DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Ms Susan Carter

v

Metro Trains Sydney Pty Ltd
(C2022/5934)

DEPUTY PRESIDENT CROSS SYDNEY, 13 MARCH 2023

Application to deal with contraventions involving dismissal.

[1] On 24 August 2022, Ms Susan Carter (the Applicant) made an application (the Application) to the Fair Work Commission (the Commission) pursuant to section 365 of the *Fair Work Act 2009* (Cth) (the Act), alleging that adverse action involving dismissal had been taken against her by Metro Trains Sydney Pty Ltd (the Respondent/MTS) because she had protections described in Sections 340 of the Act.

[2] The Respondent objected to the Application filed on the basis that the Applicant was not dismissed from her employment with the First Respondent within the meaning of section 386(1) of the Act. Section 365 of the Act requires the Commission determine a dispute about the fact of a dismissal prior to exercising powers conferred on it by sections 368 and/or 369.

[3] Section 386(1) of the Act relevantly provides that a person is dismissed only if the person's employment has been terminated on the employer's initiative. If the Respondent's contention is correct, it follows that the Applicant does not have standing to bring the Applications under s.365 of the Act and the Commission therefore does not have jurisdiction to deal with the dispute under ss.368 or 369 of the Act.[1]

Directions

[4] On 21 October 2022, Directions were issues outlining the timetable for the filing of materials. Those Directions were as follows:

1. Susan Carter (the Applicant) is directed to file with the Fair Work Commission, and serve on Metro Trains Sydney Pty Ltd (the Respondent), an outline of submissions, witness statements and other documentary material the Applicant intends to rely on in respect of the Jurisdictional Objection raised in this matter by 4pm on 4 November 2022

2. The Respondent is directed to file with the Fair Work Commission, and serve on the Applicant, an outline of submissions, witness statements and other documentary material the Respondent intends to rely on in relation to the Jurisdictional Objection raised in this matter by 4pm on 18 November 2022
3. The Applicant is directed to file with the Fair Work Commission, and serve on the Respondent, any reply material, that is, any witness statements and other documentary material in reply to the Respondent's witness statements and documents by 4pm on 25 November 2022.
4. Any party that requests permission to be legally represented at the hearing is directed to file with the Fair Work Commission, and serve on the other party, a brief outline of submissions in support of its request by 4pm on 18 November 2022.

[5] Subsequently, these Directions were later amended after a request for extension of time made by the Respondent was granted, those Directions were amended as follows:

1. The Respondent file its witness statements and submissions by close of business 23 November 2022.
2. The Applicant file her reply material by close of business 30 November 2022.
3. Submissions in support of permission to be legally represented to be filed and served by close of business 23 November 2022.

[6] The parties complied with the Directions. In particular:

- On 4 November 2022, the Applicant filed an Outline of Submissions.
- On 25 November 2022, the Respondent filed an Outline of Submissions, a witness statement of Ms Rita Nasser, Operations Team Leader (OTL) of the Respondent, and a witness statement of Ms Kylie Rogers, Operations Trainer of the Respondent.
- On 30 November 2022, the Applicant filed an Applicant's Submission in Response.

[7] The matter was listed for hearing on 16 December 2022 (the Hearing). At the Hearing, the Respondent's statements filed were received into evidence, and the Applicant's submissions were taken to be her evidence, albeit mixed with submissions. The Applicant's Outline of Submissions incorporated a statement from a co-worker and a character reference from another person. Both those documents were not admitted into evidence.

[8] While the Applicant had previously been represented, in the Hearing she represented herself. The Respondent was represented with permission by Kingston Reid, Solicitors.

[9] While the Applicant noted the interlocutory nature of the Hearing, and indicated that she did not wish to cross-examine Ms Nasser and Ms Rogers, the Respondent cross-examined the Applicant.

[10] In the hearing it became apparent that in their investigation the Respondent reviewed CCTV footage of the various incidents that occurred on 4 August 2022 (the CCTV Footage). After the conclusion of the hearing the parties were given the opportunity to review, and make submissions regarding, the CCTV Footage, and each party made such further submissions.

Background Facts

[11] The Applicant was a Customer Journey Coordinator-Stations employee (CJC-S) with Metro Trains Sydney (MTS). She commenced employment on 27 June 2002. At all relevant times she was serving a probationary period in a training group called Cohort 5, which contained 12 employees.

[12] Ms Nasser had oversight of the training and progression CJC-S employees during their probation period. In that position she addressed performance issues and performance managed CJC-S employees who were not meeting the expectations of the role.

[13] During her employment the Applicant made complaints about the training she was provided. Her complaints were that the materials provided were not properly explained and were unclear, that too many acronyms were being used, and that Ms Norton was extremely unfriendly, singling the Applicant out and making sarcastic references to her.[2]

[14] Issues arose regarding performance with the Applicant during her training, and a probation meeting was held on 14 July 2022 (the Probation Meeting). The performance issues traversed in the meeting included:

(a) Lateness to class, and disruptive behaviour when finally attending class;

(b) A comment made to a First Aid Trainer in breach of the Respondent's Code of Conduct;

(c) Being argumentative in class;

(d) The Applicant's performance in a Gateway exam; and

(e) The Applicant's knowledge of the Respondent's First Response Protocols.

