[2023] FWC 2727 [Note: An appeal pursuant to s.604 (C2023/6863) was lodged against this decision.]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Sandra Conrad
v
Rocky Bay Limited
(U2023/4334)

DEPUTY PRESIDENT O'KEEFFE PERTH, 18 OCTOBER 2023

Application for relief from unfair dismissal – Applicant unfairly dismissed – Reinstatement not appropriate – Compensation ordered.

[1] On 18 May 2023, Sandra Conrad (the Applicant) made an application to the Fair Work Commission (FWC) under s.394 of the *Fair Work Act 2009* (Cth) (FW Act) for a remedy, alleging that she had been unfairly dismissed from her employment with Rocky Bay Ltd (Respondent). The Applicant seeks compensation. The Respondent has made a jurisdictional objection to the claim on the basis that the Applicant freely resigned and was therefore not dismissed within the meaning of the FW Act.

[2] Section 394(2) of the FW Act requires that an application for an unfair dismissal remedy is to be made within 21 days after the dismissal took effect or within such further period as the FWC allows under s.394(3). It is not in dispute between the parties and I find that the Applicant's employment ended on 1 May 2023. As her application was made on 18 May 2023, it was made within the time limit allowed under the Act.

Background

[3] The Applicant was employed by the Respondent as a Disability Support Worker. During the time she was employed by the Respondent she suffered two heart attacks, the first being in 2019 and the second in December 2022. Following her return to work after the second heart attack, the Respondent held a meeting with the Applicant on 12 January 2023 to discuss her employment. While the parties differ on the exact nature of that meeting in terms of its purpose and what transpired during its course, it appears to have been the catalyst for some changes in the Applicant's working arrangements.

[4] Thereafter there is little common ground between the parties on the issue of the Applicant's working arrangements. On 7 March 2023 the Applicant emailed the Respondent notifying of a grievance regarding the way the Respondent had treated her over the issue of her working hours. On 10 March 2023 the Respondent was contacted by the Applicant's doctor advising that the Applicant was lodging a claim for workers' compensation, claiming that she was suffering from stress. The Applicant was thereafter absent from work having been certified

as unfit and on 1 May 2023 the Applicant submitted a resignation from her employment with immediate effect.

The hearing

[5] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[6] After taking into account the views of the Applicant about whether a hearing would be the most effective and efficient way to resolve the matter and noting that the Respondent chose not to make submissions on this matter, I considered it appropriate to hold a hearing for the matter (s.399 of the FW Act).

Permission to appear

[7] Both the Applicant and the Respondent sought to be represented before the Commission. The Applicant sought to be represented by a paid agent. The Respondent sought to be represented by a lawyer. Neither party opposed the other being represented.

[8] Section 596(1) of the FW Act provides that a party may be represented in a matter before the Commission by a lawyer or paid agent only with the permission of the Commission.

[9] Both parties made submissions addressing each of the three criteria in s596(2) of the FW Act. I only need to find that one of those criteria is met to exercise my discretion to allow representation. The submissions of both parties regarding s596(2)(a) went to the advantages for the FWC, particularly in complex matters involving jurisdictional objections, of having experienced advocates to confine the issues examined to those being most relevant to the case. I accept that this is the case and as such I exercised my discretion to allow both parties to be represented.

Witnesses

[10] The Applicant gave evidence on her own behalf.

[11] Ms Suzanne Woods (Ms Woods) gave evidence on behalf of the Respondent.

Submissions

[12] The Applicant filed submissions in the Commission on 10 August 2023. The Respondent filed submissions in the Commission on 22 August 2023.

[13] Reply submissions were filed by the Applicant on 31 August 2023.

When can the Commission order a remedy for unfair dismissal?

[14] Section 390 of the FW Act provides that the Commission may order a remedy if:

(a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and

(b) the Applicant has been unfairly dismissed.

[15] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

[16] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;
(ii) an enterprise agreement applies to the person in relation to the employment;
(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[17] In this instance, I find that the Applicant commenced employment with the Respondent on 19 May 2015. She therefore meets the minimum employment period set out in s.383 of the FW Act. I further find that her employment was covered by a modern award, being the Social, Community, Home Care and Disability Services Award 2010. I am therefore satisfied that the Applicant is a person protected from unfair dismissal.

When has a person been unfairly dismissed?

[18] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

[19] It is not contested between the parties that the Respondent is not a small business as defined in the FW Act and so the Small Business Fair Dismissal Code is not relevant to these proceedings. It is also not contested that the ending of the Applicant's employment was not a case of genuine redundancy and so the issue of redundancy does not arise. The issues in

contention are whether the Applicant was dismissed at the initiative of the Respondent and, if so, was that dismissal harsh, unjust or unreasonable.

Has the Applicant been dismissed?

[20] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

(a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or

(b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[21] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[22] The Applicant submits that it is open for the FWC to find that the termination falls within either of the circumstances set out in s.386(1) while the Respondent denies that it terminated the Applicant or engaged in conduct that forced her to resign. Before the merits of the matter can be considered, I need to examine whether either of the limbs of s.386(1) are applicable.

