DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Vincent Chapman
v
Site Clean Management Services Pty Ltd
(U2022/11640)

DEPUTY PRESIDENT MASSON MELBOURNE, 7 MARCH 2023

Application for an unfair dismissal remedy – jurisdictional objection raised – whether dismissed within meaning of s 386(1)(a) or (b) – found that Applicant dismissed within meaning of s 386(1)(b) – dismissal found to be unfair – reinstatement inappropriate – compensation not awarded.

Introduction

[1] On 7 December 2022, Mr Vincent Chapman (the Applicant) lodged an application pursuant to s 394 of the *Fair Work Act 2009* (the Act) in which he asserts that the termination of his employment with Site Clean Management Services Pty Ltd (the Respondent) on 23 November 2022 was unfair. The Applicant seeks an order for compensation.

[2] On 20 December 2022, the Respondent filed its Form F3 response to the unfair dismissal application in which it raised a jurisdictional objection to the application, that being the Applicant was not dismissed.

[3] Conciliation of the matter before the Commission failed to achieve a resolution and consequently the matter was listed for mention/conference before me on 11 January 2023. After hearing from the parties, I determined to conduct a hearing pursuant to s 399 of the Act. The matter was listed for hearing on 27 February 2023.

[4] At the hearing, Emilia Michaylov appeared for and called the Applicant to give evidence. Michelle Goodwin appeared for the Respondent and called the following three witnesses;

- John Goodwin – Director for Site Clean Management Services Pty Ltd
- Brok Wightman – Construction Manager for Site Clean Management Services Pty Ltd
- Ricky Vincenzino – Leading Hand Carpenter for Site Clean Management Services Pty Ltd

Background and evidence

[5] The Applicant commenced employment with the Respondent on 10 September 2018 in the position of Junior Site Supervisor (Supervisor) on a permanent full-time basis. He was covered in his employment by the *Building and Construction General On-Site Award 2020*[1] (the Award) and at the time of his dismissal his annual salary was $75,198.00. His remuneration package also included superannuation, a company supplied mobile phone and company provided motor vehicle (the Ute). The Applicant variously stated during cross-examination that; he had enjoyed his Supervisor role with the Respondent, he routinely supervised up to 20 people in the role, he did not like change and consequently did not routinely change jobs.

Leading Hand role and 14 September meeting

[6] On 19 August 2022, Mr Wightman sent the Applicant a role description for a proposed new role, that of SCMS Minor Works – Leading Hand[2] (Leading Hand). Mr Wightman was questioned on why he had sent the position description to the Applicant. He responded by stating that arising from an earlier performance review it had been determined by the Respondent that the Applicant was a "solid achiever" but at the lower end of that scale and that he would be better placed in a role where he used his carpentry skills to a greater extent.

[7] On 8 September 2022, Mr Goodwin sent an email to the Applicant indicating that while he had hoped to meet with the Applicant on the immediately following Friday to discuss the new role and contract, that meeting would need to be postponed until the following week. Mr Goodwin sought feedback from the Applicant as to whether he had any questions about the new position description previously issued in August 2022[3]. Mr Goodwin claims no feedback was provided on the position description; a claim disputed by the Applicant who inferred there had been discussion prior to the position description being sent to him.

[8] On 12 September 2022, Mr Goodwin sent a further email to the Applicant requesting that he come in for a meeting to discuss the Applicant's performance. The Applicant was asked to advise when he would be in so that a meeting time could be arranged[4]. The meeting was subsequently held on 14 September 2022, to which the Applicant attended along with Mr Goodwin and Mr Wightman.

[9] Both Mr Wightman and Mr Goodwin were pressed on why the purpose of the meeting as notified to the Applicant on 8 September 2022, that being to discuss the position description and contract, changed within a matter of four days to being for the purpose of discussing the Applicant's performance. Mr Wightman was unable to explain the reasons for the change beyond referring to concerns held regarding the Applicant's performance arising from his performance review. Mr Wightman agreed that the Respondent wanted to move the Applicant out of the Supervisor role but could not explain why the contract referred to in Mr Goodwin's email of 8 September 2022 was not provided to the Applicant.

[10] Mr Goodwin was similarly vague as to the reasons for the change in purpose of the meeting conducted on 14 September 2022 and stated that new contracts for employees were delayed and were in fact not put in place until recently. He further stated that the proposed contract for the Applicant was not implemented and that the Applicant had shown no interest in the Leading Hand role. Mr Goodwin was unable to explain why his email of 8 September 2022 specifically referred to discussing the contract when on his own evidence he was not in a position to discuss it with the Applicant at that stage. Mr Goodwin also acknowledged during

cross-examination that the Applicant had previously expressed to him that he wanted to get "off the tools". He could not however reconcile the Applicant's desire to get "off the tools" with his own view that by the Applicant taking on the Leading Hand role which would require more hands on work, that was in the best interests of the Applicant. He did clarify that by the 14 September 2022, he had formed a view that a performance management plan for the Applicant was required.

[11] On 21 September 2022, the Applicant sent an email to Mr Goodwin setting out his summary of the meeting held on 14 September 2022. He stated in the email that Mr Goodwin had advised him during the meeting that his role was no longer required arising from which he was provided with a position description for a proposed new role. He also claimed in the email that Mr Goodwin subsequently called him on 16 September 2022 asking him if he had decided to resign and if not, he would have a performance plan put in place to which the Applicant had responded that he would not be resigning[5].

[12] At 6.44pm on 21 September 2022, Mr Goodwin replied by email[6] to the Applicant's email of earlier that day. In doing so, Mr Goodwin sought to assure the Applicant that he had not been asked to resign and emphasised that the "performance management plan is and always has been the first option". When pressed in cross-examination on why he used the particular phrase of "first option", he rejected that it supported the Applicant's claim of their being an alternative path of resignation encouraged by Mr Goodwin. He was adamant that the performance management plan was in fact the only option.

[13] Mr Wightman was cross-examined on the 14 September 2022 meeting. He confirmed that he did not take minutes of the meeting and did not say anything during the meeting. He rejected that the Applicant was encouraged or told to resign by Mr Goodwin during the meeting. When asked to comment on the Applicant's record of the meeting as recorded in the Applicant's email to Mr Goodwin on 21 September 2022 Mr Wightman stated that the email was not entirely accurate. He specifically disagreed with the statements in the email that the Applicant was told his role of Supervisor was no longer required or that he should resign the alternative to which would be a performance management plan.

[14] On 6 October 2022, Mr Goodwin sent an email to the Applicant advising that organising a meeting to discuss the Applicant's performance had been delayed and that he would be looking to arrange a meeting for 14 October 2022[7].

Company restructure and potential redundancy

[15] On 11 October 2022, Mr Goodwin sent an email to staff in which he provided a "Company Update"[8] (the Company Update). The correspondence indicated the Respondent was facing some business challenges, there would consequently be restructuring which may result in potential redundancies and any employees affected would be contacted and consulted. Mr Wightman was cross-examined on his knowledge of the nature of the restructuring that was referred to in Mr Goodwin's email. He responded that one of the carpenters (Mr Vincenzino), who was formerly a senior carpenter was promoted to the position of a leading hand carpenter. Mr Vincenzino confirmed during his evidence that he had been promoted but was unable to articulate how his role had changed beyond stating he had assumed more responsibility and received a pay increase.

[16] On 12 October 2022, Mr Goodwin sent an email[9] to the Applicant advising that he had tried to call the Applicant and left a message, and that attached to the email was a letter advising that the Respondent was considering making his role redundant. In the email Mr Goodwin requested the Applicant to attend a meeting at 8.30am on 13 October 2022.

[17] The letter dated 12 October 2022 sent to the Applicant was titled "Risk of Potential Redundancy"[10] (the Redundancy Letter). It foreshadowed the potential redundancy of the Applicant's role and stated that while no final decision had been made, the Respondent wished to hold a meeting with the Applicant to discuss a number of matters including; the impact of the potential redundancy on the Applicant, any suggestions the Applicant may have and options for redeployment. A "consultation meeting" was arranged for 8.30am 13 October 2022 at the Respondent's Werribee South office. The Applicant was told he may bring a support person and that if his role were made redundant and there were no suitable redeployment opportunities available, he would be given notice that he would be terminated on the grounds of redundancy.

[18] At 6.44am on Thursday 13 October 2022, the Applicant responded to the email and text messages from Mr Goodwin sent the previous day regarding the proposed meeting for that day. The Applicant advised Mr Goodwin that he was unable to attend the scheduled meeting as he needed carers leave[11].