[15] In that meeting the Applicant asserted she had only been late once,[3] and that she had otherwise been suffering from parainfluenza.[4]

[16] On 27 July 2022, Ms Nasser received an email which attached an excel spreadsheet titled Training Gap Analysis Cohort 5. While the Applicant's performance had improved since the probation meeting of 14 July 2022, she was still not meeting the Respondent's expectations of a CJC-S employee as she only scored a rating of 12/30. One other CJC-S scored 12/30, and one 13/30, but all others exceeded 15/30.

[17] On 4 August 2022, the Respondent conducted Job Ready Assessments (JRA) for Cohort 5 at Bella Vista Station. A JRA is the assessment CJC-S employees must undertake before being signed off and cleared to work independently on a station. They are tested on their response to specific job- related scenarios. The Applicant conducted three scenarios.

[18] The Respondent utilised drama students from the local high school to act as customers in the JRA. Ms Nassar's role was to assess the JRAs and the suitability of the employees for the CJC-S positions. She shared that duty with Ms Rogers.

(a) First Scenario - Operation of Fixed Driver Panel equipment

[19] The Applicant's first scenario was a baby locked in a toilet. When undertaking this assessment, the Applicant placed a set of station keys on the ground. Ms Nasser directed a student to reach for the keys to test the Applicant's situational awareness. In response the Respondent asserted that the Applicant grabbed the student's arm with both her hands and said loudly *"Do not touch what does not belong to you"*.

[20] The Applicant denied using both hands and the alleged manner in which she spoke to the student. Her version was:[5]

> *"… - My hand, I put my hand on her hand and with the other hand took the key from beneath, saying, 'Do not touch things that do not belong to you', and that's all. No grabbing of the student, no dragging her to me, no any of this that you have asserted, no. It was just - - -*
>
> *… - It was an absolute statement, 'Do not touch things that do not belong to you'. When someone is stealing property from your feet, yes, that is actually what I said."*

And;[6]

> *"And you said that in a loud voice? --But the child was close to me and no, I didn't- say it in a loud voice. I said it in a moderate tone, 'Do not touch things that do not belong to you', just like that.*

When you said that you were within centimetres of the student, weren't you?---I - she was in front of me, I was on my knees and she was literally probably, I don't know, an arms' distance - her head was an arms' distance away from me.

Ms Nassar had to intervene in your interaction between yourself and the student?---No. No interaction - no intervention, nothing. The child stood up and walked away. Nobody said a word."

[21] The CCTV footage is obscured by another person standing within view, and the events recorded are quite distant from the camera. The parties agree that the matters attested to by Ms Nasser cannot be seen on the footage. Otherwise, I was unable to gain any assistance from the CCTV Footage in determining what occurred in scenario 1.

(b) Second Scenario - Medical emergency of male between escalators with protruding femur bone in his left thigh

[22] The Applicant's second JRA scenario was attending to a customer that had fallen on the escalator and injured his leg. The Applicant approached the student and in accordance with the procedure requested permission by stating, *"Can I touch you?"*. The student granted permission, and the Respondent asserted the Applicant then proceeded to stroke the student's upper left arm, shoulder and chest areas, whilst stating *"It will be ok"*. As the scenario injury was to the customer's leg, Ms Nasser considered the Applicant's physical contact was considered unnecessary and unprofessional in the context of the CJC-S responsibilities, and she ceased the scenario.

[23] The Applicant denied stroking the student's shoulder or touching him on the chest,[7] but agreed she touched the upper left part of the shoulder of the student. While the Applicant agreed she apologised for touching the student, her evidence was:[8]

"*And you apologised for having touched the student?---Y es, out of natural reaction. Yes, of course I did. I'd already asked for, 'Can I touch you?', 'Can I -', the three questions that are mandatory and he said, 'Yes, yes, yes'. But - so when the instructor said, 'Stop touching him', I went, like this, 'I'm sorry I even touched you'. I didn't want to offend in any way and if they thought or if somebody thought that I was - they didn't want that, absolutely stop doing what I was doing, of course."*

[24] The CCTV Footage of the second scenario is clear. After viewing that footage the Respondent accepts that the footage does not show the Applicant touching the student's chest or the scenario immediately ending.

[25] Further than the Respondent's concessions, I consider the CCTV footage is consistent with the Applicant's recollection, and overall presented an unremarkable situation and actions,

particularly where consent to be touched had been given. I also note that in a contemporaneous report of incidents to a teacher at the school attended by the students there was no mention whatsoever of the second incident.

(c) Third Scenario - Locating fire in toilet and full evacuation of the station

[26] The third scenario was a station evacuation which required the Applicant to clear customers from the platform. In the scenario the Applicant walked towards a student playing a customer who refused to leave the platform. The Applicant pulled down her face mask, leaned forward, around 10cm, from the student's face, and shouted, "You must leave now!" She yelled this three times and left to address other customers/students. Ms Nasser considered the Applicant's approach was overly aggressive, and the removal of the mask was in breach of the NSW Government COVID-19 Public Health Order that was in place at the time.

[27] Ms Nasser stated the Applicant then walked towards two other students entering the lift, playing a customer in a wheelchair and a customer pushing a wheelchair. In compliance with the procedure she stated, "Stop. You cannot use the lift". The Applicant grabbed the student in the wheelchair's thigh and wheelchair. In response, the other student yelled, "Do not touch. Do not touch the wheelchair." Ms Nasser then ended the JRA.

