



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Travis Jenkins

v

Hydac Pty Ltd

(U2023/3439)

COMMISSIONER WILSON

MELBOURNE, 29 JUNE 2023

Application for an unfair dismissal remedy – dispute as to whether a “dismissal” occurred within the meaning of the Fair Work Act 2009 – abandonment of employment – no question of extension of time arises – application dismissed

[1] This decision concerns an application made by Travis Jenkins alleging unfair dismissal (the Application) against Hydac Pty Ltd (Hydac or the Respondent). Mr Jenkins claims he was dismissed on Monday 3 April 2023. Mr Jenkins’ application for unfair dismissal remedy was lodged in the Fair Work Commission (the Commission) on Friday 21 April 2023.

[2] On 10 May 2023, the Respondent filed a Form F3 Employer Response, objecting to the Application on the grounds it is out of time, submitting that Mr Jenkins’ employment ended on 24 October 2022. Section 394(2) of the *Fair Work Act 2009* (the FW Act) requires an unfair dismissal application to be made within 21 days after the dismissal took effect or within such further period as the Commission allows under s.394(3). If the date referred to in the employer response form is correct, Mr Jenkins’ application was made outside of the statutory time limit, with it having been made after the expiry of the 21-day time period allowed for by the FW Act, which would have ended on 14 November 2022.

[3] Consistent with the Commission’s usual practice on these matters, with the application having seemingly been made out of time according to the Form F3, the matter was referred to me for hearing and determination of whether an additional period of time should be allowed for the making of Mr Jenkins’ application. Hydac object to the proposition that the Commission should allow an extension of time for the filing of an unfair dismissal application.

[4] Hydac’s response submissions also set out its belief that Mr Jenkins had abandoned his employment, which calls into question whether Mr Jenkins was dismissed within the meaning of the FW Act. Irrespective of the subject matter of the objection to be determined, the Commission is obliged to determine whether the Applicant was dismissed and if he was, pertinent to consideration of an extension of time, the date of effect of any dismissal.

[5] On 23 June 2023, a hearing was conducted in respect of a purported request to extend time for the filing of the application. Evidence was received from Mr Jenkins on his own behalf

and the Respondent was represented by Ms Nadia Maynard, solicitor from Holdstock Law. Permission for Hydac to be represented by a lawyer was granted by me pursuant to s.596(2)(a) of the FW Act, with me being satisfied that such representation would enable the matter to be dealt with more efficiently taking into account the complexity of the matter. As Mr Jenkins did not object to the Respondent's legal representation, I considered it appropriate to exercise my discretion on the subject.

BACKGROUND

[6] Mr Jenkins commenced employment with Hydac on 6 November 2019 as a hydraulic fitter. His employment was subject to a written contract of employment which included a termination of employment clause which is in relatively conventional terms. Amongst other matters the clause requires four weeks' notice to the employer upon resignation as well as the right of Hydac to terminate the Applicant's employment generally in accordance with the provisions of the FW Act and for reason of misconduct.

[7] Other than stating that the Applicant's type of employment was "Full-time (7.5 hrs/day Mo – Fr)" the contract does not stipulate the times of work or that the Applicant must attend the premises for work.

[8] In October 2021 Hydac was subject to the Victorian Government COVID – 19 vaccination mandates. Hydac submits that in order to conform to the mandates it communicated with employees, including Mr Jenkins about what was required. Those communications led to Mr Jenkins being absent from the workplace and, on Hydac's contention, abandoning his employment.

[9] The following dates and events are relevant to determination of whether Mr Jenkins was "dismissed" within the meaning of the Act:

- On 5 October 2021 Hydac sent a memo to all employees advising that only fully vaccinated people would be able to return to work. This advice was then reiterated to employees at a tool-box meeting at which Mr Jenkins expressed the view that he did not want to get vaccinated after which he "left work (early in the morning) and never returned". Mr Jenkins was not, in the view of Hydac, observably unwell when he left.¹
- On 6 October 2021 Mr Jenkins provided a medical certificate to Hydac covering the period 6 October to 15 October 2021.²
- On 13 October 2021, the Respondent asserts Mr Jenkins advised its Production and Project Manager, Mr Lamberti, by email that he "has no intention of getting vaccinated due to his personal beliefs"³ (noting that the email is not in evidence).
- On 15 October 2021 Mr Jenkins provided a further medical certificate to Hydac for the period of 15 October to 29 October 2021 with the certificate attributing his absence to "a medical condition".⁴
- On 17 October 2021 the Respondent says there was a phone call between Mr Jenkins and Mr Lamberti in which the Applicant again referred to his vaccination beliefs and

Mr Lamberti reiterated the requirements of the Victorian Government mandate, and in particular that there could be no return to work⁵ (noting that no evidence has been brought forward by the Respondent to support this assertion in its written submissions).