[19] At 11.26pm on 13 October 2022, the Applicant sent a further email[12] to Mr Goodwin advising that he required personal leave for 14 October 2022, that a certificate for his absence on 13 October 2022 was attached to the email and that he would see Mr Goodwin the following week. The Applicant also requested in the email that two weeks of his accrued annual leave be cashed out and paid to him.

[20] At 12.28pm on 14 October 2022, Mr Goodwin responded by email[13] to earlier advice from the Applicant regarding his absence that day. Mr Goodwin indicated he had no difficulty paying out the annual leave as requested by the Applicant.

[21] At 6.59am on Monday 17 October 2022, the Applicant sent a text message to Mr Goodwin advising that he was feeling unwell and would not be attending work that day[14].

Applicant's company vehicle

[22] At 9.19am on Monday 17 October 2022, Mr Goodwin responded by email[15] to advice from the Applicant that he would be away that day. Mr Goodwin asked the Applicant to provide a certificate for the "past couple of days." Mr Goodwin also advised the Applicant that in the interim, he would be arranging for the Ute to be picked up that morning from the Applicant's house and he requested that the keys be left in the mailbox. He further advised the Applicant that once he was well enough, Mr Goodwin would arrange for someone to pick him up for work.

[23] At 10.55am on 17 October 2022, Mr Goodwin sent an email[16] to the Applicant advising him that "Clint" picked up the Ute that morning despite the Applicant not having left the keys in the mailbox as requested as "Clint" had a spare set of keys. Mr Goodwin also noted that "Clint" knocked on the door several times but no one appeared to be home. He also requested

the Applicant to contact him when he was ready to return to work so it could be arranged for someone to pick him up.

[24] At 5.01pm on 17 October 2022, Mr Goodwin sent a further email[17] to the Applicant urging him to contact the Respondent as he had not responded to repeated attempts to contact him. The Applicant stated that he felt that the frequency with which Mr Goodwin was attempting to contact him was aimed at making it appear as if the Applicant had abandoned his employment, a claim denied by Mr Goodwin. Mr Goodwin confirmed during cross examination that he routinely checked on employees when they were absent due to illness, this evidence being confirmed by both Mr Wightman and Mr Vincenzino who both stated they were contacted by Mr Goodwin if they were absent due to illness.

[25] At 7.55pm on 17 October 2022, the Applicant responded by email[18] to Mr Goodwin's earlier emails. In the email the Applicant expressed concern that Mr Goodwin had authorised an employee to come to the Applicant's residence and remove company property (the Ute) which formed part of the Applicant's employment package. The Applicant claimed he had been at a medical appointment at the time and requested that his work vehicle be returned. He restated in his email his claim that Mr Goodwin had requested him to resign and threatened to put him on a performance plan. He also advised that he had been on carers leave on Friday 14 October 2022, was on sick leave on 17 October 2022 and would remain on sick leave until Friday 21 October 2022.

[26] At 8.40am on 18 October 2022, Mr Goodwin sent an email[19] to the Applicant acknowledging receipt of medical certificates but because they were too small to read Mr Goodwin requested they be resent. Mr Goodwin assured the Applicant that his personal details had not been shared with colleagues and expressed concern that the Applicant was unwell. Regarding the Ute, Mr Goodwin confirmed that he would arrange for the Applicant to be picked up when he was ready to return to work. The Applicant subsequently replied by email[20] at 10.37am on 18 October 202 to Mr Goodwin's email. In doing so he pressed for a copy of the company policy relied on by the Respondent to come to his private residence and take his work vehicle. He also advised on arrangements for return of his personal tools to his residence.

[27] At 2.16pm on 18 October 2022, Mr Goodwin sent an email[21] confirming that he had dropped off the Applicant's personal tools as arranged. He also requested the Applicant to resend the medical certificates and advised that he would contact the Applicant again the following Monday to arrange a pick-up time.

[28] During cross-examination, the Applicant stated that the company vehicle was a contractual benefit provided under the terms of the contract of employment that he entered into on commencement with the Respondent, with which evidence Mr Goodwin agreed. The Applicant further claimed that during his employment with the Respondent, the only time he had been required to return his motor vehicle to the yard was when he was on an extended period of leave and that he had not been required to return the vehicle if he was on sick leave for a few days as had been the case on 17 October 2022. He referred in particular to when he was absent for one week due to suffering a COVID-19 infection, in which case he was not required to return the Ute to the yard. The Applicant also stated that he was required to return the Ute keys to the Respondent on 26 October 2022, a claim not disputed by Mr Goodwin.

[29] The Applicant questioned both Mr Wightman and Mr Vincenzino regarding whether they had been required to return their company vehicles at any time or whether their vehicles had been removed from their private property. Both men agreed that they had not been required to return their company cars to the yard for short absences nor had them removed from their homes. Mr Wightman was also asked to explain why the Ute was not returned to the Applicant when he was able to return to work, to which he responded that he understood the car wasn't returned because the Applicant was not prepared to do the carpentry element of his role.

[30] When questioned on the Applicant's Ute, Mr Goodwin agreed it was a contractual benefit, agreed that it was not returned to the Applicant when he was able to return to work and accepted that was a mistake in hindsight. He did however attempt to justify his action of withdrawing the Ute from the Applicant on two bases. Firstly, that the Applicant had 19 days off on personal/carers leave in the August/September period, a claim that was unsupported by any documentation or leave records. Secondly, Mr Goodwin referred to car detailing costs incurred in dealing with the Ute and indicated he held concerns about the Applicant's care for the vehicle.

26 October 2022 Meeting

[31] A meeting was held on 26 October 2022 for the purpose of consulting the Applicant regarding the potential redundancy of his position. The Applicant attended with his support person Mr Vincenzino while the Respondent was represented by Mr Goodwin and Mr Wightman. At 5.27pm on 26 October 2022, the Applicant sent an email[22] to Mr Goodwin providing the Applicant's summary of the meeting held that day to discuss his position of Supervisor with the Respondent. The Applicant variously claimed in the email that he had been required to return his work vehicle, had been told his job is no longer required and is redundant and that the option was raised with him of taking on a role as a carpenter on a full-time or contract basis. The Applicant also observed that "based on today's meeting our working relationship has concluded" and requested that his entitlements be paid within the next pay cycle scheduled for Friday 28 October 2022.

[32] At 6.07pm on 26 October 2022, Mr Goodwin responded by email[23] to the Applicant's email sent at 5.27pm that day. Mr Goodwin acknowledged receipt of the Applicant's email and advised him that if he wished to conclude his working relationship with the Respondent he would need to forward a letter of resignation.

[33] At 9.56pm on 26 October 2022, Mr Goodwin sent a further email[24] to the Applicant setting out his summary of the "consultation meeting" held that day. Mr Goodwin confirmed in the email that the Applicant's role was under review, a redeployment opportunity as a full-time carpenter or as a contracted carpenter was available, in response to which the Applicant had confirmed during the meeting that he was not interested in any roles other than the Supervisor role he held. Mr Goodwin stated a final decision on the Applicant's role would be made as soon as possible, "strongly reiterated" that a final decision on the Applicant's role had not been made yet and given the Applicant's email sent at 5.27pm that day, questioned whether the Applicant wanted to resign.

[34] At 8.09pm on 27 October 2022, the Applicant sent an email[25] to Mr Vincenzino who had attended the 26 October 2022 'consultation meeting' as the Applicant's support person.

The Applicant attached to the email Mr Vicenzino's handwritten notes[26] of the meeting and requested confirmation that Mr Goodwin had stated in the meeting that the Applicant's position was no longer required due to the restructure of the company. He also requested Mr Vincenzino to confirm whether the Applicant's summary of the 26 October 2022 meeting as set out in his email to Mr Goodwin at 5.27pm on 26 October 2022 was accurate.

[35] At 8.51pm on 27 October 2022, Mr Vincenzino responded by email[27] to the Applicant stating that the notes attached to the Applicant's email were "to the best of my ability". Mr Vincenzino went on to state as follows;

> "…….
>
> John did say that, the future of the junior site supervisor role was in question and was no longer required.
>
> Your interaction with John, prior to the meeting, I am unable to comment, as I was not aware of the events that took place.
>
> The email sent to you by John, on the 26 of October, is in reply to your email, before John had a chance to give you a decision, of where you would be working for the rest of the week.
>
> ……."

