[2023] FWC 1317 [Note: An appeal pursuant to s.604 (C2023/3737) was lodged against this decision - refer to Full Bench decision dated 5 September 2023 [[2023] FWCFB 154] for result of appeal.]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Isaac Howard
v
Falls Creek Ski Lifts Pty Ltd
(U2023/3109)

DEPUTY PRESIDENT BELL MELBOURNE, 7 JUNE 2023

Application for an unfair dismissal remedy – jurisdictional objection – whether no dismissal as seasonal employment – dismissal found – application late - whether extension of time should be granted – no extension granted – application dismissed.

[1] Mr Isaac Howard is a ski instructor. Among other work, he has worked for Falls Creek Ski Lifts Pty Ltd (**Respondent**) during winter ski seasons as a casual employee since about 2011.

[2] Towards the very end of the 2022 winter ski season, Mr Howard suffered an injury to his knee. It was not a major injury but it was certainly serious enough to preclude him working further in that season. The ski season, at that point, was winding down and had only 1 week to go. He lodged a WorkCover claim, which was approved. Notwithstanding, on 15 October 2022, Mr Howard competed in a race on the Gold Coast known as the 'Trifecta Spartan' race. He says he did so in the belief it was consistent with his rehabilitation (and, for present purposes, this is a disputed matter that I do not need to, and do not, resolve).

[3] It appears that the Respondent first learnt about the Trifecta Spartan race in early 2023, as part of discussions with the WorkCover assessor. It took a different view to Mr Howard's participation in the Trifecta Spartan race. I infer that the Respondent formed the view that Mr Howard had dishonestly participated in the race outside of his certified WorkCover restrictions. It wrote to Mr Howard to that effect on 7 February 2023 and informed him that he would not be offered an employment contract to join the Falls Creek team in 2023.

[4] On 12 April 2023, Mr Howard filed an application for an unfair dismissal under s 394 of the *Fair Work Act 2009* (Cth) (**Act**). The matter was allocated to me and, being approximately 43 days past the 21-day statutory timeframe for dismissal (based on the date of dismissal specified in the Form F2 being 7 February 2022), I issued directions to determine whether an extension of time should be granted under s 394(3) of the Act.

[5] At a mention hearing listed on 8 May 2023, it became apparent that the Respondent squarely raised a question of jurisdiction, in that it asserted that Mr Howard had not been "dismissed". Rather, in accordance with s 386(2)(a) of the Act, the Respondent said Mr Howard was employed for the winter ski season and his employment terminated on 28 September 2022 at the end of that season. Even if those circumstances were insufficient to fall within the exception for "dismissals" in s 386(2)(a), the Respondent says that the proper date for dismissal was 28 September 2022, thus making Mr Howard's application approximately 170 days late (not 43 days late).

[6] In the present case, I formed the view that the Full Court decision in *Coles Supply Chain Pty Ltd v Milford and Another* (2020) 279 FCR 591 required me to first determine the question (and date) of dismissal because, without doing so, the assessment of an application for an extension of time would not be anchored by when, or if, a dismissal took place "in fact".[1] My amended directions issued to the parties required the parties to file evidence and submissions directed at the question of whether there was a "dismissal" and, if so, when.

[7] Mr Howard was represented by Ms Paula Appelhans of Cogent Legal and the Respondent by Mr Paul Lorraine of Harmers Workplace Lawyers, with permission for representation having previously been granted.

[8] Mr Howard filed a witness statement with exhibits on behalf of himself. The Respondent relied upon a witness statement of Mr Gavin Girling, Human Resources Director (Australia) for the Respondent's Australian group of companies. Each witness was cross-examined. I record at the outset, that I considered each witness did their best to provide truthful and candid evidence, so far as matters were within their knowledge. The parties also relied on their respective Form F2 (application) and Form F3 (response), together with the various documents annexed to them.

[9] While the Respondent's material was confined to the jurisdictional "dismissal" issue, the Applicant's material extended to the "extension of time" issue. I will return to this below.

[10] As an administrative matter, I also record that I have amended the name of the Respondent to "Falls Creek Ski Lifts Pty Ltd" (my amendment underlined), to reflect the correct legal name of the Respondent.

Jurisdictional objection – no dismissal

[11] Simply stated, the Respondent contends that Mr Howard was not dismissed on 7 February 2023 or at all but, rather, that his employment was terminated in accordance with s.386(2)(a) of the Act. The consequence of employment being terminated in accordance with s.386(2)(a) of the Act means that a person is not taken to have been "dismissed" for the purpose of s.385 and therefore cannot be a person who has been *unfairly dismissed*.