- On 26 October 2021 Hydac’s Managing Director – Australia and New Zealand, Mr Mark Keen, wrote to Mr Jenkins reiterating Hydac’s requirements.⁶
- On 27 October 2021 and after the submission of the further medical certificate for the period of 15 October to 29 October the Respondent says that Mr Lamberti told Mr Jenkins that his personal leave accruals had been exhausted and that he would need to take annual leave. It also says there was no contact from Mr Jenkins in the period 27 October 2021 to 11 November 2021⁷ (again noting there is no evidence of these assertions on the part of the Respondent).
- On 11 November 2021 Mr Lamberti sent an email to Mr Jenkins requesting he update Hydac, to which Mr Jenkins responded that he was on sick leave, was awaiting a medical certificate and that when he returned he would “adhere to your companies (sic) policies and procedures regarding vaccinations”.⁸
- On 16 November 2021 Mr Lamberti sent a further email to Mr Jenkins asking if he would “be able to return to work vaccinated in a foreseeable future”. The Respondent’s submissions say there was no response to this request.⁹ Mr Jenkins responded with several documents including a medical certificate from a general practitioner stating he had a “medical condition and will be unfit for work” between 15 November and 29 November 2021. He also provided a specialist’s letter dated 11 November 2021 stating Mr Jenkins had “been unable to work for the last month” with deteriorating symptoms of an identified injury. The specialist stated Mr Jenkins would be unfit for work until he saw another specialist “which will be arranged for him in the next couple of weeks”. Mr Jenkins also provided to Hydac a partially completed income protection insurance temporary disablement claim and requested it complete a section of the claim form and return it to him.¹⁰ Hydac submit that the document was completed and signed by Mr Lamberti and returned to Mr Jenkins.¹¹

[10] Hydac submit, without providing evidence about the contention, that:
 “16. Between 17 November 2021 and 24 October 2022, the Respondent attempted to contact the Applicant on many occasions to ascertain his return to work. The Applicant made no attempts to contact the Respondent in return.

17. The Respondent accepted the Applicant’s repudiation of contract on 24 October 2022. The Respondent notified the Australian Taxation Office that the Applicant’s name was of (sic) the employee register due to “*failure to return*”.”¹²

[11] The contention that contact was made with the Australian Taxation Office by Hydac is evidenced only by a payslip, apparently generated on or around 24 October 2022. The payslip records a nil payment to Mr Jenkins and as part of the payslip has the printed words “Termination Date 24-Oct-2022” and a handwritten note “Termination Reason – failure to return”. Why the Australian Taxation Office was notified that Mr Jenkins’ name was off the employee register; who may have made the notification; or why it was done in October 2022 is

unknown to me. The Respondent's solicitor says that the notification evidences the date on which it accepted Mr Jenkins' repudiation of his contract of employment.

[12] Mr Jenkins contests that he was away from work because of his vaccination status and instead puts forward that his absence was for reason of personal leave as a result of pain and other symptoms following an injury some time previously. The injury was the subject of the income protection insurance claim made by Mr Jenkins made in November 2021. The date on which the injury symptoms commenced is stated in the insurance claim as being in January 2021,¹³ however the date of the actual injury is not clear to me as Mr Jenkins submitted that the injury itself was some time prior to January 2021.

[13] Irrespective of the reasons for his absence the evidence is clear that Mr Jenkins did not attend work at Hydac from early October 2021 and that such communications as were taking place between he and Hydac ended in November 2021.

[14] On 19 January 2023 Mr Jenkins sent a text message to Mr Lamberti asking, "could you please let me know what my employment status is at hydac as I have to return to work". That communication led to several others, including a phone call with Mr Lamberti and finally a letter to Mr Jenkins from Mr Keen, Hydac's Managing Director – Australia and New Zealand:

"Re: Official Notification

Dear Travis, Following your telephone conversation with Mr Lamberti on the 21 March 2023, it was communicated to me that you were seeking clarification on your employment status with Hydac. Your employment was officially terminated on 24 October 2022 due to abandonment of employment.

