



# DECISION

*Fair Work Act 2009*

s.365 - Application to deal with contraventions involving dismissal

**Ms Kristine McCormack**

v

**Diamond Valley Pork Pty Ltd**

(C2022/8403)

COMMISSIONER JOHNS

MELBOURNE, 7 JUNE 2023

*Application to deal with contraventions involving dismissal – whether role validly altered – the impact of contractual clause - application dismissed.*

## Introduction

[1] On 19 December 2022, Kristine McCormack (**Applicant**), made an application to the Fair Work Commission (**Commission**) pursuant to s.365 of the *Fair Work Act 2009* (Cth) (**FW Act**) to deal with a general protections dispute involving dismissal.

[2] Diamond Valley Pork Pty Ltd (**Respondent**) is the Respondent. It has been a subsidiary of JBS Australia Pty Ltd since the date of its acquisition in or around January 2022.

[3] The Applicant was first engaged to work for the Respondent in or around early 2021 via Adecco as a temporary Human Resources Administrator. The Applicant commenced permanent employment as the Human Resources Administrator for the Respondent on 9 June 2021.

[4] The Applicant submitted that the Respondent took adverse action against her because the Applicant exercised or proposed to exercise her workplace rights, pursuant to s.340(1)(ii) of the FW Act. The Applicant submitted that further, and in the alternative, that the Respondent discriminated against her on basis of her age in breach of s.351 of the FW Act.

[5] On 6 December 2022, the Applicant's representative purported to accept the Respondent's repudiation of the contract of employment and ended the employment relationship.

[6] On 30 December 2022, the Respondent filed its response to the application. The Respondent raised a jurisdictional objection. It contended that the Applicant was not dismissed.

[7] The decision of the Full Court of the Federal Court of Australia in *Coles Supply Chain Pty Ltd v Milford*,<sup>1</sup> requires the Commission to determine a dispute about the fact of a dismissal under s.365 of the FW Act before the Commission can exercise powers conferred by s.368 of the FW Act. It is thus necessary to determine the jurisdictional issue to proceed further.

## Legislative scheme

[8] Section 365 of the FW Act deals with applications before the Commission and contains two limbs, one that there is a dismissal and secondly that the Applicant alleges that the dismissal occurred because of a contravention of general protections. Relevantly s.365 of the FW Act provides that a person or an industrial association may apply to the Commission to deal with the dispute if:

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

[9] Section 386 of the FW Act provides the meaning of the word dismissed:

- (1) *A person has been dismissed if:*
  - (a) *the person's employment with his or her employer has been terminated on the employer's initiative; or*
  - (b) *the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.*
- (2) *However, a person has not been dismissed if:*
  - (a) *the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or*
  - (b) *the person was an employee:*
    - (i) *to whom a training arrangement applied; and*
    - (ii) *whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;*  
*and the employment has terminated at the end of the training arrangement; or*
  - (c) *the person was demoted in employment but:*
    - (i) *the demotion does not involve a significant reduction in his or her remuneration or duties; and*
    - (ii) *he or she remains employed with the employer that effected the demotion.*

(3) *Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.*

[10] The recent Full Bench decision of *NSW Train v Mr Todd James (NSW Trains)*,<sup>2</sup> enunciated how s.386 of the FW Act should be applied. Relevantly, the decision provided:<sup>3</sup>

*[34] Section 386(2)(c) clarifies that s.386(1) does not apply to certain circumstances. It does not give rise (by implication or otherwise) to a category of dismissal that is separate to s.386(1). That is not to say that in the absence of s.386(2), all circumstances in ss.386(2)(a)-(c) would necessarily be caught by s.386(1)(a). Contrary to the ACTU's submission, the use of the word 'however' in the chapeau to s.386(2) cannot be sensibly read to suggest this.*

*[35] The effect of the Deputy President's construction of s.386(2)(c) is that by implication, a demotion in employment which involves a significant reduction in the employee's remuneration or duties is a dismissal under the FW Act. In the circumstances, Appeal ground 1 is upheld....*

*[93] ...Section 386(2)(c) deals with demotions in employment, not with other unilateral variations to an employment contract that may give rise to a repudiation of the employment contract.*

[11] The authorities referred above mean that the Applicant must satisfy the requirements of either s.386(1)(a) or (b) in order to establish that she has been dismissed.

[12] However, in this matter the Applicant did not resign. She does not contend that she was forced to do so because of her employer's conduct. Therefore, section 386(1)(b) is not enlivened.

[13] Therefore, in short, she must establish the termination was at the employer's initiative.

[14] I should also note that, in this matter, the Respondent does not rely upon s.386(2)(c). That is to say, the Respondent does not contend that the factual circumstances support a finding that the Applicant was merely demoted.

[15] The Applicant says that:

- a) she commenced employment as a Human Resources Administrator on 9 June 2021; but that
- b) in or around November 2021 her title changed to Human Resources Manager (albeit without any alterations to her contract).

[16] The Respondent maintains that the Applicant was, at all times from 9 June 2021, employed as a Human Resources Administrator ("**Human Resources Administrator/HR Administrator**"). It denies that the Applicant was ever promoted to Human Resources Manager ("**Human Resources Manager/HR Manager**").

[17] On 5 October 2022, the Respondent directed the Applicant to ensure that, consistent with her contract of employment, her email signature made it clear she was a Human Resources Administrator. It is this event, and some alleged changes in duties and reporting line, that the Applicant contends constituted a repudiation of her contract of employment. She never returned to work after that date.

### **The proceeding**

[18] On 23 January 2023, I issued Directions and listed the matter for a jurisdictional hearing.

[19] On 10 March 2023, the Applicant's Representative filed form F52 seeking an order to produce documents that the Respondent failed to provide upon request. I granted the request and issued an Order to Produce. The Respondent complied with the Order.

[20] A jurisdictional hearing was conducted by Video using Microsoft Teams on 17 March 2023.

[21] In advance of the hearing the parties filed materials which were compiled in a Digital Court Book (**DCB**). For completeness I set out below the documents relied upon by the parties. I have had regard to all this material in coming to this decision:

<b>Exhibit</b>	<b>Document title</b>	<b>Document date</b>
1	Form F8	19 December 2021
2	• Particulars of complaint	19 December 2021
3	Form F8A	30 December 2022
4	Respondent's Outline of Submissions	3 February 2023
5	Witness Statement of Clinton Jaftha	3 February 2023
6	• CJ-1	26 August 2022
7	• CJ-2	9 June 2021
8	• CJ-3	6 December 2022
9	• CJ-4	8 December 2022
10	Witness Statement of Peter Christian (first statement)	3 February 2023
11	• PFC-1	5 August 2022
12	Witness Statement of Alan Bittisnich	3 February 2023
13	• AAB-1	16 September 2022
14	Applicant's Outline of Submissions	17 February 2023
15	Witness Statement of Kristine McCormack	17 February 2023

