



DECISION

Fair Work Act 2009
s.365—General protections

Kyungin Kim

v

CJ Onetree Pty Ltd
(C2023/1719)

DEPUTY PRESIDENT BEAUMONT

PERTH, 3 JULY 2023

Application to deal with contraventions involving dismissal

1 Dispute

[1] In July 2022, CJ Onetree Pty Ltd (the **Respondent**) employed Ms Kyungin Kim (the **Applicant**) as a hairdresser. The Applicant reported to Ms You Joung Choi (**Director Choi**) who was her direct manager and was also a director of the Respondent. During her employment, the Applicant was granted a Subclass 482 (Temporary Skill Shortage) visa due to the Respondent's nomination of her in the occupation of hairdresser. From all accounts, the Applicant was grateful to have received the Respondent's support as she saw it as a pathway to permanent residency in Australia. Come early March 2023, the Applicant enquired with Director Choi about taking personal leave as she felt unwell. After a series of text messages, the Applicant discerned that Director Choi had informed her to the effect that she was unable to provide anything and to look for a new employer. The Applicant says she felt obliged to comply with Director Choi's direction, noting that she never intended to imply or suggest she wished to terminate her employment. The Applicant states that the termination of her employment was not by mutual agreement as contended by the Respondent, and she was in fact dismissed as that term is understood in both s 386(1)(a) and (b) of the *Fair Work Act 2009* (Cth) (the **Act**).

[2] The Respondent has objected to the general protections application on the ground that the Applicant was not dismissed within the meaning of s 386 the Act. The Respondent argues that the relationship between the Applicant and the Respondent deteriorated due to the Applicant's behaviour in violation of the terms of the employment contract between them, and that the provision of a termination notice on 8 March 2023 was a result of a mutual agreement between the parties and had been provided in accordance with contractual arrangements.

[3] The Respondent's objection has implications for the application on foot because it is accepted that a person *must* have been dismissed to be entitled to make a general protections dismissal dispute application.¹ Section 365 relevantly provides:

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.

[4] Where there is a dispute about whether a person was dismissed, the Commission is obliged to determine that point before exercising its powers under s 368 of the Act.² Therefore, the discrete issue for determination is whether the Applicant was ‘dismissed’ from her employment within the meaning of ss 12, 386(1)(a) and/or (b) of the Act.

[5] Before responding to that issue, it is relevant to note that permission was provided to the parties to be represented by legal counsel pursuant to s 596(2)(a) of the Act. The Applicant and Director Choi both spoke English as a second language, their primary language being Korean. As a consequence, an interpreter was utilised throughout the proceedings and the parties had, of their own volition, translated text messages that were exchanged between the Applicant and Director Choi, over the platform ‘Kakao Talk’. There was disagreement between the parties regarding the Korean to English translations of the text messages that had been provided by the parties, both parties having tendered translations by certified translators. This issue is addressed in my consideration of the issue.

[6] Returning then to the issue at hand. Briefly stated, I have concluded that the Applicant was ‘dismissed’ at the initiative of the Respondent. My detailed reasons follow.

2 Background

2.1 The Applicant’s evidence

[7] The Applicant said that on the morning of 5 March 2023, she texted Director Choi through Kakao Talk, with the intention of enquiring about her entitlement to personal leave as a full-time employee.³ The Applicant said that she was feeling unwell, and thought it would be necessary to seek medical attention and take some time off from work.⁴ The Applicant stated that she checked her payslips and realised that there was no personal leave balance stipulated, so she wished to confirm this with Director Choi.⁵

[8] According to the Applicant, she sent texts to Director Choi, asking her about her personal leave entitlements.⁶ The Applicant expressed that at the time, she reasonably expected that Director Choi would respond by asking if she was feeling unwell, or if there were other personal circumstances that had arisen.⁷ However, the Applicant said that Director Choi said to the effect that she is unable to provide anything for her and told her to look for a new employer.⁸

[9] Turning first to the translated text messages relied upon by the Applicant. The initial text messages to Director Choi appeared to be messages in English text, of extracts concerning workplace entitlements. The following is the text message dialogue that subsequently unfolded on Sunday, 5 March 2023:

