



DECISION

Fair Work Act 2009
s.365—General protections

Joseph Geiger

v

Port City Autos Pty Ltd
(C2022/7486)

COMMISSIONER HUNT

BRISBANE, 12 MAY 2023

Application to deal with contraventions involving dismissal – jurisdictional objection – whether employee was dismissed at employer’s initiative – text messages sent by employer – dismissal at employer’s initiative – jurisdictional objection dismissed.

[1] On 10 November 2022, Mr Joseph Geiger made an application to the Fair Work Commission (the Commission) under s.365 of the *Fair Work Act 2009* (the Act) to deal with a general protections dispute involving dismissal. Mr Geiger stated that he had been dismissed from his employment with Port City Autos Pty Ltd (the Respondent) on 21 October 2022.

[2] In its Form F8A – Response to general protections application, the Respondent raised a jurisdictional objection to the application on the grounds that Mr Geiger was not terminated on the employer’s initiative pursuant to s.386(1) of the Act, and that the employment had ended either by mutual agreement, or Mr Geiger deciding against returning to work.

[3] Following the Full Court of the Federal Court decision of *Coles Supply Chain Pty Ltd v Milford*,¹ the Commission must determine whether Mr Geiger was dismissed before it can exercise powers under s.368 of the Act to deal with a dispute about whether Mr Geiger was dismissed in contravention of the general protections provision.

Legislative provisions

[4] Section 365 of the Act provides as follows:

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

If:

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

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

[5] The meaning of “dismissed” is provided at s.386 of the Act:

“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.

(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.”

[6] This decision deals only with the jurisdictional objection to be determined; that is, was Mr Geiger dismissed from his employment?

Hearing

[7] The matter was listed for hearing on 14 March 2023 by video using Microsoft Teams. Mr Geiger represented himself. The Respondent was represented by Ms Evangeline Kannis, Senior Workplace Relations Advisor of MTA Queensland.

[8] The following people gave evidence and were cross-examined:

- Mr Geiger;
- Ms Leanne Richardson, Human Resources Manager for the Respondent; and
- Mr Dylan Stewart, Fixed Operations Manager for the Respondent.

[9] The Respondent also provided witness statements of Mr Mathew Harvey, Parts Manager and Mr Luke Ambrose, Workshop Foreman. It was determined during the hearing that Mr Harvey and Mr Ambrose were not required for cross-examination.

Mr Geiger's evidence

[10] Mr Geiger commenced employment with the Respondent on 1 July 2022 as an Automotive Technician, reporting to Mr Stewart. He worked Monday to Friday each week.

[11] Mr Geiger had two days of pre-approved annual leave for 17 and 18 October 2022. On 13 October 2022, Mr Geiger began to feel unwell.

[12] When he arrived to work on 14 October 2022, Mr Geiger had lost his voice and his condition was deteriorating. After his lunch break, Mr Geiger felt disoriented and required assistance from Mr Stewart to make it through the afternoon. He considered that Mr Stewart was aware of his temporary illness.

[13] On Sunday, 16 October 2022, at 7:56pm, Mr Geiger sent Mr Stewart the following text message. Mr Stewart responded at 7:05am on Monday, 17 October 2022:

Mr Geiger: Hey bossman, did you approve my annual leave for tomorrow???

Mr Stewart: Yes mate all good. Only just looked at phone.

[14] Mr Geiger's evidence is that from 14 October 2022, he remained unwell over the weekend, together with his two days of annual leave on the Monday and Tuesday. He was unable to get out of bed. By Wednesday, 19 October 2022, despite being the day he was due to return to work, he was still unwell. His partner took him to see his General Practitioner (GP). Mr Geiger concedes he failed to inform the Respondent of his absence. He noted that he didn't receive a call from the Respondent as to his whereabouts.

[15] On Thursday, 20 October 2022, Mr Geiger's partner again took him to see his GP. He was diagnosed with tonsillitis and returned a positive COVID-19 test result. He was told to remain home for the next five days to isolate. He was issued a medical certificate declaring him unfit for work for the period 19 October 2022 to 21 October 2022. Again, Mr Geiger failed

to inform the Respondent of his absence. Nobody from the Respondent attempted to call him to inquire as to his whereabouts.

[16] Mr Geiger's evidence is that at approximately 8:10am – 8:20am on 21 October 2022, he telephoned the Respondent's Service Department to discuss his absences. Mr Geiger informed a Services Advisor of his medical certificate covering the periods of 19, 20 and 21 October, and informed her that he would be in contact on Monday, 24 October 2022. Mr Geiger described the call as brief, lasting no more than a minute. His evidence is that it's usually very busy at that time, with customers dropping off their vehicles and he did not think further about it. He assumed the message would be relayed to Mr Stewart.

