



# DECISION

*Fair Work Act 2009*  
s.365—General protections

**Carla Trewin**

**v**

**S Choudhuri & A Shee t/as Ella Bache Sale**  
(C2023/3413)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 8 AUGUST 2023

*Application to deal with contraventions involving dismissal – jurisdiction – whether dismissed – casual removed from payroll system – removal triggered Centrelink notification to employee – whether employment relationship ended – objective considerations – no dismissal found – application dismissed*

[1] This is a matter where through circumstance and misunderstanding an employment dispute has arisen between what appears to be the nicest of people.

[2] For reasons set out below, I have determined the dispute by finding that the applicant, a casual employee, was not dismissed even though Centrelink had advised her that her employment had ceased.

[3] This decision should alert Australian employers to the fact that administratively removing a casual employee from a payroll system in order to make savings on payroll administration may trigger notification to the Australian Taxation Office and Centrelink that employment has ceased. Depending on the circumstances, such conduct runs the risk of having ended the employment relationship and thus being a dismissal within the meaning of the *Fair Work Act 2009* (Cth) (FW Act).

## **Background**

[4] On 13 June 2023 Carla Trewin (Ms Trewin or the applicant) made a general protections application to the Commission under s 365 of the FW Act alleging contraventions of the FW Act associated with her alleged dismissal.

[5] Ms Trewin’s application is against her former employer S Choudhuri and A Shee trading as Ella Bache Sale (Ella Bache Sale, the respondent or the employer), which she alleges committed the contraventions.

[6] The respondent opposes the application. It filed a response on 28 June 2023 raising a jurisdictional issue. It claims that Ms Trewin was not dismissed.

[7] The decision of the Full Court of the Federal Court of Australia in *Coles Supply Chain Pty Ltd v Milford*<sup>1</sup> requires applications under s 365 to be within jurisdiction before the Commission can exercise powers conferred by s 368. It is thus necessary to determine the jurisdictional issue if Ms Trewin's application is to proceed further.

[8] I issued directions on 6 July 2023.

[9] I heard the jurisdictional matter by video on 2 August 2023.

[10] Ms Trewin was self-represented. Ella Bache Sale was represented by its Store Manager Ms Taylor and co-owner Dr Shee.

[11] I heard evidence from Ms Trewin and Ms Taylor. After hearing that evidence I requested Dr Shee also give evidence, which he agreed to do.

[12] All witnesses were as honest as the day is long.

## **Facts**

### *Employment of Ms Trewin*

[13] Dr Choudhuri and Dr Shee own and operate a franchise beauty salon in Sale, Victoria trading as Ella Bache Sale.

[14] Ms Trewin commenced working in the business in December 2022 as a casual employee. She was the only casual working in the salon.

[15] Ms Trewin reported to the salon manager, Ms Tori Taylor. It was Ms Taylor who communicated with Ms Trewin on her roster (and vice versa) though Dr Shee who approved the hours for which Ms Trewin was rostered. Ms Taylor communicated with Ms Trewin and vice versa via telephone. Ms Trewin did not have her own telephone. She used her partner's phone. It was that phone number which she had advised the employer.

[16] Ms Trewin was rostered regularly on Saturdays. She also worked less commonly during the week when the salon required and when she was available.

### *Events May 2023*

[17] On Saturday 13 May 2023 Ms Trewin was rostered and worked.

[18] During the shift Ms Trewin questioned Ms Taylor about the correctness of her pay grade and superannuation. Ms Trewin also told Ms Taylor that she (Ms Trewin) had accepted work at Ella Bache Bairnsdale (a nearby but differently owned franchise) and that whilst that role may preclude accepting weekday shifts at the Ella Bache Sale salon, she would still be available for and would like to continue working her Saturday shifts at Sale.

[19] Ms Trewin worked at Ella Bache Sale on Tuesday 16 May 2023 (a product training day).

[20] This was in fact the last shift she worked for Ella Bache Sale.

[21] She was paid for this shift in the ordinary fortnightly payroll run on 22 May 2023.

