

[2023] FWC 493 [Note: An appeal pursuant to s.604 (C2023/1492) was lodged against this decision - refer to Full Bench decision dated 31 May 2023 [\[\[2023\] FWC FB 101\]](#) for result of appeal.]



DECISION

Fair Work Act 2009
s.365—General protections

Mariam Jarouche

v

Lipa Pharmaceuticals Ltd
(C2022/7079)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 28 FEBRUARY 2023

Application to deal with contraventions involving dismissal – jurisdiction – pharmaceutical industry – chief of quality – whether dismissed – whether resigned – forced resignation found – jurisdictional objection dismissed

[1] On 21 October 2022 Mariam Jarouche (Dr Jarouche or the applicant) made a general protections application under s 365 of the *Fair Work Act 2009* (Cth) (FW Act) alleging contraventions of the FW Act associated with her alleged dismissal.

[2] Dr Jarouche’s application is brought against her former employer, Lipa Pharmaceuticals Ltd (Lipa, the respondent or the employer).

[3] Lipa oppose the application and raise a jurisdictional issue. It says that Dr Jarouche resigned and was not dismissed.

[4] Conciliation was conducted on 13 December 2022 but the matter did not resolve.

[5] The decision of the Full Court of the Federal Court of Australia in *Coles Supply Chain Pty Ltd v Milford*¹ requires the Commission to determine a dispute about the fact of a dismissal under s 365 of the FW Act before the Commission can exercise powers under s 368 including issuing a certificate under s 368(3).

[6] It is thus necessary to determine the jurisdictional issue if Dr Jarouche’s application is to proceed further.

[7] I issued directions on 4 January 2023.

[8] By consent, I granted permission for both parties to be represented.

[9] I heard the jurisdictional matter by video on 16 February 2023.

Evidence

[10] Dr Jarouche gave evidence on a statement filed in her name.²

[11] For the respondent, I heard from Robert Vincent Tanna, Chief Executive Officer, on two statements filed in his name.³

[12] Although background matters relevant to the jurisdictional issue are not in dispute, there are disputed facts. It is appropriate to make some observations on the evidence.

[13] Dr Jarouche's gave evidence attentively but displayed some difficulties in recall. She tended to re-create the narrative by expressing a general understanding of conversations and events but not an exact recall of what had been said or done. This is particularly so with respect to her two conversations with Mr Tanna on 29 September 2022. I am not critical of Dr Jarouche in this respect as I accept her evidence that she was "in shock" at that time and immediately following. Being in shock, it is plausible that her recall months later was imprecise.

[14] Mr Tanna was an impressive witness. He was measured, controlled and made concessions where warranted. He generally displayed good recall of events and conversations.

[15] Where there are disputed facts, I generally prefer the evidence of Mr Tanna over Dr Jarouche where it is plausible and consistent with surrounding circumstances and contemporaneous documents. I do so because Mr Tanna displayed better and more specific recall, and did not convey a generalised summary of impressions or understandings.

[16] One unusual aspect of the evidence is that Dr Jarouche's witness statement was very brief, including as to her conversations with Mr Tanna on 29 September 2022. She did not directly respond to Mr Tanna's detailed statement on that matter, despite my directions providing an opportunity for each party to file evidence in reply (which Lipa did). Aside from one element of her statement (paragraph 6), it was only in cross examination that Dr Jarouche disputed other parts of Mr Tanna's evidence and the broader sequence of events advanced by the employer.

[17] Whilst somewhat irregular, I do not consider this denied the employer procedural fairness. Lipa was able to advance its own evidence unencumbered, and through its representative was able to cross examine Dr Jarouche on Mr Tanna's statement. This had the effect of the Commission obtaining, albeit belatedly, Dr Jarouche's response to the full range of the employer's evidence. Through this route, I have all relevant material before me on which to make findings of fact. The rules of procedural fairness (including that in *Browne v Dunne*)⁴ have been met.

[18] I add one final note on the evidence. By agreement confirmed following the hearing, I have formally brought into evidence a letter sent by Lipa dated 4 October 2022 appearing at page 17 of the digital court book (exhibit MJ2).⁵

Facts

Lipa

[19] Lipa is a pharmaceutical manufacturer headquartered in New South Wales, Australia.

[20] It is a large employer and has internal human resources capacity.

Dr Jarouche

[21] Dr Jarouche holds a PhD in analytical chemistry.

[22] Dr Jarouche was employed by Lipa as Chief of Quality. She commenced on or around 24 May 2021 under terms of an employment contract dated 20 April 2021 (Employment Contract).⁶

[23] The position held by Dr Jarouche was senior, well-remunerated and responsible.

