



# DECISION

*Fair Work Act 2009*

s.365 - Application to deal with contraventions involving dismissal

**Na Zhang**

v

**Ky Plaster and Building Supplies Pty Ltd**

(C2023/4010)

COMMISSIONER ALLISON

MELBOURNE, 24 NOVEMBER 2023

*General protections dismissal dispute – jurisdictional objection relating to no dismissal – section 386 meaning of dismissed – whether dismissal or voluntary resignation – whether resignation ineffectual because expressed in the heat of the moment – whether forced resignation*

## What is this decision about?

[1] This decision concerns an application made by Ms Na Zhang (**Applicant**) for the Fair Work Commission to deal with a dismissal dispute under s.365 of the *Fair Work Act 2009* (Cth) (**FW Act**). The Applicant alleges she was unlawfully dismissed from her employment with KY Plaster and Building Supplies Pty Ltd (**Respondent**) in contravention of Part 3-1 of the FW Act.

[2] The Respondent has raised a jurisdictional objection to the application. The Respondent argues that the Applicant was not dismissed, but voluntarily resigned. If no dismissal took place, the Commission has no jurisdiction to progress the dispute under s.368 of the FW Act and the application must be dismissed.<sup>1</sup>

[3] Accordingly, this decision considers whether the Applicant was dismissed within the meaning of the FW Act or whether the Applicant voluntarily resigned.

## Outcome

[4] Having considered all the circumstances of this matter I have determined that the Applicant was dismissed for the purposes of the FW Act. For the reasons explained in this decision, I have determined that while the Applicant ostensibly resigned, this was done in the “*heat of the moment*” after an extremely stressful situation that involved a threat to the Applicant’s personal safety. In these circumstances the resignation was ineffectual, and the Respondent’s prompt acceptance of the resignation was unreasonable and amounted to a dismissal.

[5] Accordingly, the Commission has jurisdiction to deal with the Applicant's s.365 application and the matter can progress to a private conference before the Commission under s.368 of the Act.

[6] The reasons for my determination are set out below.

### **Background**

[7] The Respondent company supplies plaster, building material and equipment to small-medium size businesses and contractors. The Respondent has several warehouses located at a site in Bundoora, Victoria, where product is stored and sold. The Respondent sells product direct to the public – that is, customers can walk into the main warehouse to purchase their supplies directly. The Respondent's warehouse is open 5.30am – 9pm.

[8] The Respondent company is owned and managed by a married couple, Kaiyuan Chen and Yanan Zhang. As Ms Yanan Zhang shares the same surname as the Applicant, I will identify her as "Ms YZ" in this decision to avoid any confusion. Mr Chen is the sole director of the Respondent, while Ms YZ manages the day-to-day operations of the business premises.

[9] Mr Chen also runs a separate plastering company.

[10] The Applicant was engaged to work in the Respondent's warehouse from 16 January 2023. The parties disagree on the role the Applicant was engaged to perform. However, while engaged with the Respondent, the Applicant performed a range of tasks including, but not limited to, accountancy related tasks, general administration, and customer sales.

[11] In March 2023, the Applicant asked Ms YZ if she would recommend a builder for a planned renovation of the Applicant's home. Ms YZ introduced the Applicant to a builder, who for the purposes of this decision I will refer to as Mr D. The evidence before the Commission suggests Mr D may have engaged in conduct that was improper, or potentially criminal, as well as displaying poor workmanship. As Mr D was not called as a witness and did not have an opportunity to respond to these matters, I have decided not to identify Mr D in this decision.

[12] Mr D is a family friend of Mr Chen and Ms YZ.

[13] On 25 March 2023, Mr D attended the Applicant's house to discuss the price of the proposed renovation. Mr Chen and Ms YZ also attended this meeting. Mr Chen assisted with the negotiations between the Applicant and Mr D.