[12] Section 386 of the Act is as follows (emphasis added):

> "**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.
>
> (2) 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
>
> (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
> (ii) he or she remains employed with the employer that effected the demotion.
>
> (3) 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."

[13] There was no allegation that subsection 386(3) applied and I am satisfied that the Respondent had no purpose of the kind described by that subsection in relation to its employment of Mr Howard.

[14] The critical question was whether Mr Howard "*was employed under a contract of employment … for the duration of a specified season, and the employment has terminated …at the end of the season*".

[15] As recorded above, Mr Howard has been employed as a ski instructor for nearly every ski season by the Respondent since 2011. The exceptions were 2013 (when he did not work) and 2020 where, due to COVID-19 restrictions, Mr Howard was employed for just 3 days.

[16] Mr Howard's contract of employment for 2022 was contained in a letter titled "Winter Employment Offer" (**Contract**). It is unnecessary to set out the terms in full but he was

employed as a casual "for the 2022 Winter Season only", and the Contract described an "Anticipated Start Date" of 10 June 2022 and an "Anticipated End Date" of 2 October 2022.

[17] There were other terms that made the seasonal term of the employment clear. For example, the Contract stated:

> "This contract is offered on the basis that each Winter Season is a discrete employment arrangement and that Falls Creek is under no obligation to re-employ you for any future Season. As such, any future employment will be at the discretion of Falls Creek."
>
> "We anticipate your employment will commence on 10/06/2022 and conclude no later than 02/10/2022."
>
> "Your start and finish dates will also be influenced by snow and weather conditions and related business demand."
>
> "Any decision to adjust or reduce your anticipated period of Seasonal employment will be disclosed to you in writing as soon as practicable."

[18] At clause 21, titled "Special Conditions", the Contract stated:

> "(d) You warrant that you have no expectation of ongoing employment beyond the expiry of your Seasonal engagement for the 2022 Winter Season. You further warrant that Falls Creek is under no obligation to re-employ you for any future Season, and nor are you obligated to accept any offer of employment for a future Season."

[19] There is no doubt in my mind that the Contract was "*a contract of employment … for the duration of a specified season*", namely the Winter Season as set out in the Contract. That season might be increased or decreased, but the seasonal nature of the contract of employment would remain.

[20] As the Contract indicates, the "anticipated" end date of the Winter Season was 2 October 2022.

[21] At least by late September 2022, the evidence indicates there was no change to that anticipated end date and, indeed, that date had firmed. By that stage, the Falls Creek operations were winding down and the total number of instructors remaining was approximately 20 – 30, compared to around 140 at the peak.

[22] Mr Howard was in the cohort of the final 20-30. It was not surprising he was in the final cohort as he was a senior ski instructor and, on the evidence before me, very good at what he did and enthusiastic about his work.

[23] In the final week of the scheduled ski season, Mr Howard gave evidence, which I accept, that he was rostered on to work up to and including to 2 October 2022. Mr Girling also believed that this was likely to be the case although he was ultimately unsure, as he was not responsible for rostering Mr Howard.

[24] However, on 28 September 2022, an injury intervened. The injury was not disabling but was sufficiently serious that Mr Howard could not perform his usual work involving snow-boarding without real discomfort. Mr Howard obtained two Certificates of Capacity dated 1 October 2022. It is not entirely clear why two certificates were submitted, but there appears to have been a request from the employer for a second certificate. One certificate stated that Mr Howard "needs to rest knee", the other "Skating on snowboard increases pain – to avoid when working."

[25] Mr Howard reported his injury to the Respondent on the day it occurred. From that point, he was removed from the roster (which by then had 4 further days to run).

[26] The Respondent's evidence states that Mr Howard's last day of work was 28 September 2022. The Respondent's Form F3 Response states that the dismissal took effect on 28 September 2022 (although, to be clear, it raised in submissions enclosed with that Form that Mr Howard was not protected from unfair dismissal due to being a seasonal casual employee).

[27] Had Mr Howard continued to work until 2 October 2022 when all winter operations finally ceased, I would have no hesitation in concluding that the termination of his casual employment occurring at that time would fall squarely within s.386(2)(a). I would also form that conclusion if his employment ended earlier if he was part of the 'wind down' of operations I described above.