[24] During 2022, Lipa's Chief Executive Officer (Mr Tanna) developed concerns about aspects of Dr Jarouche's performance. He discussed those matters with Dr Jarouche in June and July 2022 and subsequently.

[25] Mr Tanna also came to be aware, in general terms, that Dr Jarouche may at some future time require leave for planned surgery. In September 2022 Dr Jarouche confirmed to Mr Tanna that she would require a period of six weeks' leave.

[26] On 16 September 2022 Mr Tanna sent Dr Jarouche an email concerning a backlog in product codes. He sought that the problem be urgently addressed.⁷

[27] Mr Tanna continued to hold performance concerns. By late September 2022 he "lost confidence in Dr Jarouche's ability to perform her role".⁸

29 September 2022

[28] On Thursday 29 September 2022 Mr Tanna called Dr Jarouche to a meeting.

[29] Aspects of the content of the meeting are disputed.

[30] Dr Jarouche's evidence was that Mr Tanna stated:⁹

"Mariam, this is difficult for me to say but your employment will not be continuing with Lipa. There is no need for you to undertake any more work. Leave your computer and I will be in touch with you regarding your exit arrangement."

[31] As noted, I prefer Mr Tanna's evidence to that of Dr Jarouche on this question. I do not accept that paragraph 6 of Dr Jarouche's statement reflects the precise words used by Mr Tanna. This paragraph represents Dr Jarouche's summation of the conversation. I find that the conversation was as follows:¹⁰

- MR TANNA: "I appreciate that the timing of this discussion given your personal circumstances is difficult, but the role that you perform is critical to the business. It's just not working for the business. I feel that we are at a stage where the right decision must be made for the business due to my ongoing performance concerns. This

discussion has absolutely nothing to do with your upcoming surgery. [REDACTED] (Technical Services Manager) could step up for the 3-6 week period [of leave] which he has previously done. At the end of the day we could have managed for 3-6 weeks but it would not change the outcome.”

- DR JAROUCHE: “But we have improved the stability and the raw material testing. The workload is high.”
- MR TANNA: “We never seem to be in control. We address one area and another area would fall behind. This is consuming a lot of my personal time to constantly check and make sure that we were on top of things. I believe you would have been better suited to a QC Lab Manager role. The Chief of Quality role was too big a step I feel. I have avoided making this decision for some months hoping there would be a change. We have both invested a lot of time trying to improve the situation and I’m very sorry that it’s come to this. I have a long list of concerns in front of me which I can go through in detail if you wish. Much of this we have been discussing and have been trying to rectify. I would rather we focus on looking forward and reaching an agreed communication and settlement.”
- DR JAROUCHE: “I’m sorry that I have disappointed you. I thought I was doing better.”
- MR TANNA: “Let’s work together on how we best position you leaving the business. One option is to say that due to your upcoming surgery you have decided to resign and you wish to focus on your health. This however would be your decision and I will respect whichever way you wish to do this. I can draft an announcement about your resignation for you to consider if you wish”.
- DR JAROUCHE: “OK – let me have a look at it.”
- MR TANNA: “If you wish to resign, we won’t need you to work out your 3 month notice period which we will pay together with your accrued leave. I realise that this is a lot to take in right now. We can work through the detail of your resignation over coming days. I’m OK if you wish to take some time to collect your things and say goodbye to your team.”
- DR JAROUCHE: “Here’s my laptop. I need to go downstairs to the lab and get my bag and the laptop bag. They are beautiful people in the Quality team. Please make sure you look after them.”
- MR TANNA: “That’s fine – take your time. Are you OK to drive home? Do you need us to organise a ride?”
- DR JAROUCHE: “No – I will be OK.”

[32] Dr Jarouche was in shock at what had been said and the sudden turn of events. She collected her belongings. She left the workplace about 20 minutes later.

[33] Later that day (29 September) Dr Jarouche telephoned Mr Tanna. The conversation was brief:¹¹

- DR JAROUCHE: “I am okay with the resignation, I don’t want to go legal but I do need more money and a reference from you Rob. I really need your support to get another role.”
- MR TANNA: “I will do everything I can to help you but let me get back to you on your request for more money.”

30 September 2022

[34] As had been suggested by Mr Tanna, Dr Jarouche did not attend work the next day (30 September).

[35] Over the course of the following week emails and texts were exchanged.

[36] On Friday 30 September Mr Tanna called Dr Jarouche but was unable to get through. He sent her a text at 12.23pm to that effect.

[37] At 3.50pm Mr Tanna sent the following email:¹²

“Subject: Confidential

Hi Mariam

I hope you’re OK.

I’ve tried to contact you on mobile several times today unsuccessfully.

Could you please contact me so we can work on resolving the financial terms and the proposed announcement.

