. She met the District Manager Mr Spencer.

[52] Ms Conlon had discussed the Contract and her resumption with the SDA in the days prior (between 9 and 14 June). Ms Conlon had decided to raise three issues before signing and had notated them by hand on the cover page. They were: that her start date of November 2014 was to be recognised and not the 14 June 2022 commencement date stated in the contract; that there would not be a new probation period given her earlier service; and a question over what would happen if the register role was not suitable.[20]

[53] Ms Conlon raised these issues with Mr Spencer and indicated that she needed clarification on them before signing the contract and starting work.

[54] Mr Spencer left the meeting and telephoned Ms Slucki. He was provided guidance on each.

[55] Ms Spencer returned to the meeting whereupon he told Ms Conlon, according to her evidence, words to the effect of "don't worry about the original start date in the contract that

will be recognised and there will be no probation period. He gave no response to the question regarding what next if the register role is not suitable".[21]

[56] Ms Conlon accepted what was said on face value, whereupon Mr Spencer printed a clean copy of the Contract (absent Ms Conlon's handwritten notes). The Contract was then signed by Ms Conlon unaltered following which she recommenced working at the store and the shift she had been rostered.

[57] In making these findings about the 14 June 2022 conversation:

- I do not find that Mr Spencer necessarily used the exact words deposed to by Ms Conlon. As noted, her recall on specifics was vague though I find, on the balance of probabilities, that Ms Conlon was told words conveying the general impression that her past service was being recognised notwithstanding the contract referring to a commencement date of 14 June 2022.[22] I make this finding because it accords with the general thrust of Ms Conlon's evidence, is consistent with representations made in the days prior on her behalf by the SDA, is consistent with cl 2.3 of the contract as drafted by Savers insofar as crediting her leave balance is concerned, is consistent with Ms Conlon not being placed on a fresh probation period, is consistent with Ms Conlon raising this issue with Mr Spencer prior to signing the Contract, and is consistent with Ms Conlon not signing the Contract and starting the shift until she had received a response. What this representation meant, as distinct from the fact it was given, is a separate question considered below;

- I find that Ms Conlon did not sign the Contract until after Mr Spencer returned and provided the responses he did. Her evidence on this was robust and plausible;

- I do not take into account the evidence of Ms Slucki as to what Mr Spencer apparently recalls was said between he and Ms Conlon at paragraph 9 of her second statement. As noted, this is untested hearsay and not a reliable basis for fact finding. If Mr Spencer's recall of the conversation is to be put before me, he ought to have been called to give evidence on it; and

- I do not accept Ms Conlon's evidence that she signed the Contract with "hesitation". That evidence was self-serving and is inconsistent with the fact that Ms Conlon could have, but did not, contact the SDA before signing. However, I do find that Ms Conlon signed the Contract trusting on face value what she had understood from Mr Spencer concerning recognition of past service.

[58] Ms Conlon commenced in the new Sales Assistant (Registers) role on 14 June 2022, the same day she signed the Contract. Saver's payroll system automatically issued her a new employee number. She undertook fresh induction training.

The SAET return to work application

[59] On 15 June 2022 Savers' legal representatives emailed the SDA asking whether Ms Conlon would be withdrawing her SAET application or be seeking consent orders on the basis

that the parties had agreed on a return to work on the basis that Ms Conlon was now working at Savers in the Sales Assistant (Registers) role.[23]

[60] On 28 June 2022 the SDA emailed the SAET indicating that complete agreement had not been reached between the parties. The SDA referred to cognitive issues suffered by Ms Conlon, and raised issues about the suitability of the Sales Assistant (Registers) role.[24]

[61] On 28 June 2022, a Directions Hearing occurred at the SAET. At the Directions Hearing the parties agreed to meet separately on a future date for an informal conference.

[62] The informal conference between the parties took place on 8 July 2022.

[63] On 4 August 2022, the SDA emailed the SAET attaching a Form P33 Application for Consent Orders and an executed standard form of order, requesting that the SAET make sealed orders by consent.