Submissions

[23] The Applicant submits in the first instance that the Respondent terminated the Applicant's employment at its own initiative because it unilaterally varied her employment contract from one that was full-time based on 76 hours per fortnight to one that was part-time based on 60 hours per fortnight. Such a variation was submitted to be a repudiation of the employment contract by the Respondent. In support of this proposition, the Applicant drew my attention to the statement of the Full Bench in *City of Sydney RSL and Community Club Limited v Balgowan* as follows:

> *"The question whether there has been a repudiation of the contract of employment is determined objectively, it is unnecessary to show a subjective intention to repudiate and is a question of fact not law. Relevantly, for present purposes, repudiation may exist where an employer reduces the wages of an employee without the employee's consent or where there is a serious non-consensual intrusion on the nature of the employee's status and responsibilities in a way which is not permitted by the contract. Similarly, if an employer seeks to bring about a change in the employee's duties or place of work which is not within the scope of the express or implied terms of the contract of employment, the conduct may evince an intention to no longer be bound by those terms. Therefore, in these circumstances if an employee does not agree to the change, which if agreed would amount to a variation of the contract, the employee may claim to have been constructively dismissed."(footnotes omitted)*[1]

[24] The Applicant further submitted that while there was repudiatory conduct by the Respondent, such conduct does not, as a matter of law, bring the contract of employment to an

end. The Applicant relied here on the explanation provided by Deputy President Easton in *NSW Trains v Mr Todd James (NSW Trains)* as follows:

> *"At common law repudiatory conduct does not terminate the contract of itself. A repudiation gives the innocent party the right to elect to terminate the contract. The innocent party is "confronted" by two inconsistent options: either to accept the repudiation and bring about the end of the contract, or to affirm the contract and continue it. The innocent party may "keep the question open, so long as he does not affirm the contract ... and so long as the delay does not cause prejudice to the other side", but ultimately must make an election because the law does not allow a party to maintain two inconsistent rights (or positions) and requires a choice to be made.*
>
> *If an employer engages in repudiatory conduct by demoting an employee, at common law the employee has the right to elect to terminate the employment. If the employee so elects then, for the purposes of s.386(1), the employment is likely to have been terminated at the initiative of the employer. That is, where an employee elects to terminate the employment because of the repudiation by the employer, they are likely to be "a person who has been dismissed" for the purposes of s.386(1) and s.385(a). Importantly, it is only once the employee makes the election to accept the repudiation that the dismissal occurs." (footnotes omitted)*[2]

[25] The Applicant submitted that at no time had the reduced hours contract been agreed. Rather, she had attempted to clarify the proposal and had challenged the unilateral change but had been unsuccessful in getting the Respondent to engage meaningfully on the issue. As such, on 1 May 2023 she accepted the repudiation of her full-time contract and resigned as a result.

[26] The Applicant further submitted that other conduct by the Respondent was such that it amounted to the sort of conduct envisaged by s386(1)(b) of the Act. The Applicant noted the findings of the Full Bench in *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli (Bupa)* as follows:

> *"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 probably [sic] 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."*[3]

[27] The Applicant submitted that the conduct engaged in by the Respondent occurred over a period of time which was analogous to the circumstances referred to by a Full Bench in *Sydney Water Corporation v Yelda*, where the Full Bench stated as follows:

> *"We accept that the line between conduct that leaves no choice but to resign and conduct that cannot be held to cause the resignation must be "rigorously observed". We note that it was accepted by the Full Bench in Peary that a course of conduct that made continuation of the employment relationship intolerable was a basis for finding that the termination of employment was at the initiative of the employer. The facts of Peary may be distinguished from those in the present matter in that the employee claiming to have been dismissed in Peary remained at work up to the point of her resignation. At first*

> *instance the presiding member found that the "cumulative effect" of the employer's conduct made the applicant's situation insufferable as to make her continued employment untenable. That finding was not disturbed on appeal.*
>
> *While the facts in Peary may be different to those in the present matter, the Deputy President similarly concluded that the conduct or course of conduct of the Appellant was such as to leave the Respondent no choice but to resign. We would also observe that the cumulative effect of the course of conduct engaged in by the Appellant, both acts and omissions, was ongoing at the date of resignation and we do not accept that a temporal link was not established. Furthermore, and having regard to the particular facts of this case and the lack of communication by the Appellant with the Respondent from early 2018, it is unclear what other outcome, other than resignation, might have been expected."*[4]

[28] In terms of the precise conduct of the Respondent, the Applicant cited, in addition to the contractual variation, the removing of the Applicant from night shift, the rostering of her to work at a location she had specifically requested not to be sent to, and the breaching of her rights under the relevant award. The Applicant was also aggrieved that the Respondent had not, as she saw things, properly addressed the formal grievance she had lodged regarding her situation.

[29] In her submissions in response, the Applicant contended that the Respondent had not addressed the issue of the alleged unilateral variation of the Applicant's employment contract from 76 hours per fortnight to 60 hours and particularly had not addressed the Change of Status form sent to the Applicant clearly stating that her status was changing from full time to part time. The Applicant further contended that the Respondent had failed to address the breach of its own policy by not allowing the Applicant the opportunity to nominate a support person for the discussions about her hours of work, and it had engaged in a historical review of the Applicant's employment to justify its actions, albeit that the conclusions it had drawn from the review were erroneous and the many of the accompanying assertions were factually incorrect.

[30] The Respondent submitted that the Applicant had not been dismissed and had instead resigned her employment freely, albeit that the Respondent claimed to be somewhat unclear about the reason for the resignation. It was the Respondent's view that it was undertaking a process of consultation with the Applicant, with the intent of devising a roster to take into account her safety concerns, her domestic responsibilities and her health issues including the most recent heart attack.

[31] The Respondent claimed that at the meeting on 12 January 2023, the Applicant had indicated a willingness to contemplate different rostering options and that had she not so indicated, it would have ended the discussions at that point. Instead, it presented the Applicant with three options to consider and gave the Applicant until 17 January 2023 to provide a response. The Respondent submitted that as it received no response to these options from the Applicant despite several attempts, it had asked the Applicant to provide her availability for work.

