DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Ms Leanne Taprell
v
Mark Anthony John Boyle, Jenny Bouris
(C2023/961)

COMMISSIONER HUNT BRISBANE, 14 JUNE 2023

Application to deal with contraventions involving dismissal – jurisdictional objection – whether employee was dismissed at employer's initiative – text messages sent by partner of supervisor – dismissal at employer's initiative – jurisdictional objection dismissed.

[1] On 22 February 2023, Ms Leanne Taprell made an application to the Fair Work Commission (the Commission) under s.365 of the *Fair Work Act 2009* (the Act) to deal with a general protections dispute involving dismissal. Ms Taprell stated that she had been dismissed from her employment with a takeaway shop named Kingscliff Takeaway owned by Mr Mark Anthony John Boyle. Ms Taprell alleges the dismissal took place on 9 February 2023.

[2] Mr Boyle operates Kingscliff Takeaway as a sole trader. His mother, Ms Jenny Bouris is the Second Respondent in these proceedings. Ms Bouris works at Kingscliff Takeaway and supervised Ms Taprell. Ms Taprell alleges Ms Bouris contravened the general protections within the Act and pursuant to s.550 of the Act is pursued for accessorial liability.

[3] Ms Bouris completed the Form F8A – Response to general protections application. Ms Bouris raised a jurisdictional objection to the application on the grounds that Ms Taprell was not terminated on the employer's initiative pursuant to s.386(1) of the Act, asserting that she hadn't attended for work for two days and therefore she considered that she had abandoned her employment.

[4] Following the Full Court of the Federal Court decision of *Coles Supply Chain Pty Ltd v Milford*,[1] the Commission must determine whether Ms Taprell was dismissed before it can exercise powers under s.368 of the Act to deal with a dispute about whether Ms Taprell was dismissed in contravention of the general protections provision.

Legislative provisions

[5] Section 365 of the Act provides as follows:

"**365 Application for the FWC to deal with a dismissal dispute**

If:

(a) a person has been dismissed; and

(b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute."

[6] The meaning of "dismissed" is provided at s.386 of the Act:

"**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."

[7] This decision deals only with the jurisdictional objection to be determined; that is, was Ms Taprell dismissed from her employment?

Hearing

[8] The matter was listed for hearing on 8 June 2023 by video using Microsoft Teams. Ms Taprell was granted leave to be represented by Mr Richard Aslanian, Solicitor of Connect Legal Pty Ltd. Mr Boyle and Ms Bouris appeared and gave evidence.

Evidence of Ms Taprell

[9] In December 2019, Ms Taprell commenced employment with Kingscliff Takeaway as a short order cook. Kingscliff Takeaway provides for purchase items such as burgers, fish and chips, salads, hot and fried food, and bacon and egg rolls. While the shop was registered under Mr Boyle's name, he was not involved in the business. He would attend upon the shop once or twice per month to say hello and assist, if required. Ms Bouris ran the shop's operations while her partner, Mr Jamie Byrne helped to finance the business.

[10] The hours worked by Ms Taprell in the last few months of her employment are detailed below:

Payslip dated 24 October 2022	34.75 hours worked
Payslip dated 31 October 2022	36.75 hours worked
Payslip dated 7 November 2022	42.75 hours worked
Payslip dated 21 November 2022	52.50 hours worked
Payslip dated 28 November 2022	48.75 hours worked
Payslip dated 12 December 2022	33.75 hours worked
Payslip dated 20 December 2022	40.00 hours worked
Payslip dated 28 December 2022	35.25 hours worked
Payslip dated 3 January 2023	43.00 hours worked
Payslip dated 16 January 2023	17.00.hours worked
Payslip dated 30 January 2023	37.00 hours worked
Payslip dated 31 January 2023	25.00 hours worked
Payslip dated 6 February 2023	30.00 hours worked

[11] Ms Taprell was paid as a casual employee $24.46 per hour, then later $26.76 per hour. From November 2022, Ms Taprell complained to Ms Bouris that she was underpaid as against the *Fast Food Industry Award 2020* (the Award).