[28] To fall within the exception of s.386(2)(a), it is not enough that Mr Howard "was employed under a contract of employment … for the duration of a specified season" (which he was), but it is also necessary that "the employment has terminated …*at the end* of the season". If the termination arose prior to the end of the season from an unrelated matter – such as misconduct, abandonment or, in this case, being taken off the roster due to injury – that termination does not fall within s.386(2)(a).

[29] So as at 28 September 2022, while Mr Howard's employment was about to be terminated at the end of the Winter Season, in a somewhat unusual turn of events, his employment ended four days earlier because he was taken off the roster due to being unable to work.

[30] While the mechanics of the rostering system for Mr Howard were not particularly clear from the evidence, it is sufficiently clear that the decisions for rostering were made by the Respondent. I am satisfied that Mr Howard's employment was terminated on 28 September 2022, at the initiative of the employer, and it was not because of the Winter Season wind-down.

[31] In these circumstances, I find that Mr Howard was "dismissed" for the purposes of s.386 of the Act.

Whether extension of time should be granted

[32] While my conclusion above is sufficient to address the jurisdictional objection, I am mindful that the next step would require a further hearing on the question of whether an extension of time should be granted.

[33] The Commission is required to perform its functions in a manner that is quick, informal and avoids unnecessary technicalities: s.577(b).

[34] While it is often the case that Respondents are not required to file material for extension of time applications (although they may do so), I am particularly mindful that the Respondents indicated they have not necessarily filed all the material they might wish to file in relation to the extension of time question. There is, however, some material from the Respondent as part of its Form F3 Response (and exhibits).

[35] For the reasons that follow, I have determined that an extension of time should not be granted to file an unfair dismissal claim. I was able to determine that on the strength of Mr Howard's material, which I note was confirmed as complete by his legal representative. I consider that no disadvantage lies to the Respondent if I take this course and, to the contrary, I consider it in the interests of both parties by minimising further expenditure of legal fees already incurred.

Date of dismissal

[36] Mr Howard's submissions contend that the date of dismissal was 7 February 2023.

[37] If the date of dismissal was 7 February 2023, that presupposes that Mr Howard was in fact employed at that time.

[38] I do not accept that Mr Howard was employed in February 2023 or, indeed, from any time after 28 September 2022 (or, at the latest, 2 October 2022). Mr Howard's submissions appears to rely heavily on a contention that there was an ongoing employment relationship subsisting after September 2022, because he was a "regular casual employee", with a "reasonable expectation of continuing employment" on a "regular and systematic basis". Those propositions are relevant to establishing "continuous service" for the purpose of s.382 of the Act but they do not, in my view, *create* an employment relationship where none exists.

[39] The Contract by which Mr Howard was employed in the 2022 ski season was clear in its terms that it was for that season alone.

[40] In addition to his contractual entitlements, Mr Howard's employment relationship was affected by the *Mount Hotham and Falls Creek Enterprise Agreement 2018* (**Agreement**). Clause 30 of the Agreement provides that, prior to 10 December in a given year, the employer will advise seasonal employees and casuals (which includes Mr Howard) whether he/she will be asked to reapply for his/her position for the following season.

[41] On 31 October 2022, Mr Howard received an email from the Respondent stating "We are super excited to welcome you back for another great season in 2023 and would love to hear some feedback from your 2022 experience and find out your intentions for 2023." It stated "We are planning on having return staff offers sent out before Christmas 2022 and will be in contact closer to when this information will be going out."

[42] Notwithstanding the indication of further correspondence before Christmas 2022 and a staff "offer", Mr Howard did not receive any further correspondence until 7 February 2023. I will return to this email below.

[43] While I accept that Mr Howard clearly had a reasonable expectation that he *would be* receiving a future Winter Season contract for 2023, that expectation does not create an ongoing employment relationship during the off-season.

[44] On no meaningful basis could it be said Mr Howard was employed during the off-season. There were no rosters, no duties, no customers, no reporting, no wages, and no snow. His expectation of *future* employment does not alter that.

[45] Somewhat faintly, the applicant relied on a 'return to work' offer of employment duties as part of his WorkCover claim. Those duties were modified duties, offered in compliance with the Respondent's WorkCover obligations. According to a form titled 'Return to Work Arrangements' dated 12 October 2022, Mr Howard was to be offered 'General admin tasks' and 'Assist with laundry'. Listed restrictions were 'No lifting of anything above 10kg' and 'No squatting'. Despite this, Mr Howard did not take up any return to work offer as part of the WorkCover process.