[32] The Respondent submitted that the Applicant's response regarding her availability:

"…indicated that the Applicant could no longer work full time and was only available 60 hours per fortnight."

[33] As it considered that the Applicant's new availability was 60 hours a fortnight, the Respondent had then sent the Applicant a Change of Status form on 24 February 2023 to reflect a 60 hour per fortnight part time contract. During the hearing I questioned the Respondent on the assertion that the Applicant had indicated that she was only available part time and 60 hours a fortnight, as I could find no evidence in any of the material lodged that this was the case. Further, the Applicant herself denied ever having provided such an indication. The Respondent then advised that it was withdrawing its submission that the Applicant had indicated that she was reducing her availability. Instead, it suggested that the part time / 60 hours per week notion had arisen as it was one of the options for a change of role canvassed with the Applicant.

[34] The Applicant did not respond to the email containing the Change of Status form but emailed the Respondent on 7 March 2023 with a grievance about her treatment post her return from her December 2022 heart attack. The Respondent submitted that it responded to this email suggesting it would consider ways to deal with the grievance, however, shortly thereafter the Respondent was advised that the Applicant was unfit for work and was lodging a workers' compensation claim as a result of stress she claimed she had suffered due to her treatment by the Respondent. Thereafter, the Applicant had not returned to work, and the grievance had not been investigated as the Respondent had been advised by its workers' compensation insurer not to do so. In further submissions the Respondent contended that the Applicant's view that the Respondent's conduct was such that she had no option but to resign was misconceived, as there was nothing that the Respondent could be said to have done in the period between when the Applicant returned to work in January 2023 and her resignation in May 2023 that would lend credence to this assertion.

Evidence

[35] In her witness statement, the Applicant stated that when she returned to work in January 2023 after her heart attack, she had been directed to attend a meeting with her manager and the Respondent's Human Resources manager to discuss her role on night shift. Her evidence is that at the meeting she was told to "come off night shift due to (her) health and family commitments." At that meeting, the Applicant claims that she was provided with a roster totalling 76 hours per fortnight, which was consistent with her contract, but which removed her from night shift. Her evidence was that she advised the Respondent that she did not want to change rosters and that her doctor had cleared her to return to normal duties, which meant night shift. Further, she had stated that it was poor fatigue management to move her from night shift directly to day shift. Finally, she stated that she did not wish to work any of her shifts at the Bank Street facility, which was not her usual worksite. The Applicant states that she did not sign the proposed roster change paperwork.

[36] The Applicant's further evidence was that following this meeting, she proposed a mix of afternoon and night shifts, but the Respondent refused to accept this proposal. Instead, she states that on 24 February 2023 she was issued with a new roster, which provided 60 hours per fortnight guaranteed, with extra shifts possibly available to make the total up to 76 per fortnight. As the document issued did not specify the actual days to be worked, the Applicant stated that she asked for further details, but these were not supplied by the Respondent.

[37] Following this, the Applicant states that on 3 March 2023 she saw her roster for the following two-week period, which was for 60 hours, and included work at Bank Street. At this point she lodged a grievance against her manager and the Respondent's Human Resources department. Her evidence was that at this time she sought medical treatment for stress and she was certified as unfit for work from 3 March 2023.

[38] In her witness statement in response, the Applicant denied that either of her heart attacks occurred at work and challenged the Respondent's assertion that co-workers had been traumatised by witnessing these heart attacks. She also responded to the Respondent's assertion that she had been tired and defensive during the meeting held on 12 January 2023. The Applicant's evidence was that she was tired because she had just completed a night shift, and defensive because the meeting was dealing with removing her from night shift and she did not have a support person so felt outnumbered.

[39] The Applicant's further evidence in her witness statement in response was that she was not at any time told that the process of roster change was one of consultation, and that she believed that the Respondent had unilaterally reduced her hours, which eventually prompted her resignation. She also claimed that her grievance had not been dealt with in accordance with the Respondent's policy and she challenged the Respondent's claim that the grievance had been left in abeyance due to her lodgment of a workers' compensation claim.

[40] Under cross-examination, the Applicant denied that in the meeting held on 12 January 2023 she had agreed that her current shift arrangements were not working or that she had agreed to change her night shift to what were described as "more social hours". While the Applicant did concede that the options for shift and position changes set out in the email to her from Alison Rennick on 9 February 2023 were the options that arose from previous discussions, she was adamant that she did not and would not consider a move to a part time / 60 hours per fortnight working arrangement.

[41] The Respondent put to the Applicant that the Change of Status form provided to her by the Respondent, which changed her status from full time to part time and reduced her hours to 60 per fortnight, was not intended to change her hours, as it was conditional upon her acceptance. The Applicant did not agree that this was the case. The Respondent, consistent with its submission that there was nothing it had done that could be a catalyst for forced resignation, asked the Applicant what it had done in the period between 10 March 2023 (the beginning of the Applicant's absence due to illness) and her resignation on 1 May 2023 that provoked the resignation. The Applicant's evidence was that she regarded the handling of her grievance and the sense that she had been ignored as significant factors that had impacted her well-being. She further claimed that the requirement from the Respondent's Occupational Safety and Health department to attend a medical appointment to demonstrate her fitness for work while she was absent under the auspices of a medical certificate for stress as unreasonable.

[42] In her witness statement, Ms Woods claimed that the Respondent had serious concerns for the wellbeing of the Applicant after her second heart attack. She stated that the Applicant had previous issues regarding stress and anxiety associated with working on night shift. As such, the Respondent had resolved to meet with the Applicant to perform a "welfare check".

