



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Marcia Pitt

v

Wentworth Area Chaplaincy Association Incorporated
(U2022/9281)

DEPUTY PRESIDENT BOYCE

SYDNEY, 12 APRIL 2023

Application for an unfair dismissal remedy – jurisdictional objection – whether applicant “dismissed” by respondent.

Introduction

[1] On 13 September 2022, Ms Marcia Pitt (**Applicant**) filed an unfair dismissal application (**Application**) with the Fair Work Commission (**Commission**). The Respondent to the Application is Wentworth Area Chaplaincy Association Incorporated (**Respondent**).

[2] The Respondent raises a jurisdictional objection to the Application, namely, that the Applicant was not “dismissed” by the Respondent within the meaning of s.386(1)(a) of the *Fair Work Act 2009* (**Act**).¹ This decision concerns this jurisdictional objection.

[3] At the hearing, the Applicant was represented by Mr Chris Dekker, Industrial Officer, Nurses Professional Association of Australia (Red Union), and the Respondent was represented (with permission) by Mr Chris Mossman, Partner, Wotton + Kearney Lawyers.²

Evidence

[4] Ms Cathy Gault, Committee Member of the Respondent, gave the following unchallenged (by way of cross-examination or otherwise) evidence:

“4. Ms Pitt was employed by WACA as a part-time chaplain to work in public hospitals (in the Nepean Blue Mountains Local Health District, notably at Nepean Hospital) to deliver pastoral care on a co-operative and non-denominational basis to patients, families and staff of all faiths and of no particular faith.

5. To work in public hospitals, WACA chaplains had to be accredited by the Chief Executive of an Area Health Service (or their delegate) with accreditation being able to be withdrawn by the Chief Executive (or their delegate). Chaplains, upon accreditation, were classified as a ‘Contingency Worker’ — that is, a non-public service employee working within the public service.

6. The process to have WACA chaplains working in public hospitals is governed by the Memorandum of Understanding ('MOU') between NSW Health Civil Chaplaincies Advisory Committee NSW (on behalf of its member religious organisations) and the NSW Department of Health. Accredited WACA chaplains need to abide by the MOU, NSW Health Code of Conduct and NSW Health policies and procedures.

7. On 28 September 2021, arising from the COVID-19 pandemic, an email from HealthShare NSW (the largest government shared services organisation in Australia who support the delivery of patient care in NSW Health) was sent to WACA's Treasurer, Mr Neil Bartlett; that email was in relation to "*Important information regarding COVID-19 vaccinations*". That email informed WACA that the *Public Health (COVID-19 Vaccination of Health Care Workers) Order 2021* (the 'Order') set out directions for health staff and "people working within health settings in relation to receiving a COVID-19 vaccination" (which included Ms Pitt). Annexed hereto and marked 'A' is a copy of the email sent by HealthShare NSW to Mr Bartlett including attachment.

8. The Order (as amended on 29 September 2021) stated:

"2 Definitions

(1) In this Order

health care worker means each of the following—

(a) a person who does work, including as a member of staff of the NSW .Health Service, for any of the following—

a public health organisation,

(ii) the Health Administration Corporation,

(iii) the Ambulance Service of NSW

...

4 Directions of Minister for health care workers to be vaccinated

(1) The Minister directs that a health care worker must not do work as a health care worker unless—

(a) if the work is done on or after 30 September but before 30 November 2021— the worker has received at least 1 dose of a COVID-19 vaccine, or

(b) if the work is done on or after 30 November 2021—the worker has received at least 2 doses of a COVID-19 vaccine.

(1A) Subclause (1) does not apply in relation to work done for a public health organisation, the Health Administration Corporation, the Ambulance Service of NSW or the Ministry of Health under a contract of service or a contract for services if—

the work does not involve the provision of a health service, and

(b) the person doing the work is not physically present, while doing the work, at premises operated by the public health organisation, Health Administration Corporation, Ambulance Service of NSW or Ministry of Health.

(2) The Minister directs that a health care worker must, if required to do so by an authorised person on or after the commencement of this Order, provide vaccination evidence for the worker.

...

5 Direction of Minister for responsible persons for health care workers

The Minister directs that each responsible person for a health care worker must take all reasonable steps to ensure that the health care worker to whom clause 4 applies complies with the directions of the clause.”

9. On 30 September 2021, having regard to the information received from HealthShare NSW and, as Ms Pitt’s employment required her to be physically present on the premises of a public hospital to fulfil the inherent requirements of her job, a letter was sent by WACA’s Chairperson, Mr Ivan Menzies to Ms Pitt, informing Ms Pitt that as she had not complied with mandated COVID-19 vaccine requirements to work in a public hospital, she would be stood down by WACA as a consequence. Ms Pitt was also informed that she was entitled to access any holiday leave that she had accrued. Annexed hereto and marked ‘B’ is a copy of the letter sent by Mr Menzies to Ms Pitt.

10. The requirements of the Order (and its subsequent amended iterations) continued to apply to Ms Pitt for the balance of 2021 year, into 2022, and even after the expiration of the *Public Health (COVID-19 Vaccination of Health Care Workers) Order 2022* on 19 June 2022 given the application of NSW Health’s *Occupational Assessment Screening and Vaccination Against Specified Infectious Diseases* policy directive (‘Policy Directive’) requiring that NSW Health workers (including persons who are employed in NSW Health, whether on a permanent, casual or temporary basis, including employees, contractors, volunteers and researchers who provide services for or on behalf of NSW Health) to have received at least two doses of COVID-19 vaccine to work or be employed with a NSW Health agency.

11. The Order (and its subsequent amended iterations) and the Policy Directive supplanted Ms Pitt’s temporary contraindication certificate(s) - the second of which WACA only found out about when WACA received Ms Pitt’s Fair Work Commission unfair dismissal application.

12. On 15 July 2022, WACA’s Secretary, Ms Margaret McGarity sent a letter to Ms Pitt clarifying WACA’s position regarding Ms Pitt’s employment as Ms Pitt remained

unvaccinated to COVID-19. Annexed hereto and marked 'C' is a copy of the letter sent by Ms McGarity to Ms Pitt.

13. On 23 August 2022 an email was sent by Ms Pitt to Mr Bartlett where Ms Pitt stated:

"I would like to request to be given my final pay (holiday pay).

In correspondence above dated 8th October [where I asked not to be paid your (sic) final pay yet] I asked for my final pay to be paused temporarily and to not be paid until requested.

I am now requesting and wish to be provided my pay."