[17] At 9:51pm on Friday, 21 October 2022, Mr Geiger received a text message from Mr Stewart. It was almost 20 minutes later when Mr Geiger opened and read the message. The text message read, "*Your toolbox is on islander road*". Mr Geiger explained that he felt quite shocked by the text message since he made contact to report his absence earlier in the morning.

[18] Mr Geiger responded to Mr Stewart with two text messages at 10:09pm. The first message was a picture of Mr Geiger's positive COVID-19 rapid antigen test, and the other being a picture of his medical certificate from his doctor dated 20 October 2022 declaring him unfit for work for the period 19-21 October 2022.

[19] From 10:10pm until 11:04pm, the following text exchange occurred between Mr Geiger and Mr Stewart:

Mr Geiger:	Had tonsillitis and then got covid, have not been able to talk since I left on Friday and been stuck in bed
Mr Stewart:	Don't care I can message You better go get it Done !
Mr Geiger:	Thanks
Mr Stewart:	Not my problem. Incorrect address lies and I said last chance. No phone call so I'm done sorry I have a business to control .See you at court if u want. Your box is on the road !
Mr Geiger:	Y would I go to court Dylan , and when my isolation is over I can leave home to get my box . Thanku
Mr Stewart:	Yet another lie. Sorry mate we're done I would rwc I would get check if ur toolbox

Mr Geiger: Can't leave home

Mr Stewart: Not my problem

Mr Geiger: Well leaving my toolbox out on the street would be ur problem, but I'll get someone to go and check if it's there for me

Mr Stewart: Not my problem. Your problem. Sick of you and being down rite rude towards me.

[20] Mr Geiger stated he had not been contacted in any way at all since the confirmation text he received on Monday, 17 October 2022, until he received the text message from Mr Stewart at 9:51pm on 21 October 2022. Mr Geiger was even more shocked when the text messages continued which he described to be threatening, demeaning and completely uncalled for abuse. Mr Geiger concluded that his employment had been terminated and he was to collect his toolbox.

[21] Between 23 October 2022 and 26 October 2022, Mr Geiger sent the following next messages to Mr Stewart, without Mr Stewart responding to any:

23 Oct 22: Understandable, so U have fired me ? No toolbox was on the street either.

24 Oct 22: Got my negative test on covid before been 5 days, I'll collect my toolbox tomorrow if that's what U wish, thanku

25 Oct 22: I'll be there to get my toolbox in 10 if that's ok

26 Oct 22 So y am I still on the payroll if U have fired me ?

2 Nov 22 I assume U have paid out my entitlements of separation of employment today? As U terminated my employment U r still required to pay my annual leave etc

I will be going to fair work tomorrow as I had a medical certificate and was impacted with covid at the time, granted the lack of communication from myself but Ur pursuant texts messages of how U went about dismissing me were quite abusive boarding threatening Dylan

I would also like the tools that are missing from my tool box returned, there is no need to bring the company into any disrepute in a fair work legal matter but withholding the entitlements that are required by law to be paid out upon termination and the manner it was conduct in. I only ask that my separation of employment is done in a mutual and acceptable manner however I see this will not be the case now, thanku Dylan

[22] Mr Geiger stated that after sending the text message on 25 October 2022 regarding collecting his toolbox, he arrived at the business where his toolbox was already at the door for his collection. Mr Geiger loaded it into his car and left.

[23] While the usual pay cycle fell with payment to Mr Geiger on 26 October 2022, he considered he acted reasonably when his termination pay was not in his account that day. He was prepared to allow the Respondent one further week to make the payment. When Mr Geiger didn't receive his termination payment on the next pay day, being 2 November 2022, he contacted the Respondent's payroll department by email that evening. The correspondence by Mr Geiger is extracted below:

“As Dylan terminated my employment in a rather abusive threatening manner the company is still required to pay out any annual leave entitlements upon separation, this has not happened and I would of hoped to have walked away without having to go to fair work and begin action.

As I had a medical certificate and was impacted with covid 19 at the time of dismissal and then received abusive texts from Dylan stating he had terminated my employment due to these reasons , I am left with no choice but to pursue legal action now as the company has not met it's requirements of termination of employment”

[24] Ms Katrina Smith, Payroll Manager by reply correspondence that evening communicated the following:

“Hi Joe

Thank you for your email.

I have passed your email onto our HR Manager who will review your concerns raised and I'm sure she'll respond when she can.