[43] It was Ms Woods' further evidence that in that meeting, held on 12 January 2023, the Applicant had stated that shift work was affecting her "physically and emotionally" and that it would be a good time to explore different shifts. However, according to Ms Woods the Applicant had then "disengaged" with what Ms Woods termed a consultation process and did not respond to attempts to contact her. It was Ms Woods' evidence that, had the Applicant contacted the Respondent, it would have been made clear to her that the process was about consultation, and that she would not be disadvantaged.

[44] Ms Woods provided some further evidence regarding the administration of rosters and payroll by the Respondent, the relevance of which was that the Applicant had retained her full-time classification until her resignation. Ms Woods confirmed in her evidence that the Respondent had been advised by its workers' compensation insurer not to deal with the Applicant's grievance, lodged on 7 March 2023, as it covered the same issues as her workers' compensation claim.

[45] Finally, Ms Woods stated that the Respondent remained unaware of the reason for the Applicant's resignation, noting that there were a number of options open to the Applicant and it had been the Respondent's desire that the Applicant engage with its consultation process.

Consideration

[46] The relevant consideration is whether the conduct of the Respondent can be said to fall within the ambit of s386(1)(b) of the FW Act. More particularly, whether it is within the ambit of the conduct contemplated in *Bupa* as set out above at paragraph 26 above. The Applicant claims that in the first instance, the action taken by the Respondent in unilaterally reducing the Applicant's contract from full time 76 hours per fortnight to part time 60 hours per fortnight is a clear repudiation, entitling the Applicant to treat her employment contract as being at an end at the initiative of the Respondent.

[47] In reviewing the submissions and evidence, I find that the Respondent was acting based on an incorrect assumption when it came to the issue of the Applicant's contractual hours. The Respondent seemed to be operating under an assumption that the Applicant had reduced her available hours to 60 per fortnight. However, I can find no evidence that the Applicant ever indicated that her availability was limited to 60 hours per fortnight. The only evidence before the FWC of any information provided by the Applicant to the Respondent regarding her availability is the signed but undated "Support Worker Availability Form" completed by the Applicant and submitted into evidence by the Respondent. That form does not include any references to hours or start and finish times of work but does indicate availability for nine days per fortnight. Under the terms of the relevant Social, Community, Home Care and Disability Services Industry Award 2010 (the Award), a full-time employee can be engaged for 76 hours over nine days in a fortnight. As such, I find that the form itself cannot be said to be limiting the Applicant to part time work or 60 hours per fortnight.

[48] I questioned Ms Woods about how and by what method she came to understand that the Applicant had limited her availability to part time and 60 hours per fortnight. It became apparent that Ms Woods was not able to answer this question. She appeared to have assumed it was based on the Applicant submitting, at the Respondent's request, the "Support Worker Availability Form". As I found above, this form did not in any way restrict the Applicant's

hours our capacity for full time work. I pointed this out to Ms Woods and then asked if this was indeed the form on which the Respondent had relied to determine that the Applicant had restricted her availability. Ms Woods replied that she could not comment.

[49] I find that the Applicant did not restrict her availability and it was not open to the Respondent to conclude that she did. However, I accept that the issue of a 60-hour fortnight in all likelihood arose initially as one of the options put to the Applicant either at the meeting on 12 January 2023 or via email soon after that meeting. As such, I am not persuaded that the Respondent's continual canvassing of the 60 hours / part time roster with the Applicant can be said to have been malicious or intended to provoke a negative reaction. Nevertheless, I do find that it was reasonable, given the correspondence from the Respondent, including a 60-hour roster for the fortnight commencing 13 March 2023, for the for the Applicant to conclude that the Respondent was seeking to unilaterally change her hours to part time and 60 hours per fortnight.

[50] I was not persuaded by the submissions and evidence from the Respondent that the Applicant was under no compulsion to accept those hours and that if she had objected, the proposal would have been withdrawn. In support of this conclusion, I note firstly that the email sent to the Applicant by her manager on 24 February 2023, which was in evidence, makes it clear that if the Applicant wished to continue working at the sites where she had been engaged, she needed to complete the "Change of Status" form which reduced her hours to 60 per fortnight. There is no suggestion in that email that this is voluntary or that there are other options. Further, the email appears to refer to the Applicant's full time 76 hours per fortnight night shift role as her "previous N/D position". Secondly, while the Respondent sought to characterize the correspondence regarding the Applicant's hours as simply a "consultation" and that any decision would rest with the Applicant, there is no evidence to suggest that this was ever made clear to the Applicant herself.

[51] As such, my initial finding is that, notwithstanding the Respondent's perseverance with the 60 hour per fortnight proposal was an unintentional error, the Applicant was nevertheless entitled to proceed on the basis that the Respondent was intending to unilaterally reduce her contractual hours. I find that such a unilateral variation would amount to a repudiation of the full-time contract by the Respondent and in the circumstances the Applicant is entitled to rely upon it to advance her claim that the actions of the Respondent led to her termination.

[52] The Applicant's claim that her resignation was forced also relies upon other treatment by the Respondent that she claims was unreasonable. I believe that it is important to address these issues. I note that it might have assisted the Commission if the Applicant's direct manager, who had carriage of most of the correspondence regarding the change to the Applicant's work arrangements, had been available to give evidence as in was clear that with respect to much of the interplay between the Applicant and her direct manager, Ms Woods was unable to provide any evidence. Nevertheless, I accept the explanation given by Ms Woods for the direct manager's absence and do not propose to draw any *Jones v Dunkel* inferences from that absence.