As we discussed yesterday I have advised staff that you are on sick leave today. However we need to reach a resolution.

Please contact me – [REDACTED]

Thanks

Rob Tanna | Chief Executive Officer”

[38] There was no immediate reply by Dr Jarouche.

[39] At 4.51pm Mr Tanna sent a further email:¹³

“Subject: Confidential

Attachments: Announcement – Chief of Quality

Hi Mariam

Draft announcement attached. Please let me know if you have any changes. Plan is to announce on Tuesday morning.

As discussed, I have approval to offer 4 months pay i.e. 3 months notice in lieu and one additional month. You will not be required to work your notice period.

We will also need a Deed of Release signed which protects both parties from any further claims.

Please let me know if this is acceptable and I will get the documentation finalised on Tuesday.

Take care – I will be in touch.

Regards

Rob”

[40] The attachment read as follows:¹⁴

“**Subject:** Announcement – Chief of Quality

DRAFT

Dear everyone

I wish to advise that Mariam Jarouche will be leaving the business. Mariam has been dealing with a personal illness in recent months which will require surgery and a long recovery period.

She has decided to resign to focus on her health. Her surgery is scheduled within the next two weeks. As a result we have agreed that she will leave the business today.

Mariam has made an impact in her time with the business and we are grateful for her contribution.

We wish her a full recovery and the best for her next role.

Regards

Rob Tanna | Chief Executive Officer”

[41] Mr Tanna did not hear back from Dr Jarouche that afternoon nor on 1, 2 or 3 October 2022 (a weekend and a public holiday in New South Wales).

4 October 2022

[42] On the morning of Tuesday 4 October 2022 (10.03am) Mr Tanna sent Dr Jarouche a text.¹⁵

“Hi Mariam – hope you’re OK. I need to release the announcement this morning to let people know where you are. Can you please advise if you are ok with this ? Thanks Rob”

[43] Dr Jarouche replied by email at 12.06pm:¹⁶

“Good morning Rob,

Can you please issue me with a reference letter for future employment and I can sign away on the release form.

As for the announcement that will be ok once I have the reference letter. I am sure you understand that under these circumstances I also require assurance of support for future employment.

Please also confirm that any outstanding leave will be paid in addition to the 4 months proposed in your previous email.

Best regards,

Mariam”

[44] Mr Tanna then sent Dr Jarouche a draft (unsigned) reference. It read:

“4 October 2022

To Whom it May Concern

This letter confirms that Mariam Jarouche held the position of **Chief of Quality** with Lipa Pharmaceuticals Limited. Mariam commenced on 7 June 2021 and was employed until 30 September 2022. Mariam resigned to focus on her health, which required a surgery and an extended recovery period.

During her time with Lipa Mariam made a positive contribution to the Quality function. This included an improvement in the efficiency of product testing which resulted in fewer errors, improved outputs and lower external testing costs. She also led improvements in streamlining many processes.

Mariam also brings an energy and a “can do” attitude with a balance in meeting both commercial and compliance requirements.

We wish Mariam a speedy recovery and well for her future endeavours.

Should you require any additional information please do not hesitate to contact me on [REDACTED]

Yours sincerely

Rob Tanna
Chief Executive Officer” (emphasis in original)

[45] At 3.19pm Mr Tanna sent Dr Jarouche a further email:¹⁷

“Hi Mariam

I sent through the draft reference earlier today.

Attached is the Deed of Release and a payment calculation. I confirm that the accrued annual leave will also be paid (see attached).

Please confirm that this is Ok and I will sign the reference and also the Deed of Release. You will need to then send back the signed Deed.

Regards

Rob”

[46] The attachment was a proposed Deed of Release marked “without prejudice until executed”.

[47] The proposed Deed included a recital as follows:

“The Company and the Employee have agreed that the Employment terminated on 30 September 2022 by way of resignation...”

[48] The proposed Deed included provision for payment of three months in lieu of notice plus a further one month *ex gratia*, and accrued statutory entitlements.

[49] Dr Jarouche did not immediately respond.

[50] Mr Tanna sent a text at 4.41pm:¹⁸

“Hi Mariam – sent you email. Thanks Rob”

[51] Dr Jarouche did not immediately respond.

5 October 2022

[52] At 7.56am the following day (Wednesday 5 October 2022) Dr Jarouche responded by email to Mr Tanna. She stated:¹⁹

“Subject: Re: Confidential

Good morning Rob,

The reference letter is fine, thank you.

Will wait on the next steps from your end.”

[53] Mr Tanna was relieved by the response. He informed Lipa’s human resources department that an agreement had been reached.

[54] Mr Tanna instructed that the announcement to staff, in the terms of the draft sent to Dr Jarouche on 3 October 2022, be broadcast. It was sent to staff that day (5 October 2022).