[12] From November 2022, Ms Taprell also made inquiries with Ms Bouris with respect to not receiving payment into her superannuation account. Ms Bouris informed Ms Taprell that superannuation will not be paid into her account until she leaves the business.

[13] On 9 December 2022, the following text messages were exchanged:

> Ms Taprell: Hey Jenny are you able to help me be unconfused in regard to the far works pay rate please, I have taken photos of pay rates for fast food does not match what I get so was hoping you could let me know where to look when you have time please. I get you are buggered tonight plus help with the weekend rates.
>
> Ms Bouris: I pay national minimum award rate I will look it up for you tomorrow.

[14] On 12 December 2022, Ms Taprell said to Ms Bouris that she believed she was being underpaid. On 15 December 2022, Ms Taprell sent the following text message to Ms Bouris and did not receive a response:

> Ms Taprell: I actually have no superannuation at all I rang superhost fund, over $12,700 in superannuation and I have zero. Not able to earn interest not able to access insurance, superannuation is supposed to be paid quarterly not when I leave, I am beyond disappointed I was kind enough not to mention who I work for.

[15] On 18 December 2022, Ms Bouris approached Ms Taprell in the shop and said that she and Mr Byrne had decided that they would pay her $30.00 per hour. Upon returning home, Ms Taprell sent Ms Bouris a text message to the following effect:

- Ms Bouris doesn't need to pay her $30.00 per hour, only $29.29 as per the relevant award casual rate;
- From that day, she will need to be paid proper weekend rates and public holiday rates when working; and
- She hasn't been paid weekend rates or public holiday rates and this needs to be rectified as soon as possible.

[16] From 20 December 2022, Ms Taprell started to receive the correct award rate of pay. On 21 December 2022, Ms Bouris approached Ms Taprell and asked her if she was happy with receiving the new pay rate, because she was not. Ms Bouris further said that the business could not afford her, and they would be cutting her hours accordingly.

[17] On three occasions in January 2023, Ms Taprell inquired as to when her approximate $14,000 in superannuation payments would be made into her account. On one occasion, Ms Bouris stated that the amount was only $9,000, and she would try and make a lump sum payment.

[18] On 30 January 2023, Ms Bouris approached Ms Taprell and accepted that approximately $14,000 was owed in superannuation. She stated that she could make an $8,000 payment if Ms Taprell would open a new superannuation account. The following text messages were exchanged later that day:

> Ms Taprell: Jenny even if I set up my own superannuation fund it has no direct link to my work superannuation therefore it is pointless of me doing this

when you and your accountant are the only ones who can directly pay me my super into my hostplus. I have just been speaking to a host plus employee and they advised me that opening up for myself means only I can contribute and they advised that this is something only my employer can do as I am not self-employed. I tried.

Ms Bouris: Funny that because when I spoke to them yesterday they told me that it would be easier for the client to set it up then I pay into it. Lol I will tell my accountant again tomorrow.

Ms Taprell: Your accountant told you today that you cannot do that and that you have to go through the Ato to pay me that is what you said this morning so it adds up to what I was told. If I set up a fund I have to invest into it you actually cannot invest into my self funded super fund.

Ms Bouris: Yes but we still need your account details to pay the quarterly super it is only the overdue that has to go to the tax office and they usually hold onto it unless you have a super account too.

Ms Taprell: I filled out a super form in 2020 and gave it to you for the accountant to open up the Super haven't you got a default super fund.

Ms Bouris: Okay I will see if I can open a personal one with them for myself tomorrow and transfer my other super into it and try to use it for work too.

Ms Taprell: I believed you and your accountant opened up a host super plus for me so where are the forms that were filled in 2020.

Ms Bouris: He did not open it because we did not have any money until now to put into it so now we try the rules have changed. I told you we paid the other staff we just paid it out when they left.

Ms Taprell: That is not legal Jenny.