[28] The Applicant's evidence regarding the third scenario was as follows:[9]

> *"Again, you touched the wheelchair without the permission of that student?---No, I didn't touch the wheelchair. They were actually in the ready - in the lift and I was beckoning them out of the lift, because the lift wouldn't work and I was explaining that, beckoning them out of the lift and using hand motions, but I didn't - no, I didn't touch them, I didn't offer to wheel him out of that space. When he came out he was being wheeled by the other student and I motioned, with my hand. I never touched his wheelchair, I never touched any part of this person.*
>
> *Notwithstanding that, Ms Rogers intervened by standing between you and the wheelchair?---No.*
>
> *Following - - -?---They were instructed to shout at me. They were instructed to refuse. I'm thinking that this, all of a sudden, because I was getting, I was doing this, he decided to follow through with his instructions.*
>
> *Was that in answer to a question I'd asked you?---No. If she got - no. I do not believe she stood in front of me. The students came out of the lift, and I directed them around to the safe place, which is the egress area, and that's basically what happened. I did go down lower to speak to him and given him instructions, saying he was safe, and the further instructions that the Fire Department would come and get them from this egress*

area. However, no scenario was every - that was - no scenario was stopped and I didn't touch him and I was directing him with my hand. Not touching his wheelchair, not touching him in any way."

[29] In the Respondent's submission regarding the CCTV Footage, the Respondent accepts the Applicant's submission that none of the footage shows the Applicant 'held' the Fourth Student or the wheelchair, and is inconclusive as to whether the Applicant grabbed or touched the Fourth Student or the wheelchair. One matter clearly disclosed by this footage was that the students, as actors in the scenarios, were attempting to be 'difficult', and that, for example, the Applicant touching a student to gain their attention where repeated vocal attempts at contact had not penetrated headphones must be viewed through the prism of such acted difficulty.

(d) Post Scenario Discussions

[30] Ms Nasser and Ms Rogers considered some of the Applicant's conduct in the JRA to be reportable, and they took steps to advise the school of the students who had acted in the scenarios. They wanted to give the Applicant feedback on the JRA, but due to the seriousness of some of the incidents they decided to send the Applicant home, and instructed her to leave her phone on so they could contact her later in the afternoon.

[31] The Applicant was waiting on the station concourse and Ms Nasser had the following discussion with the Applicant in the presence of Ms Watene, Operations Team Leader:

Ms Nasser: "How do you think you went?"

The Applicant: "I think I did okay."

Ms Nasser: "Okay. How about we go into the SMR and let's have a chat."

[32] The parties moved to the SMR (Station Manager's Room). While there was some confusion in cross examination of the Applicant between the first and third scenario,[10] I accept words to the following were said:

Ms Nasser: "Sorry it has taken so long. I just needed to raise a few things with you. Let us discuss your first JRA scenario with the baby locked in the bathroom. You placed your station keys and L key on the ground. One of the female high school students went to go pick up the station keys and L keys off the ground. The way you grabbed her and yelled at her is not acceptable. You scared her. Unfortunately, that student requested to not participate in the rest of your JRA because she felt uncomfortable being around you."

The Applicant: "It was unintentional. I didn't mean to scare her. I am sorry she felt like that."

Ms Nasser: "Let's move to your second scenario. This was a medical emergency. There was unnecessary touching on the student's upper left arm and chest areas. At one stage Kylie did ask you to stop touching [the student] and I am not sure if you noticed that Kylie stepped between the both of you to create the separation. That was simply for a duty of care."

The Applicant: "I did not touch his chest. I touched his shoulder". I think you underestimate the power of touch. It can be very comforting in a distressing situation."

The Applicant began stroking her shoulder and upper forearm to demonstrate.

Ms Nasser: "Both Kylie and I were observing your JRA, and we agreed it was unnecessary touching. The students feel uncomfortable around you. They are currently with their drama teacher."

The Applicant: "I am sorry that they feel that way. Can I apologise to them? It wasn't my intention to make them feel that way."

Ms Nasser: "That is okay. We will leave it for now. I will let them know that you send your apologies. They are currently with Kylie and their teacher."

The Applicant: "Ok so what now?"

Ms Nasser: "What we are going to do, due to the seriousness of this matter, is to ask you to go home. Please keep your work phone on and wait for someone to call you to let you know the next steps."

[33] Ms Nasser walked the Applicant out of the SMR and onto the concourse, and watched the Applicant go to the escalators and down to the platform level. The Applicant was on the platform level for around 5 seconds before returning back up the escalator. The Applicant approached Ms Nasser and stated, "I want to have a discussion with you, but I want a witness to this discussion."

[34] As issue arose in proceedings as to whether the Applicant was *"calm"* during the conversations with Ms Nasser and Ms Watene when she indicated an intention to resign. That arose from the Applicant's Submission, which was accepted as her evidence, where the Applicant stated:

"I went back and calmly requested to speak to [Ms Nasser] in front of a witness. I placed my work phone and ID cards on the desk and told them that I was shocked and disgusted by her accusations and consequently handed in my verbal resignation.

Rita repeated the same accusations under the guise of feedback. I said I have never been accused of anything like being aggressive to anyone or anything inappropriate in 21 years of customer service and that I was disgusted by her allegations. Yes, I have already received your feedback, good day. I walked out of the office."

[35] The Respondent stated that the Applicant and Ms Nasser walked back to the SMR, again in the presence of Ms Watene, wherein the following, not materially dissimilar, discussion occurred:

The Applicant: "I will make your job easier. I am tendering my resignation effective immediately. I will send you my resignation by email when I get home. This is my phone, this is my MTS ID card and this is my Lanyard."