Annexed hereto and marked 'D' is a copy of the email sent by Ms Pitt to Mr Bartlett.

14. On 25 August 2022, a letter was sent by Ms McGarity to Ms Pitt confirming WACA receiving Ms Pitt's email sent on 23 August 2022, the cessation of Ms Pitt's employment with WACA following WACA receiving her request for her 'final pay (holiday pay)', and WACA's foreshadowed payment of 9 days leave entitlement to Ms Pitt. Annexed hereto and marked 'E' is a copy of the letter sent by Ms McGarity to Ms Pitt."³

[5] The Applicant was paid her annual leave termination pay on 17 September 2022 (i.e. four days after she filed her Application with the Commission on 13 September 2022).⁴

[6] The only cross-examination of Ms Gault concerned whether or not the Applicant had been paid her annual leave termination pay,⁵ and whether or not the Applicant had communicated with the Respondent post 25 August 2022 and prior to filing her unfair dismissal claim.⁶

[7] The following correspondence, emails and/or email exchanges were tendered into evidence in the proceedings:

A. Email from the Applicant to Mr Neil Bartlett, 8 October 2021, 4.14pm.

"Subject: Pay

Hi Neil,

After speaking with Ivan on Tuesday of this week, he informed me to contact Michael regarding arranging pay that is due to me, for the days I have worked this month. Michael stated he would sign off on it as usual as I was available to work up to the end of the month 30/09/21.

I am emailing you to ensure you do not pay me any Annual Leave, as I wish to keep any Annual leave, at this stage.

Michael confirmed I could request annual leave at a later date.

Regards
Marcia Pitt”

B. Email from Mr Ivan Menzies to the Applicant, 3 March 2022.

“Dear Marcia

We would like you to know that we continue to be concerned for your ongoing welfare.

However, I am sure that you understand that the WACA committee need to progress a resolution to your employment situation regarding our hospital Chaplains.

WACA have had recent confirmation from Peter Hinrichsen that your Contingent Worker Contract with Nepean Hospital has not been renewed.

Therefore, we require from you a written clarification of your future intentions with us regarding your position as Hospital Chaplain.

Consequently, the WACA committee requires clarification of your intentions within 7 days of the date of this email.

Yours in Christ

Ivan Menzies

Chairperson WACA Committee”

C. Email from the Applicant to Mr Peter Hinrichsen (Director, Corporate Services, Nepean Hospital), 4 March 2022, 6.04pm.

“Hi Peter,

Pls find attached an exemption. Could you also advise on the following: - I received an email from Ivan Menzies (sic)

WACA who stated you confirmed to him that my Contingent (sic) Work Contract with Nepean Hospital has not been renewed and I am to let him know in writing of my intentions regarding the Chaplains position.

I informed I have not had any such information from you regarding my contract and the last email I had from you stated you were willing to wait for the outcome of my immunologist appointment. I have tried to access my emails and have phone HR and left a message could you please be in touch re same.

Regards
Marcia Pitt”

D. Email from Mr Peter Hinrichsen (Director, Corporate Services, Nepean Hospital), to the Applicant, 7 March 2022, 7.45am.

“Hi Marcia

Thank you for your email

Your Contract of employment with the LHD expired on the 1st August 2021

The public health order required you receive a first dose of vaccine by 9 September 2021 or had at lease (sic) booked to receive it by 19/9. I acknowledge you provided two medical contraindication applications however I was not advised that either was accepted by the Staff Health unit the first dated 24/8 and the second 30/9

Whilst the second noted your intention to visit an immunologist it post-dated the cut-off date for you to have received a first dose or provide an accepted medical contraindication and as such your contract was not renewed

It remains open to you to re-apply to the health service.

Thank you

Peter”

E. Email from the Applicant to Mr Ivan Menzies, 7 March 2022, 9.46pm.

“Hi Ivan,

Thank You for your reply. In regards to your email requesting clarification of my future intentions regarding my position. My intentions have never changed, they remain the same as when I have spoken with you by phone on a couple of occasions. My intentions are to seek the opinions and advice of professionals (immunologists) and to continue to be employed.

In regards to my contract and as I was not advised prior to this regarding my contract, I have contacted HR and left a number of messages for them to return my call. I now await to hear from them.

Kind Regards,
Marcia Pitt”

F. Letter from Ms Margaret McGarity to the Applicant, 15 July 2022 (Annexure ‘C’ to Witness Statement of Cathy Gault, 7 December 2022).

“Dear Marcia,

I am writing to you on behalf of the WACA committee in response to your email to Ivan Menzies received on 10th July, so that we may clarify the position.

Your Employment Contract is not with Nepean Hospital but with Wentworth Area Chaplaincy Association (WACA). Your payslips and ATO information is in that name.

Chaplains are classified as Contingent Worker under the Public Service; that is employees of outside companies working within the Public Service.

The process to have Chaplains working in the Public Hospitals is governed by the MEMORANDUM OF UNDERSTANDING between the NSW Health Civil Chaplaincies Advisory Committee NSW (On behalf of its Member Religious Organisations) and the NSW Department of Health.

The MOU states:

7.1.1 Chaplains and Pastoral Care Workers

The following procedure is to be followed for the appointment of full-time and part-time accredited Chaplains and Pastoral Care Workers who are appointed by a religious organisation and, in most cases, are also employed by the religious organisation

A. Selection. The Chaplain or Pastoral Care Worker is selected by the appointing/employing religious organisation, taking into account relevant training and qualifications, including standards set by the CCAC and the hospital, and involving the Hospital Chaplaincy or Pastoral Care Department Coordinator or representative in the selection process.

B. Accreditation. On completion of the necessary Confidentiality Agreement, Criminal Record and Prohibited Person checks, the Chief Executive (or delegate), accredits the selected Chaplain or pastoral Care Worker to function within the hospital. The Chief Executive (or delegate) may take into consideration advice from the Chaplaincy or Pastoral Care Department during this process.

C. Appointment. Following advice and recommendations from the Hospital, usually through the Chaplaincy or Pastoral Care Department, the Chaplain or Pastoral Care Worker is appointed by the religious organisation.

D. Review. The religious organisation, with the help of the Hospital Chaplaincy or Pastoral Care Department, assesses the work of the new Chaplain or Pastoral Care Worker after three (3) months. Organisations wishing to appoint Chaplains or Pastoral Care Workers should contact the Hospital or its Chaplaincy or Pastoral Care Department in the first instance and follow the procedure set out above.