[22] On leaving her shift on 16 May 2023, Ms Trewin advised Ms Taylor that she (Ms Trewin) was purchasing her own phone. Each acknowledged that they would see each other the following Saturday (20 May) when Ms Trewin was next rostered.

[23] On Thursday 18 May 2023 Ms Taylor telephoned the Ella Bache Bairnsdale salon to speak to a therapist. Ms Trewin happened to answer the telephone. In a friendly discussion about working hours, Ms Taylor advised Ms Trewin that winter was a quiet time and that as the Ella Bache Sale salon was not busy Ms Trewin did not need to work the following Saturday. Ms Trewin agreed not to do so and did not do so.

[24] No contact occurred between Ms Taylor and Ms Trewin or vice versa for the next three weeks.

[25] Ms Trewin's evidence was that during this period she was waiting for Ms Taylor to call and advise of a next rostered shift. Ms Taylor's evidence was that no casual work was needed as the salon was quiet and that in any event she was waiting for Ms Trewin to contact her with a new telephone number.

[26] In actual fact, Ms Trewin had obtained a new telephone but had also retained the former number that had applied to her partner's phone.

*Centrelink notification no longer employed*

[27] Ms Trewin is in receipt of certain Centrelink benefits and is required to report her income to Centrelink.

[28] On Thursday 25 May 2023 Ms Trewin logged onto 'myGov' which was linked to her Centrelink account to update her income details. She observed that the questionnaire she was completing informed her that her employment at Ella Bache Sale had ceased on 22 May 2023 and asked her to provide the reason.

[29] Ms Trewin was taken aback by this information. She was disappointed that the employer had, to her mind, dismissed her and not notified her. She presumed that she had been dismissed because she had taken up work at Ella Bache Bairnsdale or queried her wage.

[30] Ms Trewin did not contact Ms Taylor or Ella Bache Sale to confirm whether the information she read on the Centrelink site was correct.

*Removal from payroll system*

[31] Ella Bache Sale processes its payroll through a third party payroll services company. The payroll run for hours worked is authorised by Dr Shee. The employer pays the payroll

services company a fee for administering the payroll. The fee is based on the number of persons on the payroll.

[32] Unknown to Ms Trewin, Dr Shee decided to remove Ms Trewin from the payroll system for the month of June 2023 because he assessed that she would not be required to work at the salon during June because it was a quiet period, and in order to save the administrative fee (approximately \$20 per payroll run per employee) payable to the third party payroll provider.

[33] The employer did not advise Ms Trewin that it had removed her from the payroll system.

[34] Precisely when Dr Shee did so is not clear from the evidence. He believed it was in June 2023 and not May 2023. The first fortnightly payroll run in June 2023 was 5 June.

*Events 8 and 13 June 2023*

[35] On 8 June 2023 Ms Taylor sent an email to Ms Trewin:<sup>2</sup>

“Good afternoon Carla,

I am sending an email as I haven’t heard from you in three weeks now. When you were in last we spoke together about you getting a new phone and I requested your number. I am a bit disappointed as I haven’t heard from you. I am hoping that when you’re available we can sit down together and have a meeting.

Could you please let me know if you can make it to the meeting requested on Wednesday 14<sup>th</sup> at 4pm.

I hope you had a lovely week,

Talk soon,

Tori Taylor”

[36] Ms Trewin replied by email five days later, on the morning of 13 June 2023:

“Good morning,

As per our conversation last time I saw you was that I was getting a new phone with the same number to contact myself. As per the conversation I also stated that my pay grade was incorrect and it was going to be changed to diploma – level 6 and all super paid. Following the conversation I then received a letter regarding I had choose to leave and docked 1.5 hours of pay, which is incorrect.

I’m very disappointed by the way I have been treated and I have gone to fair work to adjust this.

I cannot attend the meeting on Wednesday.

Regards Carla”

[37] Ms Taylor read Ms Trewin’s email of 13 June 2023. It was the first she was aware of a “letter” saying that Ms Trewin had chosen to leave her employment.

[38] Ms Taylor sent the email to Dr Shee and discussed it with him. Dr Shee advised that he did not know of any such letter or communication about Ms Trewin’s employment ending.