[14] Following this meeting Mr Chen and Ms YZ took the Applicant and Mr D out for dinner at a restaurant. The Applicant provided evidence, which I accept, that she was uncomfortable about her employer paying for an expensive dinner and she felt under pressure to enter an agreement with Mr D.

[15] On 28 March 2023, the Applicant entered into an agreement with Mr D for the renovation of her home.

[16] Following the agreement, Mr D purchased renovation materials for the Applicant's house from the Respondent on numerous occasions. The Respondent stated this amounted to less than five transactions of approximately \$3000. This was not substantially contested by the Applicant.

[17] On at least two occasions Ms YZ delivered materials to Mr D while he was working on the Applicant's house. The Respondent also lent Mr D a subcontractor to perform work on the renovation.

[18] Mr D visited the Applicant at work on numerous occasions to discuss the Applicant's renovation during the Applicant's work time. While Ms YZ was not always on site when Mr D visited, she was aware that Mr D was visiting the site to speak to the Applicant about the renovations. At no stage did Ms YZ tell the Applicant or Mr D that they were not to discuss the renovations at the worksite or during worktime.

[19] On 28 April 2023, the Applicant and Mr D had a dispute about the renovation contract. When the Applicant arrived at work, she informed Ms YZ that she was in dispute with Mr D, and that she wished to exit the renovation contract. There is disputed evidence whether the Applicant or Ms YZ invited Mr D to attend the warehouse to discuss the matter. In any event, Mr D attended the warehouse to discuss the dispute with the knowledge and approval of Ms YZ. Ms YZ helped mediate a resolution to the dispute.

[20] However, on the next day, 29 April 2023, the Applicant and Mr D were again in dispute. The Applicant provided evidence that she had discovered that Mr D did not have the required licences to perform some of the construction work. The Applicant sought a refund for her money, which was refused. The Applicant then contacted Ms YZ to ask for Mr D's address. Ms YZ did not provide Mr D's address, but later invited the Applicant and Mr D to her house to discuss the matter. The Applicant and Mr D attended Ms YZ and Mr Chen's house to discuss the renovation contract. The Applicant and Mr D agreed to continue working together.

[21] During the meeting at Mr Chen and Ms YZ's house on 29 April 2023, Mr Chen made reference to his business card for his plastering company.<sup>2</sup> The front of the business card states Mr Chen's name followed by "Plastering Services". On the back of the card Mr Chen's mobile and email are provided along with the following list: "New houses, Renovations, Residential & Commercial Extensions." When referring to his business card Mr Chen stated words to the effect that the reference to "Renovations" on the back of the card was there to get business for Mr D.<sup>3</sup> I accept the Respondent's evidence that this was a light-hearted comment<sup>4</sup> and that the reference to "Renovations" on Mr Chen's card is actually a reference to renovation work relating to Mr Chen's plastering company.<sup>5</sup> However, it is also clear on the evidence that the Respondent informally promoted Mr D's business.

[22] On 24 June 2023, the Applicant had a dispute with Mr D about the remaining money owed to Mr D. The Applicant gave evidence that Mr D said words to the effect you should "talk to your boss" about the dispute.<sup>6</sup>

[23] The Applicant reported this conversation to Ms YZ in a phone call. Ms YZ said words to the effect that she "wouldn't clean up Mr D's mess anymore"<sup>7</sup>. In a later conversation on the

same day, Ms YZ said words to the effect of “I won’t deduct your wages to give to Mr D and I won’t fire you because of the dispute with Mr D”.<sup>8</sup>

[24] On 26 June 2023, the Respondent published an advertisement looking for a “warehouse admin person... to start early at 6 o’clock”.<sup>9</sup>

[25] On the evening of 26 June 2023, the Applicant was working in the Respondent’s warehouse that is open for public sales. The Applicant was working alone in the warehouse. At approximately 9pm, Mr D and two other men visited the Applicant at the worksite.