The Code of Conduct Policy which is signed by all contingent workers annually states that you must:

Clause 4.3. 7 “Comply with all lawful and reasonable directions given by their managers or other members of staff authorised to give them.”

Clause 4.3.8 says “Comply with all applicable NSW Health policies and procedures, and those of the NSW Health agency where they work.”

7.2 Withdrawal of accreditation. The Chief Executive of an Area Health Service may withdraw the accreditation of a Chaplain or Pastoral Care Worker where the person is found to have breached the terms of this MOU, the health service’s Code of Conduct, or other protocols or policies.

The accreditation of Chaplains has nothing to do with WACA. As far as we understand it is still a requirement for Health, Aged Care and Disability staff to be vaccinated to work in a Public Hospital. Even if you had been able to provide a Contraindication Medical Exemption (which you have not) you would still not be able to do the duties of a Chaplain under the current health directive.

Therefore the issue is that you are not vaccinated and therefore cannot work in the Chaplaincy Department at Nepean Hospital. We hope that this clears up some of the issues you have raised.

Yours sincerely

Margaret McGarity – Secretary

Wentworth Area Chaplaincy Association”

G. Email from the Applicant to Mr Neil Bartlett, 23 August 2022, 4.34pm (Annexure ‘D’ to Witness Statement of Cathy Gault, 7 December 2022).

“Subject: Re: Pay

Hi Neil,

I would like to request to be given my final pay (holiday pay).

In correspondence above dated 8th October [where I asked not to be paid your final pay yet] I asked for my final pay to be paused temporarily and to not be paid until requested.

I am now requesting and wish to be provided my pay.

Kind regards,
Marcia Pitt.”

H. Letter from Margaret McGarity to Applicant, 25 August 2022 (Annexure 'E' to Witness Statement of Cathy Gault, 7 December 2022).

“Dear Marcia,

Neil passed on your email regarding your holiday pay to our committee meeting yesterday.

As you have requested your final pay, we wish to clarify that this be an end to your employment with WACA because we cannot place you in a public hospital due to your vaccination status.

Your leave entitlement is 9 days. Please advise us your current banking details so that this can be processed for you as quickly as possible.

Thank you for your service to WACA. We wish you well in your future endeavours.

Regards,
Margaret McGarity
Secretary
on behalf of the WACA committee.”

I. Email from Ms Margaret McGarity to the Applicant, 12 September 2022, 11.58am.

“Subject: holiday pay

Hello Marcia,

I am writing to follow up on my previous email sent on 25th August requesting your current bank details so that we could process the holiday pay owing to you, as you had asked.

We would appreciate it if you could let us know these details as soon as you can, as I am sure finalising this matter will be helpful for both of us.

regards,
Margaret.”

J. Email from the Applicant to Ms Margaret McGarity, 13 September 2022, 7.20pm (masking bank account details).

“Subject: Re: holiday pay

Thank You for your email Margaret my bank details have not changed still commonwealth bank [BSB and account number].”

K. Email from Ms Margaret McGarity to the Applicant, 14 September 2022, 9.49am.

“Subject: Re: holiday pay

Thanks Marcia,

I have confirmed this with Neil and he will process as soon as he can.

Regards
Margaret”

[8] Despite the opportunity to do so, pursuant to the Directions issued in this matter to file and serve witness statement evidence, the Applicant did not file or tender any witness statement evidence. During the hearing, I raised a concern with Mr *Dekker* in this regard, and ultimately granted the Applicant leave to provide oral in-chief evidence at the hearing limited to the issue of why the Applicant had failed to engage with the Respondent post 25 August 2022 (and prior to filing her Application) about her purported dismissal at the Respondent’s initiative. Mr *Mossman* took no objection to this approach, provided that any evidence in-chief given by the Applicant was so limited, and subject to him being provided with an opportunity to cross-examine the Applicant.⁷

[9] It is appropriate to set out the following aspects of the Applicant’s evidence in-chief (given orally at the hearing):

“MR DEKKER: Thank you, Deputy President. Marcia, turning our minds back to 23 August 2022, what were your intentions leading up to sending your letter on that date?

APPLICANT: My intentions were only to ask for my annual leave that was sitting there, as I was previously told that I could put it there for a later date. The reason for saying that is because I had made previous replies back to the President of WACA when he asked me what was my intentions regarding my position. I had put it in writing on numerous occasions - - -

...

---Well, all I wanted to say was that was my whole thing that I was asking for, and to support that, that was what was written in the subject, that was the reply from Margaret. She states holiday pay and just to support it a little bit further, which I think is an important thing to bring up. I had responded to WACA's, the President of WACA's emails a number of times stating my position to continue to be employed by WACA and seek the immunologist for an exemption. So, the exemption came, I sent it forth and there was no reply. So, yes, completely just asking for holiday pay, it was – and when I wrote final pay, final holiday pay, and that was holiday pay and it was in the subject, I was implying I wanted my full holiday pay. So, the final amount of my holiday pay and it's written in the subject there, holiday pay. It's written final pay in brackets, very clearly holiday pay and it was replied to me by Margaret on a number of occasions in emails, holiday pay.”⁸

“MR DEKKER: Yes. After the letter on 25 August 2022 from Margaret McGar[ity], did you receive any follow-up correspondence from the employer or Ms McGar[ity]?”

APPLICANT: Yes. On 12 September I received an email, which is, you know, that much later, a number of weeks, because I had been waiting for that pay to be put in, I received the email from Margaret stating 'I'm writing to you to follow-up on your previous email of 25 August requesting your current bank details, so that we could process your holiday pay owing to you, as you have asked. We would appreciate that you let us know these details as soon as possible as we assure finalising this matter will be helpful for both of us'. Yes, and I replied to that immediately to them, or immediate as possible, the next day. But my reply was, again, replying, I am still employed and I have no intentions of resigning that was not what was written, but in my email was written, 'Thank you for your email Margaret, but my bank details have not changed at all. Still, such and such and such and such. Regards, Marcia'. So, I was a bit bewildered why you are asking me for my bank details when they've got it on record, as I'm part of the staff.”⁹

“MR DEKKER: Marcia, and sorry, just to clarify, so on 12 September you received this follow-up correspondence and did you say it was immediately, or the following day that you replied to that?”

APPLICANT: It's the following day, because I think I received it late at night. But as soon as I saw it, the email come through, I replied immediately. So, it was dated the following day here.”¹⁰

“MR DEKKER: Certainly, and was there any reason that you didn't correspond after the 25 August and before 12 September, regarding the status of your employment?”