[36] Mr Goodwin was questioned on the meeting of 26 October 2022. He denied having told the Applicant he should resign. He also disagreed with other aspects of the Applicant's summary of the meeting set out in his email sent to Mr Goodwin at 5.27pm on 26 October 2022. Specifically, he rejected that he had told the Applicant that his Supervisor role was no longer required and that he was to be made redundant. Mr Goodwin was pressed to reconcile his claim that the Applicant's role was not redundant with the fact that no supervisory work was made available to the Applicant. Mr Goodwin responded that despite the Applicant's resignation, the Applicant's former role had not been removed and that the Respondent had been advertising to fill the role for several months, without success. He attempted to explain that at the time of the Applicant's dismissal, the construction industry was going through a difficult period which had affected the Respondent and caused uncertainty for the business.

[37] During cross-examination the Applicant accepted that he had received the above-referred email from Mr Goodwin on 26 October 2022. However, unlike the version in evidence which was signed by Mr Goodwin, Mr Wightman and Mr Vincenzino, the version he received did not have a signature block at the bottom of the email or contain signatures of the three afore-mention men. Mr Wightman confirmed during cross-examination that he signed the 26 October 2022 email during preparation of material for the unfair dismissal proceedings and not at the time it was sent to the Applicant.

[38] Mr Vincenzino was also cross-examined on the meeting of 26 October 2022 and the notes he made of that meeting that were in evidence. He confirmed his recollection that the Applicant was told that no decision had been made on the Supervisor role at that point and he did not recall the Applicant being asked to resign. He did however confirm that his notes

recorded it being said by Mr Goodwin in the meeting that the "junior role" was "not required" and that in respect of the question of redundancy, he had written "yes in short". He also confirmed during cross-examination that in the period leading up to and including the events of September and October the Applicant had confided to him that he had been seeking alternate employment and had been unhappy in the role and with Mr Goodwin.

[39] Mr Wightman was also questioned on the meeting of 26 October 2022. He also confirmed that the Applicant was told his job was at risk but that no decision had been made at that point. He rejected that the Applicant was asked to resign by Mr Goodwin during the meeting. He agreed however that while the Applicant had undertaken supervisor work in the period prior to the 26 October 2022 meeting, no supervisor work was made available to the Applicant after that date.

Applicant's resignation and notice period

[40] At 12.02am on 2 November 2022, the Applicant emailed[28] Mr Goodwin advising he felt he had no choice but to resign having been told that his role as Supervisor was no longer required due to the Company restructure. He further claimed to have been told by Mr Goodwin to either sign an agreement to leave or hand in a letter of resignation. He requested his entitlements be processed and he provided a medical certificate for the period from 17-21 October 2022. When pressed in cross-examination on the reason for his resignation the Applicant pointed to the following matters as forcing his decision;

- advice from Mr Goodwin that his role was no longer required in a meeting on 14 September 2022 and in a follow-up telephone conversation on 16 September 2022;
- his access to the weekly work report was removed from 14 October 2022;
- his company motor vehicle was withdrawn from him on 17 October 2022 and was not restored when he was able to return to work after an absence on personal/carers leave;
- his immediate supervisor ("Tristan") to whom he had reported for 18 months ceased to engage directly with him after the Applicant was asked to resign at the meeting on 14 September 2022; and
- harassing emails and text messages from the Respondent in the period when he was unwell.

[41] At 7.27pm on 2 November 2022, Mr Goodwin replied by email[29] to the Applicant's email sent earlier that day confirming receipt of his resignation. Mr Goodwin took the opportunity of reiterating that the Applicant's role was under review and that the decision was pending. Mr Goodwin sought confirmation as to whether the Applicant would be working out his notice period and whether the Applicant intended to keep the company phone, charger and phone cover or hand them back. The Applicant was encouraged to call Mr Goodwin if he had any questions.

[42] At 9.14am on 4 November 2022, the Applicant responded by email[30] to Mr Goodwin confirming that he was providing three weeks' notice of resignation in accordance with Award requirements. The Applicant again claimed in the email that he resigned because he was told his role was no longer required, that he was asked to resign, that he had been bullied, that his company vehicle had been removed from his private property and that he had been required to return various materials on 26 October 2022. He further claimed that he had remained ready to

work but had been unable to do so because his company car had been withdrawn from him and the Respondent had not made contact to make arrangements for his transportation to work.

[43] At 5.05pm on 9 November 2022, Mr Goodwin sent an email[31] to the Applicant to which was attached a letter dated 8 November 2022[32] (8 November Letter) confirming receipt of the Applicant's resignation and acknowledging the required three week notice period from 3 - 24 November 2022. Mr Goodwin claimed in the letter that the Respondent had attempted to arrange for the Applicant to attend work but had been met with either no response or a text advising the Applicant was unwell. Mr Goodwin referred to an email sent to the Applicant on 2 November 2022 asking whether the Applicant intended to work the notice period to which no response had been received. Mr Goodwin confirmed his presumption that a "no work notice period will apply" and that payment of entitlements would be processed on 24 November 2022. The Applicant was also requested in the covering email to return company property by 23 November 2022.

[44] At 11.30pm on 9 November 2022, the Applicant responded by email[33] to Mr Goodwin. In doing so, he rejected that he had not been ready to work and referred to the confiscation of his work vehicle and claimed that Mr Goodwin had not called him since 17 October 2022 nor emailed him since 31 October 2022. He also complained that access to his work email and work app had been removed despite not having finished his notice period.

[45] At 5.32pm on 10 November 2022, Mr Goodwin sent an email[34] to the Applicant confirming that the Respondent had sent a text that morning to both the Applicant's personal and work phone to arrange for someone to pick him up the following morning so that the Applicant could work out his notice period. Mr Goodwin advised that as the Applicant had not responded, it was assumed he would not be working the following day. The Applicant was requested to advise as the Respondent needed to make the necessary arrangements.

[46] At 9.11pm on 10 November 2022, the Applicant responded by email[35] to Mr Goodwin's email of earlier that day. In doing so he claimed that he had been ready every day for a 7am start and it should not be assumed he was not coming to work unless told otherwise. He also sought advice on what work he would be doing as there was no Supervisor work for him and requested an updated redundancy letter that included three weeks' notice, eight weeks' redundancy pay and four years' worth of outstanding contributions to the Coinvest Long Service Leave scheme. The Applicant attended work on 11 November 2022, although he stated that there was in fact no work being undertaken that day on the site he was directed to, with which evidence Mr Wightman agreed.

[47] On 17 November 2022, Mr Goodwin wrote[36] to the Applicant confirming that his notice period would be paid out, according to the Applicant's request, as a combination of annual leave, one day's normal pay and leave without pay. The Applicant denied having made such a request.

[48] For the pay period 14-27 October 2022, the Applicant attended work for two days in that period (25 & 26 October 2022) and received eight days personal/carers leave for the balance of the days in that fortnight[37].

[49] For the pay period 28 October – 10 November 2022, the Applicant did not attend work and received payment of one days public holiday payment (Melbourne Cup), one days annual leave and the balance of the fortnight (eight days) was processed as unpaid leave[38].

[50] For the pay period 11-24 November 2022, which was the Applicant's final pay, the Applicant received one day's pay for time worked on 11 November 2022, nine days' annual leave payment and his outstanding accrued annual leave balance of 163 hours was paid out on termination[39]. The payment of the notice period as a combination of annual leave and one day's pay for time worked, was processed at the request of the Applicant according to the Respondent[40]. The Applicant rejected that he had requested the Respondent to process his final pay in the manner described by the Respondent.

Applicant's employment with Catholic Regional College

[51] On 19 September 2022, the Melbourne Archdiocese Catholic Schools Ltd Catholic advertised the role of Property Manager at the Catholic Regional College at Caroline Springs (the College)[41].

[52] On 22 September 2022, the Applicant applied for the above-referred Property Manager role with the College[42]. The Applicant claimed in cross-examination that he was unaware that the College was a client of the Respondent, a point confirmed by Mr Goodwin in his evidence.

[53] At 1.30pm on 14 October 2022, the Applicant attended an interview at the College with the Principal and Deputy Principal for the Property Manager role he had applied for[43]. The Applicant was pressed during cross-examination to reconcile his claim for carers leave on 14 October 2022 with his attendance at an interview for the role with the College. He explained that he was required to look after his young child that day due to his partner being ill and that he was only able to attend the interview at the College at the appointment time of 1.30pm because his partner was breast feeding their child at that time.

[54] On 20 October 2022, the College provided an offer of employment[44] (the Offer of Employment) to the Applicant. The hours of work and the date of his commencement with the College were to be confirmed. The Applicant signed and accepted the Offer of Employment on 23 October 2022. He agreed in cross-examination that after accepting the role with the College he did not disclose that information to the Respondent prior to his resignation from the Respondent on 2 November 2022.