[26] There is video footage of this visit. The video footage shows Mr D speaking to the Applicant at the counter while the other two men walk around close by. The Applicant yells at Mr D to the effect that she will not pay. At one point, one of the other men (**Second Man**), who is tall and dressed in black, stands next to Mr D and repeatedly says “just pay”. The following conversation occurs between the Applicant and Second Man.

“Second Man: Listen to me.  
Applicant: Who are you?  
Second Man: I’m from the debt collection company. Give me the money.  
Applicant: I won’t give it.  
Second Man: I know where you live.  
Applicant: I’ve dealt with debt collection agencies before.  
Second Man: Just wait and see.”<sup>10</sup>

[27] The Applicant yells at the men to leave. It is clear the intention of the men is to intimidate the Applicant into paying Mr D (the **threatening incident**).

[28] The Applicant then called the police in front of the men. The two men accompanying Mr D then leave.

[29] The police arrived at the worksite at approximately 9.15pm and had a discussion with the Applicant and Mr D. Mr D then left the warehouse. The Applicant told the police about the threatening incident and her belief that her employer was involved in the threatening incident. The police then offered to accompany the Applicant out of the warehouse.

[30] The Applicant gave evidence that at approximately this time she decided she needed to resign for her own safety.<sup>11</sup>

[31] At that stage the Applicant asked the police to wait while she reset the password for the Respondent’s work computer. The Applicant then reset the password to the computer. The Applicant has given evidence, which I accept, that she did this so that she would not have to provide the Respondent with her personal password to access the computer as she was worried about the Respondent having access to private information on her email and providing that information to Mr D.<sup>12</sup> The Applicant has given evidence that she tried to remove her private email from the computer, but was unable to.<sup>13</sup>

[32] The Applicant was escorted out of the warehouse by the police at approximately 10pm. Mr Chen and Ms YZ arrived at the warehouse and met the police and the Applicant. During

their discussion the Applicant told Mr Chen and Ms YZ that she could no longer work for the Respondent due to the threatening incident with Mr D and that she was resigning. The Applicant said she did not feel safe. The police told Mr Chen and Ms YZ that the Applicant had stated that the Respondent was involved in the threatening incident.

[33] In response to the Applicant's statement of resignation, the Respondent offered to move the Applicant to dayshift so she would not be working alone at night. (It is disputed if this was first suggested by the police officer or Mr Chen, but either way the Respondent made the offer to the Applicant). The Applicant told the Respondent she knew they were hiring a new employee. Mr Chen and Ms YZ told the Applicant not to worry about the new employee and proposed that the Applicant could work the dayshift instead. The Applicant refused this offer and left the worksite.

[34] On 27 June 2023, Ms YZ rang the Applicant to ask for the password for the Respondent's computer. The Applicant did not provide the password. The Applicant has given evidence, which I accept, that she did this as she was worried about the Respondent or Mr D having access to private information on her email. During the conversation Ms YZ and the Applicant agreed that the Respondent would get their IT consultant to send the Applicant a link to unlink her account from the Respondent's computer.

[35] Later that day the Applicant attended the worksite to collect her personal belongings. The Applicant did not inform the Respondent that she was attending the site. During the Applicant's time at the worksite, the Applicant was confronted by Mr Chen and Ms YZ about the password for the Respondent's computer. I note that Ms YZ was heavily pregnant at the time and may have been in an emotional state. A significant argument ensued which involved Ms YZ, Mr Chen and the Applicant yelling at each other in close proximity. In the CCTV footage, Ms YZ can be seen moving towards the Applicant as she is yelling on a number of occasions but being gently "held back" by Mr Chen and another man. The Applicant called the police. The police attended the site, but no charges were laid.

### **Relevant Legislation and Legal Principles**

[36] As noted above, this decision considers whether the Applicant was dismissed within the meaning of the FW Act or whether the Applicant voluntarily resigned. An application under s.365 of the Act requires that "a person has been dismissed" as a threshold matter. An actual dismissal must occur – a mere allegation that a person has been dismissed is not sufficient.<sup>14</sup>

[37] The meaning of "dismissed" for the purposes of s.365 and other sections of the FW Act is set out in s.386 of the FW Act.