APPLICANT: No, the reason being is if you look back on other emails, it was the President of WACA that was contacting me all the time about my position, so I'm writing back to him and to then suddenly it switched to Margaret, she just came on to the end details. So, the reason being was we – I was working for the union person and not you, Chris, but another person was working on sending numerous emails to WACA stating and asking questions on my behalf, and even to the point where I had sent them one as well, regarding my contract, regarding lots of questions, why they didn't respond to my extension, lots of things. And still to this point, I believe they never answered a question regarding the contract, even though I continued to work, they just kept saying no, finish back then. But I continued to work for months and they couldn't explain to me all about that, and they just didn't. So, you know, I just asked for my holiday pay.”¹¹

Legislation and case law

[10] Section 386(1) of the Act reads:

“386 Meaning of *dismissed*

(1) A person has been *dismissed* if:

- (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
- (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."

[11] This is not a case in which the Applicant says that she was forced to resign. Hence, my determination in this matter concerns whether the Applicant's dismissal arose at the Respondent's (employer's) initiative (s.386(1)(a)).¹²

[12] In *Mohazab v Dick Smith Electronics Pty Ltd (No 2)*¹³ (**Mohazab**), the Full Court of the Industrial Relations Court of Australia (relevantly) said:

"Consistent with the ordinary meaning of the expression in the Convention, a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship."¹⁴

"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."¹⁵

[13] In *Mahony v White*¹⁶, the Full Court of the Federal Court accepted the following submissions of the Applicants (in that case) as to the meaning of the term "employer's initiative":

"In circumstances where the employer decides to terminate an employee's employment and puts that decision into effect by giving notice of termination, the employee has been "terminated on the employer's initiative". Whether or not the employer was required to dismiss the employee by some legislative, contractual or other obligation, if the employer did not take that step the employment would have continued. The motivation of the employer or the degree of discretion it possessed in deciding to terminate the employment is irrelevant. In other words, if the employer had not dismissed the employee, the employment would not have come to an end. That is so, irrespective of whether the employer was, or believed itself to be, obliged to take that step."¹⁷

[14] In *Rheinberger v Huxley Marketing Pty Limited*¹⁸, the Industrial Relations Court, referring to *Mohazab*, stated:

"However it is plain from these passages that it is not sufficient to demonstrate that the employee did not voluntarily leave his or her employment to establish that there had been a termination of the employment at the initiative of the employer. Such a termination must result from some action on the part of the employer intended to bring

the employment to an end and perhaps action which would, on any reasonable view, probably have that effect. I leave open the question of whether a termination of employment at the initiative of the employer requires the employer to intend by its action that the employment will conclude. I am prepared to assume, for present purposes, that there can be a termination at the initiative of the employer if the cessation of the employment relationship is the probable result of the employer's conduct.”¹⁹

[15] It is trite that in normal circumstances, where unequivocal words of resignation are used by an employee, an employer is entitled to accept the resignation and act accordingly.²⁰ But where there is ambiguity, one must consider the relevant words (of both the employer and the employee) in the context of all of the circumstances of the case to determine whether a reasonable employer or employee might have considered the words as a resignation or a dismissal.²¹ This is so even where one is dealing with an ambiguous resignation absent “special circumstances” (e.g. intellectual or mental impairment, heat of the moment, temper tantrum and/or emotional state resignations).²²

Respondent’s submissions

[16] The Respondent submits that it had no intention to dismiss the Applicant.

[17] Rather, the Respondent says that the Applicant’s request that she be given her “final pay (holiday pay)” via email on 23 August 2022,²³ having regard to all of the facts and circumstances (pre and post 23 August 2022), discloses that there was no dismissal at the Respondent’s initiative. In other words, the Respondent submits that Ms McGarity’s letter of 25 August 2022 was merely a responsive confirmation to the Applicant’s request that her employment be brought to an end - via her request for her to be paid her final (holiday) pay. On the Respondent’s case, it was the Applicant who initiated her employment being brought to an end (pursuant to the words set out in the Applicant’s email dated 23 August 2022), and this was simply confirmed by the Respondent in Ms McGarity’s letter of 25 August 2022.

[18] In its further closing submissions, the Respondent essentially joins issue with the Applicant’s contention that there was a dismissal at the Respondent’s initiative, and again says that a proper analysis of all of the facts and circumstances points to a reasonable and plausible inference that the Applicant’s 23 August 2022 email was a resignation. In respect of the evidence, the Respondent makes the following submissions:

“Credibility of the Applicant

5. The Applicant was present on the phone and listened to the Respondent’s full evidentiary case, its closing submissions and the exchanges between the Commission and the parties’ representatives regarding the Commission’s wish to hear from the Applicant about why she sent the email and what, if any, steps she took in response to the letter sent by Margaret McGarity of 25 August 2022 (see Exhibit E of the Statement of Cathy Gault).

6. Accordingly, the Commission should be cautious in accepting any evidence of the Applicant given at the hearing on 18 January 2023. Particularly, the Applicant had the opportunity to reconstruct her version of events having listened to the arguments made

by the Respondent in its closing Submissions and the exchanges between the Commission and the representatives immediately prior to her giving evidence.

7. The Commission should also take into account the Applicant was directed to put on a witness statement prior to the hearing but deliberately did not do so. That is a matter that reflects negatively on her credibility.

Analysis of the Evidence

8. The Applicant's explanation of the events surrounding her issuing her email of 23 August 2022 and her conduct after receiving the letter from Margaret McGarity on 25 August 2022 are utterly implausible.

9. The Applicant gave evidence that she was able to raise any issues, concerns or grievances about her employment with the President, Mr Menzies. She gave evidence that during employment when she was seeking to return to work while she had temporary contraindication certificate, she was able to agitate that issue with Mr Menzies.

10. Her actions upon the receipt of the letter of 25 August 2022 from Ms McGarity stand in stark contrast to her actions in contacting Mr Menzies about previous work related issues.

11. Importantly, Ms McGarity states in the letter "***We wish to clarify this will be an end to your employment ...***" (our emphasis). Ms McGarity then asked the Applicant to confirm her bank account details to process the final pay.

12. Extraordinarily the Applicant makes no effort to clarify her alleged position that she was not ceasing employment at all with Ms McGarity. Nor does she raise any concerns, issues or grievance with Mr Menzies about the content of Mr McGarity's letter. To the contrary, she subsequently confirms her bank account details to allow Mr McGarity to process the final payment in accordance with Ms McGarity's letter of 25 August 2022.