16	• KM-1	8 June 2021
17	• KM-2	9 June 2021
18	• KM-3	13 April 2021
19	• KM-4	November 2021
20	• KM-5	26 May 2022
21	• KM-6	June 2022
22	• KM-7	July 2022
23	• KM-8	16 September 2022
24	• KM-9	October 2022
25	• KM-10	June 2022
26	• KM-11	6 December 2022
27	Respondent's outline of Submissions in Reply	23 February 2023
28	Further Witness Statement of Clinton Jaftha	24 February 2023
29	• CJ-1	7 October 2022
30	Further Witness Statement of Peter Christian (second statement)	24 February 2023
31	Further Witness Statement of Peter Christian (third statement)	28 February 2023
32	• PFC-1	27 May 2022
33	• PFC-2	3 June 2022
34	• PFC-3	1 July 202
35	• PFC-4	2 August 2022
36	• PFC-5	2 September 2022
37	• PFC-6	17 October 2022
38	• PFC-7	12 October 2022
39	Further Witness Statement of Kristine McCormack	10 March 2023
40	Joint Chronology	14 March 2023
41	Letter from the Applicant's solicitors to the Respondent	25 October 2022

[22] During the hearing additional oral evidence was provided by the Applicant, Mr Clinton Jaftha (General Manager of people and performance at JBS Australia Pork Division), Mr Peter Fletcher Christian (Operations Manager at Diamond Valley Pork Pty Ltd) and Mr Alan Anthony Bittisnich (Group Operations Manager at Diamond Valley Pork Pty Ltd). The

Respondent's witnesses were all cross-examined.

### **Factual findings**

[23] The following matters were either agreed between the parties or not substantially contested. Consequently, I make the following findings of fact based on the evidence:

- a) In or around early 2021, the Applicant was engaged by the Respondent via Adecco as a temporary Human Resources Administrator.
- b) On 9 June 2021, the Applicant commenced permanent employment as the Human Resources Administrator with the Respondent. The Applicant prepared her own employment contract pursuant to the directive of the Respondent.

Importantly, the Applicant's contract of employment provided:

*Your position title, objective, responsibilities and the person/position that you report to, may, at the discretion of the Company, vary significantly during your employment.*

*In the event of any variations as referred to above, the remaining terms of this Contract will continue to apply to you unless altered in writing.*

*You are required to carry out other duties reasonably required by the Company, that you are skilled and capable of performing.*

- c) In or around January 2022, through acquisition by Primo Foods Pty Ltd, the Respondent became part of the JBS Australia group of companies. The Respondent, together with Seven Point Pork Pty Ltd and Rivalea Pty Ltd were subsequently referred to as the "Pork Division".
- d) On 27 May 2022, the Applicant prepared a first draft of a new organisational chart. The Applicant recorded her title as the Human Resources Manager.
- e) Notwithstanding what the Applicant put in the organisational chart in an email sent by her at 10.26am on 27 May 2022, her email signature recorded her title as the "HR Administrator".
- f) In or around June 2022, a new version of the organisational chart was created listing the Applicant's title as the Human Resources Manager. The organisational chart was emailed by the Applicant to Mr Christian (the Respondent's Operations Manager) and Mr Bittisnich (the Respondent's Group Operation Manager).
- g) On 3 June 2022 at 1:40pm, the Applicant sent an email attaching an organisational chart to Mr Bittisnich listing her title as the Human Resources Manager. The email signature recorded her as the "HR Administrator".
- h) On 14 June 2022 at 9:29am, the Applicant sent an email noting various changes to the

organisational chart, but her email signature remained “HR Administrator”.

- i) On 1 July 2022, a new version of the organisational chart was created listing the Applicant’s title as the Human Resources Manager and forwarded to the Applicant by Ms Vicki Clayton. The Applicant replied via email at 10:51am with the email signature of “HR Administrator”.
- j) On 18 July 2022, Mr Jaftha commenced employment with Rivalea Pty Ltd. He was employed as General Manager of people and performance at JBS Australia Pork Division.
- k) On 2 August 2022, a new version of the organisational chart was created listing the Applicant’s title as the Human Resources Manager. The Applicant replied via email at 1:19pm and 1:24pm with the email signature of “HR Administrator”.
- l) On 5 August 2022, the Applicant changed her title to “HR Manager” on her email signature.
- m) On 23 August 2022, the Applicant sent an email to Mr Jaftha seeking to discuss a salary increase. Mr Jaftha replied to this email on 26 August 2022, noting that he will discuss this matter in person with Mr Bittisnich, Mr Christian and the Applicant when he is at the plant next.
- n) On 2 September 2022, a new version of the organisational chart was created listing the Applicant’s title as the Human Resources Manager.
- o) On 16 September 2022, the Applicant, Mr Bittisnich, and Mr Christian were sent a copy of an organisational chart.
- p) On 4 October 2022, a new version of the organisational chart was created listing the Applicant’s title as the Human Resources Manager.
- q) On 5 October 2022, the Applicant and Mr Jaftha met over Microsoft Teams. They had a discussion pertaining the Applicant’s role and title in contrary to her employment contract. During the call the Applicant was advised that she would now be reporting to Mr Jaftha and her title was to be consistent with her contract of employment (i.e. HR Administrator).
- r) On 6 October 2022, the Applicant commenced a period of leave.
- s) On 7 October 2022, a new version of the organisational chart was released by Mr Jaftha to various members of the Pork Division human resources team. It listed the Applicant’s title as Human Resources Administrator.
- t) On 25 October 2022, the Applicant’s legal representatives sent a letter of complaint to the Respondent asserting adverse action had been taken by the Respondent as a result of the Applicant exercising her workplace rights. The Applicant provided the Respondent until 4:00pm on 31 October 2022 to respond.

- u) On 6 December 2022, the Applicant's legal representatives sent a letter to the Respondent asserting:<sup>4</sup>

*A summary of our client's position is as follows:*

- 1. Diamond Valley Pork has altered our client's line of reporting, and altered our client's position title from HR Manager to HR Administrator, reducing both the complexity and sophistication of our client's position (collectively, the Position Alteration).*
- 2. The Position Alteration constitutes a breach of a fundamental term of our client's employment agreement and accordingly is in repudiation of the agreement (the Repudiation); and*
- 3. The Position Alteration is evidence that our client's contractual position is not required to be performed by anyone and accordingly, is redundant and a suitable new role has not been offered nor was there consultation.*

*Diamond Valley Pork had the opportunity to remedy the Repudiation following our correspondence of 25 October 2022 and did not do so. Accordingly, our client hereby accepts the Repudiation as terminating her employment agreement effective immediately (the Dismissal).*

- v) On 8 December 2022, the Respondent replied via email:<sup>5</sup>

*In response to your letter we say as follows:*

- 1. Diamond Valley Pork's (DVP) position is that there has been no repudiation of the contract by it because no change of any substance was made to Ms McCormack's position.*
- 2. It follows that DVP also does not accept that Ms McCormack's position was made redundant. It still requires her position to be performed by someone.*
- 3. It is clear, however, from your letter, that Ms McCormack no longer intends to be bound by her contract of employment with DVP. DVP considers this a repudiation of the contract of employment and accepts that repudiation, bringing the contract to an end with effect from today's date.*

- w) On 19 December 2022, the Applicant filed the present General Protections claim.