[39] The employer did not contact Ms Trewin to inquire what she meant by her email. The employer did not respond to the email. Dr Shee and Ms Taylor considered it to be disappointing that Ms Trewin had stated in her email that she had gone to “fair work” with her concerns.

[40] Ms Trewin filed these proceedings later that day (13 June 2023). In her application Ms Trewin claims that she was notified of her dismissal on 25 May 2023 in a “letter from Centrelink” and that it took effect that day.

#### *Events since 13 June 2023*

[41] Not until it was served with the application was the employer aware that the “letter” referred to by Ms Trewin in her email of 13 June 2023 was connected to Centrelink.

[42] In actual fact, there is no such letter. Rather, Ms Trewin was referring to the online notification to her that was on the Centrelink questionnaire.

[43] After making further inquiries of Centrelink (Services Australia) Ms Trewin believes that Centrelink was notified via the Australian Taxation Office following advice to it by the employer (via the third party payroll provider) that Ms Trewin had been removed from the payroll system.

[44] Ms Trewin has made a freedom of information request for the document she says the employer or its agent provided that triggered the notification to her that she had left her employment.

[45] Ms Trewin has not been rostered since she last worked on 16 May 2023.

#### **Submissions**

##### *Ms Trewin*

[46] Ms Trewin submits that she was dismissed because the employer removed her from the payroll system and failed to tell her about it, and did not roster her after 16 May 2023.

[47] Ms Trewin submits that she was notified of dismissal when told by Centrelink on 25 May 2023 that the employer had reported that she had left her employment.

[48] Ms Trewin submits that Centrelink advised her of termination following advice to Centrelink or the ATO by the employer or its agent that Ms Trewin had been removed from the payroll system.

[49] Ms Trewin believes that she was dismissed in part because she complained about her pay grade and superannuation.

*Ella Bache Sale*

[50] Ella Bache Sale submit that Ms Trewin was not dismissed. It submits that she has remained as a casual on the books but has not made herself available for work and failed to attend a meeting on 14 June 2023 to discuss her situation.

[51] Ella Bache Sale submit that removing Ms Trewin from the payroll system was an internal administrative act and not a dismissal. It neither did nor intend to end the employment relationship.

[52] Ella Bache Sale submit that it did not knowingly advise Centrelink that Ms Trewin had been removed from the payroll system, let alone dismissed.

[53] Ella Bache Sale submit that it is entitled to roster a casual employee such as Ms Trewin as and when the business requires and that in the winter period demand is low.

[54] Ella Bache Sale submit that if it had decided to dismiss Ms Trewin it would have informed her of that fact. She remains a casual employee on the books and will be placed back on the payroll system and rostered when her services are required.

[55] Ella Bache Sale submit that underpayments (if any) will be rectified and that such issues are not relevant to the question of dismissal.

**Consideration**

[56] Section 365 of the FW Act 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.”

[57] Section 365 requires a dismissal to have occurred as a jurisdictional fact. A mere allegation that a person has been dismissed will not establish this as fact.<sup>3</sup> “Dismissal” for these purposes (and other purposes of the FW Act) is defined in s 386(1), which provides:

**“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.”

[58] That Ms Trewin was a casual employee does not preclude a finding that she was dismissed. Whilst a casual employee is a person employed on a series of separate contractual engagements, the legal concept of dismissal concerns termination of the employment relationship and not necessarily the ending of a contract. Thus, a casual (especially one commonly rostered or called on) can have, in the absence of evidence to the contrary, a continuing employment relationship with their employer from which they can be dismissed.

[59] Ms Trewin worked regularly at Elle Bache Sale between December 2022 and May 2023. She was the casual employee on whom Ms Taylor relied when extra assistance was required in the salon. I find that Ms Trewin had a continuing employment relationship from which she could be dismissed.

*Dismissal*

[60] Was Ms Trewin dismissed?

[61] In answering this question it is relevant to note that whether a person has been dismissed is not decided by reference to the subjective intention or belief of either the employee or the employer. It is decided objectively by reference to all relevant circumstances.

[62] I do not conclude that Ms Trewin was dismissed.