I will also follow up with her tomorrow to see if there is anything I can do to assist.”

[25] Mr Geiger responded shortly thereafter:

“I would only like to leave my employment on a decent manner and after my termination I should still receive any entitlements that are owed to me .

This has now been a unfair and unjust dismissal and have not received these entitlements I had a medical certificate and was impacted with covid19 at the time of being dismissed. Thanku but I am left with no choice now as I was hoping my entitlements would have been paid today and have had no response from the company, I'm now going to loose my rental property and as I accepted the termination even tho it was by text and in a abusive threatening manner and could only expect that the company does the right thing by paying the entitlements owed, then the separation of employment would be mutual and been in a acceptable manner .”

[26] On 3 November 2022, Mr Geiger was contacted by Ms Richardson, Human Resources Manager. Mr Geiger explained to Ms Richardson the situation and forwarded her all the text

messages between himself and Mr Stewart. Ms Richardson informed Mr Geiger that she was completely unaware of his situation, and it was very poor of Mr Stewart to have acted in this manner.

[27] Mr Geiger and Ms Richardson engaged in various phone calls, texts and emails on 3 November 2022. The following text messages were exchanged following the text messages Mr Geiger had received from Mr Stewart and forwarded to Ms Richardson:

Mr Geiger: This is all I have received and have had no response since, thanku and I'm sorry that its like this, I left in a decent manner and only expected that as I was terminated I would of been paid out my entitlements upon my separation of employment.

Sorry missed your call

Hello, thank you for your assistance in this matter but I feel that it would be to uncomfortable to return to workshop and think that its best that we end this in a mutual way. I walked away in a decent manner and thought that I would just be paid out all entitlements upon separation of employment so it stays amicable. Thankyou once again for the assistance

Can U please let me know when U r able to pay out all entitlements owed so I can pay my rent/bills etc, thankyou and muchly appreciated.

Ms Richardson: Hi Joseph
Should be tomorrow for you.
Kind regards
Leanne

[28] On 4 November 2022, Mr Gavin Fletcher, General Manager sent the following email to Mr Geiger, copying in Ms Richardson:

“Hi Joe,

I've attached a copy of the Termination of Employment for you. We will also send a mailed copy to you in the post to [address].

I personally wish you all the best in the future and hope things turn out well for you.”

[29] The ‘Termination of Employment’ letter attached to the email is as follows:

“Wednesday 26th October 2022

PRIVATE & CONFIDENTIAL

Mr Joseph Geiger

[redacted address]

Termination of your Employment

Dear Joseph

I am writing to you about the termination of your employment during your probationary period as a Automotive Technician with Port City Autos Pty Ltd.

As per our discussion today, we are providing you with one week's notice based on your length of service (start date: 1st July 2022). In lieu of working out your notice period, you will be paid \$1,140.00 as an Eligible Termination Payment and your employment will end immediately. You will also be paid any accrued annual leave entitlements less any applicable taxation.

Employees and employers may seek information about minimum terms and conditions of employment from the Fair Work Ombudsman. If you wish to contact them you can call 13 13 94 or visit their website at www.fairwork.gov.au

On behalf of Port City Autos, we thank you for your efforts and we wish you well with your future employment endeavours.

Yours sincerely,

Mr Gavin Fletcher
General Manager
Port City Autos"

[30] The payslip for 3 November 2022 records the payment of 38 hours as 'Lump Sum C in lieu', an amount of \$1,140, together with accrued annual leave and annual leave loading.

Evidence given during the hearing

[31] Mr Geiger gave the following evidence during the hearing:

Commissioner: All right. Mr Geiger, when you saw the text message that said that your tools were on the road, what did you understand that to mean?

Mr Geiger: Well, a little shocked. I take that as you know, go and get your tools and don't come back.

Commissioner: What did you understand it to mean?

Mr Geiger: Basically, yeah, your tools are on the street. You don't have a job anymore. Don't come back. Which is why I – I then tried to initiate like a – talk to Dylan, but, yeah.