[55] On 25 October 2022, the Applicant received a letter[45] (the Variation Letter) from the College confirming a variation to his Offer of Employment. The Variation Letter confirmed his hours of duty and a commencement date of Monday 14 November 2022. The Applicant signed his acceptance of the Variation Letter on 7 November 2022.

[56] The Applicant was also pressed in cross-examination on why he failed to disclose to the Respondent at the meeting on 26 October 2022 that he had already accepted the role with the College on 23 October 2022. The Applicant responded that even at the point of the 26 October 2022 meeting he remained hopeful that his employment situation with the Respondent could have been resolved through him remaining in his supervisor role. He further claimed that had

his position with the Respondent been resolved favourably, he would have withdrawn from the role with the College.

[57] At 8.00am on 27 October 2022[46], the Applicant attended the Caroline Springs campus to spend the day with the College's previous Property Manager and the current College Maintenance Officer for a handover for the new role the Applicant had accepted with the College[47].

[58] During cross-examination the Applicant was questioned on his evidence that he was ready and available to work for the Respondent on 27 October 2020 in circumstances where he undertook a handover with the College on that same day. The Applicant explained that evidentiary tension by stating that during the meeting on 26 October 2022 he questioned Mr Goodwin on whether he had any work for him the following day, to which he says he was advised by Mr Goodwin that he would get back to him. The Applicant says that as he was not subsequently contacted by Mr Goodwin regarding work on 27 October 2022, he contacted the College on the afternoon of 26 October 2022 to arrange the handover at the College for the following day. When pressed on that evidence the Applicant conceded that he may not have contacted the College that afternoon and also agreed that the handover day appointment may have been sent to him and arranged prior to his meeting with the Respondent on 26 October 2022.

[59] Mr Wightman agreed during his cross-examination that the Applicant had asked during the meeting on 26 October 2022 where he would be working on 27 October 2022, to which Mr Goodwin replied he would get back to the Applicant.

[60] The Applicant also confirmed in cross-examination that he commenced work for the College on 14 November 2022 and worked the entire week of 14-18 November 2022 at the College. Because Mr Goodwin raised concerns regarding him not having completed his notice period with the Respondent, the Applicant did not work for the College again until after his formal notice period ended on 23 November 2022. His hourly rate of pay for his role with the College is $45.05 which equates to an annual salary of $89,324.85 (excluding superannuation).

Has the Applicant been dismissed?

[61] A threshold issue to be determined in this matter is whether the Applicant has been dismissed from his employment. The circumstances in which a person is taken to be "dismissed" are set out in s 386 of the Act. Section 386(1) relevantly provides as follows:

> (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.

[62] Section 386(2) of the Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant. In this matter, the Applicant contends that he

was dismissed from his employment as per the second limb of s.386(1). He contends that he resigned because of the Respondent's conduct or course of conduct.

Evidentiary findings

[63] In turning to consider whether the Applicant was dismissed at the Respondent's initiative, it is necessary for me to make findings in relation to a number of matters. That is so because of the substantial factual contest over issues central to establishing whether the Applicant's dismissal was at the initiative of the Respondent.

[64] It is uncontroversial that the Applicant, who is a carpenter by trade, commenced employment with the Respondent in 2018 in the Supervisor role. He was covered in his employment by the Award and at the time of his dismissal was in receipt of annual base remuneration of $75,198. It was also uncontested that the Applicant was entitled as part of his contract of employment to superannuation, a work mobile phone and a company vehicle. The Applicant had not been subject to any performance management or disciplinary action during his employment with the Respondent.

[65] I am satisfied on the evidence that in mid-2022, the Applicant participated in a performance review arising from which he was assessed as a "solid achiever". I also accept on the evidence that the Respondent placed him at the lower end of that rating and felt his skills would be better utilised as a carpenter rather than as Supervisor. To that end the Respondent provided a position description to the Applicant to consider on 19 August 2022 for the role of Leading Hand which was more of a hands on carpenter role. While the Applicant sought to infer that he did respond to the Position Description, there is no evidence before me that established that the Applicant responded or commented on the position description provided to him. It is clear and I am satisfied that the Applicant had no interest in taking on a more junior role and had made clear to the Respondent in the past that he wanted to get "off the tools".

[66] Mr Goodwin foreshadowed to the Applicant on 8 September 2022 that he wished to have a meeting to discuss the position description and contract. However, in the space of four days, the stated purpose of the meeting changed to that of holding a meeting to discuss the Applicant's performance, as evidenced by Mr Goodwin's email of 12 September 2022. Mr Goodwin and Mr Wightman's evidence on the change in purpose of the meeting was unconvincing and did not satisfactorily explain why the position description and contract ceased to be of importance. The unsatisfactory evidence of Mr Goodwin and Mr Wightman is a matter to which I will shortly return.

[67] The meeting proceeded on 14 September 2022, following which the Applicant sent an email on 21 September 2022 to Mr Goodwin detailing his account of the meeting. Critically, the Applicant claimed he had been told his role was no longer required and that he had been asked to resign. He also claimed that in a subsequent telephone conversation with Mr Goodwin on 16 September 2022 he was again pressed to resign and was told that if he did not do so he would be put on a performance management plan. Both Mr Goodwin and Mr Wightman claimed that the Applicant was not pressed to resign or told his job was no longer required at the meeting. I found their evidence to be unconvincing and contrived for the following reasons.

[68] The Applicant provided a detailed note of the meeting and was consistent in his evidence as to what was stated to him both at the meeting and in the follow-up telephone conversation with Mr Goodwin on the 16 August 2022. While both Mr Wightman and Mr Goodwin were adamant no such comments were made, neither made contemporaneous notes of the meeting and could not adequately explain why the performance discussion was initiated in an email to the Applicant on 12 September 2022 despite Mr Goodwin having stated to the Applicant in an email only four days earlier on 8 September 2022 that he wanted to discuss the position description (for the Leading Hand role) and contract. Mr Goodwin's explanation that he had formed the view by 14 September 2022 that a performance management plan was necessary was entirely unconvincing given the performance appraisal had taken place at least a month earlier when the Applicant had been assessed as a "solid achiever".

[69] A more credible explanation is found in the Applicant's evidence, that being he had made clear he did not want to do the lesser role of Leading Hand and had no intention of resigning. In that context, the threat of a performance management plan is entirely consistent with the comments attributed to Mr Goodwin both in the 14 September meeting and during the 16 September telephone conversation between he and the Applicant. I also note the language used in Mr Goodwin's email of 21 September 2022 where he referred to the performance management plan as the "first option". He sought to back away from that language during cross-examination but I found his evidence on this point unconvincing. The language used by Mr Goodwin specifically contemplates other options being available to deal with the situation of the Applicant's employment, which was the very matter raised by the Applicant with Mr Goodwin in his email on 21 September 2022.

[70] It follows from the above that I accept the Applicant's evidence that it was made clear to him in the meeting on 14 September and during his follow-up telephone conversation with Mr Goodwin on 16 September 2022 that the Applicant's role was no longer required. I am further satisfied on the evidence that the Respondent wished to remove the Applicant from the Supervisor role based on its view that his skills would be better utilised as a carpenter. The Leading Hand role was floated with the Applicant but he showed no interest, following which the Respondent elected to then threaten the Applicant with a performance management process. My view on this is fortified by the timing of Applicant's application on 22 September 2022 for the Property Manager role with the College, that timing being consistent with the Applicant having formed a view that his employment with the Respondent was at risk.

[71] There was also unchallenged evidence given by the Applicant that in the wake of the 14 September 2022 meeting with Mr Goodwin and Mr Wightman, the Applicant's direct supervisor ceased to engage directly with him and that the Applicant was then reliant on information passed to him by his subordinates, including Mr Vincenzino. I accept on the Applicant's evidence that for reasons that are unclear, the Applicant ceased receiving direct instructions from his direct supervisor from on or about 14 September 2022. Nor does it appear on the evidence that he performed duties as the Supervisor after that date.

[72] Mr Goodwin then wrote to employees on 11 October 2022 foreshadowing a restructure and the potential for redundancies. The nature of the restructure ultimately implemented is however entirely unclear. Mr Wightman as Construction Manager was unable to describe the restructure that took place beyond the elevation of Mr Vicenzino from Senior Carpenter to Leading Hand Carpenter. That change seems in any case to have been a minor change on the

evidence of Mr Vincenzino who was unable to articulate what had changed in his role beyond his job title, stated that he was given some "extra responsibility" that was not detailed and received an unspecified increase in his rate of pay.