[38] Section 386 of the Act provides as follows:

#### **"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.”

[39] The Full Bench of the Commission in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli* considered the application of s.386 of the FW Act in detail and provided the following guidance in applying the section when there has been an ostensible resignation:<sup>15</sup>

[47] ...

*(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 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.*

[40] Having outlined the key legislative provisions and legal principles, I will now turn to submissions made by the Applicant and Respondent.

### **Applicant’s Submissions**

[41] The Applicant presented submissions that her termination should be considered a dismissal under limb s.386(1)(a) or alternatively under s.386(1)(b).

*s.386(1)(a) No legal effect as expressed in the “heat of the moment”*

[42] The Applicant argued that her resignation had no legal effect as it was expressed in the “heat of the moment” and the Respondent’s acceptance of her resignation was unreasonable. The Applicant provided written submissions as follows:<sup>16</sup>

*“[Mr D’s] behavior (sic) can strongly trigger me, leading to emotional agitation and irrational decisions.....[Ms YZ] made the decision regarding my resignation hastily within one hour after being strongly stimulated. She did not provide me with a reasonable cooling-off period, and 16 hours after the events of the 26th, she continued to humiliate me, threaten me, and even physically provoke me ..., forcing me to eventually leave this company.”*

[43] Further the Applicant submitted:<sup>17</sup>

*“If an employee resigns under extreme pressure or in a moment of excitement, the employer should, after a reasonable cooling-off period, re-evaluate whether the employee has actually resigned. On 26<sup>th</sup>, just one hour after experiencing strong stimulation, and in a state of extreme fear, I resigned to [Ms YZ]. In such a situation, you might not have wanted to lose your job but made an irrational and non-sober decision. However, in the videos from the 27<sup>th</sup>, it can be observed that [Ms YZ], one day after I was threatened, immediately determined that I had resigned and accused me of violating company property by not providing the computer password.”*

*S.386(1)(b) Forced resignation*

[44] Alternatively, the Applicant submits she was forced to resign as per the second limb of s.386(1) for one of the following reasons:

*i. Forced to resign for safety reasons*

[45] The Applicant argued she was forced to resign following the threatening incident on 26 June 2023 for reasons of personal safety. The Applicant submitted that the Respondent knew in advance about the threatening incident and either colluded with or supported Mr D in relation to the incident. In making this submission the Applicant relied on:<sup>18</sup>

- The personal relationship between the Respondent and Mr D
- The alleged vested interest the Respondent had in Mr D’s business
- The fact the Respondent placed an advertisement for an administrative assistant immediately before the threatening incident – which the Applicant alleges shows the Respondent was planning for her to resign.

*ii. Forced to resign because of other conduct by the Respondent*

[46] The Applicant submitted that there was a range of other conduct engaged in by the Respondent that forced her to resign. This conduct included:

- Requiring the Applicant to perform front desk, sales, and other duties when she was engaged as an accountant<sup>19</sup>
- Failure to provide the Applicant with documents such as a Fair Work Information Statement, code of conduct, leave approval process, or written employment contract<sup>20</sup>

- Unilaterally changing the Applicant's hours from 40 to 35, citing "slow business" as the reason<sup>21</sup>
- Requiring the Applicant to work weekends and public holidays and not providing the proper penalty rates<sup>22</sup>
- Discriminating against the Applicant<sup>23</sup>
- Requiring the Applicant to work in hot conditions, while other employees worked in an air-conditioned space.<sup>24</sup>

### **Respondent's Submissions**

[47] The Respondent submitted that the Applicant voluntarily resigned on the night 26 June 2023, and the resignation was not forced by the Respondent.

*s.386(1)(a) No legal effect as expressed in the "heat of the moment"*

[48] In relation to *s.386(1)(a) No legal effect as expressed in the "heat of the moment"* the Respondent made the following submissions.