Ms Bouris: Do you not think I have been stressed about the business not having enough money.

Ms Taprell: Of course you have, SO HAVE I JENNY

Ms Bouris: And every sole trader I have worked for it has been the same I have received it when I left only big companies pay it on time back in the day. Laws are changing in March that is why they are buckling up on it now with employers and changing the ATO system to make it tighter and harsher, they will very relaxed over COVID with it.

Ms Taprell: I have never had a business pay me my super upon leaving they have always opened up a super and contributed even dots by the sea did a super for me.

Ms Bouris: I'm aiming to have it paid by the time you have your birthday, if you were born in 1964 you are allowed to access it when you turn 59.

Ms Taprell: So where are you putting it then is that accessing for super?

Ms Bouris: I have to give it to the tax office now I spoke to my accountant this morning.

Ms Taprell: Yes, so you make the contribution to the Ato and they put it in my super, what super are you asking them to put it in?

[19] On 6 February 2023, Ms Taprell worked 7 hours. She sent the following text message to Ms Bouris:

"Jen,
I want my super and I want it by end of next week. Been too nice and too kind about it.. end of next week I want the whole lot, just like you would want it. If the situation was reversed.. I'm not a fool
I'm over it..
I'll still continue to work..
But I want what I've worked so hard for..
Thank you"

[20] Shortly after sending the above text message, Mr Byrne telephoned Ms Taprell. This is her account of the conversation:

- Mr Byrne said words to the effect that the superannuation payment is with their accountant and will be deposited soon;
- Ms Taprell asked Mr Byrne if he can guarantee when it will be made;
- Mr Byrne said he can't, and the shop will be closed the following day so don't bother coming to work;
- Ms Taprell asked if she was being terminated or if she'll be coming back to work;
- Mr Byrne said she has a personality clash with Ms Bouris and why would she want to come back;
- Ms Taprell said that 'they' (Ms Bouris and Mr Byrne) are the ones who have done wrong by her, and she's entitled to inquire about her rights and she wants what is owed to her.

[21] Ms Taprell did not attend for work on 7 February 2023 as she had been informed by Mr Byrne that the shop was shut. On 8 February 2023, she did not attend for work as she was stressed by the events. She did not communicate her non-attendance.

[22] On 9 February 2023, Mr Byrne attempted to telephone Ms Taprell. She did not want to speak with him on the phone as she was suffering from stress. The following text messages were exchanged from 11:48am:

Ms Taprell: Hi Jamie,
What's the call in regards too as I'm quite busy. Thanks.

Mr Byrne: Your employment!

Ms Taprell: Please just txt me anything you need to say.

Mr Byrne: After no notice yesterday and not turning up for work, your go slow work behaviour in the last couple of months and the attitude you showed to our staff. After giving you a pay rise recently your work ethic dropped to a poor standard. All this has left Jenny and I feeling we can no longer rely or trust you anymore.
Please return shop key to shop mailbox.

Meeting tomorrow with [text message cut off]

Ms Taprell: After 3 years of giving my all, being loyal, going in and working for free, because of the kindness of my own heart, I am treated extremely poorly by you and Jen, who have ripped me off and showed illegal action re my superannuation and wages. This is how you have both treated an innocent loyal worker.
All has been documented
Thank you.

Jamie,
Have I been terminated?

Mr Byrne: Yes

Contact you tomorrow afternoon after appointment with accountant re superannuation lump sum payment.

Leanne,
Unfortunately our accountant or us have no record of your superannuation forms. The quickest and convenient way to pay your superannuation is to set up an account. We have found Host Plus is the best to deal with. If you set up account online with them, takes roughly 20mins. Pass the account number on to me and I will pay all superannuation owed to you.
Thanks Jamie.

Evidence of Ms Bouris

[23] In the Form F8A completed by Ms Bouris, she stated that Ms Taprell did not attend for work on 7 and 8 February 2023, without notification, and she assumed she had left her employment. It was submitted that Ms Taprell resigned when she didn't show up for work.