[53] The first issue to address is the lack of the presence of a support person at the meeting held with the Applicant on 12 January 2023. I believe this issue is one of many scenarios that arose in the course of the Applicant's exit from the Respondent's business whereby there was

no malicious intent, but circumstances were such that the Applicant perceived such a motive. I accept that the Respondent had valid concerns for the Applicant's wellbeing and did genuinely intend to conduct what it called a "welfare check". I also find that the intended presence of the Human Resources Manager was made clear to the Applicant in the email dated 10 January 2023 that invited her to the meeting. As such, the Applicant could have requested to have a representative present if she had concerns.

[54] However, she did not do so but it nevertheless appears that the presence of a Human Resources Manager, and the canvassing of job roles that were not palatable to the Applicant, have created for the Applicant a perception that the meeting was perhaps more formal than initially described to her and had the intention of pushing her towards an outcome she did not want. The evidence adduced by each party with respect to that meeting paints two different pictures of what transpired, and I do not propose to delve too deeply into who is correct, as it is likely that both parties' versions accord with their own perceptions of the meeting. However, in summary, I do not think that there is anything in the calling and conduct of that meeting that persuades me that it should be regarded, at least in isolation, as behaviour that could be reasonably said to be capable of provoking a resignation.

[55] I then turn to the issue of the Respondent removing the Applicant from night shift. It was perceived by the Applicant that the Respondent was intending to remove her from night shift, which in her evidence she stated was her preferred shift. In further evidence, which was not challenged, the Applicant stated that she had proposed a mix of night and afternoon shifts but that this had been refused. The Respondent's unchallenged evidence was that a mix of afternoon and night shifts was not possible as it would breach the "break between shifts" provision in the Award. The Respondent's further evidence was that the Applicant had expressed some previous concerns regarding aspects of night shift such as working alone and as such the Respondent was seeking to explore the issue of changing shifts based on its concern for the Applicant's wellbeing.

[56] In assessing this issue, I find that the parties have been potentially at crossed purposes. The Respondent's evidence on the issue of roster changes was, as set out above, that this was a consultation and nothing would change unless the Applicant agreed. However, I do not accept that this was made clear to the Applicant herself and so again, I find that she was entitled to proceed on the basis that the Respondent was going to remove her from nightshift. The Applicant submitted that this change was in breach of the Award consultation provisions and this further aggravated the situation in which she found herself. I do not propose to delve into the issue of Award compliance and note that this particular issue arose only in submissions and not in any correspondence from the Applicant during her employment. I find that the practical issue of being unwillingly removed from nightshift was a concern to the Applicant that caused her distress, as her unchallenged evidence was that she had been cleared by her doctor to return to nightshift, and that was her preferred shift. Irrespective of the Respondent's motives, the perception of being forced from nightshift has negatively impacted the Applicant and I find that she is entitled to regard this as behaviour by the Respondent that contributed to her decision to resign.

[57] The next issue to consider is the Respondent rostering the Applicant to work at its Bank Street facility. The Applicant tendered into evidence a copy of the roster provided to her by the Respondent for the fortnight commencing 13 March 2023. It is clear from that document that

the Applicant was rostered to work at the Bank Street facility for four of the eight working days in that cycle. The Applicant gave unchallenged evidence that she had made it clear that she did not want to work at Bank Street. In re-examination the Applicant clarified that this was due to her having a previous conflict with the manager of that facility. The Respondent did not provide any reasons for rostering the Applicant at Bank Street in its evidence and Ms Woods was not cross-examined on this issue. As such, it is not clear why the Applicant was rostered at Bank Street, but I accept that such a roster was contrary to her express request not to be rostered at that facility. Accordingly, I find that even if the rostering of the Applicant was not the result of any desire to cause upset and was merely an error, it nonetheless created angst for the Applicant and this angst would have contributed to what the Applicant herself referred to as a "snowballing effect" of numerous issues that caused her upset and led to her resignation.

[58] The next issue raised by the Applicant was the response to her formal grievance email addressed to "HR", lodged with the Respondent via email on 7 March 2023. In this grievance email, which was in evidence, the Applicant outlined a number of concerns she had regarding the way her return to work in January had been handled, including a concern with the way the Respondent had handled her difficulties with the NDIS Worker Screening Check. The Applicant requested a meeting with the Respondent to talk about this grievance. The Applicant's evidence was that she had been distressed about the non-committal response to her grievance, the subsequent lack of attention paid to it by the Respondent and the fact that the response, such as it was, came from someone contained in the grievance. The Respondent's evidence, which I accept, was that the Applicant had also around this time lodged a workers' compensation claim which complained about essentially the same issues and the Respondent's workers' compensation insurer had directed the Respondent not to address the grievances in the email until the workers' compensation claim had been resolved.

[59] Tendered into evidence was the email dated 8 March 2023 sent by the Respondent to the Applicant in response to her grievance. The email reads as follows:

> *"Hi Sandra*
>
> *Thank you for your email. I'm sorry that you have had issues following your return to work from your health concerns and I hope things have improved. Before I can follow this one up, do you have a clearance from your doctor signing off your return to work after your heart attack?*
>
> *I will look at what options are available and what has been proposed from our end, however this may take me a few days.*
>
> *With regards your NDIS check, I can confirm I responded to you about this advising that we had received your clearance. I have attached this email for your reference.*
>
> *Kind regards*
> *…"*

[60] Also in evidence was an email from Tracy Astfalk, the Respondent's Workers' Compensation and Injury Management Coordinator, to the Respondent's insurer. In that email, it is made clear that the Respondent's Human Resources Department did not become aware of

the workers' compensation claim made by the Applicant until 10 March 2023. As such, when the above response to the Applicant's grievance was sent on 8 March 2023, the author of that email was not aware of the compensation claim and the Respondent cannot claim that its response was tempered by advice from its insurer. I accept that sometime later, in an email dated 13 April 2023 which was in evidence, the Respondent clarified for the Applicant that her workers' compensation claim was taking precedent over the grievance due to the similarity in the relevant issues. However, this email is dated 36 days after the grievance was notified, and 34 days after the initial response. I find that it is reasonable that the Applicant should become further aggrieved at this delay and that the delay reflects poorly on the Respondent. Although again I do not find that there was any malice, the effect on the Applicant cannot be ignored and she was entitled to regard this as another issue compounding her concerns.