[24] This decision deals with the question of whether the Applicant was a person dismissed at the time that she made the application within s.365(a) of the FW Act and whether the Commission can deal with her application pursuant to s.368 of the FW Act.

### **Applicant's submissions**



[25] The Applicant in her particulars of complaint dated 19 December 2022 submitted that, notwithstanding the title of Human Resources Administrator in her employment contract, she performed the role of a Human Resources Manager from 9 June 2021. The Applicant's evidence was that in December 2021 Mr Christian was consulted about whether she should change her email signature to Human Resources Manager. The Applicant's evidence was that this was agreed to by Mr Christian.<sup>6</sup>

[26] However, the Applicant's outline of submissions on the jurisdictional objection dated 17 February 2023 submitted that rather the change of position occurred in November 2021. The Applicant further submitted that the conversation with Mr Christian also occurred in or around November 2021.<sup>7</sup>

[27] In the absence of a contract noting a change in the Applicant's title, the Applicant relied on subsequent conduct following the execution of the contract on 9 June 2021. The Applicant submitted that several factual circumstances confirm that the role she performed was that of a Human Resources Manager (**Subsequent Conduct**):<sup>8</sup>

- (a) *in November 2021, I asked Mr Christian if he would like me to change my email signature so that my email correspondence accurately reflected the title of my role as I was being referred to. Mr Christian agreed that this would be appropriate. I then changed my email signature to Human Resource Manager. This change was made with Mr Christian's consent; and*
- (b) *the Respondent's organisational chart also reflected my title as Human Resource Manager, which occurred shortly after my email signature changed. Attached and marked "KM-4" is the November 2021 Diamond Valley Pork Organisational Chart.*
- (c) *I worked alone in the Human Resources Department for the duration of my employment;*
- (d) *immediately after commencing employment, Mr Christian requested that I assume his administrative and human resource related responsibilities. This included performing duties such as: drafting and finalising employment contracts, facilitating disciplinary action, arranging for the onboarding of new staff members via marketing campaigns on SEEK and maintaining the following databases: Preceda, Y Drive, Mitre Finch, HR Onboard;*
- (e) *as I was regularly managing confidential information, I expressed concern to Mr Christian that there could be some exposure of private and confidential information. Mr Christian suggested that I move into a private office to facilitate privacy. This was indicative of the work that I was undertaking and demonstrated to other staff members my seniority as the HR Manager;*
- (f) *both Mr Christian and Alan Bittisnich (Mr Bittisnich) – Chief Executive Officer, often verbally referred to me as the Human Resource Manager. This happened soon after I joined the Respondent in a full-time capacity;*
- (g) *many employees at the office referred to me as the Human Resource Manager. For*

*instance, employees would often say words to the effect of 'go ask Kristine, she's the HR Manager' and 'because you're the HR manager, can you help me out';*

- (h) many of the Respondent's external contracts referred to me as the Human Resources Manager. These were shared and shown to Mr Christian who approved the contracts;*
- (i) in August 2022 I attended a safety conference in Sydney to introduce and implement a uniform safety culture across JBS following the Acquisition. On the invitation email my name and position was listed as HR Manager;*
- (j) in September 2022 I was invited to attend JBS cultural event. On the invitation email my name and position was listed as HR Manager; and*
- (k) I was allocated a parking space outside the Diamond Valley Pork plant along with Mr Christian, Mr Bittisnich, Mr Tony Enach (Mr Enach) – Finance Manager, Ms Livia Bertoli (Ms Bertoli) – Office Manager, Gerton Mulder (Mr Mulder) – Plant Engineer. The parking space listed my title as HR Manager. Mr Christian was responsible for the allocation of the parking spaces and would direct Peter Pieri (Mr Piere) – Cleaning Supervisor, to organise the outsourcing of the production of the parking signs.*

**[28]** The Applicant submitted that the contractual clause allowing for significant changes in the Applicant's position should be read down to only allow for a variation based on mutual consent. It was further asserted that to allow otherwise would be inconsistent with the redundancy provisions under the National Employment Standards and established case law.<sup>9</sup>

**[29]** The Applicant submitted that in demoting her from a Human Resources Manager to a Human Resources Administrator, the Respondent repudiated her contract which she accepted as the termination of her employment contract. Therefore, she is a person within the meaning of the word "dismissed".<sup>10</sup>

### **Respondent's submissions**

**[30]** The Respondent submitted that:

- a) the Applicant did not perform the role of the Human Resources Manager;
- b) there was no variation to her contract of employment to this effect; and
- c) there was no communication about her change in position as per the standard processes.

**[31]** The Respondent contended in or around August 2022, the Applicant changed her title to Human Resources Manager on her email signature (and on organisational charts prepared by her) without consulting her manager or anyone else.<sup>11</sup>

**[32]** The Respondent responded to the Applicant's assertions of facts as follows:<sup>12</sup>

- (a) The Applicant was employed under the Contract, as a HR Administrator;*

- (b) The Respondent never agreed to vary the Applicant's title to 'Human Resources Manager' and in any event, the Applicant did not actually change her title on her email signature until approximately 9 months after she alleges she received approval to do so;*
- (c) The Applicant was never issued a contract letter which varied her Contract, as was the Respondent's usual process when effecting any contract variation;*
- (d) The Applicant's duties and responsibilities did not vary significantly during the entire length of her employment;*
- (e) The Applicant plainly overstates her duties, status and responsibilities. The Applicant did not perform the duties or have the responsibilities ordinarily expected of a Human Resources Manager, she performed duties which were consistent with the role of a Human Resources Administrator;*
- (f) The Applicant was not referred to by Mr Christian or Mr Bittisnich as the Human Resources Manager;*
- (g) The Applicant did not possess the level of relevant experience that would ordinarily be expected of a Human Resources Manager; and*
- (h) The Applicant was paid, for the entire duration of her employment, a salary of \$90,000.00 per annum.*

*5. It is wholly unclear how the Applicant relies on her being the sole human resources employee on site as evidence that the Respondent held her out to be its Human Resources Manager and that submission should be rejected. This was of course the existing state of affairs at the Applicant's date of hire, as a Human Resources Administrator.*

*6. The Applicant also submits that an organisational chart reflecting her title as Human Resources Manager, which she produced herself, supports the conclusion that the Applicant was "accepted by the Respondent as its Human Resources Manager". That submission is, respectfully, unintelligible and should be rejected.*

*7. Further, the fact that other employees (who had no authority and were not capable of making a contract with the Applicant on behalf of the Respondent) may or may not have mistakenly referred to the Applicant as the Human Resources Manager is of no consequence and should bear no weight in determining the intentions of the Respondent.*

**[33]** The Respondent further submitted that for a valid contract to exist, there must be a valuable consideration. Accordingly, if there was a change of the role, in or around November 2021, there was no benefit or valuable consideration exchanged to the Applicant nor to the Respondent.<sup>13</sup>

[34] The Respondent submitted that should the Commission find that there has been a variation of the contract, the Respondent believes that there is still no repudiation. In submitting so, the Respondent asserted that despite the proposed changes by Mr Jaftha, the Applicant was to continue performing the same duties and have the same responsibilities, report to senior personnel and not have her remuneration changed.<sup>14</sup>

[35] The Respondent asserts the Applicant terminated the employment on her own initiative, and that, consequently, she is not a person who has been dismissed as defined in s.386 of the FW Act. The Respondent invited the Commission to dismiss the application.