[49] First, the Respondent submits that contrary to being scared and in an emotional state because of the threatening incident, the evidence, including the CCTV footage shows that the Applicant had "presence of mind and control throughout the incident"<sup>25</sup>. The Respondent relies on:

- The fact the Applicant yells at and says threatening things to Mr D and the men
- The fact the Applicant was thinking clearly enough to ask the police to wait while she changed the password on the Respondent's computer
- The fact that the Applicant was able to discuss matters like handover and final pay arrangements with the Respondent on the night of the threatening incident.

[50] Second, the Respondent argues the real reason for the Applicant resigning was the Applicant wanted an accountancy role and was dissatisfied with her role and other tasks she was completing. "*The Applicant has voluntary (sic) resigned out of convenience and opportunity under cover of the incident rather than being forced to do so.*"<sup>26</sup> The Respondent further argues that the Applicant resigned because she believed she would be compensated by Mr D while she looked for more suitable employment as an accountant. However, due to Mr D's financial inability to compensate her, the Applicant has decided to pursue the Respondent with an "unfounded contradictory conspiracy."<sup>27</sup>

[51] Third, the Respondent, in any event, did not immediately accept the Applicant's resignation, but offered the Applicant an alternative to resigning on the night of 26 June 2023, by proposing the Applicant move to dayshift hours.<sup>28</sup> The Applicant rejected this offer and re-confirmed her resignation.



*S.386(1)(b) Forced resignation*

[52] In relation to the contention that the Applicant’s resignation was forced, the Respondent made the following submissions.

[53] The Respondent didn’t want the Applicant to resign. In fact, the Applicant was “irreplaceable” because at the time of the resignation Ms YZ was about to give birth and following the birth, Ms YZ would be required to enter a month of confinement.<sup>29</sup> The Respondent especially needed the Applicant to continue her employment in this period and told the Applicant this on the night of 26 June 2023.<sup>30</sup>

[54] The Respondent had nothing to do with the threatening incident and cannot be held accountable for it. The Applicant’s belief of a relationship between the Respondent and Mr D “*beyond that of a referral is misguided and without base.*”<sup>31</sup>. In particular the Respondent argues:

- The Respondent introduced the Applicant to Mr D, but otherwise the Applicant and Mr D conducted their negotiations independently of the Respondent
- The Respondent had no business connection with Mr D
- The Respondent did not endorse Mr D and the Applicant discussing their personal renovation matters at the worksite
- The Respondent helped resolve disputes between Mr D and the Applicant, not out of personal interest, but to assist the Applicant and Mr D.

[55] In any event, the Applicant had alternatives to resignation if she was concerned about Mr D returning to the worksite, including working the dayshift hours offered by the Respondent.

**Consideration – Was the termination a dismissal or a voluntary resignation?**

[56] It is well accepted that, generally speaking, when an employee uses unambiguous words to state their intention to resign, the employer is entitled to treat this as an effective resignation which operates to terminate the employment.<sup>32</sup>

[57] However, as noted above at paragraph [39], s.386(1)(a) and (b) of the FW Act contemplate two distinct circumstances where an ostensible resignation may not be considered a termination initiated by the employee, but rather a dismissal instigated by the employer.

[58] I will now consider whether the Applicant’s ostensible resignation on the night of 26 June 2023 can be considered a dismissal under either of the limbs of s.386(1)(a) and (b).

*s.386(1)(a) No legal effect as expressed in the “heat of the moment”*

[59] It is worth repeating the relevant paragraph from the Full Bench in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli*<sup>33</sup> regarding the test in s.386(1)(a):

*“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...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.”*

**(emphasis added)**

[60] I note that the test under s.386(1)(a) is an objective test based on whether a reasonable person would have considered the employee meant to resign, see Rares J in *Koutalis v Pollett*.<sup>34</sup>

[61] I find that the threatening incident that occurred on the 26 June 2023 was extremely distressing to the Applicant. The actions of Mr D and the two men who attended the worksite are reprehensible and any reasonable person would be distressed by the situation. I accept the Applicant’s evidence that she was scared, and that the threatening incident led to “emotional agitation and irrational decisions.”<sup>35</sup>

[62] I find that following the threatening incident the Applicant 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.”