The Applicant placed each object on the table one by one.

Ms Nasser: "Look this is a serious matter and it has been a big day for you. Please take the feedback I have provided and just wait for the call."

The Applicant: "Yes, I have already received your feedback. I have never been so insulted. I have never been accused of anything like this in the other industries I have worked in. You can consider this me resigning."

[36] The Applicant was questioned in cross-examination regarding whether she was calm at this time. Her evidence was:[11]

"And you were calm at this time? Internally I was very upset and doing my best to keep myself together with dignity.

So you were holding yourself composed? That's correct.

Then you approached Ms Nassar on the concourse and told her you wanted to have a discussion? Yes.

And you said that you wanted to have a witness for that discussion? Yes, because it was my intention to give my phone to her and have that witnessed so that in the future it wasn't said, 'You didn't return our property', that's what was behind that.

Part of the reason why you wanted a witness is because you understood the seriousness of what you were about to do? No. I wanted to make sure that nobody could attack me again about anything, in regards to returning those possessions, that's why.

When you asked for a witness you knew that you were about to resign? Yes.

Part of the reason you wanted that witness was to be able to confirm your version of events, with respect to the resignation? No, because there was no discussion about my version of events, my dear. I - there was no question of it. The head of training came down and had the discussion with everybody else. I was precluded from that exchange and then I was presented, the facts are, 'This phone is (indistinct)' and then, 'Go home, wait by the phone', and my wanting to make sure that there was a witness to the phone and the other valuables was to make sure that they had their valuables. That was my intention to get a witness."

And:[12]

"*Can I take you to page 17 of the court book? At the bottom of that page you outline your version of events, with respect to that meeting and what you say, on the second last paragraph, that you went back and calmly requested to speak to Rita, with Ms Nassar, in front of a witness. You don't say anything there about your demeanour, other than the fact you were calm?---I was presenting a calm demeanour. How would you feel under these circumstances, sir? I wasn't crying my head off. I do - I do try to be - yes, I was trying to be as calm as possible and, yes, I was - that's me."*

[37] Although the Applicant had indicated her resignation, allegedly pursuant to the Respondent's procedure, Ms Nasser said she submitted an Incident Report. The exact chronology recorded in Ms Nasser's statement was as follows:

"66. Although the Applicant had resigned, as is MTS procedure, I submitted an Incident Report. Annexed and marked RN-10 is the Incident Report dated 4 August 2022.

Acceptance of the Applicant's resignation.

67. At 2:39PM, I received an email from Mr Morton, drafting an acceptance of the Applicant's resignation, for me to send to the Applicant.

68. At 4:41PM, as I had not received any further communications from the Applicant withdrawing or confirming her resignation, I sent the email accepting her verbal resignation. Annexed and marked RN-11 is my email to the Applicant of 4 August 2022.

69. I did not receive a response to this email from the Applicant."

[38] While the above recited evidence appears on its face to record a chronological progression, I note that the Incident Report records, apparently contemporaneously, the following:

"Susan requested to speak with me and asked for a witness to the conversation. I asked Rebekah Watene to come into the SMR and witness the conversation that is about to take place.

Susan said to me "I will make your job easier". Susan returned her MTS mobile phone, MTS ID Card and MTS EAC. Susan advised me she will send me an email this afternoon with her resignation.

I did not receive a resignation letter from Susan.

At 16:41 on 04/08/2022, I sent Susan Carter an email advising MTS accepts her resignation."

[39] At 2:39pm, Ms Nasser received an email from Mr Morton, People and Culture Business Partner, with an acceptance of the Applicant's resignation, for Ms Nasser to send to the Applicant. At 4:41pm, as Ms Nasser had not received any further communications from the Applicant withdrawing or confirming her resignation, Ms Nasser sent the email accepting her verbal resignation, as follows:

"Dear Susan,

I refer to our discussion at Bella Vista station today, during which you advised you are resigning from your employment. MTS accepts your verbal resignation from your role as Customer Journey Coordinator – Stations, effective immediately, 04 August 2022.

In line with your immediate resignation, MTS has agreed to waive your 1 week notice period as per your employment contract. Your termination pay will include any unused annual leave and outstanding salary owed. I note, that during our conversation you returned your MTS ID Card, EAC Card and mobile phone to me.

Our Employee Assistance Program is also available for free, confidential counselling on 1800 808 374 (Assure Programs) or via email to i nfo@assureprograms.com.au.

Kindest Regards,"

[40] The Applicant did not on 4 August 2022, or thereafter, contact anyone within the Respondent regarding her resignation, and did not seek to withdraw her resignation.[13] The Applicant did make a complaint to Safe Work NSW regarding the JRA.[14]

[41] The Applicant and all other members of Cohort 5 failed the JRA.[15] Fifty percent of the cohort left employment before the end of training.[16] The Applicant claimed Ms Nasser and Ms Norton put her under a great amount of stress in the JRA so they could fail her.[17]

Applicant's Submission

[42] The Applicant succinctly summarised her case in her Outline of Submissions, were she submitted:

> *"I had no intention to resign from my position with Metro Trains Sydney (MTS). In fact, I did turn down other job opportunities after acceptance of their offer and again during training.*
> *MTS Trainers discriminated and bullied me, also making unacceptable accusations with the clear intention to force me to resign.*
> *…*
> *The bullying and adverse actions of MTS made me resign under duress whist being emotionally upset. My verbal heat of the moment resignation came after continued hurtful defamatory accusations and unfair treatment.*
> *Without any delay MTS happily accepted this as effective resignation and did so without any attempt to contact me for any kind of follow-up, clarification, leave alone a welfare check.*
> *The response MTS offered during the attempted mediation is full of untrue statements, deliberately misinterpretations, falsehoods presented as facts and lies.*
> *I cannot imagine that Fair Work would tolerate this adverse treatment of employees by employers under the disguise of employee performance management.*
> *I find it shocking that an employer such as MTS can keep "legally" bullying and discriminating staff – as long as they can successfully coerce staff into a constructive dismissal within 6 months."*
>
> (Emphasis added)

[43] The Applicant submitted that during her employment, adverse actions of the Respondent caused her to suffer undue stress. The behaviours of the Respondent were submitted to include bullying, together with attempts to diminish, belittle, and embarrass her that resulted in continuous distress, and caused her forced resignation to protect her mental and emotional wellbeing.

[44] The Applicant submitted the extreme action against her of being falsely accused of inappropriate touching of a child/young person was done in manner indicating the intent to

make her resign. In that *"moment"*, the fear of having to continue under pressure at work and also under what she described as the threat of further fabrications and falsehoods in the future, put the Applicant in the position where she felt she had no alternative but to resign.

[45] The Applicant relied on the authorities of *Mohazb v Dick Smith Electronics Pty Ltd (No 2),*[18] *O'Meara v Stanley Works Pty Ltd*,[19] and *Yang v FCS Business Service Pty Ltd*.[20]

Respondent's Submission

[46] The Respondent submitted that the onus falls upon the Applicant to satisfy the Commission that she was dismissed such that the Commission's jurisdiction is enlivened.

[47] The Respondent submitted there was no dismissal at Respondent's initiative. The Respondent noted the definition of dismissal in s 386(1) of the Act contains two distinct limbs, and noted the Full Bench recently restated that:

> *"For the purpose of the first limb of the definition of "dismissed" in s 386(1)(a) [of the FW Act], a person's employment has been terminated at the employer's initiative where the action of the employer is the principal contributing factor which leads to the termination of the employment relationship such that, had the employer not taken the action it did, the employee would have remained in the employment relationship."*[21]

[48] In this matter, the Respondent submitted there was no such action on the part of the Respondent. Rather, the Applicant made a decision which was entirely her own. The chain of causation was broken by the Applicant's independent decision to end her employment. In any case, any action taken by the Respondent would be required to have been taken with the intention of bringing the employment relationship to an end, or have the probable result of doing so, however, no action of the Respondent could be said to have such a character. Ms Nassar simply advised the Applicant of allegations against her and asked her to go home to await further advice.

[49] The Respondent further submitted that when the facts are judged objectively, it cannot be concluded that the Applicant resigned in the heat of the moment. There was no 'special circumstance' and the Respondent did not unreasonably accept the Applicant's resignation. The Respondent noted Ms Nassar's evidence that:

> *"During this [resignation] discussion, the Applicant was understandably upset by the impending investigation, however, she was unequivocal and assertive when resigning and seemed unwilling for MTS to commence an investigation."*

[50] The Respondent submitted the Applicant's resignation could not have been in the heat of the moment in circumstances where the Applicant:

(a) admitted she was acting calmly;

(b) returned to Ms Nassar and requested a meeting and a witness for the specific purpose of resigning;

(c) unambiguously communicated her resignation to the Respondent, by stating, *"I will make your job easier"*, handed back company equipment and notified that she would confirm her resignation by email; and

(d) did not demonstrate any irrational behaviour, 'emotional distress' or 'level of confusion' which would have put the Respondent on notice that a further enquiry was necessary.

[51] The Respondent submitted the opportunity to withdraw her resignation was extended for approximately a further six hours before the Respondent confirmed acceptance by email. The Applicant did not take any steps to advise the Respondent that she did not intend to resign, either before or after Ms Nassar emailed the Applicant to confirm the verbal resignation.

[52] The Respondent noted the Applicant identified three occasions during which she believed she was targeted and bullied, being:

(a) The Probation Meeting of 14 July 2022;

(b) The re-sit of the Gateway 1 Examination on 23 July 2022; and

(c) The meeting with Ms Nassar and Ms Watene, after the JRA on 4 August 2022 (the JRA Meeting).

[53] To the extent those matters provided context to the Applicant's decision to resign, each of those matters were warranted on the basis of legitimate concerns regarding the Applicant's performance. The Applicant was capable of engaging in the investigation process, but of her own volition decided to jump before she was pushed.[22]

[54] The Respondent submitted that, when looking at the totality of the evidence, the Applicant did not resign in the heat of the moment, nor was she constructively dismissed. The Applicant resigned to avoid an investigation into the events of her JRA. That was entirely her choice, and does not amount to a dismissal.

Applicant's Submission in Response

[55] Regarding s.386(1) of the Act, the Applicant submitted the Respondent was the driving force. Due to the alleged bulling behaviour of both Ms Norton and Ms Nassar, with the full

knowledge of the Respondent, there was no alternative but to resign or be subjected to further psychological distress by the organization in the future.