[24] In the form, Ms Bouris stated:

> "I understand Leanne contacted my partner James Byrne to ask if her employment was terminated. He said yes because she hadn't turned up for the last 2 shifts."

[25] In her witness statement in this matter, Ms Bouris stated that by 30 January 2023, there was agreement that superannuation was owed, however there was miscommunication as to how it would be rectified.

[26] Ms Bouris noted that on 27 January 2023, Ms Taprell had sent her a text message requesting Ms Bouris complete a reference for a new position Ms Taprell had applied for. During the hearing, it was accepted that the new work Ms Taprell was applying for was in addition to her role with the takeaway store, on account of her hours being reduced. The text message was forwarded following the hearing and reads:

> "Can you please take 5-10 mins tonight to help me secure some more work so as I can afford to live after you yourself told me your dropping my hours to 20 hours a week because YOU CANT AFFORD ME. Your words Jen. I'm turning up to work know this since December and still putting in 110% percent. It's not easy coming in know I haven't secure work with you anymore not do I have superannuation, I reckon it's the least you can do for the loyal worker I've been to you Jen.

[27] Ms Bouris stated that at no point did the business consider it optional to pay employees superannuation, however as evidenced by the outstanding tax bill, the business is struggling to survive after the challenges presented by COVID-19. She stated that every month was a matter of hoping things would improve, but they did not. When Ms Taprell confronted her about the unpaid superannuation, contact was made with the business' accountant.

[28] Ms Bouris stated that on 6 February 2023, the financial stress overwhelmed her, and that's when Mr Byrne telephoned Ms Taprell and had the conversation at [20]. Ms Bouris had expressed to Mr Byrne that she didn't know if she could trust Ms Taprell again. Ms Bouris stated that Mr Byrne telephoned Ms Taprell at his own initiative after Ms Bouris showed Mr Byrne the text messages regarding unpaid superannuation at [19]. During the hearing, Ms Bouris gave evidence that she was present in the room with Mr Byrne as he made the telephone call to Ms Taprell.

[29] Ms Bouris had made the decision not to open the shop on 7 February 2023, as Mr Byrne was having surgery. Mr Byrne was the one to inform Ms Taprell she was not required to attend for work the next day. Ms Bouris also sent a text message to another employee, advising her not to come into work.

[30] Ms Bouris stated during the hearing that she was happy when Ms Taprell did not attend for work on 8 February 2023 after all of the text messages that had been exchanged between them. In cross-examination, she accepted she had been wrong about her assertion that Ms Taprell had not shown for work on 7 February 2023, given the shop had been closed.

[31] On 9 February 2023, when Ms Taprell did not attend for work in the morning, Ms Bouris informed Mr Byrne and expressed her frustration. She learned on the evening of 9 February

2023 that Mr Byrne had sent the text messages to Ms Taprell at [22], purportedly terminating her employment. The evidence she gave at the hearing is that she told him he shouldn't have done that, and she was embarrassed.

[32] In cross-examination, she conceded that she made no effort to inform Ms Taprell that Mr Byrne had acted outside of authority and her employment was ongoing.

[33] Ms Bouris provided a medical certificate dated 1 June 2023 in respect of Mr Byrne. It notes that Mr Byrne suffered a Cerebro Vascular Accident on 19 June 2010 and again in January 2014. Mr Byrne has been left with a number of cognitive deficits and mood impairments, including labile mood, short fuse/irritability, poor anger management and anxiety/depression.

[34] Ms Bouris stated that she did not wish for Mr Byrne to give evidence in these proceedings, as she does not know what he would say. Mr Boyle echoed this sentiment.

[35] In cross-examination, Ms Bouris agreed that Mr Byrne had made a financial stake in the business. He would often voice his opinion about the business but did not make operational decisions. He came daily to eat breakfast in the shop. He would not give many directions, however if a table needed wiping, he'd be able to give instruction to staff in the shop to wipe the table. Ms Bouris stated that any customer could make the same respectful request.