[64] On 11 August 2022, Commissioner Byrt of the SAET made orders dismissing the Application for Suitable Employment by consent. The Consent order provided:[25]

> "AND IT IS NOTED THAT the above orders are part of a wider agreement between the parties which also incorporates the following terms:
>
> 1) The Respondent and the Applicant agree that for the purposes of section 18:
>
> a) the Respondent offered the Applicant suitable employment on 2 June 2022;
>
> b) the Applicant accepted suitable employment with the Respondent being a permanent part-time position of Sales Assistant (Registers) working rostered hours of 70 hours a fortnight, over a Monday to Friday roster, and this is equivalent to the position the Applicant was employed in immediately before the incapacity for work arose (Suitable Employment); and
>
> c) the Applicant signed a contract of employment detailing the terms of the Suitable Employment on 14 June 2022.
>
> 2) The Respondent has agreed to credit the Applicant's leave balance:
>
> a) the amount of accrued personal leave the Applicant had as at 24 January 2022; and
>
> b) the amount of personal leave, annual leave and long service leave that would have accrued in the period 24 January to the Applicant's reemployment had she been employed during this period"

Ms Conlon's second period of employment and the end of that employment

[65] Issues subsequently arose concerning Ms Conlon's conduct during her return to work.

[66] On 29 November 2022, Ms Slucki wrote to Ms Conlon advising, amongst other matters, that Savers was concerned about her alleged unwillingness or inability to perform duties under the Contract as well as an alleged failure to comply with directions previously issued (such as positively participating in an Individual Learning Plan). Savers advised that it believed that Ms Conlon had, by conduct, "renounced" her employment and that Savers was considering "whether to terminate" her employment.[26]

[67] Ms Slucki invited Ms Conlon to a meeting to discuss these concerns. It was originally scheduled for 30 November 2022. Following a request for further time from the SDA, it was rescheduled to 6 December 2022.

[68] On 6 December 2022, a meeting took place and was attended by Ms Slucki, the District Manager, Ms Conlon and Ms Conlon's support person from the SDA.

[69] According to Ms Slucki's evidence, Ms Conlon communicated that she should not have applied for the Sales Assistant (Registers) role and should not have signed the Contract. She also indicated that, as a result of an asserted brain injury, she was not able to undertake the inherent requirements of her role, such as assisting customers to process purchases at the Assisted Checkout, nor was she able to provide appropriate customer service, which included approaching customers as necessary.

[70] Ms Slucki considered that, in the meeting, Ms Conlon had made it clear that she was not willing to work in the Sales Assistant (Registers) role, despite the support Savers had provided. Through these words and other conduct, Savers contends that Ms Conlon renounced her employment with Savers (an issue that does not presently arise for determination).

[71] On 8 December 2022 Ms Slucki provided Ms Conlon with a letter to the effect that Savers had decided to accept Ms Conlon's renunciation and that Savers considered that Ms Conlon had herself ended the employment relationship. The letter (among other things) provided:[27]

> **"Ending your employment contract**
>
> This letter constitutes notice of termination of your contract effective immediately."

[72] Ms Conlon commenced these proceedings on 29 December 2022.

Submissions

Savers

[73] Savers submit that Ms Conlon did not serve the minimum period of six months required by the FW Act to have been protected from unfair dismissal.

[74] Savers submit that the period of Ms Conlon's service prior to dismissal was the period between 14 June 2022 and 8 December 2022 (inclusive) being a period of five months and twenty four days only.

[75] Savers submit that Ms Conlon's service between November 2014 and 24 January 2022 cannot be taken into account because the subsequent period of nineteen weeks between 25 January 2022 and 13 June 2022 inclusive (gap period) broke the continuity of service such that Ms Conlon's prior service was not service within the meaning of s 22 of the FW Act.

[76] Savers advance this submission on the basis that, as a matter of fact, no employment relationship nor employment contract existed between Savers and Ms Conlon during the gap period.

[77] Savers submit that no law altered this factual position or deemed it to be otherwise. Savers submit that s 18 of the *Return to Work Act 2014 (SA)* does not have the effect of deeming by operation of law service to have been continuous after 24 January 2022. In the alternative, Savers submit that any State law that purports to have that effect would be inconsistent with the FW Act and invalid by virtue of s 109 of the Australian Constitution.

[78] Savers submit that, as a matter of fact, Ms Conlon was not contractually promised that her prior service would be recognised as continuous for all employment purposes. Rather, Savers submit that the recognition was for the purpose of crediting the gap period as service for the purpose of calculating certain accruals only, as reflected in the terms of cl 2.3 of the Contract.

[79] In any event, and in the alternative, Savers submit that a contractual representation cannot supplant the terms of s 22 of the FW Act requiring a period of employment to have existed for service to be counted. Savers submit that it is a legal fiction to conclude that a subsequent contractual representation created something that did not exist.

[80] Accordingly, Savers submit that the application should be dismissed as Ms Conlon did not serve the minimum employment period and thus was not a person protected from unfair dismissal within the meaning of ss 382 and 383 of the FW Act.