[55] Mr Tanna also signed and sent Dr Jarouche the reference letter dated 4 October 2022.²⁰

6 October 2022

[56] Not having received back the Deed of Release, at 8.12am on 6 October 2022 Mr Tanna sent Dr Jarouche a further text:²¹

“Hi Mariam – hope all is well. I sent you an email yesterday. Can you please review and action. Thanks Rob”

[57] Dr Jarouche did not immediately respond.

[58] Mr Tanna followed up with a further text at 2.03pm:²²

“Hi Mariam – I have reached out several times without success. I need to finalise this. If I don’t receive the signed deed by close of business today we will pay the 3 months notice and accrued leave. Regards Rob”

[59] Dr Jarouche did not immediately respond.

7 October 2022

[60] At 9.42am on Friday 7 October 2022 Dr Jarouche responded by email to Mr Tanna. She stated:²³

“Good morning Rob,

I have received your text message regarding my pay deadline.

Please proceed with payment of the 3 months and my annual leave entitlements as you have stated in your phone message to me.

I do not want to sign the deed of release.

The work mobile will be sent to Lipa pharmaceuticals today via registered post.

Best regards,
Mariam”

10 October 2022

[61] Mr Tanna responded on 10 October 2022. He advised Dr Jarouche:²⁴

“**Subject:** RE: Confidential

Good morning Mariam

On the basis of the matters that have been agreed, I issued to you the reference based upon the fact that you had agreed to resign. I appreciate that you now do not wish to sign the release document. As per your email on Friday, you now state that I should “proceed with the payment of three months” plus your accrued annual leave.

Without any prejudice to the legal position of Lipa, we will pay the amount in lieu of notice into your bank account, plus any accrued but untaken annual leave. So that there is no confusion, we regard you as having resigned the employment, effective 05 October 2022.

Regards

Rob Tanna | Chief Executive Officer”

[62] Lipa proceeded to make a final payment to Dr Jarouche of three months’ pay plus her statutory entitlements.

Litigation

[63] On 21 October 2022, through her solicitors, Dr Jarouche filed these proceedings.

Submissions

Dr Jarouche

[64] Dr Jarouche submits that she was dismissed within the meaning of s 386(1)(a) the FW Act. She says that her employment was terminated on the employer’s initiative. She says that Mr Tanna’s conduct removed her from employment with three months’ pay in lieu of notice.

[65] Dr Jarouche rejects the assertion that she resigned. She submits that:

- She did not resign because her Employment Contract required a resignation to be in writing, and there was no such written resignation;

- She expressly refused to sign Lipa's proposed deed of release in which the company proposed that she resign effective 30 September 2022; and
- Nothing she otherwise said or did constituted an agreement to resign or was an act of resignation.

[66] In the alternative, Dr Jarouche submits that if she resigned, she was forced to do so because of conduct or a course of conduct engaged in by Lipa, and thus was dismissed within the meaning of s 386(1)(b) of the FW Act.

[67] Accordingly, Dr Jarouche submits that her application is within jurisdiction and must proceed to a conference under s 368 and, if unresolved, the Commission must issue a certificate enabling further proceedings.

Lipa

[68] Lipa submit that Dr Jarouche was not terminated at its initiative, that she resigned, and that she was not forced to resign. Thus Lipa submit that Dr Jarouche was not dismissed within the meaning of the FW Act or at all.

[69] In particular Lipa submit that:

- An employer raising exit options with an employee after having lost confidence in the employee does not constitute a termination at its initiative;
- Mr Tanna raised the issue of resignation with Dr Jarouche as "one option";
- Mr Tanna's conduct did not place Dr Jarouche in the position where she had no effective or real choice but to resign;
- Dr Jarouche was given a number of days to consider her position and options;
- Dr Jarouche communicated her agreement to resign on 4 and 5 October 2022 when she advised Mr Tanna that the reference he had prepared was in acceptable terms as was the message to staff;
- On the basis of those representations Lipa sent Dr Jarouche the signed reference and broadcast her resignation to all staff;
- Both the signed reference and the all staff message referred to Dr Jarouche as having resigned, and Dr Jarouche had agreed to those terms;
- The resignation was not made in the heat of the moment;
- The failure by Dr Jarouche to sign the deed of release did not negate the fact that she had resigned. The deed of release provided for terms beyond an acknowledgement of resignation, such as the payment of an *ex gratia* sum. There is no evidence of disagreement on the fact of resignation;

- A contractual requirement that Dr Jarouche resign in writing does not have the effect of negating a resignation; and
- The three month termination payment made by Lipa was consistent with a resignation on three months' notice as required of Dr Jarouche by the Employment Contract, which Lipa had agreed did not need to be worked out.