[36] In cross-examination, Ms Bouris agreed that Mr Byrne would attend with her with the accountant, as he had a financial interest. She then said his attendance was more as a support for her.

[37] In cross-examination, Ms Bouris agreed that it was Mr Byrne who had said Ms Taprell should be paid $30.00 per hour when the underpayment was discovered. This was then reduced at Ms Taprell's suggestion to the casual award rate of pay.

[38] It is Ms Bouris' submission that Mr Byrne acted without authority and Ms Taprell cannot rely on the text messages sent by him to have dismissed her. During the hearing, Ms Bouris stated that she was sorry, and she had done 'everything wrong.'[2]

Evidence of Mr Boyle

[39] Mr Boyle gave evidence that he is a sole trader operating the takeaway shop. A letter from the Murwillumbah & Tweed Financial Counselling Service was submitted, dated 24 May 2023. The financial counselling service is funded through NSW Office of Fair Trading and FaHCSIA.

[40] The letter records Mr Boyle seeking advice, with acknowledgement that monies are owed to Ms Taprell on account of unpaid superannuation and underpayment of wages. Mr Boyle is presently studying, and his income is less than $20,000 per annum.

[41] The taxation bill owed to the ATO is nearly $100,000 for unpaid GST and BAS, together with unpaid superannuation of $40,000 and an accounting bill of $2,000.

[42] Mr Boyle stated that he found out on the evening of 9 February 2023 that Mr Byrne had sent the text messages to Ms Taprell, purportedly dismissing her. He said that upon learning this, he 'flipped his lid'. He did not make any effort to contact Ms Taprell to communicate that Mr Byrne had acted without authority.

Consideration

[43] Section 386 of the Act provides that a person has been dismissed in several circumstances, including when their "employment" has been "terminated on the employer's initiative". Such a situation refers to a termination that is brought about by an employer and which is not agreed to by the employee.[3]

[44] When analysing whether there has been a "termination at the initiative of the employer" for the purpose of s.386(1)(a) of the Act, it is necessary for the analysis to be conducted by reference to termination of the employment relationship. It is not conducted by reference to the termination of the contract of employment in operation immediately before the cessation of the employment.[4]

[45] A "termination at the initiative of the employer" is when two criteria are satisfied:

1. the employer's action "directly and consequentially" results in the termination of employment; and

2. had the employer not taken this action, the employee would have remained employed.[5]

[46] For there to be a "termination at the initiative of the employer" there must be action by the employer that either intends to bring the relationship to an end or has that probable result.

[47] In *Abandonment of Employment*,[6] the Full Bench of this Commission considered the meaning of the "abandonment of employment" in the context of the four-yearly review of modern award. However, the comments of the Full Bench are relevant here:

> "'Abandonment of employment' is an expression sometimes used to describe a situation where an employee ceases to attend his or her place of employment without proper excuse or explanation and thereby evinces an unwillingness or inability to substantially perform his or her obligations under the employment contract. This may be termed a renunciation of the employment contract. The test is whether the employee's conduct is such as to convey to a reasonable person in the situation of the employer a renunciation of the employment contract as a whole or the employee's fundamental obligations under it. Renunciation is a species of repudiation which entitles the employer to terminate the employment contract. Although it is the action of the employer in that situation which terminates the employment contract, the employment relationship is ended by the employee's renunciation of the employment obligations.
>
> Where this occurs, it may have various consequences in terms of the application of provisions of the FW Act. To give three examples, first, because the employer has not terminated the employee's employment, the NES requirement in s 117 for the provision of notice by the employer, or payment in lieu of notice, will not be applicable. Second,

> if a modern award or enterprise agreement provision made pursuant to s 118 requiring an employee to give notice of the termination of his or her employment applies, a question may arise about compliance with such a provision. Third, if the employee lodges an unfair dismissal application, then the application is liable to be struck out on the ground that there was no termination of the employment relationship at the initiative of the employer and thus no dismissal within the meaning of s 386(1)(a) (unless there is some distinguishing factual circumstance in the matter or the employee can argue that there was a forced resignation under s 386(1)(b)).”