[56] The Applicant submitted the Respondent was not interested to hear her point of view and did not take any steps to make further inquiries into the events of the day. They took no steps to check on the Applicant to enquire of her wellbeing, which she asserts would follow best practice. No attempt was made to discuss any matter in relation to the verbal resignation of the Applicant or to advise of any such matter regarding an investigation. Within hours, the Respondent confirmed her verbal resignation.

The Relevant Provisions of the Act

[57] Part 3-1 of the Act is titled *"General Protections"*. Section 340(1) relevantly provides that a person must not take *"adverse action"* against another person because the other person has exercised (or proposes to exercise) a *"workplace right"*. Adverse action is taken by an employer against an employee if the employer (relevantly) dismisses the employee and that action is not authorised by law: s.342(1), item 1; s.342(3). There are other defined adverse actions that do not involve dismissal.

[58] Section 12 defines the word *"dismissed"* by reference to s 386. It relevantly provides:

> *386 Meaning of dismissed*
>
> *(1) A person has been dismissed if:*
>
> *(a) the person's employment with his or her employer has been terminated on the employer's initiative; or*
>
> *(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.*

[59] Division 8 of Pt 3-1 is titled *"Compliance"*. It establishes two regimes for dealing with disputes in which allegations of contravention of general protection provisions are made: a regime for dismissal disputes (Subdiv A) and a regime for non-dismissal disputes (Subdiv B).

[60] Section 365 of the Act is contained in Subdiv A. It provides:

> *365 Application for the FWC to deal with a dismissal dispute*
>
> *If:*
>
> *(a) a person has been dismissed; and*

(b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.

[61] Section 368 of the Act confers authority on the Fair Work Commission (the FWC) to deal with a dismissal dispute in the event that an application is made under s.365. It provides:

Dealing with a dismissal dispute (other than by arbitration)

(1) If an application is made under section 365, the FWC must deal with the dispute (other than by arbitration).

Note: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)). One of the recommendations that the FWC might make is that an application be made under Part 3-2 (which deals with unfair dismissal) in relation to the dispute.

(2) Any conference conducted for the purposes of dealing with the dispute (other than by arbitration) must be conducted in private, despite subsection 592(3).
Note: For conferences, see section 592.

(3) If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:

(a) the FWC must issue a certificate to that effect; and

(b) if the FWC considers, taking into account all the materials before it, that arbitration under section 369, or a general protections court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.

(4) A general protections court application is an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of this Part.

[62] If a certificate is issued under s.368(3), the parties may agree to the FWC arbitrating the dispute: s.369. In that event, the FWC may deal with the dispute by arbitration and may make orders affecting the substantive rights of the parities, including orders for reinstatement, and for

the payment of compensation: s.369(2). Section 369(3) prohibits a person from contravening an order made under s.369(2).

[63] Section 370 of the FW Act provides *that "A person who is entitled to apply under s 365 for the FWC to deal with a dispute"* must not make a general protections court application (as defined in s 368(4)) in relation to the dispute unless:

> *(a) both of the following apply:*
>
> *(i) the FWC has issued a certificate under paragraph 368(3)(a) in relation to the dispute;*
>
> *(ii) the general protections court application is made within 14 days after the day the certificate is issued, or within such period as the court allows on an application made during or after those 14 days; or*
>
> *(b) the general protections court application includes an application for an interim injunction.*

Consideration

[64] In *Bupa Aged Care Australia Pty Ltd v Shahin Tavassoli* (*Tavassoli*),[23] the Full Bench of the Commission conducted a detailed analysis of authorities relating to whether particular resignations constituted dismissal pursuant to various legislative schemes. After that analysis, the Full Bench provided the following distillation:

> "*[47] Having regard to the above authorities and the bifurcation in the definition of "dismissal" established in s.386(1) of the FW Act, we consider that the position under the FW Act may be summarised as follows:*
>
> *(1) There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the "heat of the moment" or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although "jostling" by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.*

> *(2) A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probably 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.*
>
> *[48] It is necessary for an applicant for an unfair dismissal remedy whose employment has terminated because the employer has acted on a communication of resignation on the part of the employee to articulate whether they contend they were dismissed in the first or the second scenario above (although it may be possible for both scenarios to arise in a particular factual situation). Where the applicant is self-represented or inadequately represented, it may be necessary for the member of the Commission hearing the matter to clarify with the applicant the precise basis upon which it is contended that the applicant was dismissed. If this is not done, it may lead to the wrong test being applied to the matter."*
>
> (Emphasis added)

[65] As is apparent from the Applicant's Submissions and Applicant's Submissions in Response (see, for example, paragraphs [54] and [55] above), the Applicant advanced both limbs of the definition in s.386(1), and the Respondent addressed those submissions. I will address each test.

(a) S.386(1)(b)

[66] The Applicant identified that the alleged bulling behaviour of both Ms Norton and Ms Nassar, and the psychological distress associated with the allegations of inappropriately touching children, left her not alternative but to resign.

[67] In *Ashton v Consumer Action Law Centre*,[24] Commissioner Bisset considered whether an employee had no effective or real choice but to resign due to supervisory requirements, which he claimed were so onerous that it made his job impossible to do. The Commissioner held that even where an employee believes supervisory requirements to be harsh, it does not mean they are so. Further, the Commissioner found:[25]

> *"[59] It is not expected that employees will always be happy in their employment. Dissatisfied employees resign from their employment on a regular basis. That they were not satisfied with management's actions or decisions does not mean that there was a constructive dismissal or that the actions of the employer, viewed objectively,*

left the employee with no choice but to resign.