[46] In all respects, Mr Howard's most recent employment had ended on 28 September 2022, when he was removed from the final week of the Winter Season roster due to injury. On that basis, any unfair dismissal application should have been lodged on 19 October 2022 and, in the circumstances, his application was 175 days late.

[47] Mr Howard relies on the email dated 7 February 2023 as the date of dismissal. The email dated 7 February 2023 stated:

> "This email is to advise that we have recently conducted a review of our worker's compensation claims with our Insurer.
>
> In reviewing your claim, the Insurer has made us aware of a factual discrepancy included in an investigation report regarding your work capacity. This report also confirmed you competed in The Gold Coast Trifecta Spartan Race on 15 October 2022 while on restricted duties for your workplace injury and unable to undertake suitable duties.
>
> Your dishonesty and decision to participate in an event while undertaking rehabilitation and outside of your certified restrictions, go against our value of Do Right, as does the factual discrepancy that was raised as an issue by the Insurer. In consultation with the Snowsports Management Team, it has been decided that you will not be offered an employment contract to join the Falls Creek team in 2023."

[48] If Mr Howard was employed on 7 February 2023, then I accept that this email would have constituted dismissal by the initiative of the employer. However, consistent with the Contract, the 7 February 2023 does not refer to 'dismissal' or 'termination' but instead states "you will not be offered" a future contract.

[49] Following receipt of this email, Mr Howard was advised by a lawyer to obtain the investigation report and the WorkCover report to address the allegations, as the 2023 winter season had not yet started. This is what he did, although on 23 February 2023 he was advised the report would not be delivered for approximately 28 days.

[50] On 23 March 2023, he received the file from EML, who I understand is the Respondent's WorkCover assessor.

[51] On 27 March 2023, based on information from the EML file, he provided a substantial response in reply to the 7 February 2023 email.

[52] Unfortunately for Mr Howard, the Respondent did not accept his explanations.

[53] On 12 April 2023, the Respondent replied to Mr Howard's email from 27 March 2023. The email reiterated the Respondent's initial position, although no elaboration was provided. The somewhat bare response simply stated:

> "Please accept my apologies for the delay in getting back to you. I appreciate you taking the time to provide a response, however our position has not changed. You will not be offered a position with Falls Creek Ski Lifts in 2023."

[54] That day, Mr Howard filed his application for an unfair dismissal remedy.

[55] The application having not been made within 21 days of the date on which the dismissal took effect, I need to consider whether it was made within such further period as the Commission allows.

[56] Under section 394(3) of the Act, the Commission may allow a further period for an unfair dismissal application to be made if the Commission is satisfied that there are exceptional circumstances, taking into account:

(a) the reason for the delay; and

(b) whether the Applicant first became aware of the dismissal after it had taken effect; and

(c) any action taken by the Applicant to dispute the dismissal; and

(d) prejudice to the employer (including prejudice caused by the delay); and

(e) the merits of the application; and

(f) fairness as between the Applicant and other persons in a similar position.

[57] Each of the above matters must be considered in assessing whether there are exceptional circumstances.[2]

[58] I set out my consideration of each matter below.

Reason for the delay

[59] For the application to have been made within 21 days after the dismissal took effect, it needed to have been made by midnight on 19 October 2022. The delay is the period commencing immediately after that time until 12 April 2023, although circumstances arising prior to that delay may be relevant to the reason for the delay.[3] In the present case, the delay is approximately 175 days.

[60] The reason for the delay is not in itself required to be an exceptional circumstance. It is one of the factors that must be weighed in assessing whether, overall, there are exceptional circumstances.[4]

[61] An applicant does not need to provide a reason for the entire period of the delay. Depending on all the circumstances, an extension of time may be granted where the applicant has not provided any reason for any part of the delay.[5]

[62] The reason for the delay in the present case spans two periods of time: the events prior to 7 February 2023 and the events from 7 February 2023. I say this because:

- For the period prior to 7 February 2023, Mr Howard had no awareness that his 2023 Winter Season work was about to be withdrawn. Hence, up to this point, his reason for delaying making an unfair dismissal application was because there was no basis to make one that he was aware of. That reason also appears to have been informed by a mistaken belief as to his current employment status due to his expectation that he *would be* offered a new contract for the 2023 season.