[48] Where the conduct of an employee amounts to a renunciation of the contract of employment, it is the conduct of the employee that terminates the employment relationship.[7] Renunciation is a species of repudiation which entitles the employer to terminate the employment contract.[8] The difference between renunciation and repudiation was explained by Gleeson CJ, Gummow, Heydon and Crennan JJ in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited*[9] as follows (references omitted):

> “In its letter of termination, Koompahtoo claimed that the conduct of Sanpine amounted to repudiatory breach of contract. The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it... Secondly, it may refer to any breach of contract which justifies termination by the other party... There may be cases where a failure to perform, even if not a breach of an essential term ... manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words.”

[49] Ms Taprell did not abandon her employment and there is simply no basis for Ms Bouris to sensibly assert that she did. Mr Byrne contacted Ms Taprell on 6 February 2023 to inform her not to come to work on 7 February 2023 on account of the shop being closed. Ms Bouris was present when the phone call was made. Ms Bouris was aware of Mr Byrne’s actions and permitted it.

[50] Ms Taprell did not attend for work on 8 February 2023, nor on the morning of 9 February 2023 before she received the text message from Mr Byrne. She accepts she did not properly inform Ms Bouris she would not be attending. Ms Bouris made no effort to contact Ms Taprell and inquire as to her whereabouts, and her evidence before the Commission is that she didn’t want to speak with her; she wanted ‘time out’.[10] I am not satisfied that Ms Taprell’s conduct in not telephoning her absences on 8 and 9 February 2023 evidenced an unwillingness or inability to substantially perform her obligations under the employment contact. The conduct was not

so serious to convey to a reasonable person in the situation of the employer a renunciation of the employment contract as a whole, or Ms Taprell's fundamental obligations under it.

[51] If I am incorrect on this point, the reasons provided for the purported termination in Mr Byrne's text message to Ms Taprell go far beyond Ms Taprell's absence on 8 and 9 February 2023; they go to an alleged go-slow and attitudinal problem after having received a pay rise. Mr Byrne stated he and Ms Bouris cannot 'trust' Ms Taprell any further.

[52] If it was simply about the absences, Mr Byrne need not have stated the extra reasons as to why he and Ms Bouris considered Ms Taprell should no longer be employed.

[53] There is no doubt whatsoever that the text message sent by Mr Byrne to Ms Taprell on 9 February 2023 at [22] would constitute a dismissal if Mr Byrne had apparent or ostensible authority to dismiss Ms Taprell. The text message is clear and unequivocal; the employment has been terminated.

[54] The Act sets out the following in respect of liability of bodies corporate:

> "**793 Liability of bodies corporate**
>
> *Conduct of a body corporate*
>
> (1) Any conduct engaged in on behalf of a body corporate:
>
> > (a) by an officer, employee or agent (an official) of the body within the scope of his or her actual or apparent authority; or
> >
> > (b) by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;
>
> is taken, for the purposes of this Act and the procedural rules, to have been engaged in also by the body.
>
> *State of mind of a body corporate*
>
> (2) If, for the purposes of this Act or the procedural rules, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is enough to show:
>
> > (a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and
> > (b) that the person had that state of mind.
>
> …….
> ……."

[55] In this case, Mr Boyle is the true employer, and in my view, cannot be categorised as a body corporate as he is a sole trader and natural person. However, he has cast-off most of his day-to-day responsibilities to his mother to run the business, with her partner, Mr Byrne providing the financial backing.

[56] It is uncontested that Ms Bouris makes the bulk of the decisions on a day-to-day basis. Mr Byrne has a financial interest in the operation, but on account of the structure of it, no apparent liability other than the loss of his stake.

[57] Much of the case law with respect to apparent or ostensible authority of agents deal with relevant employees or agents of corporations.