### Consideration

[36] In discharging the Respondent's jurisdictional objection, the Applicant must surpass two hurdles:

- a) The Applicant must first demonstrate that based on the Subsequent Conduct of the parties, the Applicant's position/title was validly varied (**The Subsequent Conduct issue**); and
- b) The Applicant must then demonstrate that the Respondent repudiated the new contract (**The repudiation issue**) and consequently dismissed her.

### The Subsequent Conduct issue

[37] Evidently, there is a factual contest as to the Applicant's title with the Respondent.

[38] As affirmed by Gordon J in *Construction, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd*, there is a general principle against using subsequent conduct in the construction of a contract unless an exception applies.<sup>15</sup>

*Of course, the general principle against the use of subsequent conduct in construing a contract wholly in writing says nothing against the admissibility of conduct for purposes unrelated to construction, including in relation to: (1) formation – to establish whether a contract was actually formed and when it was formed<sup>293</sup>; (2) contractual terms – where a contract is not wholly in writing, to establish the existence of a contractual term or terms; (3) discharge or variation – to demonstrate that a subsequent agreement has been made varying one or more terms of the original contract; (4) sham – to show that the contract was a "sham" in that it was brought into existence as "a mere piece of machinery" to serve some purpose other than that of constituting the whole of the arrangement; and (5) other – to reveal "probative evidence of facts relevant to rectification, estoppel or any other legal, equitable or statutory rights or remedies that may impinge on an otherwise concluded, construed and interpreted contract.*

[39] So it is that in relation to considering variation of contract the use of subsequent conduct of the parties is permissible.

[40] The Applicant submitted that eleven (11) factual circumstances confirm the variation of the contract by the Respondent. I adopt the same paragraph structure as the Applicant's

submissions below.

Subsequent Conduct (a) – November 2021 conversation

[41] Mr Christian in his first sworn witness statement denied ever having such a conversation with the Applicant.<sup>16</sup>

[42] This was put to Mr Christian by the Applicant’s counsel during the hearing who challenged its credibility. Mr Christian stood by his statement.<sup>17</sup> However, the Respondent did not cross examine the Applicant.

[43] During the hearing, I put this factual contest to both parties and sought submissions on how it is to be resolved.<sup>18</sup>

[44] The Respondent submitted that it is highly improbable for the alleged conversation to have occurred considering the email signature was not changed until on or about 5 August 2022.<sup>19</sup>

[45] The Applicant’s counsel submitted that the factual contest is to be resolved given that the facts were not put to the Applicant in cross examination. Therefore, they ought to be accepted as they are, whereas in contrary, Mr Christian’s evidence was tested who proved to be a “most unimpressive witness”.<sup>20</sup>

[46] I am not satisfied that this Subsequent Conduct assists the Applicant given there are five separate occasions between the period of May to August 2022 where the Applicant’s email signature is noted as “HR Administrator”. Before me the Applicant explained the discrepancy as follows in relation to the email of 27 May 2022:<sup>21</sup>

*Yes?---The IT manager – we had just hired a new IT manager. He was going through all of the email signatures and he was changing them and putting them in according to what was already listed in the database. In this instance, as I had changed to HR manager on Peter Christian’s instruction this was obviously missed in that instance.*

*It wasn’t Mr Christian who instructed you to change it, was it?---Mr Christian, originally, when I asked him if I should change my email signature to HR manager when he said ‘yes’. And then, Josh, the new IT manager came in and obviously it wasn’t just myself that was affected this, sir, there was quite a few of us, that we had to keep changing it backwards and forwards.*

*Why isn’t that in your evidence?---I omitted it.*

[47] Whilst this may explain the change of title in May, it does not explain the emails of 3 June 2022, 14 June 2022, 1 July 2022, and 2 August 2022. Furthermore, even if the above alleged conversation actually occurred between the Applicant and Mr Christian, it is unexplained why the Applicant did not formalise this change of status beyond a simple email signature and organisational chart. The Applicant had prepared her original contract of employment as HR Administrator. If, as she contends, there was agreement to promote her to HR Manager, it is unexplained why she did not prepare a written variation to her contract or a

new contract. I am not satisfied that there was any concluded agreement between the Applicant and the Respondent that the Applicant be promoted to HR Manager.

[48] It is also unexplained why the Applicant didn't change her title until many months after the alleged conversation with Mr Christian. The Applicant said she did, but there is no evidence of this.

[49] The Applicant and her legal representatives had every opportunity to issue an Order to Produce for emails sent in November 2021, and thereby explain the discrepancy in her witness statement about email signatures for period between May to August 2022. She did not do so.

[50] It seems to me that, more likely than not, the conversation relied upon by the Applicant either did not happen, or, if it did, it did not have the significance for Mr Christian that it appeared to have for the Applicant. Likely, Mr Christian did not turn his mind to or particularly care about what the Applicant called herself.

[51] Regardless of the truth about the alleged conversation in November 2021, I am not satisfied that, even if the conversation occurred as alleged by the Applicant, that it resulted in her being promoted from HR Administrator to HR Manager. I am not satisfied that at any time, the Respondent agreed to a variation of the original HR Administrator contract or to the creation of new contract of employment such that the Applicant ever became the HR Manager.

[52] There is insufficient evidence that the Respondent and the Applicant were ever *ad idem* (in agreement) about the Applicant being the HR Manager.

[53] This alleged Subsequent Conduct weighs against finding that the Applicant's role was varied.

#### Subsequent Conduct (b) – organisational chart

[54] The Respondent submitted that an organisational chart prepared by the Applicant herself should be rejected.

[55] In his first sworn witness statement Mr Jaftha noted:<sup>22</sup>

*16. I revisited some organisational charts I had been sent previously for DVP which nominated Kristine as the HR Manager and I had also noticed that she used HR Manager as her title on her email signature. I inquired with Vicky Clayton (Rivalea's Employment Manager at the time) about who had the ability to amend the charts. Vicki advised that the site had access to amend the charts at any time themselves.*

[56] As noted in the history of the matter, the organisational chart listed the Applicant's title as the Human Resources Manager from 27 May 2022 onwards. However, as foreshadowed above, there were emails spanning months where the Applicant's email signature remained as "HR Administrator".