Director Choi	You must have worked hard searching for this
---------------	--

Applicant	'capture image' Why isn't my personal leave included? [You must have worked hard searching for this] – What do you mean by this?
Director Choi	I am not a person who has an ability to fulfil these things. I am sorry. It would be good if you can look for a workplace that suits you.
Applicant	Ok I see. Then I will look for it and contact you!
Director Choi	This is a lot of material and I cannot even translate it. I have no idea why on earth you sent these to me. Have you translated all this? I can't understand what you wanted out of this, but I am saying it again, there is not a single thing I can do for you now. I did my best to make things convenient for you but since you find everything uncomfortable, please go and look for a good workplace that you want. And I don't think it is good that you send me text messages only when you need something.
Applicant	<p>Oh, all those texts were copied all at once.</p> <p>I sent it to ask you about my personal leave, but everything got copied all at once.</p> <p>As I told you before, the reason why I made a move to work here was because you told me that you would pay the same amount as I get from the local Australian shop, and you contacted me to say that you would sponsor me and asked me to meet with you over a meal. And I really put in a lot of thoughts before deciding to work here. And I had already told you before I started, that I did not want to cut hair in a place resembling a crowded, chaotic market.</p> <p>And it seems that the dissatisfied one is not me but you and your staff. Anyway I understand what you are saying. Someone I know offered to sponsor me so I will have a talk with them and then contact you.</p> <p>You say that I send text messages only when I need something, but I did not send text messages to you when I needed something.</p> <p>I contacted you because I wanted to talk to you about things that I am naturally entitled to under the labour law, so I wonder why you are talking that way?</p> <p>You can read the materials easily by using Google translator or Papago translator.</p> <p>And when you employ a worker, you as an employer should make a full payment for their work, that is what I was taught in Korea.</p> <p>And I wanted to talk to you because I think I have been putting up with unfairness, but I will look for another place and then leave, since you are telling me to do so.</p>
Director Choi	Since our hair shop is a crowded chaotic market, go and look for a good hair shop.
Applicant	<p>Ok.</p> <p>Thank you for everything. I will be there to pack my things on Tuesday.</p> <p>And when you get someone to work for you, you should always pay what is due to be paid.</p> <p>You should not run a business that way.</p>

	<p>And since I started working in July last year, even though I worked full time, you did not give me an annual leave, and you did not pay me at the casual hourly rate, either. The wage went up by 4.65% as of June last year.</p> <p>But the hourly rate I have been receiving is the rate I was getting 2 years ago. Anyway, the past is past, and I am not asking you to pay that to me. I am just telling you.</p> <p>I am sorry I am leaving the job this way. I hope you keep well. I will leave the key for you on Tuesday</p>
Director Choi	Ok, I see. This will be the end of us. ⁹

[10] It would appear the next day, on Monday 6 March 2023, that the Applicant still had issues of concern. The following was communicated by text:

Applicant	<p>Oh and about the counter that you made an offer for in the past, when an offer is made for a custom-made product elsewhere, it will be \$2500, \$3000 or more. They did not rip you off at all. They just wanted to get the wholesale price and \$1500 was a really cheap price as it included the delivery and set up. They told me that you cannot get that price with that kind of wood material. If you want something cheap, go to IKEA to buy one. These days it will cost more than \$500 at IKEA, too. And if you have no intention of getting something, please do not make requests to people. I nearly died of embarrassment at the time. You made them come and go many times, leading them to think that you would get it and then you made them look like a fool</p>
Director Choi	<p>I understand what you are saying. Looking through the text message, it seems that we had a misunderstanding between us somewhere along the line. I am sorry about that part. It was not my intention, but it must have put you in an awkward position. I work on Tuesday. I will give you the incentive on that day. I will send the annual leave payment in full next week as well. And I talked with a legal agent over the phone in the morning to cancel the contract between you and our shop effective on the 18th of March</p>
Applicant	<p>Ok</p> <p>I will take the yellow roll straight rolls I left there.</p>
Director Choi	Ok. ¹⁰

[11] By Tuesday, 7 March 2023, Director Choi sent a text message to the Applicant noting that it would be appreciated if she left the ‘group chat room for our hair shop.’ The Applicant replied:

Based on what you have said and looking at the whole thing, you fired me with no reason. I sent you captured images about personal leave. But you suddenly told me that you did not have such an ability and asked me to look for another workplace. And then you notified that you terminated our contract through your legal agent, without discussing it with me at all. I am told that these actions that you took against me constitute an unfair dismissal. Therefore, I will make a formal report to Fair Work Commission.