Ms Conlon

[81] Ms Conlon submits that the gap period and her service prior to 24 January 2022 should be counted for two reasons.

[82] Firstly, she submits that her service in the gap period should be counted because she was wrongly terminated from employment by Savers on 24 January 2022. Ms Conlon advances this proposition because she says that s 18 of the *Return to Work Act 2014 (SA)* imposed a duty on Savers to provide work to the extent she was able to work and that the negotiation that occurred during the gap period between her union and Savers leading to the recommencement of work on 14 June 2022 was recognition by Savers that it had wrongly terminated her contract in breach of this obligation.

[83] Secondly, and in the alternative, Ms Conlon submits that the gap period should be counted as service because she recommenced work on 14 June 2022 having received and acted on a promise by Savers that her prior service would be recognised. Ms Conlon submits that this promise was a promise of continuity of service back to November 2014 for all purposes. Ms

Conlon submits that this promise was enforceable such that the gap period became part of her continuous service joining her two periods of work.

[84] Accordingly, Ms Conlon submits that she served more than six months prior to her employment ending on 8 December 2022 and is thus a person protected from unfair dismissal within the meaning of s 382 of the FW Act.

Consideration

Legal provisions

[85] Section 382 of the FW Act provides that a person is protected from unfair dismissal if they have completed a period of employment of at least the minimum employment period.

[86] Section 383 sets out the minimum employment period:

> **"383 Meaning of minimum employment period**
>
> The minimum employment period is:
>
> (a) if the employer is not a small business employer—6 months ending at the earlier of the following times:
>
> (i) the time when the person is given notice of the dismissal;
>
> (ii) immediately before the dismissal; or
>
> (b) if the employer is a small business employer—one year ending at that time."

[87] Section 384(1) provides:

> **"384 Period of employment**
>
> (1) An employee's period of employment with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee."

[88] Section 12 defines "service" by referring to "section 22" and "continuous service" as having "a meaning affected by section 22".

[89] In somewhat curious drafting, s 22 defines "service" but does not contain an express meaning of "continuous service" (though the phrase is bolded by the legislature in s 22(4)(b) without subsequent definition). Section 22 relevantly provides:

> "**22 Meanings of service and continuous service**
>
> *General meaning*

(1) A period of ***service*** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an ***excluded period***) that does not count as service because of subsection (2).

(2) The following periods do not count as service:

(a) any period of unauthorised absence;

(b) any period of unpaid leave or unpaid authorised absence, other than:

(i) a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or

(ii) a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment; or

(iii) a period of leave or absence of a kind prescribed by the regulations;

(c) any other period of a kind prescribed by the regulations.

(3) An excluded period does not break a national system employee's ***continuous service*** with his or her national system employer, but does not count towards the length of the employee's continuous service.

(3A) Regulations made for the purposes of paragraph (2)(c) may prescribe different kinds of periods for the purposes of different provisions of this Act (other than provisions to which subsection (4) applies). If they do so, subsection (3) applies accordingly."

Minimum employment period

[90] Savers is not a small business employer. In order to be protected from unfair dismissal, the minimum employment period required to have been worked by Ms Conlon prior to her dismissal taking effect is six months.

[91] As Ms Conlon's dismissal took effect on 8 December 2022, the question which arises is whether she had six months of relevant service prior to that date, that is during the period 8 June 2022 to 8 December 2022.

[92] It is not disputed by Savers that Ms Conlon was first employed in November 2014 and worked continuously under a series of contracts until 24 January 2022.

[93] Nor is it disputed by Savers that Ms Conlon recommenced work from 14 June 2022 until 8 December 2022 under a new contract.

[94] The issue for determination in this matter is whether as a matter of fact or by operation of law the gap period (or at least that part of it from 8 June to 13 June inclusive) is service for the purposes of the FW Act.

Status during gap period

[95] An employment relationship is inherently contractual.[28] Whilst it is necessary for a contract of employment to exist for there to be "employment" from which a person is terminated, the FW Act's unfair dismissal jurisdiction concerns itself with termination of the employment relationship and not necessarily termination of the contract.[29] It has been said by a Full Bench of the Commission that these provisions concern themselves with "termination of the employment relationship and/or termination of the contract of employment".[30]

[96] Indeed, termination of the employment relationship is a different concept from the termination of an employment contract[31].

[97] It is not disputed by Ms Conlon that she did not work for Savers in the nineteen week gap period 25 January 2022 to 13 June 2022 inclusive following the termination of her employment on 24 January 2022.