[57] I am not satisfied that these organisational charts were accurate. They were routinely prepared by the Applicant herself. It was she who selected her title. The fact that no one appears

to have noticed (until Mr Jaftha started) or cared is not evidence of some contractual variation or change. The Applicant “promoted” herself. It was not with the agreement of the Respondent.

[58] This Subsequent Conduct weighs against finding that the Applicant’s role was varied.

Subsequent Conduct (c) – sole person in the HR department

[59] The Respondent rejected the Applicant’s submission on the basis that this was the existing state of affairs in the business.

[60] Mr Christian in his second sworn statement asserted that:<sup>23</sup>

*(c) I agree that Kristine was the only person employed in the HR team at DVP for the entire duration of her employment, but she reported into me and Karen in the broader HR team, located at Corowa.*

[61] This Subsequent Conduct was not further tested during the hearing.

[62] I reject the suggestion that just because a person is the sole employee working in a Human Resources Department it automatically makes them the Human Resources Manager, and entitled to the title. The prerogative rests with the employer.

[63] Further, a position is more than just a title. There is little evidence that the Applicant was performing the higher functional duties of a HR Manager as opposed to a HR Administrator. Her contrary view exhibits delusions of grandeur.

[64] This Subsequent Conduct weighs against finding that the Applicant’s role was varied.

Subsequent Conduct (d) – assumption of Mr Christian’s duties

[65] In his second sworn witness statement Mr Christian rejected parts of the Applicant’s submissions:<sup>24</sup>

*(a) I agree that I asked for Kristine’s assistance with administrative tasks, because that’s what she was employed to do, but I never asked Kristine to “assume my human resource responsibilities”. Any directions to assist with the maintenance of Preceda, Y drive, Mitre Finch and HR Onboard were also not given by me. I did not have access to administer those systems.*

*(b) I agree that Kristine provided me (as a senior manager in the business) with administrative support. I believed that this arrangement would continue after the appointment of a Human Resources Manager.*

[66] Mr Christian submitted that the Applicant overstated the role that she played in relation to drafting contracts, negotiating terms and conditions of employment, interpreting enterprise agreements and onboarding new employees.<sup>25</sup>

[67] In his first sworn witness statement Mr Christian further submitted:<sup>26</sup>

13. *I did not allow Kristine to deal with any complex HR or IR matters without my involvement because I was of the opinion that she was not capable of managing those matters on her own.*

14. *One example of this is where I asked her to investigate whether or not a conflict of interest existed between a supervisor and a worker who I suspected were sleeping together, where the supervisor was looking to promote the worker. Kristine later advised that she had spoken to the supervisor and that he had denied this was occurring.*

15. *I later spoke to the supervisor myself and asked what had been discussed with Kristine. He said that (rather than following a proper, confidential process) they'd only spoken informally at a team barbeque (while both at the grill). He admitted to me that he had been sleeping with the worker. I indicated that any decision about her promotion would now not involve him.*

16. *Kristine also demonstrated poor attention to detail when producing contracts of employment. All contracts came to me for approval before issue. About 3 times out of 10, I had to return contracts to her to correct errors in the schedule or covering letter, or because she had used the wrong contract template entirely.*

**[68]** I am not satisfied that the Applicant's acceptance of further tasks from Mr Christian elevated her to the position of a HR Manager. As stated above, there is little evidence that the Applicant was performing the higher functional duties of a HR Manager as opposed to a HR Administrator.

**[69]** Even if I am wrong in that factual finding, the Applicant's contractual clause remedies any deficiency:

*You are required to carry out other duties reasonably required by the Company, that you are skilled and capable of performing.*

**[70]** Overall, I am not satisfied that this subsequent conduct supports a finding that the Applicant's role was varied.

Subsequent Conduct (e) – management of confidential information

**[71]** Mr Christian in his first witness statement rejected the Applicant's submission and instead provided:<sup>27</sup>

*17. When Kristin took simple statements for HR purposes, I noticed through her records of interview that she tended to 'lead' the witness, rather than just asking open questions. It was because of this that I moved Kristine to the office next to me so that I could overhear her conversations with workers and intervene if necessary. I did not tell Kristine that this was "to facilitate privacy akin to that of a Human Resources Manager" or anything along those lines.*

**[72]** The Applicant's counsel cross examined Mr Christian during the hearing. The relevant



questioning unfolded as follows:<sup>28</sup>

*In respect of the first sentence of paragraph 17, you say that she had a tendency to lead witnesses. You did not commence any performance management process in relation to that issue, did you?---No, I didn't.*

*The office that she moved in, that had a door, didn't it?---yes.*

*And she was able to close that door?---Yes, she was.*

*Whereas in the office plan environment she was directly in front of your door?---Correct.*

*I suggest to you that you were better able to overhear her conversations when she was in open plan, directly in front of your door, rather than in an adjacent office where she could close her door?---That is not correct. The acoustics aren't such that that's the case.*

*And I suggest to you that the real reason you moved her was so that she could have confidential conversations with employees without being overheard?---Part of that is correct, yes.*

*Yes, and that was part of her duties as an HR manager, to have confidential conversations with employees?---It was part of her responsibilities, yes.*

*As HR manager?---Not as HR administrator.*

*THE COMMISSIONER: Sorry, Mr Christian, I missed what you just said then? I said as HR administrator that was part of her duties.*

[73] Even if the Applicant was required to have some confidential conversations with other employees from time to time, that is not inconsistent with the role of a HR Administrator. Such conversations are not the exclusive remit of a HR Manager.

[74] This factor also weighs against a finding that the Applicant's title was varied.

Subsequent Conduct (f) – reference to the Applicant as HR Manager

[75] Mr Christian and Mr Bittisnich both rejected ever referring to the Applicant as the HR Manager.

[76] Notwithstanding their denials, it is possible that, from time to time, the Applicant was misdescribed. Likely Mr Christian and Mr Bittisnich did not turn their mind to the Applicant's title and allowed her some "free reign". That is not evidence of a variation of contract or the creation of a new contract as HR Manager. At its highest it was a careless use of language.

[77] Similar to factor (e) I am not convinced that the Applicant was referred to as the HR Manager because there had been some agreement to promote her. Therefore, this factor also

weighs against a finding that the Applicant's title was varied.

Subsequent Conduct (g) – references by other employees

[78] The Respondent did not categorically reject this assertion but submitted that what other employees called the Applicant should not be determinative of the Respondent's intention.

[79] The Applicant did not provide witness statements of any employees attesting to this.

[80] This Subsequent Conduct was not further tested during the hearing.

[81] It may well have been that other employees referred to the Applicant as "the HR Manager". That is not evidence that the Respondent ever came to an agreement with the Applicant that she be appointed to such a role.

[82] This factor also weighs against a finding that the Applicant's title was varied.