- Commissioner: You say you received that at night. Did you think that the tools were on the street?
- Mr Geiger: Oh, I have no idea. Honestly I don't know. I couldn't – to be honest, I – I didn't know. But it was something that I just didn't – I wouldn't expect it to be on the street, but it could very well have been. I mean - - -
- Commissioner: I mean, the respondent's submissions, not evidence, but submissions, say it was just a [ruse]. It was a [ruse] to get you to – to respond to Dylan. A trick?
- Mr Geiger: Well, I – I had – I had contacted the Department Friday morning briefly for 15 seconds to advise that I wasn't going to be attending, but it wasn't until late that night when Dylan obviously had sent me that text that I was a little bit (indistinct words) okay, righto, well, and then the text messages from there on, telling me that I'm a liar, I'm – I'm this. That just made it pretty clear to me that, well, don't have a job, get your shit and fuck off. Sorry – sorry, Commissioner, I did not mean – to get your stuff and go away is pretty much what I took that as.
- Commissioner: No, I'm happy to hear your evidence on that, Mr Geiger. If you're swearing, that's okay. I'm – this is – I'm asking you what you were thinking?
- Mr Geiger: Exactly that.
- Commissioner: That's what you thought is it?
- Mr Geiger: Exactly that. I couldn't see it any other way. Especially after – after those texts. I never heard a word from Dylan again. Not even three or four days later, when I said all right, well, I'm coming to get me tool box then, what – you know, do you want it. I have never heard a word from Dylan again, since that night.
- Commissioner: So why didn't you go to work on the Monday?
- Mr Geiger: Because I was assuming that my toolboxes on the street don't come back and that's pretty much what I was – I was informed of from the Friday's texters. Friday's texts. I – I wouldn't have brought anything different. I mean, it's – I would (indistinct words) well, you're not welcome anymore.
- Commissioner: So, then you make some contact with Payroll and what are you attempting to do there?

- Mr Geiger: It was the 14th was the last day that I had actually – sorry, (indistinct words) this off. It was the 14th that I had last been at work. I then believe it was the 2nd of – 2 November. That was when I actually contacted HR to find out, Your Honour, what was going on, because like, I hadn't been given out my last weeks of pay. And I hadn't been given my entitlements, nothing. And from what I got told from Leanne on – the first time we spoke on the 3rd, they were fully unaware of the situation that had happened and had no idea that I was no longer working for the company. Which is all in my evidence that I've provided. Then we went on from there to try and discuss things. So basically, I was just trying to find out since I was fired, I was told to leave. Why wasn't my entitlements paid out and what was going on. It had been from the 14th to the 2 November. Over two weeks.
- Commissioner: So you were paid a – one week payment. So what was that for, do you think?
- Mr Geiger: Well, that was the – after we'd spoken and had finalised everything. That was when Leanne had said, well, we'd spoken about trying to come back to the employment. Clearly, the environment would not have been a happy environment to return to. And that's when I suggested that, yes, okay, well, there's – there's no point me coming back to the job, because there's not going to be a very good point of having a job that you're not going to be – that you don't want to go to every day. Especially with that environment and the way that things were with Dylan and what was said. I just didn't think that was the – the right option. So they paid me out then, on the fourth, I believe it was, after Leanne and I had spoken to try and resolve the matter. But it took over two weeks for me to actually – to go to them to figure out what's going on, because no one had even said anything from the Department here to the offices in Brisbane.
- Commissioner: All right. Thank you. So you consider you were dismissed on 21 October?
- Mr Geiger: Yes, I clearly would say that would be a dismissal to me, yes. I was well and truly under the assumption that from that date on, there was no employment for me ever again.

Evidence of Leanne Richardson

[32] Ms Richardson is the Human Resources Manager for the Respondent, based in Brisbane part of the HGWP Auto Solutions.

[33] Ms Richardson provided the following record of the phone call she had with Mr Geiger on 3 November 2023 and subsequent communications with Mr Geiger relating to this application.

- On Thursday, 3 November 2023 at approximately 1:15pm, Ms Richardson received a phone call from Mr Geiger asking why he had not been paid out his entitlements.
- Ms Katrina Smith, Payroll Manager of the Respondent was present in Ms Richardson's office when she answered. The call was on loud speaker for the entirety of the conversation with Mr Geiger.
- Ms Richardson explained to Mr Geiger that she was completely unaware that he had been terminated and that no termination had been initiated by the Respondent. Ms Richardson confirmed with Mr Gavin Fletcher, the General Manager of the Respondent, post the telephone conversation.
- During the conversation with Mr Geiger, he read various text messages. Ms Richardson explained the text messages were conversations between Mr Geiger and Mr Stewart. Ms Richardson advised Mr Geiger that this was the first time she was reading / hearing about this conversation.
- Ms Richardson asked Mr Geiger if he would be willing to come and speak to Mr Stewart and Mr Fletcher about the situation or even consider moving to one of the other sites, including even move to one of the Brisbane dealerships.
- Ms Richardson emphasised to Mr Geiger that there is an extreme skill shortage in qualified Automotive Mechanics and that they would not want to lose the skill and experience.
- Based on the discussion, Mr Geiger agreed to meet at the dealership on Monday, 7 November 2022 to coordinate a return to work. He was considering returning, however wanted to meet with Mr Stewart first to "see how it feels". Mr Geiger told Ms Richardson that he was not available to attend on Thursday, 3 November 2022 or Friday, 4 November 2022 as he had some family business to attend to on the Sunshine Coast and would not be back in Hervey Bay until Monday.
- Mr Geiger advised that he did not have another job to go to.
- The call with Mr Geiger ended positively. He thanked Ms Richardson for taking the time and assisting in return to work option for him.
- After the telephone conversation, Ms Richardson contacted Mr Fletcher by phone to explain the phone call she had received. Mr Fletcher was also unaware of any termination of employment involving Mr Geiger.
- Mr Fletcher was pleased to facilitate a meeting with Mr Stewart and Mr Geiger on Monday, 7 November 2022 and was optimistic that there would be a resolution,