13. It would be reasonable to expect that if the Applicant had no intention to resign, then she would have made immediate contact with Ms McGarity to disavow Ms McGarity of her belief that the Applicant was bringing the client (sic) to end upon request for her final pay. It would have also been reasonable to expect that the Applicant would have immediately contacted Mr Menzies to express her concern that Mr McGarity was wrong in her belief that the Applicant was ceasing employment upon her request for her final pay.

14. Not only do (sic) the Applicants (sic) do none of those things, but she also subsequently acts in accordance with the letter of 25 August 2022 and confirms her bank account details for payment of a final pay without any protest or objection to the position stated by Mr McGarity that the Applicant was bringing the employment relationship to an end upon a request for her final pay.

15. The language used in the Applicant's email of 23 August 2022 should also be given

consideration. She does not request to take a period of annual leave (this could be contrasted with her email of 8 October 2021 where she states “Michael confirmed I could request annual leave at a later date”). In contrast she requests her “final pay”. If the Applicant was truly requesting to take annual leave pay and keep the employment relationship on foot, she would have requested to take annual leave not final pay.

16. The email also needs to be construed in the factual context that the Applicant was aware that she did not have the necessary COVID-19 vaccination requirements that were mandatory to allow her to perform the role. The Applicant sent the email knowing that there was no ability for her to return to work in the foreseeable future given the relevant requirements of the New South Wales Health Department.

17. The Fair Work Commission should also have regard to the Applicant’s Form 2.

18. At Schedule 3, the Applicant seeks no compensation at all for the alleged unfair dismissal. All she seeks is back pay for the 4 months she alleges she had a temporary contraindication certificate and the 4 weeks payment in lieu of notice pursuant to the National Employment Standards. Essentially, it is a claim for the underpayment of entitlements.

19. The Fair Work Commission has no jurisdiction to grant the remedies the Applicant seeks. The Applicant’s application is an attempt to inappropriately use the Fair Work Commission’s Unfair Dismissal jurisdiction to recover alleged underpayments of entitlements which is a matter which needs to be brought in a court of competent jurisdiction. The Fair Work Commission should not allow its procedures to be misused in this way.

20. The only plausible explanation for the Applicant’s action is that she wished to obtain her final pay and to do so it was her intention to cease her employment.

21. Particularly, the Applicant knew that a request for annual leave could be rejected. However, payment of pro rata annual leave upon termination of employment is a mandatory requirement pursuant to Section 90(2) of the FW Act.

22. In those circumstances, the jurisdictional objection should be upheld.”²⁴

Applicant’s submissions

[19] The Applicant submits that Ms McGarity’s letter of 25 August 2022 is the principle contributing factor to the cessation of the Applicant’s employment with the Respondent. She says that having regard to all of the facts and circumstances, her request for her final pay was not a resignation, or a request (by her), let alone an unequivocal request, that her employment be brought to an end. In this regard, the Applicant points to the letter of 25 August 2022 “wish[ing] to clarify” that the Applicant’s employment will be at an end “**because** we cannot place you in a public hospital due to your vaccination status” (my emphasis). Rather than clarifying with the Applicant as to whether she was intending to resign as a result of her request for her final pay, the Respondent went one step further and advised the Applicant that her employment is being brought to an end because the Respondent cannot place her in a public

hospital due to her vaccination status. This was not confirmation of a resignation, but a termination at the employer's initiative.

[20] In response to the Respondent's Closing Submissions, the Applicant made the following submissions (citations omitted):

"Relevance of Conduct After the Cessation of Employment"

1. The applicant rejects the assertion by the respondent that the Applicant was "directed to put on a witness statement prior to the hearing but deliberately did not do so".

2. The directions order issued on 16 November 2022 by the Deputy President provided at [2]-[4]:

- i. By 4.00pm AEDT on Wednesday, 7 December 2022, the Respondent must file with the Commission and serve on the Applicant an outline of submissions, witness statements, and any documents in support of the jurisdictional objection(s) it relies upon.
- ii. By 4.00pm AEDT on Wednesday, 21 December 2022, the Applicant must file in the Commission and serve on the Respondent an outline of submissions, witness statements, and any documents in opposition to the jurisdictional objection(s) relied upon by the Respondent.
- iii. By 4.00pm AEDT on Wednesday, 4 January 2023, the Respondent must file in the Commission and serve on the Applicant any submissions, witness statements, and other documents in reply.

3. The Respondent, in their submissions filed on 7 December 2022, make no mention of any conduct or lack thereof, from the applicant, after receiving the 25 August 2022 letter (the "alleged termination letter") from Ms McGarity.

4. Similarly, no mention of conduct after the alleged termination letter is mentioned in the Respondents written submissions filed on 3 January 2023.

5. The only time that the applicant's conduct following this letter became an issue was in the Respondent's oral submissions and cross-examination of the Applicant, and their closing submissions following the 18 January 2023 hearing.

6. As the written submissions provided by the Respondent sought largely to rely on the interpretation of the alleged termination letter and the events leading up to it, it did not seem relevant to provide a witness statement of the Applicant.

7. In the event that the Respondent seeks to rely on this second round of written submissions in any request for a costs order, we will be relying on amongst other things, the fact that the Applicant's conduct immediately following the cessation of employment was never called into question until 18 January 2023.

25 August Letter was Termination on the Employer's initiative

8. Notwithstanding the above, the Applicant submits that any behaviour following cessation of employment is largely irrelevant to the question of whether employment was terminated at the employer's initiative.

9. There is no obligation for a recently terminated employee to follow up with an employer to "double check" their employment status following its cessation.

10. Even if the Commission were to see it that Ms Pitt did not fully believe or comprehend that she had been terminated, the question of whether termination occurred at the employer's initiative is not one of the Applicant's belief.

11. We rely on our earlier written submissions, in that the language of Ms Gault in the alleged termination letter indicates that, because of a request for leave entitlements, the Applicant's employment had been terminated:

- a. The employer appears to establish a cause for termination by stating that the employment had ceased because Ms Pitt requested her entitlements.
- b. The employer establishes another cause by inferring that termination occurred because of their inability to place Ms Pitt in a public hospital.
- c. At no point in the 25 August 2022 letter does Ms Gault refer to resignation from Ms Pitt.
- d. Furthermore, Ms Pitt specifically referred to the 8 October 2021 letter to Mr Neil Bartlett about saving her annual leave for use at another date, when requesting her leave."²⁵

Respondent's closing reply submissions

[21] The Respondent made the following Closing Reply Submissions:

"1. The conduct of the Applicant after receiving Ms McGarity's letter of 25 August 2022 is directly relevant and should be taken into account in determination of the jurisdictional objection.