[63] The decisive consideration in this matter is whether the decision to remove Ms Trewin from the payroll system was conduct that objectively brought the employment relationship to an end.

[64] For the following reasons it was not.

[65] Firstly, this was an administrative act by Dr Shee arising from the fact that the employer did not plan to roster Ms Trewin during the month of June 2023 and was unlikely to do so whilst business was slow, and sought to not incur a payroll administration fee payable to a third party payroll services company in that period. Conceptually at least, there is a difference, albeit a fine line, between administratively removing an employee’s name off a payroll system and taking them ‘off the books’ as a casual in the sense of removing them as an employee. Whether in fact that line is crossed depends on the overall circumstances.

[66] Secondly, it is objectively plausible that the employer did not plan to roster Ms Trewin during the month of June 2023 on account of its assessment of business conditions because that

is what it did when it altered Ms Trewin's roster for Saturday 20 May 2023, five days before the alleged dismissal.

[67] Thirdly, Ms Taylor's email to Ms Trewin on 8 June 2023 is a clear indication that an employment relationship existed beyond the date Ms Trewin claims she was dismissed. In that communication Ms Taylor asked Ms Trewin to attend the salon and meet with her to discuss the fact that no communication had been had for three weeks.

[68] I also take into account that the nature of the employment relationship between an employer and a casual employee who is 'on the books' and rostered when required (as was Ms Trewin) will necessarily involve periods, sometimes weeks, when the employee is not rostered to work. The fact of not being rostered does not necessarily mean that the employment relationship has come to an end such that the employer has dismissed the casual employee.

### **Conclusion**

[69] As I have not found that Ms Trewin was dismissed within the meaning of the FW Act, application C2023/3413 is not within jurisdiction. The jurisdictional objection is upheld. The application must be dismissed.

[70] An order<sup>4</sup> giving effect to this decision will be issued in conjunction with its publication.

### **Concluding observations**

[71] I make a number of concluding observations to assist the parties to navigate their relationship.

[72] Firstly, that Ms Trewin was not dismissed means that she continues to be employed. That being so, and in order to avoid any future misunderstanding, the employer would be well advised to communicate that fact to Ms Trewin and provide her with rostered shifts at Ella Bache Sale when trade permits. Ms Trewin should inform the employer whether and (if so) when she is available to work given her other commitments. Such work should be offered irrespective of whether an outstanding dispute exists over wages or superannuation. A failure to provide work because Ms Trewin has complained about her wages or has taken these proceedings would be unlawful.

[73] Secondly, the employer would be well advised to exercise a higher degree of care when deciding to remove casual employees, even temporarily, from the payroll system. As the evidence in this matter shows, doing so carries risk that an employer could, even inadvertently, be found to have ended the employment relationship and thus dismissed the employee. Ella Bache Sale is now aware that doing so appears to trigger a chain of events that can result in an employee quite reasonably believing advice from a government agency that they have been dismissed.

[74] Thirdly, that I have found that Ms Trewin was not dismissed does not mean that the employer handled this matter well. By not communicating with Ms Trewin between 16 May 2023 and 8 June 2023 Ms Taylor assumed that Ms Trewin was not contactable on account of acquiring a new phone. That was not an assumption wisely made. Moreover, the employer



should have but did not reassure Ms Trewin when removing her from the payroll system that she nonetheless remained employed and eligible to be offered shifts.

[75] Fourthly, this decision does not impact Ms Trewin's rights to pursue an underpayment claim. If Ms Trewin has not been paid as required by law, rights exist to recover sums due whether or not she was dismissed. The employer would be well advised to examine the underpayment claim promptly and correct any error if one exists. I express no view on whether an underpayment has occurred.



DEPUTY PRESIDENT

*Appearances:*

Ms C Trewin *on her own behalf*

Ms T Taylor with Dr A Shee *of S Choudhuri & A Shee t/as Ella Bache Sale*

*Hearing details:*

Adelaide (by video)

2 August

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<sup>1</sup> [2020] FCAFC 152

<sup>2</sup> XX

<sup>3</sup> *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152, [54]

<sup>4</sup> [PR764870](#)