[73] Following his 11 October 2022 email to staff, Mr Goodwin wrote to the Applicant on 12 October 2022 foreshadowing that his role of Supervisor was slated for potential redundancy and that a meeting would be arranged to consult the Applicant over the proposed change. There was no evidence that Mr Goodwin wrote to any other staff or that any other roles were flagged for potential redundancy. While at the time of the Applicant's dismissal there was said by the Respondent to be some business uncertainty, ultimately the Supervisor role was still required according to Mr Goodwin and remains vacant despite the Respondent advertising the position over several months. In these circumstances it is entirely unclear what restructuring was actually intended or did in fact take place, beyond a title change and perhaps a modest increase in responsibility for Mr Vincenzino as the Leading Hand Carpenter. This causes me to distrust the evidence of the Respondent's witnesses in respect of the foreshadowed "restructure".

[74] In his 12 October 2022 email to the Applicant, Mr Goodwin proposed a meeting for 13 October 2022 with the Applicant to consult over the potential redundancy of the Applicant's role, however it is apparent that the meeting was delayed due to the Applicant taking a period of personal/carers leave between 13 - 21 October 2022.

[75] It was during the above-referred period of personal/carers leave that the Applicant was interviewed for the Property Manger role with the College at 1.30pm on 14 October 2022, that being a day he claimed carers leave for. When pressed on this point he stated that he was only able to attend the interview because his ill partner was breast feeding their child at the scheduled meeting time. I found that evidence unconvincing. I find it more likely that the interview at the College on 14 October 2022 was pre-arranged for that day and it suited the Applicant to take a day's carers leave to accommodate that commitment. It should be recalled that the Applicant had not disclosed to the Respondent his interest in the role with the College at this point so it is unsurprising he failed to reveal to his employer the true reason for his absence on that day. Nevertheless, I find that the conduct of the Applicant in applying for carers leave for the purpose of attending a job interview with the College on 14 October 2022 was disingenuous.

[76] It was then on Monday 17 October 2022 that the Respondent determined to retrieve the Applicant's work vehicle from his private property. The reasoning for its withdrawal from the Applicant was explained by Mr Goodwin as being due to the Applicant's significant periods of personal/carers leave and his failure to properly look after the vehicle. Those explanations are simply not credible and are consequently rejected. As already stated, at the time of the removal of the Ute from the Applicant's private property on 17 October 2022, the Applicant had been away from work for two days and there was no evidence that other employees had their company vehicle withdrawn during similar short absences. It is also noted that a company maintained work vehicle was part of the Applicant's employment package. Significantly and as conceded by Mr Goodwin, no steps were taken by the Respondent to return the vehicle to the Applicant on his return to work after his period of personal/carers leave. In fact, the Respondent took steps to make clear it would not be returned when it removed the Applicant's tools from the vehicle and dropped them off at his home on 18 October 2022.

[77] In the period between the removal of his company vehicle and the "consultation meeting" on 26 October 2022, which was held to discuss the Applicant's potential redundancy, the Applicant received an offer of employment from the College on 20 October 2022 for the Property Manager role which he accepted on 23 October 2022. The start date with the College was however yet to be confirmed. He subsequently received a letter from the College on 25 October 2022 confirming a start date of 14 November 2022 which he replied to and accepted on 7 November 2023. It is not in dispute that the Applicant failed to disclose to the Respondent that he had formally accepted a role with the College on 23 October 2022, at least up until the 14 November 2022 when the Applicant commenced work for the College.

[78] The Applicant was pressed on why he failed to disclose to the Respondent after 23 October 2022 that he had accepted a role with the College in circumstances where an important meeting to discuss his potential redundancy and future with the Respondent was held on 26 October 2022. The Applicant sought to explain his omission as due to his still holding out hopes as of 26 October 2022 that his relationship with the Respondent could be resolved such that he remained employed by the Respondent in the Supervisor role. I found that explanation unconvincing and at odds with the balance of the Applicant's evidence that the Respondent's course of conduct towards him was such as to leave him no choice but to resign. The two positions cannot be easily reconciled in my view. I prefer a less favourable explanation of the Applicant's conduct. That is, the Applicant had made a choice to leave the Respondent's employ having secured a role with the College and he was seeking to ensure he obtained a redundancy payment on departure. This finding does not mean that the Applicant's decision to resign was not forced by the Respondent's conduct but it displays a degree of calculation on the Applicant's part in his dealings with the Respondent in the latter stages of his employment.

[79] Turning now to the "consultation meeting" which was held on 26 October 2022, the Applicant attended the meeting with his nominated support person Mr Vicenzino who made notes, while Mr Goodwin and Mr Wightman attended for the Respondent. The accounts of the meeting are again different in significant respects. For his part, the Applicant states that he was told by Mr Goodwin that the Supervisor role was no longer required, that the position was redundant and that a carpenter role on a permanent or contract basis was available as an alternative. The Applicant sent an email to Mr Goodwin following the meeting recording these and other details and then observed that "based on today's meeting our working relationship has concluded".

[80] Mr Goodwin denied that he had told the Applicant that his Supervisor role was no longer required or that he should resign and maintained that he had stated to the Applicant that no decision had yet been made. Mr Wightman and Mr Vincenzino gave similar evidence. I have some difficulty accepting the evidence of the Respondent's witnesses given the contemporaneous notes of the meeting made by Mr Vincenzino. Those notes specifically state that the "junior role not required" arising from the restructure while at the same time confusingly state that the role was "at risk". Mr Vicenzino's notes then go on to record "made redundant – yes in short" and "Junior Site Supervisor Role (gone)". Mr Vincenzino agreed during cross-examination to the notes he had made. That record of the discussion, albeit captured in shorthand fashion by Mr Vincenzino, undermines Mr Goodwin and Mr Wightman's evidence and supports the Applicant's version of the meeting. While I accept there may be some conflict in the notes going to whether a decision had been made on the Applicant's role, I find that the Applicant was told his role was no longer required, that there was a carpenter role

available as an alternative, and that a redundancy was the likely outcome. If it was unclear up to this point I am satisfied that the 26 October 2022 meeting removed any doubt that the Respondent did not want the Applicant to continue in the role of Supervisor. This conclusion is reinforced by the Respondent requiring the Applicant to return his company vehicle keys, vehicle manual, work on-site keys and Link toll pass for the vehicle during the meeting.

[81] At the conclusion of the meeting the Applicant asked Mr Goodwin about work for the following day to which Mr Goodwin replied that he would get back to the Applicant. It does not appear on the evidence that Mr Goodwin did in fact get back to the Applicant. The Applicant's motive for asking this question might be seen as him genuinely wanting to work the following day notwithstanding the clear message that his future with the Respondent was tenuous at best. I do not favour that view however given the Applicant had already arranged to participate in a one day handover for his new role at the College on 27 October 2022. The Applicant attempted to rationalise his attendance at the College on 27 October 2022, for which day he was paid by the Respondent, on the basis of the Respondent not having provided him with any work on that day. It may be the case that Mr Goodwin did not get back to the Applicant following the meeting on 26 October 2022 regarding the next day, but the Applicant's claims again appear disingenuous in circumstances where he had already accepted the role with the College, and where the all-day handover meeting at the College was clearly arranged prior to the Applicant's meeting with Mr Goodwin on 26 October 2002, a point conceded by the Applicant in closing submissions.

[82] It is also clear on the evidence that the Applicant tendered his resignation on 2 November 2022 and subsequently confirmed in an email to Mr Goodwin on 4 November 2022 that he was providing three weeks' notice as required by the Award, which the Respondent subsequently acknowledged on 9 November 2022. On 7 November 2022 the Applicant formally accepted the variation to his contract of employment with the College that confirmed a start day with his new employer on 14 November 2022.

[83] It is apparent that following the meeting on 26 October 2022, the Applicant only worked one more day prior to his cessation of employment on 23 November 2022, that day being 11 November 2022. There was conflicting evidence between the parties about whether the Applicant was ready, willing and able to work after the 26 October 2022 meeting. The Applicant claimed he had not been contacted regarding where he was working, what he would be doing or the pick-up arrangements. The Respondent claimed in reply that the Applicant was either uncontactable or sick, frustrating its attempts to arrange for him to attend for work. While it is unnecessary for me to resolve this conflict in evidence for the purpose of these proceedings, what can be stated with certainty is that in the period immediately prior to the 26 October 2022 meeting and up until his termination of employment on 23 November 2022, the Applicant was not offered any further work in the Supervisor role. This is consistent with the earlier finding I have made that the Respondent did not want the Applicant in that role.

[84] I am satisfied that notwithstanding the Applicant's advice to the Respondent on 2 November 2022 confirming his three weeks' notice of his resignation which took his employment with the Respondent up to 23 November 2022, he actually commenced employment with the College on 14 November 2022 and worked that full week for the College from 14-18 November 2022.