- For the period from 7 February 2023, the reason for the delay was because Mr Howard was seeking to obtain evidence and then to provide explanation to dispel any concern the Respondent had regarding the allegations against him.

Did the Applicant first become aware of the dismissal after it had taken effect?

[63] Had Mr Howard worked through the balance of the Winter Season until 2 October 2022, there would have been no particular need to have informed Mr Howard of the termination of employment (because it would not have been a "dismissal").

[64] While I have found that the legal effect of his employment being terminated on 28 September 2022 was a "dismissal", there is no evidence before me to show that he was informed of the fact that it was a "dismissal" as such. That said, Mr Howard was fully aware that he was no longer rostered and why.

[65] In the somewhat unusual circumstances of the matter before me, it appears that Mr Howard only became aware of his dismissal on 7 February 2023. What is unusual is that that awareness appears to be premised on an incorrect impression or belief that his employment was continuing up until 7 February 2023.

[66] If, contrary to my conclusions above, the correct date of dismissal is 7 February 2023 then I find that Mr Howard became aware of the dismissal on that same date although I consider he ought reasonably should have been aware the dismissal occurred on 28 September 2022 (or at least by 2 October 2022) given the clear seasonal nature of the Contract.

What action was taken by the Applicant to dispute the dismissal?

[67] Where an applicant takes action to contest a termination, it will put the employer on notice that its decision to terminate the applicant's employment is actively contested and may, depending on all the circumstances, favour the granting of an extension of time.[6]

[68] As the dismissal took effect on 28 September 2022, Mr Howard did not take action to dispute the dismissal prior to 7 February 2023.

[69] Once again noting the unusual circumstances of this case, if the dismissal took effect on 7 February 2023, then I am satisfied that Mr Howard took steps to challenge the dismissal by seeking the EML file and attempting to convince the employer to reconsider its position.

What is the prejudice to the employer (including prejudice caused by the delay)?

[70] In all the circumstances, I do not find that any material prejudice would be suffered by the Respondent if an extension of time were granted. However, noting that the Respondent has not filed evidence about such issues, I cannot discount the possibility that such prejudice exists but I am prepared to proceed in Mr Howard's favour that there is none.

What are the merits of the application?

[71] The competing contentions of the parties in relation to the merits of the application are set out in the filed materials (although in the Respondent's material to a much lesser extent), although at a relatively high level.

[72] Again, the relevance of that material depends upon the event that constituted the dismissal. As I have found that the dismissal arose from the events on 28 September 2023, there is no material before me to suggest that that dismissal was unfair (and, in fairness to Mr Howard, I did not understand him as suggesting otherwise).

[73] If the dismissal event was the email on 7 February 2023, then different considerations arise. Having examined the materials relating to that event (again, noting that the Respondent may have filed further material in relation to it), it is evident to me that the merits of the application turn on contested points of fact, evidence in respect of which would be heard and weighed in a hearing of the merits of this matter, if an extension of time were granted. It is well established that, "it will not be appropriate for the Tribunal to resolve contested issues of fact going to the ultimate merits for the purposes of taking account of the matter in s.366(2)(d)"[7] and the same applies to s.394(3)(e).

[74] In the absence of a hearing of the evidence, it is not possible to make any firm or detailed assessment of the merits. The Applicant has an apparent case, to which the Respondent has an apparent defence.

[75] In the latter circumstances, I find that it is not possible to make an assessment of the merits of the application if the date of dismissal was found to be 7 February 2023. I treat this factor neutrally.

Fairness as between the Applicant and other persons in a similar position

[76] Neither party brought to my attention any relevant matter concerning this consideration and I am unaware of any relevant matter. In relation to this factor, I therefore find that there is nothing for me to weigh in my assessment of whether there are exceptional circumstances.

Is the Commission satisfied that there are exceptional circumstances, taking into account the matters above?

[77] I must now consider whether I am satisfied that there are exceptional circumstances, taking into account my findings above.

[78] Briefly, exceptional circumstances are circumstances that are out of the ordinary course, unusual, special or uncommon but the circumstances themselves do not need to be unique nor unprecedented, nor even very rare.[8] Exceptional circumstances may include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together can be considered exceptional.[9] Mere ignorance of the statutory time limit is not an exceptional circumstance.[10]

[79] The delay in the present case is significant – approximately 175 days. In one respect, it is a non sequitur to describe Mr Howard's reasons for delay as to the dismissal on 28 September 2022, because he is not challenging a dismissal based on that event. Further, the events that follow on 7 February 2023 do not form part of the factual matrix regarding the dismissal, because that event had passed. So far as Mr Howard misunderstood his employment status due to his expectation of *future* employment, that is not a basis to extend the statutory timeframe. In short, taking into consideration all the factors under s.394(3), there are no "exceptional circumstances" of the kind required by the statute for a dismissal based on the date of 28 September 2022.