2. Particularly, Ms McGarity in her letter of 25 August 2022 uses the words "*wish to clarify*". She also asked the Applicant to confirm her bank account details to process the final pay.

3. Accordingly, the Applicant was provided with an opportunity to "clarify" what she alleges to be her position. She did not do so despite her previous ability to raise concerns or queries with her employment particularly with Mr Menzies.

4. It is relevant that the Applicant acts in accordance with the letter of 25 August 2022 and goes on in fact to provide Ms McGarity with her bank account details without protest or objection.

5. Her actions are entirely consistent with the fact that she had decided to cease her employment and be paid her pro rata annual leave entitlement pursuant to Section 90(2) of the FW Act.

6. Critically the request made by the Applicant was for her final pay. Clearly the Applicant knew this would be the last time she would be paid by the Respondent because she was ceasing her employment.”²⁶

Applicant’s further submissions and evidence

[22] I note that after I reserved my decision, post the receipt of the Respondent’s Closing Reply Submissions (dated 27 February 2023), the Applicant (on 6 March 2023) submitted further written submissions and evidence. I did not give her any prior leave to do this, and the Applicant did not seek leave before doing so. I reject those submissions and evidence, and have not considered them in this decision. In my view, this practice should be strongly condemned. As the High Court said in *Re Application by the Chief Commissioner of Police (Vic)*²⁷:

“Where leave has not been given publicly for supplementary submissions and evidence, the provision of such material to court registries without permission of the court, publicly signified, is a derogation from the principle of the open administration of justice. It should not occur. If new points of importance arise in the case whilst a matter stands for judgment, the proper course (unless statute or court rules permit otherwise) is for the proceeding to be relisted so that an application to enlarge the record can be made and determined in open court.”²⁸

Consideration

[23] On the basis of the evidence and submissions of the parties, I make the following findings:

- a) The Applicant was employed by the Respondent as a Hospital Chaplain. This role required her, in short summary, and subject to her holding relevant accreditation, to physically attend upon patients in public hospitals for the purposes of providing non-secular or non-denominational spiritual support to patients, families and staff.
- b) In order to attend upon a public hospital as a Chaplain, the individual must be accredited by the relevant Area Health Service. To be clear, such accreditation does not reposit with the Respondent. The Applicant’s accreditation to work in the Nepean Blue Mountains Local Health District (essentially at the Nepean Hospital, NSW) expired in August 2021, and was not thereafter renewed. It is apparent that the Applicant could not obtain further or renewed accreditation post August 2021 unless she was vaccinated for COVID-19. It was an essential requirement of the Applicant’s role with the Respondent that she be accredited by the relevant Area Health Service. If she was not so accredited, she had no entitlement to request or

otherwise receive any payments from the Respondent in that she was not ready or able to perform any work. The fact that the Applicant holds or held a contraindication exemption is essentially irrelevant in circumstances where the Applicant holds no accreditation.

- c) In her Form F2, the Applicant asserts that despite her accreditation expiring and not being renewed, and/or because she was not informed of this expiration and non-renewal, the Applicant's contractual arrangements with Nepean Hospital and/or the Respondent continued (including by implication) to the extent that such contractual arrangements required the Applicant to be paid by the Respondent when she did not perform any work.²⁹ On the evidence before me, I do not accept that there is any basis at law for this assertion. The foundation of the Applicant's circumstances (and the events that have happened) is directly attributable to the Applicant's on-going failure or refusal to be vaccinated. In other words, individuals are free to choose whether or not to be vaccinated, but what flows from that choice, in terms of consequences and outcomes to their employment and related contractual arrangements, is an inherent part of the choice that they have made.
- d) Due to mandatory vaccination requirements applying to hospitals (which are not in dispute between the parties as applying to the Applicant), the Applicant has not performed any work for the Respondent since late September 2021 (as she has been unvaccinated and unable to enter public hospital premises).³⁰ She has also not been accredited since August 2021 to perform work as a contingency worker in a public hospital. Prior to the Applicant's accrued annual leave being paid to her on 17 September 2022, she had not received any payments from the Respondent (for work performed) since September 2021, and nor has she held any entitlement to receive such payments.
- e) Since September 2021, the Applicant claims she has been investigating becoming vaccinated. It appears that the Applicant may have hoped to wait out the mandatory vaccination requirements applying to hospitals, on the basis that such mandatory vaccination requirements, with the passage of time, may be removed, repealed, watered down, or allow for a contraindication medical exemption.³¹ It is apparent that this is unlikely to occur, given the obligations of public health institutions to ensure as far as reasonably practicable the non-transmission of COVID-19 between hospital service providers or staff and patients whilst COVID-19 (and its multiple variants) remain present in the community (i.e. whether or not COVID-19 is at pandemic levels or not, and whether or not vaccination actually stops or otherwise limits transmission is not to the point, public health institution risk management analysis will always consider vaccination to create a lower risk profile for infection and/or transmission than non-vaccination (or majority vaccination with contraindication exemptions)).
- f) On 8 October 2021, the Applicant (in her email to Mr Bartlett) asks Mr Bartlett to ensure that her annual leave is not paid to her, as she wishes to keep any annual leave in her accrual bank and request such annual leave "at a later date". In my view, the import of this request is that the Applicant (as at 8 October 2021) does not

wish to take paid annual leave, or be paid out her accrued entitlements as to annual leave, until she makes a further request to access same.