[58] In *Northside Developments Pty Ltd v Registrar-General*, Brennan J stated:[11]

> "6. A company, being a corporation, is a legal fiction. Its existence, capacities and activities are only such as the law attributes to it. The acts and omissions attributed to a company are perforce the acts and omissions of natural persons. A company is bound by an act done when the person who does it purports thereby to bind the company and that person is authorized to do so or the doing of the act is subsequently ratified. (There is no question of ratification in this case.) Authority for the purpose is derived either directly from the constitution of the company or from some antecedent act (typically, a resolution of the governing body) which is itself binding on the company. As between a company and a party who deals with it, a company is bound by an act purporting to bind it not only when the person who does the act has the company's authority to bind it by that act but also when that person is held out by the company as having that authority and the party dealing with the company relies on that person's ostensible authority. Conversely, the company is not bound when the person who does the act has neither actual nor ostensible authority to bind the company by doing the act which the other party asserts to be binding on the company. The foundation of ostensible authority is estoppel, as Diplock L.J. pointed out in *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* (1964) 2 QB 480, at p 503:
>
> > 'An 'apparent' or 'ostensible' authority ... is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract'."

[59] While Mr Boyle is the true employer on account of being a sole trader, he has effectively handed over the day-to-day running of the business to his mother, his agent. Ms Taprell was required to follow lawful and reasonable directions of Ms Bouris.

[60] I am further satisfied that Mr Byrne involved himself in the business as it suited him, without any instruction from Ms Bouris or Mr Boyle to employees that Mr Byrne's directions should not be followed. On 6 February 2023, Mr Byrne instructed Ms Taprell not to attend for work on 7 February 2023. This was done not at Ms Bouris' insistence, but with her knowledge. If he had not informed Ms Taprell, Ms Bouris would have needed to, as she did with another employee.

[61] Ms Taprell accepted this instruction and had no basis to consider that Mr Byrne was acting outside of authority vested in him. In the same conversation, Mr Byrne committed to having Ms Taprell's outstanding superannuation paid to her.

[62] On 9 February 2023 it was Mr Byrne who initiated contact with Ms Taprell to discuss her employment, as he said in the text message. He informed her by text message that her employment was terminated. Ms Taprell was entitled to treat the communication as that from her employer on account of Mr Byrne having apparent or ostensible authority to dismiss her.

[63] Upon learning of Mr Byrne's act of dismissing Ms Taprell, both Mr Boyle and Ms Bouris did nothing. Neither of them sought to assure Ms Taprell that there had been a mistake, and Mr Byrne was acting outside of any authority vested in him. They learned of the act on the same day and are effectively estopped from asserting that Mr Byrne's conduct is not authorised and binding.

Conclusion

[64] I am satisfied that Ms Taprell was dismissed from her employment at the employer's initiative and therefore s.386(1)(a) is satisfied. The jurisdictional objection is dismissed.

[65] Should the parties wish to engage in conciliation they should advise my Chambers by no later than 4:00pm (AEST) on 16 June 2023. If the matter does not resolve by conciliation, I will issue a certificate under s.368(3)(a) of the Act.

COMMISSIONER

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<PR762913>

[1] [2020] FCAFC 152.

[2] Audio of hearing at 1:13:29.

[3] *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162 at [75], see also *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200.

[4] *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162 at [75].

[5] *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200.

[6] [2018] FWCFB 139 [21]-[22].

[7] *Visscher v The Honourable President Justice Giudice* (2009) 239 CLR 361 at [53]-[55]; *NSW Trains v James* [2022] FWCFB 55 at [62]; *Abandonment of Employment* [2018] FWCFB 139 at [21].

[8] *Abandonment of Employment* [2018] FWCFB 139 at [21].

[9] [2007] HCA 61

[10] Audio of hearing at 1:34:38.

[11] *Northside Developments Pty Ltd v Registrar-General* [1990] HCA 32; (1990) 170 CLR 146 (28 June 1990).