[60] That, following the grievance outcome and the delivery to him of a letter seeking his response on performance matters, Ashton felt he had no choice but to resign does not mean that the actions of the Respondent were intended to force that resignation.

[61] In this matter, viewed objectively, the actions of the employer in investigating Mr Ashton's grievance and/or in instigating higher level supervisory requirements and/or in providing him with a letter outlining specific areas of concern with his performance were not designed to force Ashton to resign.

[62] I find that Mr Ashton was not forced to resign because of conduct, or a course of conduct, engaged in by his employer."

[68] In the context of an actual or prospective investigation, consideration should be given to the actions and motives of the Respondent during the investigation process. In *Sherman v Sunrise Health Service Aboriginal Corporation*, Commissioner Wilson observed and found as follows:

"*[35] The evidence about Sunrise Health Service's actions and motives includes that it had received and acted upon complaints of bullying and harassment by Ms Sherman against other employees of the Corporation. The evidence shows that it properly received the complaints and decided to investigate them through the appointment of an arms-length investigator. The report provided by the investigator shows her work to have been undertaken in a measured and methodical manner, having regard not only to the complaints that were made, as well as to principles of natural justice and procedural fairness. The report provided to Sunrise Health Service by Ms Ellison shows that she spoke with numerous witnesses and took into account the matters each had to say. She sought a response from Ms Sherman and appeared open to the matters that Ms Sherman wished to address. While Ms Ellison made findings of fact and expressed opinions about the matters she had found, and recommended her findings be considered by Sunrise Health Service for disciplinary action, she did not recommend specific action.*

[36] I have accepted that Mr Hopp's evidence is that the purpose of the meeting, had a resignation not been offered at the start, would have been for the Corporation to have Ms Sherman "show cause" about the investigation outcomes and why her employment should not be terminated. Despite that disclosure, there is no evidence that either Mr Hopp or Mr Dean had already settled on dismissal as being the only available course of action.

[37] I therefore consider it more likely than not that, at the time Ms Sherman resigned, Sunrise Health Service had not decided on dismissal as being the only available sanction.

[38] I do not consider that Sunrise Health Service's actions in investigating the bullying and harassment allegations against Ms Sherman, or in inviting her to a meeting to discuss the results of the investigation, or in disclosing to Ms Doyle the findings of the investigation, were done with the intention of bringing Ms Sherman's employment to an end. Nor do I consider that those actions would, on any reasonable view, probably have that effect. Each of the actions by Sunrise Health Service in these regards were proper and in accord with its obligations to receive and investigate allegations of bullying and harassment.

[39] Likewise, I am unable to find there was, at the relevant time, evidence of any subjective intention of forcing Ms Sherman to resign. The actions of Sunrise Health Service, while no doubt headed in a direction with serious consequences for Ms Sherman were not such as to cause an involuntary departure from employment."

[69] In *Jodie Moore v Woolworths Group Limited T/A Big W*,[26] Deputy President Lake held:

> *"…[i]t would be a perverse outcome to consider an objectively fair investigation and show cause process as imposing forcibly upon the Applicant that they must resign."*
> (Emphasis added)

[70] What must be shown is that the conduct of the employer was *"intended to bring the employment to an end"*. The usual purpose of an investigation is not to bring about termination of employment. The intention is to ascertain, with a degree of certainty, what event or series of events transpired. Once that information is gathered, then the employer may decide what action is appropriate.

[71] I do not consider the conduct of the Respondent and its officers throughout the Applicant's employment in general, or in the Probation Meeting of 14 July 2022 and the re-sit of the Gateway 1 Examination on 23 July 2022 in particular, was conduct intended to bring the employment to an end. The Respondent was attempting to address issues with the Applicant and seek an improvement in her performance, which did occur after the Probation Meeting. The aim of that conduct was continued employment, and employment past the probationary period.

[72] The conduct of the Respondent in and after the JSA, however, stands in contrast to that previous behaviour. That is because the descriptions of what was said to have occurred in the JSA differed, in some respects markedly, from the clear CCTV Footage. I note that I am not fully seized of the training provided to CJC-S employees, and the application and impact of the Respondent's policies, and so am not prepared to impose my views as to, for example,

appropriate conduct towards the relevant students, particularly regarding scenarios 1 and 3, though I note that the Respondent conceded discrepancies.

[73] Scenario 2, however, stands as a clear example of the difference between what was said to occur and what the CCTV Footage clearly displayed. Ms Nasser's evidence regarding scenario 2 was:

> *"43. The Applicant's second JRA scenario was attending to a customer that had fallen on the escalator and injured his leg. The customer was played by a student whom I knew as [the Student]. The Applicant approached [the Student] and in accordance with the procedure requested permission by stating, "Can I touch you?". [the Student] granted permission.*
>
> *44. The Applicant then proceeded to unnecessarily stroke [the Student's] upper left arm, shoulder and chest areas, whilst stating "It will be ok". Considering the injury to the customer's leg, the Applicant's physical contact was considered unnecessary and unprofessional in the context of the CJC-S responsibilities.*
>
> *45. I immediately stated to Ms Rogers, "The assessment needs to stop. She cannot be touching him like that". Ms Rogers called out to the Applicant and stated, "Stop. It is way too much touching. I need you to stop touching him." To end the scenario, Ms Rogers had to physically place herself between the Applicant and the students."*

[74] While also a witness in the proceedings, Ms Rogers did not address scenario 2 at all in her evidence.