[61] The final issue for me to consider is the Respondent's decision to seek to have the Applicant assessed for work capacity during a period where she was off work certified as unfit due to stress and in the middle of a workers' compensation claim. The Applicant's evidence is that she felt pressured and distressed by this request from the Respondent and did not understand why she was being asked to be assessed given that she was certified as unfit. The Respondent's evidence is that the Applicant had indicated some financial difficulties and so the Respondent was trying to determine if she could come back to work albeit in some limited capacity. In examining the various items of correspondence tendered into evidence, it would seem that different officers of the Respondent took different views as to the purpose of that proposed assessment, including to allow the Applicant to earn some income or to assist her in returning to work after her workers' compensation matter had been resolved. What emerges from the evidence and cross-examination however is that the Applicant was concerned that having been certified as physically fit to return to work post her December 2022 heart attack, the Respondent was seeking to have her physically assessed by its own doctor to determine if she was fit for work, an action she regarded with some concern. In the circumstances, I find that the Respondent's decision to embark on this course of action was, irrespective of its intentions, particularly unwise in the circumstances as it contributed to the Applicant's concerns.

[62] One of the submissions made by the Respondent was that it experienced difficulties in communicating with the Applicant as the Applicant did not return phone calls or emails. Although I can make no comment about telephone calls, it does appear that there are a reasonable number of emails between the parties and apart from some short periods where the Applicant may be said to have been slow in responding to emails, it appears that it was not until late in the process, where the Applicant was seeking legal advice, that the level of communication between the parties fell away. As such, I have not been persuaded to resile from my findings on the grounds of the Applicant being uncommunicative.

[63] In considering all of the issues set out above, I find that the actions of the Respondent were such that they forced the resignation of the Applicant and the termination was at the initiative of the Respondent. I do not consider that this was the Respondent's intent but rather the inevitable result of a combination of factors and issues that caused great distress to the Applicant. Essentially, the behaviour can be broken down into two main categories. The first, being the reduction of the Applicant's hours from 76 to 60 per fortnight is so significant that in all likelihood it would sustain a claim of forced resignation on its own. I am not persuaded that the period of time taken to act upon the reduction is significant. As was submitted by the

Applicant, the decision in *NSW Trains* confirms that a decision to accept a repudiation need not be made immediately:

> *"The innocent party may "keep the question open, so long as he does not affirm the contract ... and so long as the delay does not cause prejudice to the other side", but ultimately must make an election because the law does not allow a party to maintain two inconsistent rights (or positions) and requires a choice to be made."*[5]

[64] I find that the Applicant was genuinely trying to resolve the issue of the hours reduction with the Respondent and as such the delay in accepting the repudiation is not particularly unusual. I find that the desire for resolution is also relevant to the second category of behaviours. The second category is the matters as set out in paragraphs 53 to 61 above. Individually these issues would not be likely to support a finding that the Applicant was forced to resign. Collectively they would be somewhat persuasive in terms of such a finding but when collectively they are added to the reduction in hours, it provides a compelling argument that the resignation was forced by the actions of the Respondent. I must again note that I do not think the actions of the Respondent were a deliberate strategy to pressure the Applicant. Noting that Ms Woods often responded to questions in cross-examination by stating that she was not responsible for the particular action or was unable to comment as it was in the remit of another department or manager, I formed the view that there was potentially an element of bureaucratic isolation between officers of the Respondent who were dealing with the Applicant. This has led to certain assumptions being made and certain "facts" – such as the Applicant reducing her availability – being accorded a higher level of authority than they perhaps deserved. Nonetheless, from the Applicant's perspective the various actions all came from the Respondent and she was entitled to rely on what she was being told as being the Respondent's considered position.

Was the dismissal harsh, unjust or unreasonable?

[65] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant.

[66] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[6] However, in this particular case, the Respondent conceded that there were no valid reasons for termination and that its case rested upon the notion that it did not dismiss the Applicant. As such, my consideration will be brief.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?

[67] The Applicant submitted that there was no valid reason for dismissal and the Respondent conceded that this was the case. As such, I find that there was no valid reason related to the Applicant's capacity or conduct.

Was the Applicant notified of the valid reason?

[68] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[7]

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[69] As I have not found that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[8]

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

[70] As there were no discussions relating to the dismissal as such, and the Respondent did not object to the Applicant seeking legal advice, this factor is not relevant.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[71] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[72] Neither party submitted that the size of the Respondent's enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the Respondent's enterprise had no such impact.

To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[73] While neither party made submissions on this matter, the evidence tendered demonstrates that the Respondent had a competent human resources department. As such, I find that the Respondent's enterprise did not lack dedicated human resource management specialists and expertise.

What other matters are relevant?

[74] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. Neither party made submissions on this factor and there are no matters of which I am aware that ought to be considered.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[75] I have made findings in relation to each matter specified in section 387 as relevant.

[76] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[9]

[77] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was unjust because through no fault of her own she was placed into a situation where she had no option other than to resign.