[98] I am well satisfied that as a matter of fact Ms Conlon was not employed during the gap period.

[99] Her employment was expressly terminated by Savers by oral and written notice on 24 January 2022. That termination came into immediate effect.

[100] The employment relationship was not recreated until 14 June 2022 when she resumed work after signing a contract that day.

[101] The conduct of the parties supports that finding. Ms Conlon was not rostered to work after 24 January 2022. Ms Conlon did not turn up for work after that date. Ms Conlon was on that date paid out her statutory entitlements on termination including accrued annual leave and pro rata accrued sick leave, as well as an amount of payment in lieu of notice.

[102] The subsequent filing of a workers' compensation claim by Ms Conlon in March 2022 for an alleged past aggravation of the shoulder injury and a psychological injury did not alter that fact as such a claim can be made by a former employee under South Australian law.[32]

[103] It was not until 5 April 2022 that Ms Conlon, through her representative at the SDA, communicated with Savers to the effect that she sought a return to work under the provisions of South Australian workers compensation law.

[104] The subsequent medical and other assessments of suitable work and Ms Conlon's capacity were made in that context and not in the context of a then existing employment relationship.

[105] The communication between Ms Conlon's representative and Savers in the lead-up to her employment recommencing on 14 June 2022 concerned the reestablishment of an

employment relationship if a suitable position could be found or created. One was created. Only when a new employment contract was drafted, considered and then signed, was an employment relationship restored. That occurred on 14 June 2022.

[106] Thus, I do not find that Ms Conlon was in an employment relationship with Savers during the gap period. This includes during the period 8 June to 13 June 2022 inclusive.

[107] Section 22(1) of the FW Act requires a period of service to be a period "during which the employee is employed by the employer". There having been no employment relationship between Savers and Ms Conlon during the gap period, then there cannot have been "service" within the meaning of the FW Act as Ms Conlon was not employed by the employer or in an employment relationship with it during this period.

[108] I make this finding taking into account that whilst the phrase "continuous service" is not defined in the FW Act, its ordinary meaning is a period of unbroken service by an employee with an employer.[33] Subject to statutory exceptions in s 22, "continuous service" for the purposes of ss 384 and 22 of the FW Act requires the employment relationship to have been unbroken.

[109] For the sake of completeness, I note that it was not argued, and I do not find, that Ms Conlon's absence during the gap period was an "excluded period" not breaking continuity of service within the meaning of s 22(3) of the FW Act. It was not "unpaid leave" nor an "unpaid authorised absence" within the meaning of s 22(2). It was not, in the words of a Full Bench of the Commission, a "period of time off work which, but for the permission or authorisation of the employer, would have been expected if not required to have been worked".[34]

[110] However, Ms Conlon advances two grounds on which she says that the gap period is to be counted as service.

[111] I now deal with these.

Return to Work Act 2014 (SA)

[112] Section 18(1) of the *Return to Work Act 2014 (SA)* provides:

> **"18—Employer's duty to provide work**
>
> (1) If a worker who has been incapacitated for work in consequence of a work injury is able to return to work (whether on a full-time or part-time basis and whether or not to his or her previous employment), the employer from whose employment the injury arose (the ***pre-injury employer***) must provide suitable employment for the worker (the employment being employment for which the worker is fit and, subject to that qualification and this section, so far as reasonably practicable the same as, or equivalent to, the employment in which the worker was working immediately before the incapacity)."

[113] Ms Conlon submits that her service in the gap period should be counted because she was wrongly terminated from employment on 24 January 2022 because s 18(1) imposed a duty on Savers to provide work to the extent she was able to work.

[114] Section 18(1) imposes a duty on an employer to provide work in certain circumstances only. It is not an unqualified duty. For example, the duty does not apply if the employer establishes that it is not reasonably practicable to do so (s 18(2)(a)). There is no evidence before me as to whether it was reasonably practicable for Savers to do so on 24 January 2022. However, on 2 June 2022 Savers advised the SDA that it had agreed to re-employ Ms Conlon in a newly created role after considering medical opinion about her capacity to work. In that context, it is open to find that it was reasonably practicable for Savers to provide employment from at least that date (2 June 2022).

[115] However, there are a number of difficulties with extrapolating this finding into the proposition about continuity of service advanced by Ms Conlon.