[63] I reject the Respondent’s submissions that the Applicant was calm and in control throughout the threatening incident. The video evidence of the Applicant yelling at Mr D and repeatedly yelling at the men to leave is consistent with the Applicant’s evidence of being distressed and trying to defend herself. The fact that the Applicant defended herself by yelling at Mr D and the men, and had the state of mind to call the police, is testament to her quick thinking, not evidence that she was not fearful and distressed.

[64] I also reject the Respondent’s argument that the fact the Applicant changed the password on the computer and was able to discuss handover arrangements showed she was not in a “state of emotional stress” but in control of the situation. After the threatening incident, the Applicant was understandably taking all steps she could think of to execute flight from what she perceived was a dangerous situation. This included protecting her private details by changing the password and making arrangements for leaving.

[65] I accept that the Respondent did not want the Applicant to resign and acknowledge that during the discussion with the police officers Mr Chen offered the Applicant alternative hours with a view to seeking her to stay with the Respondent. However, it should have been apparent to Mr Chen and Ms YZ that given the events the Applicant had been through on the evening of

26 June 2023, the Applicant was not in the proper state of mind to consider the decision of whether to resign or stay with the Respondent.

[66] The fact that the Applicant indicated to the police and the Respondent that she believed the Respondent was involved in the threatening incident should have been another red flag to the Respondent that the Applicant was not in a position to make a clear-headed decision about the resignation.

[67] I find that a reasonable person in the position of the Respondent would have understood that the Applicant did not intend to resign.

[68] After the Applicant refused the Respondent's offer for her to work dayshift, the Respondent promptly accepted and acted on the Applicant's resignation on the evening of 26 June 2023. On 27 June 2023 Ms YZ sought the changed password for the company's laptop as the Applicant no longer worked for the Respondent. Later in the day, both the Respondent and the Applicant, acting in the belief that the employment relationship had ended, had a very heated argument.

[69] Rather than accepting the Applicant's resignation on the evening of 26 June 2023, the Respondent should have allowed a reasonable period of time to elapse before discussing the incident with the Applicant and seeking confirmation of the Applicant's intention to resign. In these circumstances, a "reasonable period of time" for the Applicant to recover from her heightened emotional state and to feel safe, is likely to have been *at least* 24 hours.

[70] I note this because unlike some other cases dealing with "heat of the moment" resignations, at no stage has the Applicant sought to retract her resignation. Unfortunately, because of the heated argument between Mr Chen, Ms YZ and the Applicant on 27 June 2023, the Applicant was never given sufficient reasonable time to reconsider her resignation. Had the Applicant's employment not already been terminated on the evening of 26 June 2023, I find that the heated confrontation between Mr Chen, Ms YZ and the Applicant which resulted in the Applicant calling the police, would have either led to the Applicant's termination or forced resignation on 27 June 2023.

[71] While I accept the Respondent's submissions that there were other reasons the Applicant may have wanted to resign besides the threatening incident (such as being dissatisfied with her work duties), I reject the argument that this somehow makes the resignation on 26 June effective. While the Applicant may have, at some stage in the future, chosen to tender her resignation, the ostensible resignation on 26 June 2023, was clearly a reaction to the threatening incident.

[72] For my reasons given above I find that the Respondent unreasonably accepted and acted on the Applicant's ineffectual resignation on the evening of 26 June 2023, thus terminating the Applicant's employment at the initiative of the employer. Accordingly, I find that the Applicant was dismissed for the purposes of s.386(1)(a) of the FW Act.

*S.386(1)(b) Forced resignation*

[73] I have already found that the Applicant was dismissed for the purposes of s.386(1)(a). However, if I had to determine whether the Applicant was dismissed for the purposes of s.386(1)(b), I would find the Applicant had not been dismissed for the purposes of s.386(1)(b) for the reasons given below.