Subsequent Conduct (h) – reference in external contracts

[83] In his second sworn witness statement Mr Christian submitted that:<sup>29</sup>

*(d) I have no recollection of ever seeing a commercial contract between DVP and any third party which referred to Kristine as a Human Resources Manager. It is my understanding that most of our commercial contracts were negotiated by the Rivalea legal and HR teams anyway.*

[84] The Applicant did not provide any such contracts or seek an order to produce for them.

[85] This Subsequent Conduct was not tested further during the hearing.

[86] There is no evidence that external contracts referred to the Applicant as the HR Manager.

[87] This factor also weighs against a finding that the Applicant's title was varied.

Subsequent Conduct (i) and (j) – invites naming Applicant as HR Manager

[88] This was not contested by the Respondent. However, the Applicant also did not supply a copy of the invitational emails as evidence.

[89] This Subsequent Conduct was not tested further during the hearing.

[90] Because the Applicant was referring to herself as the HR Manager it would be unsurprising if she received invitations with that title on it. However, that is not evidence that the Respondent ever agreed to appoint her to such a role. Likely the Respondent had no knowledge of the invitations received that incorrectly identified the Applicant as the HR Manager.

[91] This factor also weighs against a finding that the Applicant's title was varied.

Subsequent Conduct (k) – allocation of a parking space

[92] In his second sworn witness statement, Mr Christian asserted that:<sup>30</sup>

*(f) As for parking available at DVP's site, there is a small row of car parks immediately outside the admin building, and the main car-park is located a short walk away. In around the middle of 2022, staff had started to fill up the car parks outside the admin building, leaving no room for visitors to park. I sent around a memo asking that everyone make sure there were spaces left in the admin building car park for visitors. After this, Peter Peri approached me and asked if he could make signs to be displayed on the car parks to reserve spaces for the people who required quick access to their vehicles. I said "yeah, go ahead and organise them." And he did that. I didn't review who was allocated a park, or what the signs would say. If I had been given a say, I would not have allocated Livia Bertoli (Office Manager) or Gerton Mulder (Plant Engineer) a park as there is no reason why they would require immediate access to their vehicles.*

[93] The Applicant's counsel questioned Mr Christian in relation to the parking space during the hearing.<sup>31</sup>

*MR BANASIK: I suggest to you, Mr Christian, that the reason that you approved for the applicant to have a car park alongside the other management employees is because she was a management employee?---She's part of the salaried staff team and as part of that she was occasionally required to take people to the doctor's, which meant she needed to have access to a vehicle.*

*Who parks in that space now?---Nobody.*

*So, what, is it now a visitor car park again?---No, they pool cars parked in that position. So at the moment everybody that needs to use a vehicle would, first option, use the pool car.*

*So you know which car park spot it was?---No, I don't. As I said, there's no sign on it now to check, so you can't even tell which one it was.*

*You've just said it's now pool parking?---Yes, exactly. So there's a couple of empty spots. Two are for visitors, one's for the pool car.*

*So the one that's now the pool car was the applicant's car park. Correct?---Could have been. I'm not sure. As I said, there's no sign there now. I can't tell.*

*But there was a sign before?---I assume so. As I understand it, yes.*

*And you say that you never noticed that that sign said 'HR Manager'?---No, I didn't. It was unimportant. It wasn't an important point.*

*It was unimportant that there was a sign saying 'HR manager' and the applicant parked in the space for the HR manager?---Well, there's a sign for the office administrator and half the time she parks in the visitors car park. It's just to let people know that if they need to park somewhere, that's where they should park.*

*The purpose of it is to let people know that that space is assigned for a certain position, isn't it?---That was Peter's intention, as I understand it, yes, the cleaning supervisor.*

*Yes?---As part of that, he assigned himself a parking space, but that doesn't make him a manager, and it means he's got to occasionally get in his car and go and pick stuff up for the cleaning crew.*

*But his position is cleaning manager, isn't it?---He's the cleaning supervisor.*

**[94]** I accept that the Applicant parked in a car spot designated for the HR Manager. But that is not conclusive evidence that there was an agreement between the Respondent and the Applicant that she had been appointed to such a role. First, the sign was made by a person with no knowledge of the contractual arrangements. True it was that the Applicant was the sole HR person. True it was that people may have referred to her as the HR Manager because of that fact. But, what co-workers thought of her is not determinative of the contractual arrangements between the Applicant and the Respondent. As the only HR person the Applicant was allowed an indulgence to park where other managerial employees were entitled to park. It evidences a latitude allowed to the Applicant. It does not evidence a variation to her contract of employment or a new contract. It does not support a finding that, at some point, the Applicant became the HR Manager. She never did.

#### *Conclusion – subsequent conduct*

**[95]** After a close analysis of the above Subsequent Conducts, for the reasons set out above, I am not satisfied that the Applicant was appointed nor her title varied to that of a Human Resources Manager.

**[96]** The Applicant changed her title on organisational charts and emails. She was content for people within the Respondent and external to it to think of her as the HR Manager. No doubt she was delighted when people called her the “HR Manager”. But none of that made her the HR Manager. I am often variously referred to by self-represented parties appearing before me as “your Honour”. Like the Applicant, I too am delighted by the supposed elevation. But it does not make it true.

**[97]** The fact that neither Mr Christian nor Mr Bittisnich seemed to notice or care or strictly enforced the use of the title HR Administrator is not evidence of an agreement by the Respondent to vary the contract or create a new one. The Applicant's title was not varied by virtue of the inaction of others.

**[98]** In considering all the material before me, I am not satisfied that there was ever an agreement between the Applicant and the Respondent that the Applicant was the Respondent's HR Manager.

[99] It must then follow that there was no repudiation of the HR Manager contract, because no such contract ever existed. There being no repudiation, there was no “termination on the employer’s initiative.”

[100] All Mr Jaftha did on 5 October 2021 was reaffirm the Applicant’s title and responsibilities. He was entitled to do so.

[101] And because it was a reaffirmation of the actual state of affairs (i.e. that the Applicant was always the HR Administrator), the factual circumstances do not give rise to a finding that the Applicant was demoted. Section 386(2)(c) is not enlivened. If it had been, this would have presented an additional difficulty for the Applicant in establishing that she was dismissed.

#### The repudiation issue

[102] Alternatively, if I am wrong in finding that the Applicant was never the HR Manager, the Applicant still faces an obstacle. This is because her contract of employment (which she drafted) expressly contemplates significant changes in “title, ... responsibilities” and reporting lines. Such a broad discretion vested with the Respondent suggests there could never be a repudiation of the contract.