[116] Firstly, that it is asserted that a wrongful dismissal in the sense of a dismissal contrary to law occurred, does not make it so. The Commission not being a court of law has no jurisdiction to make binding orders to that effect. There is no finding before me that Savers dismissed Ms Conlon contrary to law on 24 January 2022. In any event, a finding of wrongful dismissal does not automatically have the effect of re-establishing an employment relationship. I take into account that s 20 of the *Return to Work Act 2014 (SA)* imposes certain additional obligations on an employer with respect to the termination of a worker who has suffered a work injury. However, there is no finding before me that Savers breached this provision. The fact or otherwise of termination at the initiative of the employer is a contested and unresolved proposition.

[117] Secondly, whilst it has been held by the SAET that s 18 of the *Return to Work Act 2014 (SA)* sits alongside the unfair dismissal provisions of the FW Act and is not inconsistent with them,[35] I do not consider that the duty to provide work under s 18 of the *Return to Work Act 2014 (SA)* deems the establishment of an employment relationship if one does not exist or is not recreated in fact by agreement or by order. To the extent I need to express an opinion on that question, I am of the view that an employer may be in breach of the statutory duty if it fails to do so at a given point in time when the duty operated but s 18 does not deem an employment relationship to exist at that time if one had not existed in fact or is otherwise ordered to have existed by force of law. I have found that no employment relationship existed during the gap period (that is, at any time between 24 January 2022 and 14 June 2022).

[118] That said, it is tolerably arguable that where an order is made by the South Australian Employment Tribunal pursuant to s 18 of the *Return to Work Act 2014 (SA)* such that the employer is ordered to provide work to a dismissed employee and the employer does so, then the employment relationship will have been re-established on the terms of the order. In this matter, the Tribunal's consent order of 11 August 2022 dismissed Ms Conlon's application whilst noting that a private agreement between the parties had been reached.

[119] Thirdly, there is nothing in the language of the FW Act or s 22 in particular which subjugates the definition of "service" or the concept of "continuous service" to provisions of

State law, even if it was to be found that s 18 of the South Australian *Return to Work Act* was constitutionally valid and operated to create a class of deemed employment.

[120] For these reasons, I do not conclude that Ms Conlon's service during the whole or a relevant part of the gap period was service within the meaning of the FW Act by virtue of the operation of the *Return to Work Act 2014 (SA)*.

Contractual representation

[121] Ms Conlon submits that the gap period should be counted as service because she recommenced work on 14 June 2022 having received and acted on a promise by Savers that her prior service would be recognised.

[122] I have found that Ms Conlon was told words by Savers' District Manager Mr Spencer prior to signing the Contract and recommencing employment on 14 June 2022 conveying the general impression that her past service was being recognised notwithstanding Schedule 1 of the Contract and the covering letter of 9 June 2022 referring to a commencement date of 14 June 2022.

[123] I have however found that whilst this was the general import of what was said by Mr Spencer, Ms Conlon's specific recall was of words used was imprecise. Where reliance is placed on a representation, words used that are said to have formed that representation matter.

[124] Does the representation made to Ms Conlon have the effect of establishing continuity of service within the meaning of s 22 of the FW Act and for the purposes of s 384 at least relevantly in the period 8 June 2022 to 13 June 2022 inclusive?

[125] For the following reason I think not.

[126] Given the state of the evidence, I do not find that the representation made was a representation for all purposes or for purposes other than leave credits and not requiring a new probationary period. Whilst I take into account Ms Conlon's evidence that she understood it to be a more general promise, this question is to be decided objectively and not based on a subjective belief of either the employer or employee.

[127] On an objective consideration of the evidence in context I find that it was a representation related to the annual leave and personal leave credits that had been agreed to be applied to Ms Conlon for the gap period and for the purpose of not requiring Ms Conlon to resume employment on a fresh probationary period. I do not find that it was a representation for all purposes or for all purposes that included continuity of service when determining minimum employment periods under the FW Act. I take into account:

- Ms Slucki's evidence that she did not provide guidance to Mr Spencer that an earlier commencement date or past service would be recognised for all or other purposes beyond those provided for in the Contract;

- the context of Ms Conlon's query having been a series of emails exchanged in the fortnight prior between Savers and her representative in which Savers promised to recognise the gap period for the purpose of crediting leave;

- the Contract as drafted provided for the gap period to be recognised only in the sense of it being a period during which annual leave and personal leave credits would accrue; and

- Ms Conlon signed the Contract as drafted without it being amended.

[128] Having made this finding, I need not determine Savers' further submission that absent express statutory provisions to this effect, it is a legal fiction to conclude that a contractual representation creates something that did not exist and, as such, any representation (even an all purposes representation by Mr Spencer had one been made) cannot supplant the terms of s 22 of the FW Act requiring a period of employment to have existed in fact.