[70] As such, Lipa submit that there was no dismissal. That being so, the general protections application fails for want of jurisdiction and should be dismissed.

Consideration

[71] Section 365 of the FW Act provides:

“365 Application for the FWC to deal with a dismissal dispute

If:

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

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

[72] Section 365 requires a dismissal to have occurred as a jurisdictional fact. A mere allegation that a person has been dismissed will not establish this as fact.²⁵ “Dismissal” for these purposes (and other purposes of the FW Act) is defined in s 386(1). It 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.”

[73] A full bench of the Commission in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Tavassoli* set out the background to s 386.²⁶

“[33] Notwithstanding that it was clearly established, prior to the enactment of the FW Act, that a “forced” resignation could constitute a termination of employment at the initiative of the employer, the legislature in s.386(1) chose to define dismissal in a way

that retained the “termination at the initiative of the employer” formulation but separately provided for forced resignation. This was discussed in the Explanatory Memorandum for the Fair Work Bill as follows:

“1528. This clause sets out the circumstances in which a person is taken to be dismissed. A person is dismissed if the person’s employment with his or her employer was terminated on the employer’s initiative. This is intended to capture case law relating to the meaning of ‘termination at the initiative of the employer’ (see, e.g., *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200).

1529. Paragraph 386(1)(b) provides that a person has been dismissed if they resigned from their employment but were forced to do so because of conduct, or a course of conduct, engaged in by their employer. Conduct includes both an act and a failure to act (see the definition in clause 12).

1530. Paragraph 386(1)(b) is intended to reflect the common law concept of constructive dismissal, and allow for a finding that an employee was dismissed in the following situations:

- where the employee is effectively instructed to resign by the employer in the face of a threatened or impending dismissal; or
- where the employee quits their job in response to conduct by the employer which gives them no reasonable choice but to resign.”

[34] It is apparent, as was observed in the decision of the Federal Circuit Court (Whelan J) in *Wilkie v National Storage Operations Pty Ltd*, that “The wording of s.386(1)(b) of the Act appears to reflect in statutory form the test developed by the Full Court of the then Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd (No. 1)* and summarised by the Full Bench of the Australian Industrial Relations Commission in *O’Meara v Stanley Works Pty Ltd*” (footnotes omitted). The body of pre-FW Act decisions concerning “forced” resignations, including the decisions to which we have earlier referred, has been applied to s.386(1)(b): *Bruce v Fingal Glen Pty Ltd (in liq)*; *Ryan v ISS Integrated Facility Services Pty Ltd*; *Parsons v Pope Nitschke Pty Ltd ATF Pope Nitschke Unit Trust*.” (footnotes omitted)

Termination at the employer’s initiative

[74] I now deal with whether Dr Jarouche’s employment was terminated at the employer’s initiative.

[75] Termination at the initiative of an employer arises where the action of the employer is the principal contributing factor leading to the termination of the employment relationship.²⁷

[76] Weighing in favour of a finding that Lipa dismissed Dr Jarouche on 29 September 2022 is the fact that Mr Tanna advised Dr Jarouche that:

- in light of his performance concerns, her role was “not working for the business”;

- “the right decision must be made for the business”; and
- it was best that she collect her belongings and leave.

[77] However, context matters. Whilst it is readily apparent that Mr Tanna had lost confidence in Dr Jarouche and that her leaving the business was his objective, Mr Tanna stated that he wanted to “reach an agreed communication and settlement” and to “best position” her to leave the business.

[78] A Chief Executive Officer speaking in those terms to a senior manager is blunt and unwelcome but not, of itself, a termination of employment. Whilst clearly Lipa held the whip hand because it had the power to dismiss, it preferred an agreed exit. Dr Jarouche’s options were limited but she had, and then used, the ability to start bargaining for terms beyond her contractual entitlements. She told Mr Tanna later that day (29 September 2022) that she would participate in the exit negotiation that followed.

[79] Mr Tanna’s conduct on 29 September 2022 did not terminate the employment contract. Nor did Mr Tanna give notice that employment would end on unilaterally determined terms. Those terms were to be negotiated. It was not notice of dismissal Mr Tanna gave but a notification that Dr Jarouche had no continuing future in the business and that there would be a parting of the ways. Mr Tanna opened an exit discussion with his senior quality executive. He proposed a parting of the ways by a managed resignation.

[80] Dr Jarouche continued to be employed the following day, and in the week that followed during which exit terms were discussed.

[81] Despite what was said on 29 September 2022 and done over the following week, and as blunt and unwelcome the message he conveyed, I do not find that Mr Tanna terminated Dr Jarouche’s employment within the meaning of s 386(1)(a).