The actual abandonment of employment having occurred and continued since 6 October 2021 . We note that you abandoned your employment when the mandatory vaccination requirement was implemented at Hydac in 2021 . It has now been two (2) years since HYDAC last heard from you. With no communication from you during this period, and numerous failed attempts from Mr Lamberti to contact you, you abandoned your employment. In the circumstances, on 24 October 2022, Hydac notified the Australian Taxation Office that your name was off the employee register due to "failure to return".

All your accrued leave and entitlements associated with your prior employment have been paid in full and that pay slips indicating this have been sent to you confirming the same.

I trust that this letter confirms the requested details and clarifies any confusion you may have on the matter.

We wish you well in your future pursuits.

Regards

Mark Keen
Managing Director Australia & New Zealand".

LEGISLATION

[15] Section 386 of the FW Act sets out when a person has been dismissed from their employment and states:

“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 contract of that kind is, or was at the time of the person’s employment, to avoid the employer’s obligations under this Part.”

CONSIDERATION AND CONCLUSIONS

[16] While it is clear that a termination of employment on the employer's initiative does not take effect unless and until it is communicated to the employee whose employment is being terminated,¹⁴ the first issue for determination in this matter is whether Mr Jenkins abandoned his employment, with that abandonment later accepted by Hydac.

[17] Generally abandonment of employment arises in circumstances where an employee is absent from the workplace without communicating with the employer to provide a reasonable excuse or explanation for the absence.¹⁵ There is authority for the proposition that abandonment on the part of an employee constitutes repudiation of the employment contract, and that the election of the employer to accept the repudiation is the action which brings about the termination of employment, rather than the abandonment itself.¹⁶

[18] In *Searle v Moly Mines Limited*¹⁷ a Full Bench confirmed that consideration of the statutory test then applicable, of whether there had been a "termination at the initiative of the employer", relates to the termination of the employment relationship, not termination of the contract of employment. The contract of employment continues until the party breached against accepts the repudiation of the contract.¹⁸ In *GlaxoSmithKline Australia Pty Ltd v Gauci* it referred to the analysis required to be conducted, cautioning that "[t]he question posed by the statute is whether the employment was terminated at the initiative of the employer. An analysis based on contractual notions of repudiation and acceptance may not always correspond with the statutory concept".¹⁹

[19] In *John David Bourke & Jamie Clifford and Others v OS MCAP Pty Ltd* the Full Bench held that the Commission's analysis requires an "objective assessment":

"[48] Application of the test for abandonment of employment requires an objective assessment, of "whether the employee's conduct is such to convey to a reasonable person in the position of the employer and based on the facts as reasonably known to the employer at the time, that the employee had repudiated their duty to meet their obligations under the contract of employment".²⁰

[20] Consideration of the objective facts shows that Mr Jenkins did not attend for work at Hydac after about 5 October 2021. He was on leave of some types between 6 October 2021 and at least 11 November 2021. The emails that are in evidence show that the reason for his absence from work was considered by Hydac at least to be related to his vaccination status. He was absent from work after mid-November 2021 and did not provide leave applications or other material that would explain or authorise his absence from work. The income protection insurance claim indicates some level of incapacity for some period of time, however neither the application form or any of the other material presently before me either shows that such absence was or should have been authorised by Hydac or the duration of Mr Jenkins' incapacity. The 11 November 2021 communication from Mr Jenkin's medical specialist puts his forward incapacity at that time as only an unfitness until he could be seen by another specialist which would be "arranged for him in the next couple of weeks".²¹

[21] The contract of employment, such as it is, required Mr Jenkins to work on a full-time basis, 7.5 hours a day, Monday to Friday. There is no evidence that any period after 11 November 2021 was an authorised absence, whether as paid leave or unpaid. While Mr Jenkins' income protection insurance claim shows that he sought payment of the insurance to him, such

does not evidence that he made the claim with the employer's authorisation that he be absent for the duration of income protection insurance payments to him (if any were made) or, more pertinently, until January 2023 when he resumed communication with Hydac.