Conclusion

[78] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

Remedy

[79] Being satisfied that the Applicant:

- made an application for an order granting a remedy under section 394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of section 385 of the FW Act,

I may, subject to the FW Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[80] Under section 390(3) of the FW Act, I must not order the payment of compensation to the Applicant unless:

(a) I am satisfied that reinstatement of the Applicant is inappropriate; and

(b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

Is reinstatement of the Applicant inappropriate?

Submissions

[81] The Applicant seeks compensation. She submitted that she was not seeking reinstatement as in the circumstances it would not be appropriate although she did not provide details as to why this would be the case.

[82] The Respondent submitted that reinstatement is not inappropriate because it had no performance concerns with the Applicant, she was a valued employee, and the Respondent had no concerns about taking her back.

Findings

[83] I find that notwithstanding the Applicant's lack of clarity regarding why reinstatement would not be appropriate, I agree that this is the case. While I have found that the Respondent did not act with malice, it is nonetheless the case that the Applicant was required to take a not insignificant period of time off work certified by a medical practitioner as unfit due to stress arising from the actions of the Respondent as she quite justifiably perceived them. While she is now certified as fit, I am not persuaded that it would be reasonable to insist that she accept reinstatement, particularly as she has, from the start of her application, not sought such reinstatement. As Senior Deputy President Richards observed in *Taylor v C-Tech Laser Pty Ltd:*

> *"the Applicant's disposition is a sure guide to the Commission as to whether or not it would be appropriate to reinstate or re-employ the Applicant. To act contrary to the Applicant's desired position in this respect would be to give effect to an order that may not yield a productive or cooperative workplace."*[10]

Is an order for payment of compensation appropriate in all the circumstances of the case?

[84] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one…"[11]

[85] Where an applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.[12]

Submissions

[86] The Applicant did not make detailed submissions as to why payment of compensation is appropriate but rather simply suggested that as reinstatement was not appropriate, compensation was sought.

[87] In the first instance, the Respondent submitted that payment of compensation is not appropriate because the Applicant ended her own employment. If further submitted that any losses suffered had been addressed by virtue of a settlement of a workers' compensation claim.

Findings

[88] In response to the Respondent's first assertion, I note that I have already decided that the termination was at the initiative of the employer. As regards the workers' compensation claim, I am not persuaded to accept that the settlement of that claim, on terms that are not in evidence, should be considered to be a bar to compensation in this matter. It may well be that the settlement terms of that claim reflect payment for time taken off work during the Applicant's employment for which no sick leave was paid. It may be the case that there are other elements included that are beyond the scope of an unfair dismissal claim, such as provision for future medical treatments. In taking this position I should note that I am distinguishing a settlement of a workers' compensation claim from ongoing payments of wages as workers' compensation for an employee who is unable to work due to an injury arising in the course of his or her employment.

[89] To avoid any confusion over this issue, I sought submissions from the parties as to whether any element of the workers' compensation settlement could be said to be for wages lost in the period subsequent to 1 May 2023. Both parties submitted that there was no such element identified in the terms of the settlement agreement.

[90] Given the circumstances of the termination and the fact that the Applicant has lost a full-time position she held for some eight years, I consider that an order for payment of compensation is appropriate.

Compensation – what must be taken into account in determining an amount?

[91] Section 392(2) of the FW Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant in lieu of reinstatement including:

(a) the effect of the order on the viability of the Respondent's enterprise;

(b) the length of the Applicant's service;

(c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;

(d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;

(e) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;

(f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the Commission considers relevant.

[92] I consider all the circumstances of the case below.

Effect of the order on the viability of the Respondent's enterprise

[93] Neither party made submissions on the effect an order of compensation would have on the viability of the Respondent's enterprise and I am not aware of any issues that require consideration in regard to that viability. As such, this factor is neutral in considering an amount of compensation.

Length of the Applicant's service

[94] The Applicant's length of service was approximately eight years. Neither party made submissions on this issue. I find that the length of the Applicant's service does not have any bearing on the amount of compensation to be awarded.

Remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed

[95] As stated by a majority of the Full Court of the Federal Court, "[i]n determining the remuneration that the Applicant would have received, or would have been likely to receive… the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."[13]

[96] While neither party made direct submissions on this issue, I have inferred that the Respondent's willingness to accept the Applicant back into its employment and its characterisation of her in its submissions as a good employee suggests that, had the circumstances that resulted in termination not occurred, the Applicant's employment would not have been at any risk. Further, the Applicant's unchallenged evidence was that she enjoyed her work and the residents who were in her care. As such, I find that the Applicant's employment would have continued for at least one year.

Efforts of the Applicant to mitigate the loss suffered by the Applicant because of the dismissal

[97] The Applicant must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal.[14] What is reasonable depends on the circumstances of the case.[15]

[98] The Applicant conceded, in response to the Respondent's closing submissions, that the Applicant could have done a better job of mitigating her loss.

[99] The Respondent submitted that the Applicant had not taken reasonable steps to minimise the impact of the dismissal because the Applicant had failed to seek alternative employment for some period after her dismissal and even when she commenced her search for employment, she had not made sufficient efforts given the number of available positions. The Respondent submitted that there were a great many jobs for disability support workers available in the period subsequent to the Applicant being declared medically fit for work on 24 May 2023 and that the Applicant had not availed herself of the opportunity to apply for them. The Applicant rejected the number of jobs available claimed by the Respondent, noting that the figure was an unsubstantiated assertion from the bar table.

[100] In her evidence the Applicant conceded that she had, at the time of the hearing, applied for 40 positions in total, albeit that she had not started applying until late August. When challenged on this she conceded that she had considered not returning to employment as a disability support worker and this was the reason for the delay.