Forced resignation

[82] I now consider whether Dr Jarouche resigned and, if so, whether she was forced to resign because of conduct or a course of conduct engaged in by Lipa. If this was so, Dr Jarouche was dismissed within the meaning of s 386(1)(b) of the FW Act.

[83] The first question in this regard is whether Dr Jarouche resigned.

[84] Whether an employee has resigned from their employment is a question of fact. A resignation can be oral or in writing.

[85] After Mr Tanna raised the option of a managed resignation in their first (face-to-face) conversation on 29 September 2022, in their second (telephone) conversation, Dr Jarouche stated:

“I am okay with the resignation...”

[86] On the face of it, this statement was an agreement to resign.

[87] However, at that point in time resignation was one element of a broader negotiation. Was this agreement to resign conditional on the package of negotiated terms (resignation, reference and money) being negotiated and agreed?

[88] A strong inference can be drawn that at the time of the second conversation on 29 September 2022 Dr Jarouche's agreement to resign was conditional on other terms being settled, and in particular money. The full text of what she said was:

“I am okay with the resignation, I don't want to go legal but I do need more money and a reference from you Rob. I really need your support to get another role.”

[89] However, the issue did not end there.

[90] On 4 and 5 October 2022, in separate emails to Mr Tanna, Dr Jarouche stated:

- “As for the announcement, that will be ok once I have the reference letter” (4 October); and
- “The reference letter is fine, thank you” (5 October).

[91] In making these representations on 4 and 5 October 2022 Dr Jarouche consented to the terms of both the reference letter and the all staff announcement knowing that the text of both would state that she had resigned from her employment.

[92] At the point in time (5 October) that Dr Jarouche approved the reference and thereby approved broadcasting the “all staff” announcement (which had been held back due to Dr Jarouche seeking the reference), her resignation was no longer a matter of private negotiation but a fact. It was a fact agreed to be stated to third persons by both parties as the basis on which Dr Jarouche had left the business.

[93] I am well satisfied that on 5 October 2022 Dr Jarouche did, in fact, resign. She did that by authorising her employer to announce her resignation to staff and asking the employer to send her the reference on the agreed terms.

[94] I do not accept Dr Jarouche's submission that she did not resign because the exit terms (staff announcement, reference, four months' pay) were a package and the package as a whole was not agreed because she refused to sign the deed and did not receive the additional month *ex gratia* contemplated by the deed.

[95] Whilst the original intention of both parties was that all matters be agreed in order for Dr Jarouche's exit to be amicable, the events of 4 and 5 October 2022 had the effect of divorcing the fact of her resignation from the *ex gratia* payment of an extra month. Dr Jarouche's 4 and 5 October 2022 agreement to the terms of the staff announcement, to the broadcast of the staff announcement and to the reference preceded her 7 October 2022 decision not to sign the deed. She did so knowing (based on Mr Tanna's text messages of 6 October) that, as a consequence, she would forego the extra month's pay. In so doing, she sought to put the issue of her exit back in Lipa's court.

[96] Nor do I accept Dr Jarouche’s submission that no finding of resignation can be made because it was not communicated to Lipa in the written form required by the Employment Contract. A resignation can be oral or in writing. That an employee fails to resign in a manner required by their contract does not detract from the fact that they may have resigned. A breach of contractual obligation does not displace an established fact, where that fact has occurred. In any event, in this matter it is more than tolerably arguable that Dr Jarouche did in fact resign in writing because the approval she gave to her employer to announce her resignation to staff and send the reference was communicated by email of 4 and 5 October 2022.

[97] Was Dr Jarouche’s resignation given in the heat of the moment such that it could not be reasonably relied upon by Lipa?

[98] I think not.

[99] The resignation option first presented by Mr Tanna on 29 September 2022 was accompanied by Mr Tanna stating that:

- “I will respect whichever way you wish to do this. I can draft an announcement about your resignation for you to consider if you wish”; and
- “I realise that this is a lot to take in right now. We can work through the detail of your resignation over coming days.”

[100] Six days elapsed between 29 September 2022 and 5 October 2022 during which time Dr Jarouche considered her position and put exit terms to Mr Tanna, which were responded to. Over this period Dr Jarouche was not required to attend the workplace, and a long weekend arose.

[101] Leaving aside whether her resignation was forced (considered below), the agreement to resign was reasonably acted upon by Mr Tanna once it was communicated on 4 and 5 October 2022. It was a decision made under pressure, but not in the heat of the moment.

[102] For these reasons, I find that Dr Jarouche resigned on 5 October 2022. She did so knowing that Lipa had agreed that she need not work out her contractual notice period and would be paid in lieu.

[103] I now consider whether Dr Jarouche was forced to resign because of conduct or a course of conduct engaged in by Lipa (s 386(1)(b) FW Act).