[103] The relevant clause of the contract provides:

*Your position title, objectives, responsibilities and the person/position that you report to, may, at the discretion of the Company, vary significantly during your employment. In addition, you may be required to travel and work at other Company locations or at any of the Company’s related entities.*

*In the event of any variations as referred to above, the remaining terms of this Contract will continue to apply to you unless altered in writing.*

*You are required to carry out other duties reasonably required by the Company, that you are skilled and capable of performing.*

[104] The Applicant submitted in her written submissions that the contractual clause allowing for significant changes in the Applicant’s position should be read down to only allow for a variation based on mutual consent.<sup>32</sup> In supporting its argument the Applicant submitted:<sup>33</sup>

*16. In Visscher v Teekay Shipping Pty Ltd [2014] FCAFC 5, the full Federal Court confirmed the primary judge’s decision that an employer acted unlawfully when they sought to unilaterally amend an employee’s job title.*

*17. Katzmann J, the primary judge, held at [165]:*

*Although more commonly constructive dismissal is alleged in cases where an employee is given Hobson’s choice of resigning or being sacked..., there is no doubt that a demotion may amount to a constructive dismissal. Thomson was such a case. In Thomson the employee alleged that her employer discriminated against her on the ground of her sex and pregnancy by assigning her, after she*

*returned to work from maternity leave, different duties and responsibilities which his Honour found (at [53]) to be “of significantly reduced importance and status of a character amounting to a demotion (though not in official status or salary)” and conduct in serious breach of the implied term of trust and confidence entitling the employee to treat the contract as at an end...*

*18. Section 61(1) of the Fair Work Act 2009 (Cth) sets out the National Employment Standards that apply to every employee which may not be displaced. Section 61(2)(i) of the Fair Work Act 2009 (Cth) lists ‘notice of termination and redundancy pay’ as a standard which may not be displaced.*

**[105]** The Applicant’s Federal Court authority cannot be relied on in the circumstances as there was no contractual clause akin to the one in this matter. The primary judge in the above matter was alive to this issue as her honour noted in the following paragraph:<sup>34</sup>

*[166] Before the question of breach can be considered, however, there is an anterior issue to resolve. What were the terms of Mr Visscher’s contract when he was told he would be sailing as second mate?*

**[106]** During the jurisdictional hearing, the Applicant’s counsel also submitted that a contractual discretion must not be exercised in a way that is arbitrary, capricious or unreasonable as per the decision of *Silverbrook Research Pty Ltd v Lindley (Silverbrook)*. Relevantly the referenced paragraph provides as follows:<sup>35</sup>

*The task then is to value that loss of opportunity or chance. This process begins with a proper understanding of the contractual content of the obligations and entitlements arising out of cl 4 and in particular cll 4.2 and 4.3. That the decision as to whether the respondent should receive the bonus was “entirely within the discretion of” the appellant should not be construed so as to permit the appellant to withhold the bonus capriciously or arbitrarily or unreasonably; it should not be construed so as to give the appellant a free choice as to whether to perform or not a contractual obligation. The relevant discretion should be understood against the proper scope and content of the contract. This was a bargained for bonus to be assessed against set objectives. Such a clause should receive a reasonable construction and not permit the appellant to choose arbitrarily or capriciously or unreasonably that it need not pay money the set objectives having been satisfied: *Greaves v Wilson (1858) 25 Beav 290 at 293; 53 ER 647 at 650; Stadhard v Lee (1863) 3 B & S 364 at 371-372; 122 ER 138 at 141; Gardiner v Orchard [1910] HCA 18; 10 CLR 722; Carr v J A Berriman Pty Ltd [1953] HCA 31; 89 CLR 327; Selkirk v Romar Investments Ltd [1963] 1 WLR 1415 at 1422-1423; Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd [1972] HCA 36; 128 CLR 529 at 538, 543, 547 and 549-555; Pierce Bell Sales Pty Ltd v Frazer [1973] HCA 13; 130 CLR 575.**

**[107]** The Applicant’s counsel submitted before me that the demotion was at least partly motivated by Mr Jaftha’s concerns relating to the Applicant’s performance which indicates capriciousness. He also further submitted that there were no reasons for the change in the Applicant’s title which was arbitrary and unreasonable.<sup>36</sup>

[108] I am not satisfied that these decisions have much utility for the Applicant. The two cases centre around two entirely different clauses and the authority that a contractual discretion cannot be exercised in a way that is arbitrary, capricious or unreasonable is not a general principle. As His Honour President Allsop (as he then was) noted “The relevant discretion should be understood against the proper scope and content of the contract”.<sup>37</sup>

[109] In the above Silverbrook decision, the relevant contractual clause provided:

*4. ANNUAL PERFORMANCE BONUS*

*4.1 Lindley will be eligible to receive the Annual Performance Bonus subject [sic] to clause 4.2 and 4.3.*

*4.2 Silverbrook will assess Lindley’s performance against set objectives at the end of each quarter commencing from the date of her employment. Provided her performance satisfies the set objectives and subject to clause 4.3, one quarter of the Annual Performance bonus will be paid to Lindley within 21 days of the end of each quarter.*

*4.3 The decision as to whether Lindley should receive the Performance Bonus is entirely within the discretion of Silverbrook. Lindley must be in the employ of Silverbrook at the time bonuses are determined to be eligible to receive the Annual Performance Bonus.*

[110] On the contrary, the Applicant’s contractual clause does not provide any qualifiers or “set objectives” before enlivening the Respondent’s right.

[111] I put the relevant contractual clause to the Applicant in the hearing:<sup>38</sup>

*All right. Thank you. I think also in your evidence you say that you had some responsibility for drafting contracts is that correct?---That is correct.*

*And is it right that you drafted your own contract in what June of 2021 or something?---That is correct.*

*Yes. And in so far as there could be a change in your position title you agreed with the company, didn't you, that they were allowed to do that?---That's correct.*

*And that's what they did?---Yes, they did.*

*All right. And you agreed with the company that they could change your responsibilities, didn't you?---As per my signed contract, yes.*

*Even significantly?---Yes.*

*And you agreed with the company that they could change your reporting lines, didn't you?---Yes.*

*Even significantly?---Yes.*

*So in circumstances where, on your evidence, they proposed to change your title, responsibilities and reporting line and you agreed with them that they were allowed to do that?---Yes.*

*Why are you complaining about it?---Simply because the structure of the management team and the business at Diamond Valley Corp is completely different to the same with JBS.*

*You agreed with them that they could vary all of these things significantly, didn't you?---Yes.*

*And on your evidence that's what they were doing, weren't they?---Yes. Yes.*

*And they had a contractual right to do that, didn't they? ---Yes, they did.*

*And you agreed to give them that contractual right?---As per my signed contract. Yes.*

**[112]** In the face of the Applicant's honest concessions about her understanding of her own contract, there was no repudiation of it when she was required to use the title HR Administrator.

**[113]** Furthermore, I accept the Respondent's submission that despite the requirements being made by Mr Jaftha, the Applicant was to continue performing the same duties, report to senior personnel and not have her remuneration changed.<sup>39</sup> I am satisfied that, for all intents and purposes, the Applicant's role was not changing. The reaffirmation of the HR Administrator title did not amount to a repudiation of the contract of employment.

**[114]** Nothing in the conduct of Mr Jaftha evidenced arbitrary, unreasonable or capricious conduct. His desire that the Applicant use the job title she was contracted to perform was entirely reasonable. There were sound business grounds for him to do so.