*Was the Applicant forced to resign for safety reasons?*

[74] The Applicant argues that she was forced to resign for reasons of personal safety following the threatening incident on 26 June 2023.

[75] I find that following the threatening incident the Applicant believed she had no choice but to resign. I have empathy for the Applicant's position and can understand why she came to that view. However, it is not enough for the Applicant to subjectively perceive she had no choice but to resign.<sup>36</sup> There needs to be an objective analysis of the employer's conduct to determine if the Respondent engaged in "*conduct with the intention of bringing the employment to an end*" or conduct where the probable result is that "*the employee had no effective or real choice but to resign.*"<sup>37</sup>

[76] I find that the Respondent's behaviour certainly contributed to the Applicant's belief that she had no choice but to resign. This is because the Respondent clearly supported and promoted Mr D's business, including his engagement by the Applicant to renovate her house. The Respondent also allowed Mr D to discuss the Applicant's renovations at the worksite and on worktime. Needless to say, there is a significant risk for employers if they choose to promote their friends' businesses to their employees. The employment relationships may mean an employee feels obliged to use the person recommended by their employer and if problems ensue, it may be difficult to untangle the employment relationship from these issues.

[77] I also consider that the Respondent should have had better safety procedures in place. It appears little consideration had been given to the potential risk facing an employee, particularly a woman, working alone at night in a warehouse open to the public.

[78] However, despite this, I cannot find that the Respondent's conduct intended to bring the Applicant's employment to an end or was of such a nature that resignation was probable.

[79] While the Applicant has argued that the Respondent was aware, *in advance*, of Mr D's intention to threaten her on 26 June, or indeed endorsed Mr D's actions, the evidence before me did not establish this.

[80] While Mr Chen, Ms YZ and Mr D had a personal relationship, this in and of itself does not establish that the Respondent supported Mr D's behaviour on the night of the 26 June 2023.

[81] The Applicant argued that the Respondent had a financial/business interest in Mr D's renovation contracts, and this meant they supported his behaviour in pursuing the Applicant for payment. I do not find that the evidence before me establishes that the Respondent was receiving any financial commission from Mr D to perform the renovations for the Applicant. While the Respondent may have benefited by Mr D buying product at the Respondent's warehouse – the evidence was that this was a relatively small financial benefit of around \$3000.

[82] I do find that the Respondent informally promoted Mr D's business. However, this in and of itself does not establish that the Respondent supported Mr D's behaviour on the night of the 26 June 2023.

[83] The Applicant argued that the fact the Respondent advertised for an administration person on 26 June 2023 reveals the Respondent knew about the threatening incident and was planning for her resignation. I prefer the Respondent's evidence that they were advertising for additional administrative assistance because Ms YZ was about to give birth and needed additional help. I note the fact that the position was for dayshift hours instead of the Applicant's afternoon shift hours supports this view. I accept the Respondent's evidence that they would have preferred it if the Applicant did not resign and continued to work.

[84] Ultimately, while the Respondent had a personal relationship with Mr D and informally promoted his business, I find no evidence that the Respondent endorsed, supported or knew in advance about Mr D's actions on 26 June 2023.

[85] In addition, while I re-iterate that I understand why the Applicant felt she had no choice but to resign, the Applicant could have explored other alternatives to resigning including requesting that the Respondent ensure that the workplace was made safe for her, such as:

- changing her hours of work,
- ensuring the Applicant did not work alone, or
- ensuring Mr D did not attend the worksite.

[86] Accordingly, I do not find that the Applicant was forced to resign for safety reasons relating to the threatening incident.

*Was the Applicant forced to resign because of other conduct by the Respondent?*

[87] I do not find that the Applicant was forced to resign because of other conduct by the Respondent.

[88] In relation to her role, the evidence did not establish that the Applicant had been employed to perform the sole duties of an accountant. In any event, the Applicant agreed to perform other duties that were not accountant duties.