[75] The CCTV Footage does not show the Applicant touching the Student's chest, or the scenario immediately ending. The angle of the camera is such that it captures all that occurs in the scenario including the almost constant presence of Ms Nasser and Ms Rogers standing approximately three metres away from the student, and it is clear that the scenario continues for over a minute past the alleged inappropriate touching to a time when the scenario ends, and the student stands up and walks away.

[76] In that circumstance it is incomprehensible that Ms Nasser put to the Applicant, apparently less than an hour after scenario 2 concluded, the following:

> *"Let's move to your second scenario. This was a medical emergency. There was unnecessary touching on the student's upper left arm and chest areas. At one stage Kylie did ask you to stop touching [the Student] and I am not sure if you noticed that Kylie stepped between the both of you to create the separation. That was simply for a duty of care."*

[77] For completeness I note that the CCTV Footage did not show any actions that could be described in any way as Ms Rogers stepping between the Applicant and the Student to create a separation.

[78] In the circumstances, I consider the Applicant's apparent concern as to the fairness of the proposed investigation of her actions was soundly based. Extremely serious allegations were being put against her and at least part of the factual outline put in substance was demonstrably false. I consider that the factual misstatements were put with the intention of bringing the Applicant's employment to an end, either pursuant to the probationary period or by resignation.

[79] I accept the Applicant's evidence that the fear of having to continue under pressure at work and also under what she described as the threat of further fabrications and falsehoods in the future, put her in the position where she felt she had no alternative but to resign.

(b) S.386(1)(a)

[80] While I have found the Applicant was dismissed pursuant to s.386(1)(b) of the Act, the Full Bench in *Tavassoli* recognised that dismissal pursuant to both s.386(1)(a) and s.386(1)(b) may arise in a particular factual scenario.[27]

[81] The evidence establishes the resignation was expressed *"in the heat of the moment"*. The Applicant had just had extremely serious allegations put against her and was then asked to go home, but to *"... keep your work phone on and wait for someone to call you to let you know the next steps"*. I accept the Applicant's evidence that internally she was *"...very upset and doing my best to keep myself together with dignity"*. Ms Nasser conceded the Applicant was upset. Her evidence was:

> *"During this [resignation] discussion, the Applicant was understandably upset by the impending investigation, however, she was unequivocal and assertive when resigning and seemed unwilling for MTS to commence an investigation."*

[82] What is clear from the evidence is that the Respondent treated the resignation as terminating the employment rather than clarifying or confirming with the Applicant after a reasonable time whether she genuinely intended to resign. That failure was particularly pronounced where the Applicant had advised the Respondent *"... I will send you my resignation by email when I get home"*.

[83] The evidence discloses incongruous communications and chronologies that disclose the Respondent accepting the resignation with some haste. In particular:

(a) Ms Nasser apparently prepared and submitted the Incident Report prior to receiving the email from Mr Morton at 2.39pm on 4 August 2022, but the Incident Report records the email being sent to the Applicant at 4.41pm on 4 August 2022;

(b) It would appear Mr Morton did not have the Incident Report when he sent his email of 2.39pm on 4 August 2022, that provided a draft of the acceptance of the Applicant's resignation; and

(c) It is unclear whether Mr Morton was aware the Applicant had advised the Respondent "… I will send you my resignation by email when I get home".

[84] What is clear is that the Respondent completely failed to clarify or confirm with the Applicant whether she genuinely intended to resign, in circumstances where the Applicant had, while upset, verbally resigned within minutes of being accused of extremely serious allegations that were at least partially based on a factual outline that was demonstrably false. That conduct constituted a dismissal pursuant to s.386(1)(a) of the Act.

[85] I am satisfied that the Applicant was dismissed by the Respondent within the meaning of paragraphs (a) and (b) of section 386(1) of the Act.

DEPUTY PRESIDENT

Appearances:
Ms S Carter on her own behalf, as the Applicant.
Mr L Maroney (Kingston Reid Solicitors), for the Respondent.

Hearing details:
2023
SYDNEY
16 December.

Final written submissions:
6 January 2023.

Printed by authority of the Commonwealth Government Printer

<PR750630>

[1] [2020] FCAFC 152 at [74]-[75].
[2] Transcript PN 87 to 94.
[3] Transcript PN105 to 113, and 119.
[4] Transcript PN 114.
[5] Transcript PN 133 and 134.
[6] Transcript PN 138 to 140.
[7] Transcript PN 158 and 162.
[8] Transcript PN 164.
[9] Transcript PN 169 to 172.
[10] Transcript PN 178 to 180.
[11] Transcript PN 215 to 2221.
[12] Transcript PN 246.
[13] Transcript PN 254 to 258.
[14] Transcript PN 273 to 274.
[15] Transcript PN 193.
[16] Transcript PN 347.
[17] Transcript PN 194 and 203.
[18] 62 IR 200.
[19] PR 973462.
[20] [2020] FWC 4560.
[21] *Winbank v Laundy Hotels Pty Ltd* [2022] FWCFB 128 [27].
[22] Wilson v Westpac Banking Corporation [2021] FWC 763.
[23] [2017] FWCFB 3941.
[24] [2010] FWA 9356.
[25] Ibid. [59] to [62].
[26] [2020] FWC 963, at [29]
[27] *Tavassoli* at [48].