[80] While I do not accept that the date of dismissal was 7 February 2023, even if 7 February 2023 was the correct date, I do not consider that there are exceptional circumstances that would warrant an extension of time. On 7 February 2023, Mr Howard was told in clear terms that his contract would not be renewed in circumstances of alleged "dishonesty".

[81] While I accept that Mr Howard was seeking to collect evidence and to first engage with the employer, there was nothing preventing Mr Howard commencing an unfair dismissal claim within the required 21 day period. On the question of the alleged "dishonesty", Mr Howard was clear in his mind that there was no such conduct and did not need any report from EML to know it was wrong. I accept it is understandable that he wanted to obtain evidence to provide demonstrable support for his beliefs but it is frequently the case that an applicant is required to commence a claim (possibly to meet a filing deadline) with the knowledge that further information would need to be collected.

[82] The delay of 43 days (assuming 7 February 2023 was the date the dismissal took effect) is itself lengthy and represents a significant factor against there being exceptional circumstances. While Mr Howard's attempt to challenge the dismissal through correspondence is a factor in his favour, it is not a significant factor. I consider the other factors under s.394(3) are neutral.

Order

[83] Not being satisfied that there are "exceptional circumstances", I am not permitted to extend the time for Mr Howard to make an application for unfair dismissal. In these circumstances, Mr Howard's application for an unfair dismissal remedy is therefore dismissed. An Order[11] to this effect will be issued in conjunction with this decision.

A final matter

[84] There is one final observation I would wish to make about this matter. In the course of hearing the evidence, I formed the view that Mr Howard was a person who genuinely loved his work and would like to be given an opportunity to work with Falls Creek again. He is also very good at what he does. I also formed the impression that Mr Howard was not sincere and was not dishonest, although I acknowledge that the specific allegations in the 7 February 2023 were not matters tested.

[85] I suspect – but, again, do not know – that Mr Howard was overly zealous in pushing himself back into running after his injury on 28 September 2022. Fortunately no aggravation of his injury arose, which probably indicates that Mr Howard is mostly aware of his limits. I also suspect – but do not know – that Mr Howard did not really appreciate how seriously the Respondent took its WorkCover responsibilities and, for that reason, when it learnt that Mr Howard had participated in a race called the 'Trifecta Spartan' and other running activities, they would be (quite understandably) red flags in the eyes of the Respondent. Mr Howard could have been more prudent in explicitly telling the Respondent or EML what he was planning before he did it.

[86] However, Mr Howard's (over) enthusiasm to push himself does, I consider, just reflect who he is and why he is attracted to outdoor work. It is also a quality that explains why he was good at his ski instructor work. It is not for me to resolve the differences between the parties on this issue but if there is a possibility that the Respondent might accept that Mr Howard's circumstances were along the lines I have just described – as opposed to dishonesty – then the Respondent might (and I am not suggesting it must) be willing to reconsider its decision about reengaging Mr Howard. If that was possible, Fall Creek Ski Lifts would have a likeable and

experienced ski instructor added to its ranks and Mr Howard could continue doing what he is passionate about and very good at.

DEPUTY PRESIDENT

Appearances:

P. Appelhans of Cogent Legal Pty Ltd for the Applicant
P. Lorraine of Harmers Workplace Lawyers for the Respondent

Determinative Conference details:

2023.
Melbourne (by video link via Microsoft Teams):
June 5.

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[1] *Coles Supply Chain Pty Ltd v Milford and Another* (2020) 279 FCR 591 at [57] – [58].

[2] *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFB 901, [39].

[3] *Shaw v Australia and New Zealand Banking Group Ltd* [2015] FWCFB 287, [12] (Watson VP and Smith DP).

[4] *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFB 901, [39].

[5] *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFB 901, [40].

[6] *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298.

[7] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [36].

[8] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [13].

[9] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [13].

[10] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975, [14]; *Miller v Allianz Insurance Australia Ltd* [2016] FWCFB 5472, [23].

[11] PR762792