- g) After requests from the Respondent (via Mr Menzies) to clarify her intentions regarding her on-going employment with the Respondent as Hospital Chaplain, on 7 March 2022 the Applicant advises Mr Menzies that her intentions are to continue to be employed by the Respondent despite her unvaccinated status.³² This communication is made at the same time that Mr Peter Hinrichsen (Director, Corporate Services, Nepean Hospital [not the Applicant's employer]) confirms with the Applicant that her accreditation as a contingency worker expired on 1 August 2021, has not been renewed due to her unvaccinated status, but that she can reapply to have her accreditation renewed (if she becomes vaccinated). I note that there is no evidence of the Applicant reapplying to have her accreditation renewed with the Area Health Service, or otherwise being in a position to have even qualified to apply to have her accreditation renewed (because of her on-going unvaccinated status).
- h) In relation to the statement in the 25 August 2022 letter from Ms McGarity (of the Respondent) clarifying that the Applicant's employment will come to an end as a result of her request for her final pay and because of her on-going inability to work in a public hospital (due to her unvaccinated status), the Applicant was unable to explain (in any meaningful way) why she failed to respond to, engage with, or raise any concerns (at all) about this statement:
 - i) with anyone at the Respondent (e.g. Ms McGarity who sent the letter, or Mr Menzies, the President of the Respondent, with whom the Applicant had been dealing with in relation to her return to work across the previous 12 months);³³ and
 - ii) despite her being subsequently followed up about her bank account details by Ms McGarity (i.e. being the bank account details that were initially sought from her in the 25 August 2022 letter).³⁴
- i) The Applicant says that the use of the words "final pay" (in her 23 August 2022 email) did not reflect an intention or understanding on her part as to resignation.³⁵ Rather, the Applicant says she was simply asking to be paid her full holiday pay.³⁶ The most unusual aspect of this evidence is the contrast with the Applicant's evidence about her being requested to supply or reconfirm her bank account details in the 25 August 2022 letter from Ms McGarity. In other words, the 25 August 2022 letter essentially says two things. *Firstly*, that the Applicant's employment will be at an end, and *secondly*, that the Applicant needs to confirm her bank details in respect of where her final pay is to be deposited. Rather than taking issue with her employment purportedly coming to an end, the Applicant's evidence is that it was extraordinary that she was being asked to reconfirm her bank details and that she was "[like] wow", "quite surprised", and "bewildered" by the request.³⁷ Yet, the Applicant says no such thing about being notified that her employment will be at an end.

- j) In her Form F2, the Applicant says that during the period 13 June 2022 to 11 August 2022, the Applicant, the Applicant's representative (Red Union), the Respondent, and Nepean Hospital held discussions about the Applicant's absence of accreditation as a contingency worker.³⁸ It appears that there was no resolution to the Applicant's continued inability to return to work (i.e. due to her unvaccinated status and absence of accreditation, and irrespective of any contraindication certificate she may possess). But the Applicant has provided no evidence (documentary or otherwise) as to these interactions, or the substance or content of same.³⁹
- k) The words used in the Applicant's 23 August 2022 email, in terms of her request that she receive her "final pay" are ambiguous in terms of whether or not such words reflect a resignation by the Applicant. The Applicant also provides no notice of her purported resignation to the Respondent.

[24] The case law⁴⁰ requires an ultimate finding to be made as to what was the principal contributing factor (directly or consequentially) that caused the Applicant's employment with the Respondent to come to an end. Put another way:

- a) But for what the Respondent did or said, would the Applicant's employment have ended?
- b) Did the Respondent's conduct or actions have the probable result of ending the Applicant's employment?

[25] The foregoing questions necessitate regard being had to all of the circumstances, specifically in the context of:

- a) information available to the Respondent prior to its receipt of the Applicant's request for her "final pay (holiday pay)" on 23 August 2022;⁴¹
- b) information available to the Respondent at the time it sent its letter to the Applicant on 25 August 2022, "clarify[ing] that this will be the end to [the Applicant's] employment";⁴² and
- c) the Applicant's actions after she received the 25 August 2022 letter from the Respondent.

[26] In my view, notwithstanding some of the findings set out in paragraph [23] of this decision (in respect of the Applicant's unexplained conduct and actions post 25 August 2022), and despite the ambiguity contained in the Applicant's 23 August 2022 email, the "critical action" in bringing the Applicant's employment to an end with the Respondent were the following words in the 25 August 2022 letter:

"As you have requested your final pay, we wish to clarify that this will be an end to your employment with [the Respondent] because we cannot place you in a public hospital due to your vaccination status".

[27] The foregoing words do not seek to clarify the Applicant's 23 August 2022 email, nor do they seek to seek any clarification from the Applicant as to her position or intentions in respect of her continued employment with the Respondent. Rather, these words clarify the Respondent's position that, by 25 August 2022, it wanted the Applicant's employment to be at an end in that it had had enough of the futile, untenable and indefinite stance of the Applicant in respect of her on-going attempts to hold-out against the COVID-19 vaccination (under the guise of endlessly consulting medical professionals and/or immunologists), and the Applicant's continued inability (for over 12 months) to obtain further accreditation by the Area Health Service to work in a public hospital.

[28] Taking into account all of the circumstances and the totality of the evidence, I find that the Respondent's 25 August 2022 letter was the principal contributing factor that gave rise to the Applicant's employment with the Respondent coming to an end. It follows that I find that the Applicant was "dismissed" by the Respondent within the meaning of s.386(1)(a) of the Act on 25 August 2022.

Going forward

[29] Putting the (now answered) question as to the Applicant's dismissal to one side, significant issues in relation to the Applicant's Application, as to both liability and remedy, remain to be resolved. For example:

- a) Do the Respondent's reasons for the Applicant's dismissal, in all of the circumstances, constitute a valid (or sound, defensible, well-founded) reason for her dismissal?
- b) Given the findings set out in paragraph [23] of this decision, has the Applicant made her Application absent reasonable cause? (especially in circumstances where the Applicant has failed to explain why she did not object to the contents of the 25 August 2022 letter prior to filing her Application).
- c) In the facts and circumstances of this case:
 - i) Is reinstatement possible, or of any practical utility whatsoever where the Applicant remains unvaccinated (and unaccredited)? and/or
 - ii) What compensation (if any) might be awarded to the Applicant in an unfair dismissal proceeding in circumstances where the Applicant:
 - raised no specific objection or concern in relation to the Respondent's 25 August 2022 letter prior to filing her Application in these proceedings on 13 September 2022; and/or
 - has not held accreditation to work in a public hospital in the 12 months prior to her dismissal, and remains unable to obtain such accreditation due to her unvaccinated status?