Consideration

[85] Having made relevant factual findings above, I now turn to consider whether the Applicant was dismissed at the initiative of the Respondent within the meaning of s 386(1)(b) of the Act as he contends. Before doing so it is necessary to refer to some relevant authorities.

[86] The authorities in respect of the meaning of the term 'dismissed' are well traversed. In a decision made prior to the passage of the Act, the Full Court of the Industrial Relations Court of Australia *Mohazab v Dick Smith Electronics Pty Ltd*[48] (Mohazab) was considering whether an employee had been forced to resign in circumstances where the employee signed a letter of resignation drafted by the employer shortly after being interviewed in relation to allegations of dishonesty. After setting out the findings of fact the Full Court said the following when considering the meaning of *'termination at the initiative of the employer;'*

> "In these proceedings it is unnecessary and undesirable to endeavour to formulate an exhaustive description of what is termination at the initiative of the employer but plainly an important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship. This issue was addressed by Wilcox CJ in APESMA v David Graphics Pty Ltd ("David Graphics"), Industrial Relations Court of Australia, NI 94/0174, 12 July 1995, as yet unreported, Wilcox CJ. His Honour, at 3, referred to the situation an employee who resigned because "he felt he had no other option". His Honour described those circumstances as:-
>
> > "... a termination of employment at the instance [of] the employer rather than of the employee."
>
> and at 5:-
>
> > "I agree with the proposition that termination may involve more than one action. But I think it is necessary to ask oneself what was the critical action, or what were the critical actions, that constituted a termination of the employment.'" (our emphasis added)"

[87] In a more recent Full Bench decision in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli*[49] (Bupa), the Full Bench was dealing with an appeal of a decision in which the member at first instance found that the dismissal was within the meaning of s.386(1) and that the dismissal was unfair. The Full Bench in Bupa was concerned with a 'forced' resignation and how the passage of the FW Act impacted prior authorities when it stated as follows;

> **"[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."

[88] Having identified there were two elements to s.386(1) and after extensively considering the authorities, the Full Bench then said;

> **"[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 probable 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."

[89] As previously stated the Applicant contends that he was dismissed by the Respondent within the meaning of 386(1)(b), that is, he was forced to resign because of conduct or a course of conduct engaged in by the Respondent. The Respondent rejects that submission and argues the Applicant resigned because he had secured a new role with the College as revealed by the chronology of events. I accept that the Applicant applied for and secured a new role with the College. That does not however mean that his decision to resign was not made as a consequence of the Respondent's conduct or course of conduct. It is to that conduct the Applicant relies on that I now turn.

[90] I have made a number of evidentiary findings above in relation to the conduct of the Respondent which may be summarised as follows;

- the Respondent had formed a view following an August 2022 performance review that it did not want the Applicant in the Supervisor role and felt his skills would be better utilised as a carpenter;

- the Applicant was offered the more junior role of Leading Hand which he declined, as a result of which he was threatened with performance management despite being assessed as a "solid achiever" in his earlier performance review;

- in a meeting on 14 September 2022, the Respondent told the Applicant that his role of Supervisor was no longer required and that he should consider resigning, this being subsequently restated in a telephone conversation on 16 September 2022 between the Applicant and Mr Goodwin;

- having declined to resign or accept the more junior Leading Hand role, the Applicant was notified of the potential redundancy of his position on 12 October 2022, that being despite the Respondent now conceding that the role of Supervisor is still needed and has been advertised for several months;

- the Applicant ceased to receive direct instructions from his immediate supervisor from mid-September 2022 and ceased to receive the normal weekly reports from 14 October 2022;

- the Applicant's company vehicle was unilaterally removed from his private property by the Respondent during a period of personal/carers leave on 17 October 2022 and was not returned to him prior to his termination of employment despite it being a contractual entitlement;

- on 26 October 2022, the Applicant was again told during the meeting held to discuss the potential redundancy of his role, that his position was no longer required, that a carpenter position was available as an alternative and that a redundancy was likely;

- the Applicant was required to return his company vehicle keys, vehicle manual, work on-site keys and Link toll pass for his company vehicle at the 26 October 2022 meeting.

[91] I am satisfied that the conduct engaged in by the Respondent had as its objective that of securing either the Applicant's resignation or his agreement to the take on the lesser role of Leading Hand. That is evident in my view from the consistent pattern of behaviour directed towards the Applicant which made it abundantly clear to him that he had no future with the Respondent in the Supervisor role. The Respondent's narrative of their being business uncertainty and a need for a restructure at the time of the Applicant's resignation as claimed by the Respondent must be rejected on two grounds. Firstly, there was no evidence that the Respondent undertook any restructure before or since the Applicant's termination of employment. Secondly, the Respondent confirmed that the role of Supervisor remains a required position for which they have been advertising for several months without success. This reinforces the finding I have made above that the Respondent wanted to remove the Applicant from the Supervisor role.

[92] I readily accept that while there may have been good reasons for the Applicant to resign on 2 November 2022, that does not necessarily mean that the employment was not voluntarily left. That was made clear by a Full Bench in *Doumit v ABB Engineering Construction Pty Ltd*[50] (Doumit) when they stated as follows;

> "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 remedies provided in the Act are directed to the provision of remedies against unlawful termination of employment. Where it is the immediate action of the employee that causes the employment relationship to cease, it is necessary to ensure that the employer's conduct, said to have been the principal contributing factor in the resultant termination of employment, is weighed objectively. The employer's conduct may be shown to be a sufficiently operative factor in the resignation for it to be tantamount to a reason for dismissal. In such circumstances, a resignation may fairly readily be conceived to be a termination at the initiative of the employer. 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."

[93] I accept that the line between conduct that leaves no choice but to resign and conduct that cannot be held to cause the resignation must be "rigorously observed". It is however a line in the present case I am satisfied has been crossed. Confronted with a campaign to remove him from the role and being unwilling to take on a lesser role that was offered, the Applicant made the prudent decision to seek alternate employment. He secured an alternate role and resigned. It might be said that the resignation was motivated not by the conduct of the Respondent but by

the Applicant obtaining an alternate role. This was however not a case where the Applicant was simply unhappy in his role and seeking "greener pastures". He was in my view being progressively and aggressively pushed to resign by the Respondent.

[94] I am satisfied that the conduct directed towards the Applicant by the Respondent, which I have made findings on and summarised above, was taken with the intention of either forcing the Applicant into a more junior role or bringing the employment to an end. If that was not the Respondent's intention, which I do not accept, the probable result of the Respondent's conduct was in any event such that the Applicant had no effective or real choice but to resign in the face of the actions taken against him by the Respondent. It follows that I am satisfied that the termination of the Applicant's employment was at the initiative of the Respondent and that the Applicant was dismissed within the meaning of s 386(1)(b) of the Act.

[95] Having found that the Applicant was dismissed it is necessary for me to now consider a number of preliminary matters.

Initial matters

[96] Under section 396 of the Act, the Commission is obliged to decide the following matters before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code; and

(d) whether the dismissal was a case of *genuine redundancy*.

[97] Relevant to the determination of the preliminary matters I am satisfied that;

- the Applicant's employment was terminated on 23 November 2022, and he filed his unfair dismissal application on 7 December 2022, that latter date being within 21 days of the date of his dismissal;

- at the time of the Applicant's dismissal the Respondent employed approximately seven employees[51] and is therefore a small business employer within the meaning of s.23 of the Act;

- the Applicant commenced employment with the Respondent on 10 September 2018 and at the time of his dismissal had been employed for a period of approximately five years, that period being in excess of the minimum employment period of twelve months that applies for a small business employer;

- the Respondent did not contend, nor am I satisfied that the dismissal was consistent with the Small Business Fair Dismissal Code; and

- the Applicant was covered in his employment by the *Building and Construction General On-Site Award 2020*.

[98] Turning to the final preliminary matter, the question of whether the dismissal was a case of *genuine redundancy* may be easily disposed of. The Respondent foreshadowed in an email to the Applicant on the 12 October 2022 the potential redundancy of his role of Supervisor. However, Mr Goodwin gave unchallenged evidence that the redundancy did not proceed, the role is still required and has been advertised for several months since the Applicant's termination of employment. It follows that the role is still required and that the dismissal of the Applicant was not a *genuine redundancy* within the meaning set out at s 389 of the Act.

[99] Having considered each of the initial matters, I am satisfied that the application was made within the required period in subsection 394(2), the Applicant was a person protected from unfair dismissal, the small business fair dismissal code does not apply, and the dismissal was not a genuine redundancy. I am now required to consider the merits of the application.