[104] What is meant by a “forced resignation” is well established.

[105] The statutory test in s 386(1)(b) requires an assessment of “whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable (sic) result of the employer’s conduct such that the employee had no effective or real choice but to resign.”²⁸

[106] Conduct or a course of conduct forcing a resignation is not required to be repudiatory or unlawful. It could, depending on the circumstances, simply be conduct such that, in an objective sense, it forced the employee's resignation.

[107] I am well satisfied, and so find, that Lipa's conduct between 29 September and 5 October 2022 inclusive was "conduct with the intention of bringing the employment to an end" within the meaning of s 386(1)(b).

[108] Mr Tanna's initial discussion with Dr Jarouche on 29 September 2022 proposed no outcome other than her exit from the business; that is, that she no longer be employed as its Chief of Quality. That was Lipa's stated intention, and no other objective existed or was communicated over the following six days. All negotiations were directed to that end. This included Lipa's resignation option, its offer of a staff announcement nuanced around Dr Jarouche's upcoming surgery, its agreement to provide a reference, and its willingness to pay an extra month *ex gratia* in addition to the three months contractual notice it would pay out. These were all targeted at securing Dr Jarouche's exit from the business.

[109] I also find that Lipa's conduct was, in the language of the established authorities on s 386(1)(b)), "such that the employee had no effective or real choice but to resign".

[110] I make this finding noting the caution expressed by an earlier Full Bench:²⁹

"Often it will only be a narrow line that distinguishes conduct that leaves an employee no real choice but to resign employment, from conduct that cannot be held to cause a resultant resignation to be a termination at the initiative of the employer. But narrow though it be, it is important that that line be closely drawn and rigorously observed. Otherwise, the remedy against unfair termination of employment at the initiative of the employer may be too readily invoked in circumstances where it is the discretion of a resigning employee, rather than that of the employer, that gives rise to the termination.

...

The validity of any associated reason for the termination by resignation is tested. Where the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary."

[111] The factors relied upon by Dr Jarouche in support of her contention that she was denied an effective or real choice are:

- The resignation option was raised and initiated unilaterally by Mr Tanna, not Dr Jarouche;
- Dr Jarouche did not plan or wish to leave her employment. She was simply seeking leave for surgery;

- The resignation option was raised by Mr Tanna in circumstances where he had already made a decision that Dr Jarouche’s continuing employment was untenable and that her exit was his intention;
- Whilst Mr Tanna presented resignation as “one option”, it was the only option he presented;
- The stated reason for resignation (upcoming surgery) and the nuancing of communication to staff and potential future employers by reference to that reason was Mr Tanna’s idea;
- Lipa drafted the resignation announcement and reference letter;
- Lipa drafted the deed of release which asserted the fact of resignation. Dr Jarouche refused to sign the deed. In doing so Dr Jarouche refused to accept the contents of the deed including additional money offered in return for her resignation; and
- Monies paid to Dr Jarouche upon her employment ending was no more than the sum required to be paid by Lipa for terminating her employment at its initiative.

[112] The factors relied upon by Lipa in support of its contention that Dr Jarouche had and exercised an effective or real choice are:

- Resignation was presented by Mr Tanna as an option. Other options need not have been expressly stated in order to have existed;
- The negotiations between 29 September and 5 October occurred only because Dr Jarouche indicated, in her return phone call on 29 September 2022, that she would resign;
- Dr Jarouche had time to take her own counsel over multiple days and seek advice as to her options and choices;
- Dr Jarouche’s agreement to resign was made after receiving and considering draft terms of both the resignation announcement and reference letter. Dr Jarouche proposed no changes to those terms; and
- Dr Jarouche’s refusal to sign the settlement deed does not detract from the earlier choices she made to resign and the fact that she had resigned by the time she decided to refuse to sign the deed. At the time of resignation Dr Jarouche had not refused to sign the deed. The choice to not sign the deed was a separate decision from the earlier choice to resign.

[113] For the following reason, I find that Dr Jarouche had no effective or real choice but to resign.

[114] The choice Dr Jarouche exercised on 4 and 5 October 2022 was a choice to agree to Lipa's resignation announcement and reference letter. It was not an expression of any desire on her part to end her employment. Lipa not only had the intention to procure Dr Jarouche's resignation, but that was Mr Tanna's objective. Mr Tanna was the sole instigator of that discussion and did so because he had lost confidence in Dr Jarouche. He had decided that her exit was necessary and he had told her that. All negotiations were directed to Dr Jarouche's exit as the outcome. Mr Tanna put it this way in his evidence:³⁰

“we wanted to achieve an exit... an agreed exit of her employment.”