[89] I acknowledge that the Respondent's practices in relation to documentation of items such as the Applicant's contract of employment, company policies, and leave requests, may have been irregular or incomplete. The Applicant also raised issues of discrimination against her by Ms YZ. This submission was not fully substantiated, either in written submissions or during the hearing. The evidence before me does not establish that this amounts to conduct which forced the Applicant to resign. While it was open to the Applicant to resign because she was unhappy with her job, this would not be a forced resignation.

## **Conclusion**

[90] Having considered all the circumstances of this matter, I have determined that the Applicant was dismissed for the purposes of the FW Act. Accordingly, the Commission has jurisdiction to deal with the Applicant's s.365 application, and the matter can progress. I will now list the matter for a conciliation conference to deal with the dismissal dispute between the parties in accordance with s.368 of the FW Act.



COMMISSIONER

*Appearances:*

*N Zhang, Applicant*

*A Nguyen of AJL Lawyers, with permission on behalf of KY Plaster & Building Supplies, the Respondent*

*Hearing details:*

2023

21 September

Melbourne

*Final supplementary written submissions:*

*Respondent Submissions 23 October 2023*

*Applicant Submissions 27 October 2023*

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<sup>1</sup> *Coles Supply Chain v Milford* [2020] FCAFC 152.

<sup>2</sup> Exhibit YZ2.

<sup>3</sup> Transcript PN1441 – PN1449.

<sup>4</sup> Transcript PN1442.

<sup>5</sup> Transcript PN1269 – PN1278.

<sup>6</sup> Transcript PN180.

<sup>7</sup> Applicant's Submissions at [22], Hearing Book page 90.

<sup>8</sup> *Ibid.*

<sup>9</sup> Attachment 1 to Applicant's statement, Hearing Book pages 93-94.

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- <sup>10</sup> CCTV audio 21:04:10- 21:04:47 on 26 June 2023.
- <sup>11</sup> Transcript PN268 – PN275.
- <sup>12</sup> Applicant’s Statement at [26], Hearing Book page 91. Transcript PN693 – PN700.
- <sup>13</sup> Ibid.
- <sup>14</sup> *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152 at [54].
- <sup>15</sup> [\[2017\] FWCFB 3941](#) at [47]
- <sup>16</sup> Applicant Submissions re CCTV Footage filed 27 September 2023 at [1].
- <sup>17</sup> Ibid at [15](a).
- <sup>18</sup> Applicant’s Final Submissions filed 9 October 2023 at [21] – [26].
- <sup>19</sup> Ibid at [3] – [8].
- <sup>20</sup> Ibid at [9].
- <sup>21</sup> Ibid at [11].
- <sup>22</sup> Ibid at [14].
- <sup>23</sup> Ibid at [14], [17].
- <sup>24</sup> Ibid at [17].
- <sup>25</sup> Respondent’s s.386(1)(a) Submissions filed 23 October 2023 at [3].
- <sup>26</sup> Ibid at [4].
- <sup>27</sup> Ibid at [5].
- <sup>28</sup> Respondent’s submissions filed 9 October 2023 at [8].
- <sup>29</sup> Transcript PN1527
- <sup>30</sup> Respondent’s submissions filed 8 October 2023 at [8].
- <sup>31</sup> Respondent’s s.386(1)(a) Submissions filed 23 October 2023 at [1].
- <sup>32</sup> *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli* [\[2017\] FWCFB 3941](#) at [35]
- <sup>33</sup> Ibid at [47].
- <sup>34</sup> [2015] FCA 1165 at [44].
- <sup>35</sup> Applicant’s Submissions re CCTV footage filed 27 September 2023, at [1].
- <sup>36</sup> *O’Meara v Stanley Works Pty Ltd* (2006) 58 AILR 100, at [23].
- <sup>37</sup> *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli* [\[2017\] FWCFB 3941](#) at [47]