Was the dismissal harsh, unjust, or unreasonable?

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

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

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

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

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

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

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

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

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

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct – s.387(a)?

[101] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[52] and should not be "capricious, fanciful, spiteful or prejudiced[53]." However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it were in the position of the employer[54]. The question the Commission must address is whether there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees).[55]

[102] In cases relating to alleged misconduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.[56] It is not enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.[57]

[103] As I have found above, the Applicant's dismissal was not based on his conduct or performance. While the Respondent may have held concerns regarding the Applicant's performance in the Supervisor role, those concerns never rose above a threat to implement a performance management plan, which approach the Respondent quickly abandoned and instead opted to foreshadow the potential redundancy of the Applicant's role. It follows that there was no valid reason for his dismissal.

Notification of the valid reason – s.387(b)

[104] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[58] and in explicit[59], plain and clear terms[60].

[105] Absent a valid reason for dismissal the Respondent was unable to comply with the requirement to notify the Applicant of a valid reason for his dismissal. As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[61]

Opportunity to respond to any reason related to capacity or conduct – s.387(c)

[106] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[62]

[107] The opportunity to respond does not require formality and the factor is to be applied in a common-sense way to ensure the employee is treated fairly.[63] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to the concern, this is enough to satisfy the requirements.[64]

[108] As I have not found that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[65]

Support person – s.387(d)

[109] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[110] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."[66]

[111] I am satisfied that the Applicant was not denied an opportunity to be accompanied by a support person in each discussion held in relation to his employment with the Respondent. This included Mr Vincenzino accompanying the Applicant at the 26 October 2022 Meeting. That meeting was however not held to discuss the Applicant's performance or conduct so in the circumstances of this case I regard this criteria as a neutral factor.

Warnings regarding unsatisfactory performance – s.387(e)

[112] The dismissal did not relate to unsatisfactory performance. This factor is therefore not relevant in the circumstances.

Impact of the size of the Respondent on procedures followed – s.387(f)

[113] The Respondent's *Form F3 - Employer Response* indicates that at the time of the Applicant's dismissal it employed seven employees. There is no evidence before me, and nor did either party contend, that the Respondent organisation's size impacted on the procedures followed by it in dismissing the Applicant. This factor weighs neutrally in my consideration.

Impact of absence of dedicated human resources management specialist/expertise on procedures followed – s.387(g)

[114] The evidence in this matter indicates that the Respondent did not have access to the services of an in-house human resources specialist. This factor weighs neutrally in my consideration.

Other relevant matters – s.387(h)

[115] While no other matters were raised by either party, it is appropriate for me to consider the conduct of the Applicant in the period prior to his dismissal. As I have earlier observed, the Applicant having decided to seek alternate employment because of the Respondent's conduct, then took a calculated approach to his exit from the Respondent's employ. He did so by taking carers leave to attend a job interview on 14 October 2022 and by not promptly disclosing to his employer his acceptance of a role with the College on 23 October 2022 in circumstances where the Applicant saw an opportunity to obtain a redundancy payment. Further, he failed to disclose to his employer that he had arranged to do a handover day at the College on 27 October 2022,

for which day he received payment from the Respondent. Finally, having committed to a three week notice period from 2-23 November 2022 he then commenced employment with the College on 14 November 2022.

[116] The above-referred conduct of the Applicant cannot be simply put down to a hesitance to disclose to the Respondent that he was seeking alternate employment for fear of jeopardising his current employment. That might explain the conduct up until 23 October 2022 at which point he had received and accepted an offer of employment from the College. Beyond that date however I infer that his conduct is explained by his seeking to extract notice and redundancy payments in circumstances where he ought to have been candid with the Respondent. The fact that he was not candid is a matter that reflects poorly on him and although it is not so significant as to lead me to conclude the dismissal was not at the Respondent's initiative, I do have regard to it in considering whether the dismissal was unfair. It weighs against a finding that the dismissal was unfair.

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

[117] I have made findings in relation to each matter specified in s 387 of the Act as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust, or unreasonable.[37]

[118] I have found that the Applicant's dismissal was not supported by a valid reason. This weighs against a finding that the dismissal was not unfair. While I have found that the Applicant's conduct in the period prior to his dismissal weighs against a finding of unfairness it is not so significant as to displace the weight I attach to the lack of a valid reason. Other factors were either neutral or not relevant. Having considered each of the matters specified in s.387 of the Act, I am satisfied that the dismissal was unjust, unreasonable, and thereby unfair.

Remedy

[119] Being satisfied that the Applicant:

(i) made an application for an order granting a remedy under s.394;
(ii) was a person protected from unfair dismissal; and
(iii) was unfairly dismissed within the meaning of s.385 of the Act,

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

[120] Under s.390(3) of the Act, I must not order the payment of compensation to the Applicant unless:

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

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

Is reinstatement of the Applicant inappropriate?

[121] The Applicant submitted that reinstatement was not appropriate in the circumstances as he had secured alternate employment and did not wish to return to the Respondent's employ. The Respondent did not disagree and I also note that the business employs a small number of employees.

[122] Having regard to the views of the parties and the size of the Respondent's, I consider that reinstatement is inappropriate. I will now consider whether a payment for compensation is appropriate in all the circumstances.

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

[123] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one…"[67].

[124] Having found that the dismissal of the Applicant was unjust and unreasonable because of the absence of a valid reason, it is appropriate for me to consider an award of compensation. For the reasons that follow however, I have determined not to award any compensation.

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

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

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

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

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

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

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

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

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

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

[127] The Applicant submits that while he obtained employment with the College immediately on cessation of employment with the Respondent, he was forced to take a period of leave without pay over the Christmas New Year Period during the College shutdown. This was because he had not accrued sufficient leave to cover that period of leave. He calculates that loss as equivalent to three weeks pay. In support of that submission the Applicant produced a payslip[68] from his employment with the College for the pay period ending 24 February 2022. The payslip includes YTD figures and relevantly identifies the value of the 'leave without pay' as $5,776.28. The Applicant highlights that amount as the loss he has suffered as a consequence of his dismissal and seeks that amount in compensation.

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

[128] There was no evidence before me that an award of compensation to the Applicant of the amount sought by him would affect the viability of the Respondent's business. I am satisfied that an order for compensation would not have an effect on the viability of the employer's enterprise.

Length of the Applicant's service

[129] The Applicant's length of service was approximately five years. Neither party submit that the Applicant's length of service was a factor that weighed in favour of a greater or lesser amount of compensation although the Applicant states he had been loyal during his period of service and had received no prior warnings. I do not however regard the Applicant's length of service of five years as either supportive of reducing or increasing the amount of compensation otherwise calculated and ordered.

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

[130] As stated by a majority of the Full Court of the Federal Court, "[i]n determining the remuneration that the Applicant would have received, or would have been likely to receive… the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."[69]

[131] The Applicant contends that had he not been forced to resign he would have remained employed by the Respondent for an extended period. He also referred to his preference for stability and an aversion to change, hence his service of approximately five years with the Respondent.

[132] While I accept that the Applicant may have preferred to remain with the Respondent for an extended period, it is also the case that he was unhappy in his employment in the period prior to his dismissal of which he confided to Mr Vincenzino. It is also the case that the Respondent

had formed a view that the Applicant was ill-suited to the role of Supervisor and that his skills would have been better utilised as a carpenter. While the Respondent's removal of the Applicant from the role of Supervisor can be best described as "ham fisted", had the Applicant not been dismissed, it is likely in my view that a performance management plan would have been pursued by the Respondent.

[133] While it is difficult to assess how much longer the Applicant would have remained employed but for his dismissal, I judge that a performance management plan was in prospect and that the Applicant's departure from the Respondent was likely either by his own volition when confronted with such a process or as a consequence of it. In these circumstances and taking into account the Applicant's dissatisfaction with his employment with the Respondent in the period prior to his dismissal, I consider that the Applicant would only have remained employed for a further six months (twenty six weeks).

[134] As stated above, the Applicant's annual remuneration prior to the termination of his employment excluding superannuation, mobile phone and the value of the motor vehicle to which he was entitled, was $75,198. That equates to weekly earnings of $1,446.12. Based on my assessment that the Applicant would have remained employed for a further twenty six weeks I estimate that he would have been likely to receive remuneration of $37,599.12 for that period.

[135] The Applicant did not estimate a value to be placed on the motor vehicle but I note that it was used as a "tool of trade" as he needed it to travel to the various jobs that he was assigned to. I have consequently not taken the value of the motor vehicle into account when calculating likely remuneration.