Findings

[101] While I have some sympathy for the Applicant's state of mind at the time of the dismissal and it is perhaps understandable that she toyed with the idea of not returning to disability support work, it is nonetheless the case that she bears a responsibility to mitigate her loss, and such mitigation is not limited to seeking jobs in the field of disability support work. If it was the case that the Applicant was of a mind to change career, it was incumbent upon her to commence looking for work in some other field. As such, I am not satisfied that, at least initially, the Applicant took reasonable steps to mitigate her loss, which warrants a reduction of her compensation by 50%.

Amount of remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation

[102] The Applicant's evidence is that the Applicant has not earned any amount from employment or other work since the dismissal. That evidence is not challenged by the Respondent and I am satisfied that the amount of remuneration earned by the Applicant from employment or other work during the period since the dismissal is $0.

Amount of income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation

[103] The Applicant's unchallenged evidence was that the positions for which she had lodged an application were unlikely to be decided for some time. Apart from this, there was no evidence before me on the issue of the Applicant earning any income between the making of the order for compensation and the payment of compensation. As such, I find that it is unlikely the Applicant will earn any income in the period between the making of an order for compensation and the actual compensation.

Compensation – how is the amount to be calculated?

[104] As noted by the Full Bench, "[t]he well-established approach to the assessment of compensation under s.392 of the FW Act… is to apply the "Sprigg formula" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket* (***Sprigg***).[16] This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*[17]."[18]

[105] The approach in *Sprigg* is as follows:

> Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).
>
> Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation ordered.
>
> Step 3: Discount the remaining amount for contingencies.
>
> Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

Step 1

[106] I have estimated the remuneration the Applicant would have received, or would have been likely to have received, if the Respondent had not terminated the employment to be $63,192.48 on the basis of my finding that the Applicant would likely have remained in employment for a further period of one year. This estimate of how long the Applicant would have remained in employment is the "anticipated period of employment".[19]

[107] As I found that the Applicant did not make a reasonable effort to mitigate her loss, I determined to apply a 50% discount to the amount of compensation, leaving the figure at $31,596.24.

Step 2

[108] I have found that the amount of remuneration earned by the Applicant from the date of dismissal was zero, and that the amount of income reasonably likely to be earned by the Applicant between the making of the order for compensation and the payment of compensation is also zero.

[109] There is therefore no deduction to be made at this step.

Step 3

[110] I now need to consider the impact of contingencies on the amounts likely to be earned by the Applicant for the remainder of the anticipated period of employment.[20] Neither party made any submissions with respect to this issue. However, I note that the Applicant has some

health issues that have prevented her from working in the past. Noting that in one year the Applicant would accrue paid sick leave that would cover two weeks of absences, if I assume a further two weeks of absence it would reflect an amount time unpaid equal to approximately four percent of the year. Accordingly, I find that it is appropriate to make a deduction for contingencies equivalent to four percent. The deduction is therefore $2,527.70, leaving the gross figure at $29,068.54.

Step 4

[111] I have considered the impact of taxation but have elected to settle a gross amount of $29,068.54 and leave taxation for determination.

[112] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case."[21] Given my consideration as set out above, I am satisfied that the amount of $29,068.54 is appropriate.

Compensation – is the amount to be reduced on account of misconduct?

[113] If I am satisfied that misconduct of the Applicant contributed to the employer's decision to dismiss, I am obliged by section 392(3) of the FW Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct. In this case I am satisfied there was no misconduct by the Applicant and therefore, the amount of the order for compensation is not to be reduced on account of misconduct.

Compensation – how does the compensation cap apply?

[114] Section 392(5) of the FW Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

(a) the amount worked out under section 392(6); and

(b) half the amount of the high income threshold immediately before the dismissal.

[115] The amount worked out under section 392(6) and in accordance with Regulation 3.06 is $31,596.24.

[116] The high income threshold immediately before the dismissal was $162,000. Half of that amount is $81,000.

[117] The amount of compensation ordered by the Commission must therefore not exceed $31,596.24.

[118] In light of the above, I will make an order that the Respondent pay $29,068.24 gross less taxation as required by law to the Applicant in lieu of reinstatement within seven days of the date of this decision.

DEPUTY PRESIDENT

Appearances:
P Mullally for the Applicant.
S Heathcote for the Respondent.

Hearing details:
2023.
Perth.
September 27.

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[1] *City of Sydney RSL and Community Club Limited v Balgowan* [2018] FWCFB 5, [18].

[2] *NSW Trains v Mr Todd James* [2022] FWCFB 55, [183-184].

[3] *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli* [2017] FWCFB 3941, [47].

[4] *Sydney Water Corporation v Yelda* [2022] FWCFB 67, [50-51].

[5] *NSW Trains v Mr Todd James* [2022] FWCFB 55, [183-184].

[6] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

[7] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[8] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[9] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].

[10] *Taylor v C-Tech Laser Pty Ltd* [2013] FWC 8732, [58].

[11] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, [9].

[12] *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550, [20]; *Jeffrey v IBM Australia Ltd* [2015] FWCFB 4171, [5]-[7].

[13] *He v Lewin* [2004] FCAFC 161, [58].

[14] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* PR908053 (AIRCFB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

[15] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

[16] (1998) 88 IR 21.

[17] [2013] FWCFB 431.

[18] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [16].

[19] *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].

[20] *Enhance Systems Pty Ltd v Cox* PR910779 (AIRCFB, Williams SDP, Acton SDP, Gay C, 31 October 2001), [39].

[21] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [17].