Conclusion

[129] The two periods of Ms Conlon's employment with Savers were broken by a gap period of nineteen weeks between 25 January 2022 and 13 June 2022 inclusive.

[130] No employment relationship existed during this gap period.

[131] Neither the representations made to Ms Conlon in the lead-up to recommencing employment on 14 June 2022 or on the day of 14 June 2022 or in the Contract as signed on 14 June 2022 altered that fact or created continuity of service for all purposes.

[132] Nor does the operation of any law deem service under the FW Act to have existed during the gap period and in my opinion s 18 of the *Return to Work Act 2014 (SA)* does not do so.

[133] Accordingly, the gap period was not a "period of continuous service" within the meaning of s 384(1) of the FW Act.

[134] That being so, the "period of employment" for the purposes of ss 383 and 384 of the FW Act served by Ms Conlon immediately prior to the alleged dismissal on 8 December 2022 was five months and twenty four days.

[135] That being so, Ms Conlon had not relevantly completed a period of employment of six months ending on 8 December 2022 as required by s 382 of the FW Act to be protected from unfair dismissal.

[136] In light of this conclusion, there is no utility in determining the second jurisdictional issue raised by Savers (allegedly no dismissal).

[137] As Ms Conlon was not protected from unfair dismissal there is no jurisdiction to hear and determine her unfair dismissal application. It must be dismissed.

[138] An order giving effect to this decision is issued in conjunction with its publication.[36]

DEPUTY PRESIDENT

Appearances:

Ms M Conlon, *on her own behalf*.

Mr J Tracey, *of counsel and with permission*, with Ms G Turner-Mobbs and Mr B Moulday on behalf of Savers Australia Pty Ltd

Hearing details:

2023
Adelaide (video)
13 April

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[1] Employer Response (F3) 19 January 2023

[2] Audio directions hearing 6 April 2023

[3] A1 (22 March 2023)

[4] R1 (10 March 2023) and R2 (3 April 2023)

[5] A1 paragraph 40

[6] (1959) 101 CLR 298

[7] *Tamayo v Alsco Linen Service Pty Ltd* (1997) Print P1859 as cited in *Hyde v Serco Australia Pty Limited* [2018] FWCFB 3989, [102]

[8] A2 paragraph 9

[9] Subsequently the *General Retail Industry Award 2020*

[10] R1 HS1

[11] R1 HS2

[12] R1 HS3

[13] R1 HS4

[14] R1 HS7

[15] R1 HS4 Email SDA to Savers 3 June 2023 3.09pm

[16] R1 HS4 Email Savers to SDA 7 June 2023 6.22pm

[17] R1 HS4 Email SDA to Savers 8 June 2022 12.13pm

[18] R1 HS5 (letter at final page of HS6)

[19] R1 HS6

[20] Audio recording of Hearing, 13 April 2023, at 2:23:41-2:24:49

[21] A1 paragraph 40

[22] Clause 2.2 and Schedule 1

[23] R1 HS9

[24] R1 HS10

[25] R1 HS12

[26] R1 HS13

[27] R1 HS14

[28] *Broadlex Services Pty Ltd v United Workers' Union* [2020] FCA 867, 61

[29] *Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162, [50]

[30] *NSW Trains v James* [2022] FWCFB 55, [45]

[31] *Visscher v Guidice and Others* (2009) 258 ALR 651, [53] per Heydon, Crennan, Keifel and Bell JJ; *Metropolitan Fire and Emergency Services Board v Duggan* [2017] FWCFB 4878, [21] - [22]; *Khayam v Navitas English Pty Ltd* [2017] FECFB 5162, [31] - [50]

[32] *Return to Work Act 2014* (SA), s 4 (definition of both "worker" and "employer" includes former worker and former employer). See also, eg, *Morphett v Chief Executive, Department of Treasury and Finance (Forestry South Australia)* [2022] SAET 143, 245

[33] *Holland v UGL Resources Pty Ltd* [2012] FWA 3453, [20]

[34] *Affinity Education Group Limited v Kogler* [2014] FWCFB 8754, [14]

[35] See discussion in *Walmsley v Crown Equipment Pty Ltd* [2016] SAET 4, 20 – 26 and 35 – 48; *Coleman-Sleep v Return to Work Corporation of South Australia (Ceduna Koonibba Aboriginal Adelaide Health Service)* [2021] SAET 144, 179

[36] PR761518