Other matters (Form F1 filed by Respondent)

[30] As previously foreshadowed by Mr *Mossman*,⁴³ on 9 February 2023 the Respondent filed a Form F1 seeking dismissal of the Application under s.587 of the Act on the basis that it has no reasonable prospects of success. In this regard, the Respondent points to:

- a) the relief claimed by the Applicant being limited (in her Form F2) to a claim for unpaid wages or entitlements, which is beyond the jurisdiction of the Commission to award (including in an unfair dismissal proceeding)⁴⁴; and
- b) this being a matter where, even if the Applicant's dismissal is found to be harsh, unjust or unreasonable, there can be no award of reinstatement or compensation because:
 - i. as at the time of the Applicant's dismissal, she was not accredited with the Area Health Service, and was unable to obtain such accreditation due to her unvaccinated status (a contraindication certificate/s being irrelevant as a contraindication certificate is not recognised as an exception to vaccination by the Area Health Service). It is noted that the question of 'reinstatement' focuses in large part upon the time that the Applicant was dismissed. Further, even if one were to consider circumstances post the Applicant's time of dismissal (on the issue of reinstatement), the Applicant remains unvaccinated and unable to be accredited, and the requirement for a contingent worker to be vaccinated to work at a public hospital has not changed; and
 - ii. since September 2021, being nearly 12 months prior to her dismissal, the Applicant has been unable to work, has not been paid any wages, and has not been entitled to be paid any wages, because she has not been accredited, and has not been able to obtain such accreditation due to her unvaccinated status. In other words, whether it be by reference to wages the Applicant did earn in the six months prior to her dismissal, or would have earned in the six months post her dismissal, or any combination of either, the figure is always going to be zero.

[31] The power to dismiss a matter under s.587 of the Act is discretionary. A party is not bound by the relief claimed in their application at the time it is filed. Indeed, a party may amend the relief they seek all the way up to the end of closing submissions.⁴⁵ In some cases, the relief sought by an Applicant might be confirmation that they have been unfairly dismissed notwithstanding that no relief is able to be awarded (albeit this approach raises the real potential for costs to be awarded).⁴⁶ Putting aside the readily apparent merit in the Respondent's contentions (at this stage of proceedings) that any relief available to the Applicant arising from these unfair dismissal proceedings is unlikely (on the current state of the evidence) to be available, I am yet to hear full argument and receive all of the evidence on the point. I have therefore determined that it is not appropriate, and indeed would be premature, for me to exercise my discretion to dismiss the Application on the grounds that it evinces no reasonable prospects of success. I thus reject the Respondent's request to dismiss the Application on the grounds set out in the Form F1 filed 9 February 2023 (and the supporting submissions filed with same).

Conclusion

[32] Given that I have found that the Applicant was “dismissed” by the Respondent within the meaning of s.386(1)(a) of the Act, an Order dismissing the Respondent’s jurisdictional (no-dismissal) objection will be published contemporaneously with this decision. The matter will be relisted in due course for mention and directions to program the matter to resolve the Applicant’s substantive Application.



DEPUTY PRESIDENT

Appearances:

Mr Chris *Dekker*, Industrial Officer, Nurses Professional Association of Australia, appeared for the Applicant.

Mr Chris *Mossman*, Partner, Wotton + Kearney Lawyers, appeared with permission for the Respondent.

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¹ Transcript, PN17-PN21.

² I note that the hearing commenced on 16 November 2022, but was adjourned until 18 January 2023. Final written closing submissions were received from the Applicant on 6 March 2023.

³ Witness Statement of Cathy Gault, 7 December 2022, at [4]-[14].

⁴ Applicant’s payslip for the pay period 01/09/2022-30/09/2022, pay date: 17/09/2022.

⁵ Transcript, PN44-PN50.

⁶ Transcript, PN51.

⁷ Transcript, PN118-PN143, PN154-PN156.

⁸ Transcript, PN167-PN171.

⁹ Transcript, PN176-PN177.

¹⁰ Transcript, PN178.

¹¹ Transcript, PN179.

¹² Transcript, PN17-PN21.

¹³ (1995) 62 IR 200; [1995] IRCA 625.

¹⁴ (1995) 62 IR 200, at 205.

¹⁵ Ibid, at 205-206.

¹⁶ [2016] 262 IR 221; [2016] FCAFC 160.

¹⁷ Ibid, at [18].

¹⁸ (1996) 67 IR 154.

¹⁹ Ibid, at 160-161, per Moore J.

²⁰ *Birrell v Australian National Airlines Commission* (1984) 5 FCR 447; [1984] FCA 378.

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- ²¹ *Colin Matthew Connally v Malifind Pty Ltd* [1995] IRCA 84 (1 March 1995); *Minato v Palmer Corporation Ltd* (1995) 63 IR 357. See also *Achal v Electrolux Pty Ltd* (1993) 50 IR 236.
- ²² *Ibid.*
- ²³ Email from the Applicant to Mr Neil Bartlett, 23 August 2022, 4.34pm (Annexure ‘D’ to Witness Statement of Cathy Gault, 7 December 2022).
- ²⁴ Respondent’s Closing Submissions, 9 February 2023, at [5]-[22].
- ²⁵ Applicant’s Closing Submissions, 20 February 2023, at [1]-[11].
- ²⁶ Respondent’s Closing Reply Submissions, 27 February 2023, at [1]-[6].
- ²⁷ (2005) 214 ALR 422; [2005] HCA 18.
- ²⁸ *Ibid.*, at [54]. See also *Carr v Finance Corporation of Australia Ltd (No 1)* [1981] HCA 20; (1980) 147 CLR 246.
- ²⁹ Form F2, 13 September 2022, Schedule 1, at [9].
- ³⁰ Transcript, PN220.
- ³¹ Transcript, PN244.
- ³² See also Transcript, PN285.
- ³³ Transcript, PN249, PN258, PN284-PN288, PN307-PN335.
- ³⁴ Transcript, PN337-PN344, PN354-PN355.
- ³⁵ Transcript, PN288, PN293, PN327, PN330, PN354-PN356.
- ³⁶ Transcript, PN171, PN288, PN293.
- ³⁷ Transcript, PN176-PN177, PN245, and PN251.
- ³⁸ Form F2, 13 September 2022, Schedule 1, at [11]. See also Transcript, PN307.
- ³⁹ Transcript, PN336-PN337.
- ⁴⁰ See paragraphs [10] to [15] of this decision.
- ⁴¹ Email from the Applicant to Mr Neil Bartlett, 23 August 2022, 4.34pm (Annexure ‘D’ to Witness Statement of Cathy Gault, 7 December 2022).
- ⁴² Letter from Margaret McGarity to Applicant, 25 August 2022 (Annexure ‘E’ to Witness Statement of Cathy Gault, 7 December 2022).
- ⁴³ Transcript, PN144-PN145.
- ⁴⁴ Form F2, 13 September 2022, Schedule 3. Transcript, PN86-PN113, PN376-PN393.
- ⁴⁵ The same situation applies in a court of pleadings. Note also the application (or potential application) of ss.577, 586, 590, 591 and 598 of the *Fair Work Act 2009*.
- ⁴⁶ See ss.400A, 401 and 611 of the *Fair Work Act 2009*.