**[115]** In any case, I note the following observations by the full Federal Court of Australia in *Management 3 Group Pty Ltd (in liq) v Lenny's Commercial Kitchens Pty Ltd*, (affirming a previous case of the High Court):<sup>40</sup>

*[39] ... If the words are plain and unambiguous they must be given their plain meaning, even if that leads to a capricious or unreasonable result Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99 at 109–10 per Gibbs J). However, if the ordinary meaning of the words is inconsistent with other clauses of the Contract, that may be a reason to depart from the plain meaning.*

**[116]** The contractual clause of the Applicant is clearly unambiguous. The Applicant's concessions as such support such a finding. There is also no inconsistency between the clauses. In fact, in relation to working hours the contract provides:

*Working hours are to be regarded as flexible, and performed at times to suit Company requirements, with an average of 38 ordinary hours to be worked each week.*



*You may be required to work additional ad hoc hours as may be reasonably necessary to carry out your duties effectively. Please note your salary fully compensates you for additional hours and penalty payments do not apply to your position.*

[117] Therefore, this clause complements and foresees possible significant changes to the Applicant's role and responsibilities.

[118] Lastly, I am not convinced that the redundancy provision of the National Employment Standards applies here, given the termination of employment was at the initiative of the Applicant.

[119] The landscape of employment law and primacy of contract has changed as noted in the Full Bench decision of *NSW Trains*:<sup>41</sup>

*[147] The High Court, in its decisions of Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd (Personnel Contracting) and ZG Operations Australia Pty Ltd v Jamsek (Jamsek), has also recently emphasised that the character of the relationship between parties was to be determined by reference to the rights and duties created by the written agreements which comprehensively regulated those relationships.*

*[148] In the majority judgment in each decision, Kiefel CJ, Keane and Edelman JJ held that where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the rights and obligations established by the contract should be decisive of the character of the relationship (as well as its legal terms). Absent a suggestion that the written contract has been varied, or that there has been conduct giving rise to an estoppel or waiver, a wide-ranging review of the parties' subsequent conduct is unnecessary and inappropriate. However, the majority judgment in Personnel Contracting recognised that 'there may be cases where subsequent agreement or conduct effects a variation to the terms of the original contract or gives rise to an estoppel or waiver.'*

[120] In short, "the contract is King". In the present matter that contract (drafted by the Applicant) allowed the Respondent considerable power to "significantly" vary the Applicant's position, title, responsibilities and reporting lines. Although in this matter I have found that the Respondent did none of this.

[121] Accordingly, in light of my reasons set out above, even if the Respondent had significantly changed the Applicant's position, title, responsibilities and reporting lines, it would not have amounted to a repudiation of contract by the Respondent.

#### *Conclusion – repudiation question*

[122] It necessarily follows that even if the Applicant's role was validly changed to that of a HR Manager, the "changes" proposed in October 2022:

- a) did not amount to repudiatory conduct;
- b) it was not termination at the initiative of the employer; and

c) it did not constitute a dismissal in accordance with s.386 of the FW Act.

### Overall Conclusion

[123] For the above reasons I am not satisfied that the Applicant was dismissed as alleged.

[124] As outlined in my reasons above, the Applicant was never appointed to the role of a Human Resources Manager and even if she was, her contractual clause permitted significant changes to position, title, responsibilities and reporting line such that a change (as alleged by the Applicant) could not be considered a repudiation of the contract.

[125] Consequently, I find that there was no dismissal pursuant to s.386 of the FW Act. The Application is therefore dismissed.

[126] An order to this effect will be issued with this decision [[PR762879](#)].



### COMMISSIONER

#### *Appearances:*

*Mr C Banasik & Ms S Hallas* on behalf of the Applicant

*Ms B Sakrzewski-Hetherington* on behalf of the Respondent

#### *Hearing details:*

2023

Melbourne (by Video using Microsoft Teams)

17 March.

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<sup>1</sup> [2020] FCAFC 152.

<sup>2</sup> [2022] FWCFB 55.

<sup>3</sup> Ibid [34] – [35] and [93].

<sup>4</sup> Exhibit 8 at p. 69 of the Digital Court Book (“DCB”).

<sup>5</sup> Exhibit 9 at p. 72 of the DCB.

<sup>6</sup> Exhibit 2 at p. 19 of the DCB.

<sup>7</sup> Exhibit 14 at p. 92 of the DCB.

<sup>8</sup> Exhibit 15 at p. 102 - 103 of the DCB.

<sup>9</sup> Exhibit 14 at p. 97 of the DCB.

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- <sup>10</sup> Exhibit 14 at p. 95 of the DCB.
- <sup>11</sup> Exhibit 4 at p. 44 of the DCB.
- <sup>12</sup> Exhibit 27 at p. 134 - 135 of the DCB.
- <sup>13</sup> Exhibit 27 at p. 134 of the DCB.
- <sup>14</sup> Exhibit 27 at p. 136 of the DCB.
- <sup>15</sup> [2022] HCA 1, 68 [176] – [177].
- <sup>16</sup> Exhibit 10 at p. 76 of the DCB.
- <sup>17</sup> Transcript of the proceedings at PN 298.
- <sup>18</sup> Transcript of the proceedings at PN 751.
- <sup>19</sup> Transcript of the proceedings at PN 761.
- <sup>20</sup> Transcript of the proceedings at PN 769 - 770.
- <sup>21</sup> Transcript of the proceedings at PN 709 - 711.
- <sup>22</sup> Exhibit 5 at p. 50 of the DCB.
- <sup>23</sup> Exhibit 30 at p. 150 of the DCB.
- <sup>24</sup> Exhibit 30 at p. 149 of the DCB.
- <sup>25</sup> Exhibit 30 at p. 148 of the DCB.
- <sup>26</sup> Exhibit 10 at p. 75 of the DCB.
- <sup>27</sup> Exhibit 10 at p. 75 of the DCB.
- <sup>28</sup> Transcript of the proceedings at PN 168 – 176.
- <sup>29</sup> Exhibit 30 at p. 150 of the DCB.
- <sup>30</sup> Ibid.
- <sup>31</sup> Transcript of the proceedings at PN 195 – 206.
- <sup>32</sup> Exhibit 14 at p. 97 of the DCB.
- <sup>33</sup> Ibid.
- <sup>34</sup> *Visscher v Teekay Shipping (Australia) Pty Ltd (No 4)* (2012) 297 ALR 674, [166].
- <sup>35</sup> *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357, [5].
- <sup>36</sup> Transcript of the proceedings at PN 793 – 794.
- <sup>37</sup> *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357, [5].
- <sup>38</sup> Transcript of the proceedings at PN 723 – 736.
- <sup>39</sup> Exhibit 27 at p. 136 of the DCB.
- <sup>40</sup> [2011] FCAFC 162, [39].
- <sup>41</sup> [2022] FWCFB 55, [147] – [148].