In my view, your actions are truly irresponsible.¹¹

[12] While the Applicant expressed to Director Choi that she could not dismiss the Applicant without a valid reason, Director Choi stated:

Look at the text messages above. You accepted it and said you would look for another job. You wrote that there is someone who would give you the visa.¹²

2.2 The Respondent's evidence

[13] Director Choi provided evidence on behalf of the Respondent. In summary, Director Choi detailed:

- a) in June 2022, she agreed to sponsor the Applicant for a Subclass 482 visa, a commitment that cost the Respondent \$6,481.82 in expenses;¹³
- b) the Applicant signed an employment contract on 19 August 2022 agreeing to commence full-time official duties from the day the Subclass 482 visa was granted;¹⁴
- c) the Applicant's Subclass 482 visa was granted on 2 December 2022;¹⁵
- d) immediately after she sponsored the Applicant for her visa, the Applicant obtained a bridging visa A and approached her for three weeks leave;
- e) despite a shortage of hairdressers at the time and the Applicant's ineligibility for leave, she approved the annual leave;
- f) on her return from leave, the Applicant expressed her dissatisfaction with working in Australia;¹⁶
- g) whilst the Applicant displayed a lack of cooperation and consistently expressed dissatisfaction with her employment, she provided the Applicant with a weekly cash bonus averaging around \$100-\$130 per week and set her hourly rate at \$27.91, which exceeded the level appropriate for her qualification as a level 5 hairdresser;¹⁷
- h) there were multiple complaints from staff and customers about the Applicant;¹⁸
- i) in February 2023 the Applicant took another week of paid leave;¹⁹ and
- j) two weeks later the Applicant sent a series of text messages to her in English, which the Applicant later clarified were about her personal leave entitlement.²⁰

[14] Director Choi stated that on 4 March 2023, the Applicant sent her a text message advising that she would telephone Director Choi after work, but she did not.²¹

[15] Director Choi noted that on 5 March 2023, at about 9:39 AM, the Applicant sent her an extensive amount of legal information written in the English language.²² Director Choi said she could not understand the Applicant's intention of sending such legal information of almost 45 pages on the Sunday morning.²³ Director Choi said that she telephoned the Applicant at about 10:11 AM but she did not answer her telephone call, instead sending a message saying, 'Sorry for unanswerable. I'll get back you. If you have an urgent business, can you please text me'.²⁴ Director Choi gave evidence that since she had always communicated with the Applicant in Korean, she was puzzled when she received a response in English on that day. She therefore telephoned her again at about 10:31 AM, but the Applicant still failed to respond to her telephone call.²⁵

[16] Director Choi expressed extreme disappointment with the Applicant's conduct because the Applicant had not answered her calls and had failed to provide any explanation for the text messages she had sent.²⁶ Director Choi claimed that the Applicant proceeded to send her

additional legal documents, further exacerbating the situation. Director Choi said that this occurred on a busy Sunday morning, and the Applicant’s inappropriate behaviour of sending such documents without any accompanying explanation left her feeling deeply disappointed. Director Choi stated that she was unable to accommodate the Applicant’s endless complaints and therefore she said ‘I am not a person who’s capable of fulfilling this requirement... I am sorry. I think it would be good if you find a workplace for you.’ Director Choi stated that the Applicant replied ‘Okay, understood. I will find one and inform you.’²⁷

[17] Director Choi gave evidence that the text message dialogue on 5 March 2023 unfolded as follows:

Director Choi	Kayla. You must have had a hard time finding this...
Applicant	What do you mean by this?
Director Choi	I am not a person who’s capable of fulfilling this requirement... I am sorry. I think it would be good if you find a workplace suitable for you.
Applicant	Okay, understood. I will find one and inform you.
Director Choi	This is too much (overwhelming), and I fail to comprehend why you sent me such a message. Have you translated and read through all of it? I don't grasp your expectations but let me emphasise that there is nothing more I can do to assist you. I have made my best efforts to accommodate your needs, but since you find it uncomfortable, I suggest you seek a more suitable place. Moreover, I don't think it's right for you to contact me on KakaoTalk or approach me only when you require something.
Applicant	Oh, Director. All those many things were accidentally copied all at one. I was just about to ask about personal leave, but it was all copied at once. Before I moved here, you mentioned that you would pay me as much as I could make at an Australian shop. And you said you would sponsor me and invited me for a meal... I spent a lot of time considering before deciding to work here, and I told you beforehand that I cannot do haircuts as if I am working at Dotdaegi Market. And I think it is not me, but it is you and your employees who have problems. Anyway, I understand your point. Regarding my sponsorship, someone I know says they can provide it, so I will talk to them and let you know. You said I only text you (by Kakao Talk) when I need something, but I didn't do it when I need it? And it was to tell you about my rightful entitlements under the labour law. Why are you speaking to me like this? Further, you can easily translate and read it using Google Translate or Papago. And I was going to tell you about the things that I feel put at a disadvantage. But since you are responding like this, I will then seek another workplace and leave.
Director Choi	If you believe our hair salon is Dotdaegi Market, I suggest you find a good hair salon elsewhere.
Applicant	Okay.

	<p>Thank you for everything up until now. I will come on Tuesday to collect my belongings.</p> <p>And even when I worked from July last year, you didn't include annual leave while I was working full time, and you didn't even pay me the casual hourly rates. Now, the minimum wage has increased by 4.65% since June of last year.</p> <p>The hourly wage I'm currently receiving is the same as what I received two years ago. Anyway, what happened in the past is in the past, so I'm not demanding that money. I'm just letting you know.</p> <p>I'm sorry for leaving like this. I wish you all the best. I'll leave the keys on Tuesday.</p>
Director Choi	Okay. Understood. This is where we part ways. ²⁸

[18] According to Director Choi, the text messaging between the two continued on Monday, 6 March 2023:

Applicant	<p>Oh! And regarding the counter you made an offer for in the past, (let me clarify that) when an offer is made for a custom-made product elsewhere, it can cost \$2500, \$3000, or even more. He(or she) definitely didn't rip you off. He (or she) simply wanted to charge the wholesale price, and \$1500 was actually a very cheap price considering it included delivery and set up. He(or she) told me that you wouldn't find such a price for that type of wood material. If you're looking for something cheaper, go buy it from IKEA. However, these days even at IKEA, it would cost more than \$500. Also, if you have no intention of purchasing something, please refrain from making requests to people. It was quite embarrassing for me at the time. You had people come and go multiple times, leading to believe you were going to buy it, only to make others look foolish in the end. I had concerns about the transaction so I asked you about it several times, and then made the introduction. However, you didn't proceed with the order due to the high price. It would have been better to inquire beforehand. I hope you gain more knowledge throughout your life.</p>
Director Choi	<p>Kayla, I believe I understand your point now. Upon reviewing our KakaoTalk text messages, it seems that there was some misunderstanding between us at some point. Regarding that incident, I sincerely apologise. It wasn't my intention, but I realise it must have put you in an awkward position. I will be working on Tuesday, and I will provide you with the incentive on that day. Additionally, I will send the full payment for your annual leave next week. I also spoke with a legal agent over the phone this morning to cancel the contract between you and our shop, effective from the 18th of March.²⁹</p>
Applicant	<p>Noted.</p> <p>I will take my yellow roll straight roll.</p>
Director Choi	Yes.

[19] Director Choi said that the communication continued on Tuesday, 7 March 2023, at which time she asked that the Applicant leave the hair salon's group chat room.³⁰ The Applicant responded:

Based on what you have said and looking at the situation as a whole, you fired me with no reason. I sent you a captured image about personal leave. But you suddenly told me that you did

not have such an ability and asked me to look for another workplace. And then you notified me of termination of our contract through the legal agent, without discussing it with me at all. I am told that these actions that you took against me constitute an unfair dismissal. Therefore, I will make a formal report to Fair Work Commission.³¹

[20] Director Choi gave evidence that on Tuesday, 7 March 2023, at approximately 4:00 PM, the Applicant arrived at the shop and proceeded to pack her belongings, leaving the keys behind. Director Choi said that this was the first time she had seen the Applicant in person since 5 March 2023.³² Director Choi said that had the Applicant expressed concerns or discussed the termination of her employment with her at that moment, she would have been willing to address and accommodate her concerns.³³ Director Choi noted that she provided the Applicant with \$110 in cash as a bonus, as previously promised, but the Applicant did not utter a single word and left the shop taking the money.³⁴

[21] Director Choi said that to ensure adherence to the terms of the employment contract, she issued a termination notice on Wednesday, 8 March 2023, and provided one week's wages in lieu of notice.³⁵ The termination notice read:

Dear Kyungin Kim,

Termination of your employment

I am writing to you about the termination of your employment with CJ Onetree Pty Ltd.