[115] These facts materially conditioned the choice exercised by Dr Jarouche. Whilst Dr Jarouche agreed to resign when agreeing to the staff announcement and reference letter, the choice she exercised involved no realistic counterfactual whereby, absent exercising that choice, she could reasonably expect to have continued to be lawfully employed as Lipa's Chief of Quality. The employer's objective of achieving her exit was based on a stated loss of trust and confidence by the Chief Executive. That had been communicated to Dr Jarouche in direct terms on 29 September 2022.

[116] I do not make this decision by reference to the fact that Dr Jarouche refused to sign the deed of release on 7 October 2022. I agree with Lipa's submission that this was a separate decision made by Dr Jarouche after the fact of resignation. It is unnecessary to speculate whether this decision represented a change of heart by Dr Jarouche about the fact of resignation or unhappiness with the terms of resignation. As I noted earlier, it was an attempt by Dr Jarouche to put the issue of her exit back in Lipa's court.

[117] Whilst I take into account that Dr Jarouche's resignation was not made in the heat of the moment, it does not automatically follow that Dr Jarouche had a real or effective choice. The objective fact is that despite having considered her position over a number of days, Dr Jarouche still had no effective or real choice but to resign. The fact that her Chief Executive had sought her departure on 29 September 2022 on the ground of a loss of trust and confidence remained unaltered as of 4 and 5 October 2022. Nothing Lipa said or did in the interim changed that fact.

[118] In arriving at this decision I note the evidence of Mr Tanna that he considers that Dr Jarouche “played” the company by extracting from it a reference stating the fact of resignation but then refusing to sign the deed and subsequently taking legal action asserting dismissal. Mr Tanna's evidence that the company would not have provided a reference had the resignation not been agreed and had it remained exposed to legal proceedings is plausible. However, Mr Tanna's opinion on that question can play no part in this decision. It is no more relevant than Dr Jarouche's view that forcing her exit from the company was unfair and that by refusing to sign the deed she forwent an extra month's pay. This decision is based on the application of facts to legal principle, not whether conduct between senior officers of the company was, in their opinion, fair or ethical.

Conclusion

[119] I have found that Dr Jarouche's resignation was forced within the meaning of s 386(1)(b) of the FW Act. Accordingly, Dr Jarouche was dismissed from employment.

[120] The jurisdictional objection by Lipa is dismissed. Dr Jarouche's application under s 365 of the FW Act is within jurisdiction.

[121] As conciliation has occurred and as the matter was unresolved by conciliation, I am satisfied that all reasonable attempts to resolve the dispute other than by arbitration have been or are likely to be unsuccessful. A certificate under s 368(3)(a) will be issued.

[122] As any proceedings on merit are likely to concern facts and submissions beyond those considered to date by the Commission, I do not consider it appropriate to provide advice to the parties under s 368(3)(b).

[123] An order giving effect to this decision will be issued in conjunction with its publication.³¹



DEPUTY PRESIDENT

Appearances:

Ms E Dalrymple, *of counsel and with permission*, with Mr M Gillis, on behalf of Dr M Jarouche

Mr P Brown, *with permission*, on behalf of Lipa Pharmaceuticals Ltd

Hearing details:

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Adelaide (by video)

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¹ [2020] FCAFC 152

² MJ1

³ LPL1; LPL2

⁴ (1893) 6 R 67

⁵ Emails from the parties' representatives to 'Chambers - Anderson DP' on 16 February 2023

⁶ MJ1 Attachment A

⁷ LPL1 RT10

⁸ LPL1 paragraph 25

⁹ MJ1 paragraph 6

¹⁰ LPL1 paragraph 26

¹¹ LPL1 paragraph 28

¹² LPL1 RT11

¹³ LPL1 RT11

¹⁴ LPL1 RT11

¹⁵ MJ1 Attachment B

¹⁶ LPL1 RT12

¹⁷ LPL1 RT13

¹⁸ MJ1 Attachment B

¹⁹ LPL1 RT14

²⁰ MJ2

²¹ MJ1 Attachment B

²² MJ1 Attachment B

²³ LPL1 RT15

²⁴ LPL1 RT16

²⁵ *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152 at [54]

²⁶ [\[2017\] FWCFB 3941](#)

²⁷ *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200

²⁸ *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Tavassoli* [\[2017\] FWCFB 3941](#) at [47]

²⁹ *Barkla v G4S Custodial Services Pty Ltd* [\[2011\] FWAFB 3769](#) citing with evident approval the Full Bench of the Australian Industrial Relations Commission in *Doumit v ABB Engineering Construction Pty Ltd* (unreported, AIRC (FB), N6999, 9 December 1996)

³⁰ Audio recording of Hearing, 16 February 2023, 1:58:38

³¹ [PR751253](#)