which would result in Mr Geiger returning to his duties as an Automotive Mechanic for the Respondent.

- Being remotely based, Ms Richardson offered to be available by video link on the Monday and discussed this with Mr Fletcher.
- Text messages from Mr Geiger and Ms Richardson at 1:31pm on 3 November 2022, stated “this is all I have received and have had no response since, thanku and I’m sorry that it’s like this, I left in a decent manner and only expected that as I was terminated I would have been paid out my entitlements upon separation of employment”.
- On Thursday, 3 November 2022 at 2:56pm, Mr Geiger wrote “Hello, thankyou for your assistance in this matter but I feel that it would be too uncomfortable to return to workshop and thinks it’s best that we end this in a mutual way. I walked away in a decent manner and thought that I would just be paid out all entitlements upon separation of employment so it stays amicable. Thank you once again the assistance.”
- On Thursday, 3 November 2022 at 3:27pm, Mr Geiger wrote, “Can U please let me know when U r able to payout all entitlements owed so I can my rent/bills etc, thankyou and muchly appreciated.”
- Ms Richardson responded with, “Hi Joseph, should be tomorrow for you. Kind regards Leanne”.
- The termination of employment during probationary period was initiated on 3 November 2022, only after Mr Geiger sent a text direct to Ms Richardson stating, “Hello, thankyou for your assistance in this matter but I feel that is would be to uncomfortable to return to workshop and think it’s best that we end this in a mutual way”.
- Based on Mr Geiger’s text message and his refusal to work, and refusal to meet to find a resolution regarding his text message conversation with Mr Stewart, Ms Richardson said the decision seemed mutually agreed to end Mr Geiger’s employment during his probationary period.
- The letter that was sent with the email sent on 4 November 2022 was incorrectly dated as is shown on the Respondent’s payroll records.
- On Friday, 3 November 2022, Ms Smith paid out Mr Geiger’s annual leave accrual, plus an additional week in lieu as per the termination letter.

Evidence given during the hearing

[34] In evidence-in-chief, Ms Richardson stated that she informed Mr Geiger on 3 November 2022 that she wasn’t aware of a termination, and a termination would need to go via a number of people; Mr Stewart didn’t have authority to dismiss him. She informed him the Respondent needed technicians and she was hopeful he would return to work the following Monday.

[35] Ms Richardson considered that the payroll records demonstrated that Mr Geiger had been on unpaid leave during this time. Her statement prompted the following questions and answers:²

Commissioner: Why do you think he was unpaid leave, Ms Richardson? Since 21 October? Why do you think he was on unpaid leave?

Ms Richardson: (Indistinct), I actually don't know to be honest, Commissioner. He had done this a number of times in the past where he – the words used, I believe, is 'he goes underground'. Because Dylan has worked with him before. And I guess I'm understanding, Commissioner, of, you know, at the moment, and especially since the COVID, there's a number of people with all types of situations, whether it's mental health or it's financial, and, you know, we don't – I know there's some organisations cut people off, you know, they do the thing called (indistinct), lost my words, the - - -

Commissioner: You're in HR?

Ms Richardson: Yes.

Commissioner: If you thought that there was an issue in the previous two weeks - - -?

Ms Richardson: Yes, (indistinct).

Commissioner: - - - wouldn't you want to satisfy - one moment - wouldn't you want to satisfy yourself that Mr Geiger's entitlements or rights were upheld? If he wasn't at work, what sort of payment would he be entitled to? He hadn't declared that he was sick?