We consider that your performance/conduct is unsatisfactory and have decided to terminate your employment for the following reasons:

- No pleasant personality.
- No patience.
- No willing to follow reasonable directions given to you by the employer.
- No use of best endeavours to promote and protected the interests of the employer.

Your employment will end immediately. Based on your length of service, your notice period is one week. In lieu of receiving that notice, you will be paid the sum of \$1060.58.

You will also be paid your accrued entitlements and any outstanding pay, up to and including your last day of employment. This includes annual leave and superannuation.

You may seek information about minimum terms and conditions of employment from the Fair Work Ombudsman. If you wish to contact them you can call 13 13 94 or visit their website at www.fairwork.gov.au

Yours sincerely,

You Joung Chaoi
Director of CJ Onetree Pty Ltd³⁶

3 Consideration

[22] Central to the consideration in this case is the operation of s 386(1) of the Act.

[23] Section 386(1) of the Act defines what constitutes a dismissal for the purpose of Part 3-2, which concerns unfair dismissal. However, that section is relevant for present circumstances.

[24] The word ‘dismissed’ is defined in s 12 of the Act as having adopted the meaning in s 386. Section 386 reads:

(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.

[25] There are exceptions under s 386(2) of the Act regarding when a person has been dismissed; those exceptions are not relevant to this case.

[26] The definition of dismissal in s 386(1) of the Act has two elements, both of which have been subject to consideration. The first traverses ‘termination on the employer’s initiative’ and the second, ‘resignation in circumstances where the person was forced to do so because of conduct or a course of conduct’. This bifurcation was explained by the Full Bench in *Bupa Aged Care Australia Pty Ltd v Tavassoli (Bupa)*,³⁷ in the following terms:

[47] Having regard to the above authorities and the bifurcation in the definition of “dismissal” established in s.386(1) of the FW Act, we consider that the position under the FW Act may be summarised as follows:

(1) There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the “heat of the moment” or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although “jostling” by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.

(2) A resignation that is “forced” by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer’s conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element.³⁸

[27] While a summary of the position under s 386(1) was proposed in *Bupa*, a later decision of the Full Bench in *City of Sydney RSL & Community Club Ltd v Balgowan (City of Sydney RSL)* gave further consideration to the operation of s 386(1)(a), expressing:

[10] It seems clear...that the concept of constructive dismissal is to be accommodated by s.386(1)(b) and that concept is not subsumed in s.386(1)(a).

[11] Section 386(1)(a) seems plainly to be intended to capture the case law determining the meaning of termination (of the employment relationship) at the initiative of the employer. In *Mohazab* the Court considered that the expression “termination at the initiative of the employer” was:

“ . . . a reference to a termination that is brought about by an employer and which is not agreed to by the employee. Consistent with the ordinary meaning of the expression in the Convention, a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship. We proceed on the basis that the termination of the employment relationship is what is comprehended by the expression “termination of employment.”” (references omitted)³⁹

[28] The Full Bench in *City of Sydney RSL* placed reliance on the decision of the Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd [No 2] (Mohazab)*.⁴⁰ This is unsurprising given the Full Court of the Federal Court in *Mahony v White* observed that the Act had retained the use of the phrase and that the judgment in *Mohazab* remained good authority as to the connotation of that formula.⁴¹

[29] While finding it unnecessary and undesirable to endeavour to formulate an exhaustive description of what constituted ‘termination at the initiative of the employer’, the Court in *Mohazab* identified that an important feature was that the act of the employer resulted directly or consequentially in the termination of the employment and the employment relationship was not voluntarily left by the employee.⁴² Furthermore, while a termination of employment may involve more than one action, it is important to ask oneself what was the critical action or actions which constituted a termination of employment.