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

[136] The Applicant commenced employment with the College on 14 November 2022 even though his employment with the Respondent did not cease until 23 November 2022. In calculating the Applicant's earnings since dismissal, I have only taken into account his earnings from his employment with the College from 24 November 2022 onwards and have excluded from my calculation his earnings for the week of 14-18 November 2022.

[137] The Applicant produced a payslip for the pay period ending 24 February 2023 which included a year to date earnings gross figure of $19,928. That year to date figure included earnings for the week of 14-18 November 2022 which I have estimated to be $1,711.86 based on an hourly rate of $45.05 and a 38 hour week. Deducting that amount from the gross earnings of $19,928 results in a figure of $18,216.14. This represents the earnings of the Applicant from his employment with the College for the thirteen week period from 28 November 2022 to 24 February 2022 which I note includes a three week Christmas New Year shutdown period for which the Applicant was forced to take leave without pay.

[138] It is also appropriate in my view to take into account the projected earnings of the Applicant in his employment with the College to estimate his post dismissal earnings. That is so because future earnings represent mitigation of the loss for which compensation may be made. Applying the estimated weekly earnings of $1,711.86 and multiplying that by thirteen weeks results in a figure of $22,254.18. Given the relatively short period of those projected

earnings I have determined not to make a deduction for contingencies. The total amount of estimated post dismissal earnings is therefore $40,470.32.

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

[139] As stated above, the Applicant has secured employment with the College and is in receipt of weekly remuneration of approximately $1,711.86 which he is likely to continue to earn between the date of an order for compensation, if such an order were made, and the date of payment of any such compensation.

Other relevant matters

[140] While no other relevant matters were raised by the parties going to an order for compensation, I do have regard to the conduct of the Applicant in the period preceding his termination of employment. As stated above at [115]-[116], I am satisfied that the Applicant's approach to the Respondent was calculated and lacked candour in respect of his successful application for the Property Manager role with the College. This included his attendance at a job interview on 14 October 2022 for which he received payment of carers leave by the Respondent, his acceptance of that role on 23 October 2022, his attendance at a handover day at the College on 27 October 2022 for which he was paid by the Respondent, and his commencement in the Property Manager role with the College on 14 November 2022 which was during his notice period, all of these natters not having been discussed with or disclosed to the Respondent.

Compensation – how is the amount to be calculated?

[141] As noted by the Full Bench, "[t]he well-established approach to the assessment of compensation under s.392 of the Act… is to apply the "Sprigg formula" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket* (*Sprigg*)[70]. This approach was articulated in the context of the Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*[71]."[72]

[142] The total figure I have estimated for the Applicant's post dismissal earnings following his termination of employment on 23 November 2022 for the six-month period that I estimate he would have remained employed but for his dismissal is $40,470.32.

[143] As I have already found, I am not satisfied that the Applicant would have remained employed by the Respondent for more than six months beyond 23 November 2022 had his employment not been terminated. During such period he would have received remuneration of $37,599.12. In these circumstances, I am not satisfied that the Applicant has suffered nor is he likely to suffer any loss of earnings.

[144] Given the estimated post dismissal earnings of the Applicant following termination and my findings regarding how long the Applicant would have remained employed but for his termination, the other criteria under s 392 in respect of the application of the "Sprigg Formula" are not relevant in these circumstances. Having further considered the particular circumstances of the case, including the Applicant's conduct referred to above at [140], I do not believe that

any discretionary adjustment is necessary or appropriate. For this reason, I do not intend to make any order for compensation.

Conclusion

[145] I have found that the Applicant was dismissed within the meaning of s 386(1)(b) of the Act, that his dismissal was unfair, and that reinstatement was inappropriate. I have further found that compensation is not appropriate in the circumstances where the Applicant has not suffered a loss of earnings in the period since the termination of his employment. The matter is determined accordingly.

DEPUTY PRESIDENT

Appearances:
E Michaylov, for the Applicant.
M Goodwin, for the Respondent.

Hearing details:
2023.
Melbourne.
February 27;
March 2.

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[1] MA000020

[2] Exhibit A1, Email from Brok Wightman dated 19 August 2022

[3] Exhibit A2, Email from John Goodwin dated 8 September 2022, titled "PDR"

[4] Exhibit A3, Email from John Goodwin dated 12 September 2022, titled "Notice to discuss your performance"

[5] Exhibit A4, Email from Applicant dated 21 September 2022, titled "Performance Review"

[6] Exhibit R24, Email from John Goodwin sent at 6.44pm on 21 September 2022

[7] Exhibit A5, Email from John Goodwin, dated 6 October 2022, titled "Performance Management Plan"

[8] Exhibit R4, Email to staff from John Goodwin dated 11 October 2022, titled "Company Update"

[9] Exhibit A6, Email from John Goodwin dated 12 October 2022, titled "Company Letter"

[10] Exhibit R3, Risk of Potential Redundancy Letter, dated 12 October 2022

[11] Exhibit R7, Text message exchange dated 12-13 October 2022

[12] Exhibit A7, Email from Applicated dated 13 October 2022, titled "Re: meeting"

[13] Exhibit A8, Email from John Goodwin dated 14 October 2022, titled "Re: meeting"

[14] Exhibit R7, Text message exchange dated 13-17 October 2022

[15] Exhibit A9, Email from John Goodwin sent at 9.19am on 17 October 2022

[16] Exhibit A10, Email from John Goodwin sent at 10.55am on 17 October 2022

[17] Exhibit A11, Email from John Goodwin sent at 5.01pm on n17 October 2022

[18] Exhibit A12, Email from Applicant dated 17 October 2022

[19] Exhibit A14, Email from John Goodwin sent at 8.40am 18 October 2022

[20] Exhibit A15, Email from Applicant sent at 10.37am on 18 October 2022

[21] Exhibit A18, Email form John Goodwin sent at 2.16pm on 18 October 2022

[22] Exhibit A20, Email from Applicant sent at 5.27pm on 26 October 2022

[23] Exhibit A21, Email from John Goodwin sent at 5.27pm on 26 October 2022

[24] Exhibit A22, Email from John Goodwin sent at 10.26pm on 26 October 2022

[25] Exhibit A23, Email from Applicant sent at 8.09pm on 27 October 2022

[26] Exhibit A24, Handwritten meeting notes of 26 October 2022

[27] Exhibit A25, Email from Ricky Vincenzino on 27 October 2022

[28] Exhibit R11, Email from Applicant sent to John Goodwin at 12.02am 2 November 2022

[29] Exhibit R12, Email from John Goodwin sent at 7.27pm on 2 November 2022

[30] Exhibit A26, Email from Applicant dated 4 November 2022

[31] Exhibit A28, Email from John Goodwin sent at 5.05pm 9 November 2022

[32] Exhibit A27, Letter from Respondent dated 8 November 2022

[33] Exhibit A29, Email from Applicant sent at 11.30pm on 9 November 2022

[34] Exhibit A30, Email from John Goodwin sent at 5.32pm on 10 November 2022

[35] Exhibit A31, Email from Applicant sent at 9.11pm on 10 November 2022

[36] Exhibit R23, Letter from John Goodwin to Applicant, dated 17 November 2022

[37] Exhibit R8, Applicant Payslip for pay period 14-27 October 2022

[38] Exhibit R18, Applicant Payslip for pay period 28 October – 10 November 2022

[39] Exhibit R22, Applicant's final Payslip for pay period 11-24 November 2022

[40] Exhibit R23, Letter to Applicant, dated 17 November 2022

[41] Exhibit R13, Chronology of Applicant's recruitment by Catholic Regional College Caroline Springs

[42] Ibid

[43] Exhibit R14, Meeting Invite for job interview 14 October 2022

[44] Exhibit R15, Offer of Employment dated 20 October 2022

[45] Exhibit R16, Variation Letter dated 25 October 2022

[46] Exhibit R14, Meeting invite for job handover on 27 October 2022

[47] Exhibit R13

[48] [1995] IRCA 625; 62 IR 200.

[49] [2017] FWCFB 3941.

[50] *Doumit v ABB Engineering Construction Pty Ltd*, Print N6999 (AIRCFB, Munro J, Duncan DP, Merriman C, 9 December 1996).

[51] Form F3 at question 1.7

[52] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[53] Ibid.

[54] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[55] Ibid.

[56] King v Freshmore (Vic) Pty Ltd (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213 [24].

[57] Ibid.

[58] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

[59] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[60] Ibid.

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

[62] *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport*, Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

[63] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[64] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

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

[66] Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

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

[68] Exhibit A35

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

[70] (1998) 88 IR 21.

[71] [2013] FWCFB 431.

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