Ms Richardson: No, he hadn't. And that's a question between, I guess, Dylan and the payroll team as to why something wasn't raised with me prior to that. As to why it was allowed to go through as unpaid leave for the extent of time. So, (indistinct) - - -

Commissioner: But you're the HR manager, aren't you?

Ms Richardson: Yes, but I don't always see the pay – I'm not always over the – we pay weekly, and things. It is – like, it is something that Dylan should have raised with the General Manager. And that's certainly been raised since, Commissioner, I can assure you.

Commissioner: But the respondent is one. It's not a group of individual people, it's one. If you're here today arguing that there was no dismissal until – I don't know – early November, then what has the

respondent done about the time between 21 October and then? I mean, if you were the real deal, you would have said, 'Oh, we should have been paying you for that time'?

Ms Richardson: As what? Annual leave? (Indistinct) - - -

Commissioner: Well, he hasn't requested annual leave. He hasn't requested sick leave. He says he's not turning up to work on Monday because he considers he's been dismissed. And you don't agree with that because that's why you're here today?

Ms Richardson: Correct. Yes.

Commissioner: So what else is he on? I mean, what was the situation in those two weeks?

Ms Richardson: He was on unpaid leave, hoping that he would return to work. And I have asked Dylan these same questions. Why was nothing initiated. You know, why was an abandonment of employment letter not – you know, why weren't we notified to, you know, to send out an abandonment of employment, or notified that he wasn't at work. If that's what - - -

Commissioner: Is that what you're suggesting? That he abandoned his employment?

Ms Richardson: Well, why didn't he turn up to work? Joseph, this is not the first time you've done this.

Commissioner: Ms Richardson, I'm only interested in the 21 October. I'm not going to even, you know, put in there that material about Mr Geiger's personal circumstances earlier. That's my preliminary view?

Ms Richardson: Sure.

Commissioner: I'm interest in 21 October and the text messages that Mr Stewart sent to him. I'm not interested in the 'whys'. I'm interested in the facts?

Ms Richardson: (Indistinct). Okay.

[36] Following cross-examination and re-examination, Ms Richardson gave the following evidence:³

Commissioner: All right. I'll ask you, Ms Richardson, you received the text messages from Mr Geiger, where he'd screen shot the text messages that Mr Stewart had sent him. When he sent him one

- at 10.22 pm on 21 October, it says, 'See you at court. If you want, your box is on the road', how did you feel?
- Ms Richardson: How did I feel? I was angry. That he'd contacted him outside of work.
- Commissioner: And said (audio malfunction) to him, 'See you at court'?
- Ms Richardson: Yes, I (indistinct), I've had a conversation with Mr Stewart about those, as has, I believe, the director of the business. And he – Dylan's response was around that he and Joseph - - -
- Commissioner: No, I asked you how you felt?
- Ms Richardson: How I felt? I was angry about that text message. I absolutely was, Commissioner. And I did tell Joseph that as well, during that conversation, he may recall that I said that's not how we conduct business, is what I told him.
- Commissioner: Did the respondent at any time put in writing to Mr Geiger that you have not been terminated by the respondent?
- Ms Richardson: No, we didn't. No, that's – no.
- Commissioner: Why didn't you?
- Ms Richardson: I was just trying to facilitate a return to work for – maybe, you know, unless (indistinct) we need to do that in the future, I felt – I honestly left that conversation, Commissioner, content. Katrina and I spoke post the conversation with Mr Fletcher, the General Manager, I was actually content that Joseph, well, Mr Geiger, was keen to come back to work and that, you know, a situation had been resolved of (a) his absenteeism, and (b) we'd gain a tech back that we desperately need, so.
- Commissioner: How comfortable were you with the fact that he hadn't been remunerated for those two weeks?
- Ms Richardson: We have a number of people, Commissioner, that will exhaust their – need some extra time and exhaust their entitlements. And we would allow people to take time; obviously their leave still accrues while they're away, but we do allow people to take unpaid leave as a business.
- Commissioner: Well, nothing accrues while they're on unpaid leave. Everything stands still. But that's approved leave. You said you felt quite comfortable and, you know, hopeful that this would turn itself

around but the man is without pay, and you've seen the text messages where he's told that his belongings are on the street?

Ms Richardson: Yes, which is why I asked if we could facilitate a conversation quickly to come to an agreement on, you know, on steps forward. So, now - - -

Commissioner: You didn't assure him that he hadn't been terminated?

Ms Richardson: Yes, I did. Yes, I did. Yes, I said no authorisation from here or from the director had been given to terminate the employee. And all (indistinct) - - -

Commissioner: Well, it's not required, is it? It's not required, is it?