[30] The determination of whether the Respondent terminated the Applicant’s employment hinges greatly on the direct evidence of both the Applicant and Director Choi. Essentially, what unfolded between employer and employee in this case is detailed in the text messages that passed between them, in addition to their evidence as to what is to be made from those text messages.

[31] For the following reasons, I am unpersuaded by the Respondent’s submission that the termination of the Applicant’s employment was by way of a mutual agreement, and whilst it may have been the case that Director Choi was pleased by the parting of ways, it cannot be said that there was a mutual agreement to terminate the working relationship between the two.

[32] Director Choi is not only the Director of the Respondent business but was, in addition, the Applicant’s direct line manager at the relevant time. On Sunday, 5 March 2023, she was understandably flummoxed by the barrage of text messages sent by the Applicant who had, it would seem, copied extracts of a modern award and leave entitlements in English and sent them to Director Choi, who spoke English as a second language. However, as confused as Director Choi may have been to have received the text messages, Director Choi’s response, whether in accordance with her translation or that of the Applicant, was to inform the Applicant that it would be good if she found a workplace suitable for her. The Applicant says Director Choi sent the text, ‘It would be good if you can look for a workplace that suits you’.

[33] As a Director of the Respondent business and holding the authority to make decisions on its behalf, on any objective level, a communication to an employee that it would be good if the employee found a workplace suitable to them or that suits them, is highly indicative, particularly in this context, that their employer no longer wishes them to work in the current environment. Whilst appreciative that Director Choi made two attempts on the morning of Sunday, 5 March 2023, to call the Applicant and speak to her about the matter, Director Choi again emphasised in the text messages that followed on that day that the Applicant should find a more suitable place to work. Particularly, Director Choi informed the Applicant that there was nothing more she could do to assist the Applicant and whilst she had made her best efforts to accommodate the Applicant's needs, as the Applicant found it uncomfortable, she suggested she find a more suitable place to work.

[34] At hearing, it was also evident that the Applicant's reference to Director Choi's hair salon resembling a 'Dotdaegi Market' in the text messages of 5 March 2023 was deeply offensive to the Director, who again informed the Applicant in response, 'I suggest you find a good hair salon elsewhere'. Having been advised three times in the course of the text messages that passed between the Applicant and Director Choi on 5 March 2023, of the 'suggestion' that the Applicant should effectively seek work elsewhere, I am of the view that the Applicant understood that Director Choi was bringing an end to the employment relationship. This was a reasonable view to have held in all the circumstances. The Respondent appeared to place significant weight on the point that it had only been *suggested* to the Applicant that she find a more suitable place of work. However, it should be recalled that it was Director Choi who held the authority to make decisions about whom she wished to employ and whom she did not. Having said to the Applicant what she did, based on the Respondent's translations of the text messages, Director Choi's actions (the text messages) were sufficient to constitute the principal contributing factor which led to the termination of the employment relationship between the Applicant and the Respondent.

[35] It follows that the Applicant's responses that she would find other work and inform the Director or that she would come in on Tuesday to collect her belongings, does not indicate a voluntary resignation but rather compliance with the 'suggestion' of her manager, Director Choi, that she seek work elsewhere. There was not, in my view, a mutual agreement that the Respondent and the Applicant would part ways. Director Choi's communication on 5 March 2023 left the Applicant with little to no option but to depart the Respondent business. Further, while the Applicant may have spoken of another business being willing to sponsor her, the information was only proffered when the Applicant had understood that Director Choi was effectively informing her to find work elsewhere.

[36] By the Monday, 6 March 2023, Director Choi had seized upon the opportunity to confirm the finality of the employment relationship, informing the Applicant that her accrued leave would be paid out, she would receive an incentive on the Tuesday, and that having spoken to a legal agent, the contract of employment between Applicant and Respondent would be 'cancelled' effective from the 18 March 2023.

[37] On Wednesday, 8 March 2023, the Respondent issued to the Applicant the termination notice, which was unequivocal in its terms. It stated that the Respondent had decided to terminate the Applicant's employment for several reasons, some of which do not bear repeating

given they are highly subjective and perhaps should never have found their way onto a termination notice. Director Choi gave evidence that she formulated the termination notice by conducting an internet search and effectively cobbling something together. Notwithstanding, it appears implausible to me that Director Choi was not cognisant of the termination notice informing the Applicant her employment had been terminated by the Respondent. The termination notice does not 'suggest' that the Applicant mutually agreed to the termination of her employment or that she voluntarily resigned.