[22] The evidence also allows a finding that there was no contact by Mr Jenkins with Hydac until 19 January 2023 when he sent a text message to Mr Lamberti asking, "could you please let me know what my employment status is at hydac as I have to return to work".

[23] The outer-limits of those matters – a cessation of contact in November 2021 and a resumption in January 2023 – allow a finding that Mr Jenkins abandoned his employment. This is not a person who skipped contact with their employer about their attendance at work for a day or two, or even a week or three; instead Hydac argue, and Mr Jenkins does not contradict the assertion, that there was no contact from him for over a year. Further, there is no evidence that Mr Jenkins attempted an attendance at work during that period. There is some evidence (in the form of the income protection insurance claim and the medical specialist's letter, both from November 2021) which suggests an absence of some period may reasonably have been required by Mr Jenkins. However the fact that there was no indication by Mr Jenkins to Hydac about how long may be required before the absence actually commenced, and none after until January 2023 leans against a finding that the absence was reasonably required and authorised by Hydac. Taken together, these matters lean toward a finding that Mr Jenkins abandoned his employment at some time after November 2021.

[24] As a result of finding that Mr Jenkins abandoned his employment it follows there can be no finding he was terminated on the employer's initiative.

[25] Hydac have not adequately explained how it came to accept Mr Jenkins' reputation of his contract of employment. It submitted that the payslip referred to above was emailed to Mr Jenkins, however the latter does not accept that actually occurred. Whether or not the payslip was emailed to Mr Jenkins, I doubt a finding can be made that such amounts to an unambiguous acceptance of his repudiation. I also do not understand how (or why) a payslip being provided to the Australian Taxation Office amounts to the same. I have not previously come across such a procedure as either being an Australian Taxation Office requirement or totemic of the end of a person's employment. Perhaps the reference is intended to be completion and submission of the Services Australia Employment Separation Certificate. Even so, communication to a third party of an employer's belief is not the same as a direct communication to the contracting party, the employee, that their contractual repudiation has been accepted.

[26] Despite these defects in Hydac's case there is no doubt though that the repudiation was accepted by the Respondent by no later than 3 April 2023 when Mr Keen sent his letter to Mr Jenkins stating that matter.

[27] The inadequacies in Hydac's case are only matters of timing about the Respondent's acceptance of the repudiation and do not change the fundamental that Mr Jenkins abandoned his employment and thus was not terminated on the employer's initiative. It is unnecessary in this case for me to precisely determine when the acceptance was given.

[28] It follows from the above that Mr Jenkins was not "dismissed" within the meaning of the Act and not entitled to bring an application for unfair dismissal remedy. I must therefore

dismiss his substantive application and an Order doing so is issued at the same time as this decision.



COMMISSIONER

Appearances:

Mr T. Jenkins for himself
Ms. N Maynard for the Respondent

Hearing details:

Melbourne;
23 June;
2023.

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¹ *Respondent Outline of Submissions*, 8 June 2023, [5].

² *Ibid*, [6].

³ *Ibid*, [7].

⁴ *Ibid*, [8].

⁵ *Ibid*, [9].

⁶ *Ibid*, [10].

⁷ *Ibid*, [11]-[12].

⁸ *Ibid*, [13]-[14].

⁹ *Ibid*, [15].

¹⁰ DCB, pp. 10 – 19.

¹¹ From F3, *Employer Response Form*, 10 May 2023, item 3.1 (14).

¹² *Respondent Outline of Submissions*, 8 June 2023, [16]-[17].

¹³ DCB, p.14.

¹⁴ *Burns v Aboriginal Legal Service of Western Australia (Inc)* (unreported, AIRCFB, Williams SDP, Acton SDP, Gregor C, 21 November 2000) Print T3496.

¹⁵ *Abandonment of Employment* [2018] FWCFCB 139, [21].

¹⁶ *Sharpe v MCG Group Pty Ltd* [\[2010\] FWA 2357](#).

¹⁷ [2008] AIRCFB 1088, [22].

¹⁸ *Ibid*, [22] – [23].

¹⁹ [2008] AIRCFB 439, [19].

²⁰ [\[2022\] FWCFB 178](#), with reference to *Shamrock Consultancy Pty Ltd v Norma Ah San* [\[2021\] FWCFB 274](#), [17].

²¹ DCB, p.29.