Ms Richardson: We as a business do. We do, as a business. Mr Gleeson, he's our director, we wouldn't terminate anyone within that business without his – we've owner that business since September 2021. You know, it's a regional business, it's been - it's a family business, it's a family that owns Port City Autos and Michael – Mr Gleeson - Michael Gleeson would like – he tried to also reach out to Geiger as well, mobile to mobile. That's the type of business they are.

Commissioner: But there was no knowledge at that level that he had been sent those text messages and hadn't been at work for two weeks?

Ms Richardson: Correct. That's correct. Yes. And that has been addressed in between as well, Commissioner. It's not – it's not how our managers need to run their businesses, and it has been pointed out both by me, Mr Fletcher – who is the general manager – and Mr Gleeson.

Evidence of Dylan Stewart

[37] Mr Stewart gave a brief witness statement where he said that on 26 September 2022, he spoke with Mr Geiger and told him how his absences affect the workshop.

[38] On Wednesday, 19 September (which I understand he means October), he called Mr Geiger at approximately 8:30am in the presence of Mr Luke Ambrose. There was no answer. Mr Stewart's telephone records demonstrate a call was made to Mr Geiger's phone at 9:19am.

[39] Mr Stewart stated that he sent Mr Geiger the text on 21 September (which I understand he means October), regarding his tool box being out on the street as he was frustrated with him for not contacting him for three days.

Evidence given during the hearing

[40] Given the scant evidence within Mr Stewart's witness statement, it was necessary to hear substantial oral evidence given during the hearing.

[41] In evidence-in-chief, Mr Stewart stated that when he sent Mr Geiger the late-night text messages on 21 October 2022, he was very frustrated and emotional. He was distressed with the friendship he had with Mr Geiger and considered it had eroded. He explained he had held a work friendship and strong personal friendship with him. They had known each other for five years, and Mr Geiger would work on Mr Stewart's personal vehicles.

[42] Mr Stewart stated that Mr Geiger had followed him to this job, and Mr Stewart enthusiastically employed him as he considers his workmanship to be fantastic.

[43] Mr Stewart stated that he tried to contact Mr Geiger on 24 October 2022, however in evidence given later, he agreed that had not occurred.

[44] The following evidence was given:⁴

Commissioner: So on Friday night?

Mr Stewart: Yes.

Commissioner: Late at night you're texting him saying it's done, take me to court, don't care. And on Monday morning you're ringing him, are you?

Mr Stewart: I did try to make contact, yes, Commissioner.

Commissioner: Well the telephone records will show whether that's true or not, Mr Stewart?

Mr Stewart : I'm trying to ascertain those now, Commissioner.

Commissioner: Why wouldn't you have put them in your material?

Mr Stewart: It's – it lapsed my mind, Commissioner.

Commissioner: Well I'll ask for those records to be produced. Is it your evidence that following that Friday, after all those messages that you sent, you were ringing him on the Monday morning?

Mr Stewart: I was trying to make contact with him, he did not answer the phone, Commissioner.

Commissioner: So he's texted you at 6.09 saying, 'So you have fired me', why didn't you respond to him?

Mr Stewart: Because I thought – sorry, Commissioner, apologies, didn't meant interrupt Commissioner.

- Commissioner: Yes. Well, Monday at 5.08 he says, 'Got my negative test, on COVID before, been five days'?
- Mr Stewart: I'm out of place with the dates, Commissioner, sorry.
- Commissioner: Well you were asked the question did you call him on the Monday morning and you said yes, now is that true or not?
- Mr Stewart: I – it's not true, Commissioner, because I thought it was a different day, I apologise.
- Commissioner: Right, so let's backtrack. Friday 21 October, late at night, you're texting him telling him to collect his toolbox, and you don't care if he goes to court. What do you do next?
- Mr Stewart: I pretty much shut down, and I'm quite emotional and frustrated from the lack of communication from Joseph.
- Commissioner: So Monday you don't expect him at work?
- Mr Stewart: I was unknown, Commissioner. With the previous history that Joseph had shown I was unknown, unfortunately, sorry Commissioner.
- Commissioner: Well, were you unknown or did you not expect him to come to work?
- Mr Stewart: I didn't know if he was going to come or if he wasn't, because it was very hard to tell with the way he'd been conducting himself with the employment here, Commissioner.
- Commissioner: Why would he come to work when you've sent him those text messages?
- Mr Stewart: Because he was a – had a duty of responsibility to the employment, Commissioner.
- Commissioner: You've told him his tool box is on the street?
- Mr Stewart: That is due to getting a response from Mr Joseph because I wouldn't – I wasn't getting anywhere or any information or any feedback from Mr Joseph, Commissioner.
- Commissioner: In submissions it's been put that it was a ruse, how would he know that?
- Mr Stewart: I don't know how to answer that, Commissioner.