[38] The Respondent's submissions on the one hand contend that the Applicant's termination of employment was a result of her accumulated work negligence, which caused friction with many other employees.⁴³ On the other hand, the Respondent contends that despite the Respondent's hope that the Applicant would improve her attitude, the disrespectful behaviour displayed by the Applicant on Sunday morning, 5 March 2023, was a disappointment and as a result both parties *mutually agreed* to separate. The two contentions, if anything, are confused and are, at best, dissonant. The truth of the matter is that Director Choi's patience with the Applicant had worn thin and she had grown intolerant of the Applicant's lack of obeisance. On Sunday, 5 March 2023, provoked by the text messages that had passed between them, Director Choi was the progenitor who brought the employment relationship to an end when she suggested that the Applicant find a workplace that was suitable for her. The subsequent actions of Director Choi, as detailed in these reasons, reinforce the finding that the termination of the Applicant's employment was at the initiative of the Respondent. Whilst the Respondent may have terminated the employment of the Applicant in accordance with the Applicant's employment contract, such that the requisite notice was provided, this does not in turn mean that the termination of employment was consensual or that the Applicant voluntarily resigned.

4 Conclusion

[39] Having concluded that the termination of the Applicant's employment was at the initiative of the Respondent, it follows that there was a 'dismissal' as that term is understood by reference to ss 12 and 386(1)(a) of the Act. It therefore proves unnecessary to consider the Applicant's alternative argument under s 386(1)(b) of the Act.

[40] It follows that the Applicant's application under s 365 of the Act is within jurisdiction and that being so, and as the Applicant's application was made within 21 days of the dismissal taking effect, the Commission is required to further deal with the matter. It will do so by holding a conference pursuant to s 368(2) of the Act, with a notice of listing being issued shortly.



DEPUTY PRESIDENT

Appearances:

K Park for the Applicant.
B Yoon for the Respondent.

Hearing details:

2023.
Perth (by video):
28 June.

Printed by authority of the Commonwealth Government Printer

<PR763729>

¹ *Coles Supply Chain Pty Ltd v Milford* (2020) 279 FCR 591, 603 [54], special leave to appeal declined in [2021] HCASL 37.

² *Ibid* 602 [51].

³ Statutory Declaration of Kyungin Kim, [7] (**Kim Statement**).

⁴ *Ibid*.

⁵ *Ibid*.

⁶ *Ibid* [8].

⁷ *Ibid*.

⁸ *Ibid*.

⁹ Digital Hearing Book Part 2, 18–20 (**DHB Part 2**).

¹⁰ *Ibid* 20–1.

¹¹ *Ibid* 21.

¹² *Ibid* 22.

¹³ Statutory Declaration of You Joung Choi, [3] (**Choi Statement**).

¹⁴ *Ibid* [4].

¹⁵ *Ibid* [5].

¹⁶ *Ibid* [6], annexure YJ4.

¹⁷ *Ibid* [7].

¹⁸ *Ibid* [9]–[11].

¹⁹ *Ibid* [15].

²⁰ *Ibid*.

²¹ *Ibid* [16].

²² *Ibid* [17].

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ *Ibid* [9], annexure YJ9.

²⁶ *Ibid* [18].

²⁷ *Ibid* [18], annexure YJ10.

²⁸ DHB Part 2 (n 9) 51–4.

²⁹ Ibid 55.

³⁰ Ibid 56.

³¹ Ibid.

³² Choi Statement (n 13) [27].

³³ Ibid.

³⁴ Ibid [8].

³⁵ Ibid [9].

³⁶ DHB Part 2 (n 9) 57.

³⁷ (2017) 271 IR 245.

³⁸ Ibid 268–9 [47].

³⁹ (2018) 273 IR 126, 129–30 [10]–[11].

⁴⁰ (1995) 62 IR 200 (**Mohazab**).

⁴¹ (2016) 262 IR 221, 228 [23].

⁴² *Mohazab* (n 40) 205.

⁴³ Respondent’s Outline of Submissions, [23].