Commissioner: He wouldn't know that, would he?

Mr Stewart: No, but he understands my personality and he knows - - -

Commissioner: Does he?

Mr Stewart: Yes, Commissioner.

Commissioner: He's telling you, 'Leaving my tool box out in the street would be your problem.' And you wrote back, 'Not my problem'?

Mr Stewart: Correct, Commissioner.

Commissioner: He's meant to know that, in fact, his toolbox was locked up and safe?

Mr Stewart: It was 11.04 at night, Commissioner, and I was very – very upset.

Commissioner: Well why would you write that, 'Your toolbox is on the street, come and get it'?

Mr Stewart: To get a response from Mr Joseph, because he had – was not answering the phone.

Commissioner: And on that basis he's meant to turn up and present for work on Monday morning, is he?

Mr Stewart: I would expect him to, yes, Commissioner, and then we could have a meeting and go through what's going wrong, Commissioner.

Commissioner: Why wouldn't you respond to him when he's asking has he been terminated?

Mr Stewart: Excuse me, Commissioner?

Commissioner: He's asking you if he's been terminated, and you're not responding?

Mr Stewart: Correct, Commissioner.

Commissioner: So on Sunday at 6.09 pm he writes, 'Understandable, see you have fired me. No toolbox was on the street either'?

Mr Stewart: Correct, Commissioner.

Commissioner: And you don't respond, you don't respond when he texts you on Monday, you don't respond when he texts you on Tuesday, you

don't respond when he texts you on Wednesday. So what is he meant to do? I'm confused, Mr Stewart?

Mr Stewart: That's – I wasn't – I just didn't know what to do, how to respond to the text messages, Commissioner. Because I didn't want to say the wrong thing or step out of the line as in my role, Commissioner.

[45] In further cross-examination, the following evidence was given:⁵

Mr Geiger: When you say that our friendship goes back five years, and we've done all this together, why couldn't you respond to me after knowing how your text messages would come across to me as pretty rude and abusive? Why couldn't you respond to me when I was just trying to say, well look am I fired, what am I doing, what's going on. It's a simple – I hadn't heard from you since those text messages on Friday. Prior to that I hadn't heard from you since Tuesday, not even a phone call, nothing?

Mr Stewart: I was very upset with you, Joe, and I did speak with you and told you that I need you to be at work mate. And, yes, I do apologise it was a lapse in my friendship on your behalf, and I should have had more empathy and I apologise.

[46] I considered it necessary to hear from Mr Stewart relevant to what he thought had happened to Mr Geiger's employment following his text messages to him on 21 October 2022. Mr Stewart gave the following evidence:⁶

Commissioner: All right, Mr Stewart – why didn't you reach out to your HR or payroll department after the text messages that you sent on 21 October?

Mr Stewart: Because I didn't realise the escalation of the process, Commissioner. I didn't think it was an issue with Mr Geiger at that stage, Commissioner. I didn't believe that HR needed to be resolved – involved due to our friendship, Commissioner.

Commissioner: You knew he wouldn't be getting paid on the Monday or the Tuesday or the Wednesday or the Thursday?

Mr Stewart: I don't know what leave entitlements he had. I'm not – I don't have that information. I didn't get that information on what annual leave or sick leave my employees have in their accruals, Commissioner.

Commissioner: He's had to ask you to approve annual leave and in your home time you've approved annual leave?

- Mr Stewart: No, no – the process at the company is you submit a form for annual leave and you sign the form. I've approved it and I've put it in the system and that's all I have to do with it and then payroll do what they do in the background and all I do is add it into the (indistinct) and move his hours out of the day for the approved applicant's leave, Commissioner.
- Commissioner: But you do need to approve it so if he wasn't at work on Monday, Tuesday, Wednesday, Thursday, what did you think – did you think he was getting paid, Mr Stewart?
- Mr Stewart: No, I think you got misinterpreted me, sorry, Commissioner – the leave form was for the Monday.
- Commissioner: I know that. I know that but on the Monday the 24th and Tuesday the 25th and Wednesday the 26th and Thursday 27 October did you think he was getting paid?
- Mr Stewart: I assumed if his leave was approved, Commissioner, yes.
- Commissioner: Who would approve his leave?
- Mr Stewart: I approve his leave but I don't have access to what leave entitlements he has in his accrual. I'm unaware.
- Commissioner: So he hasn't asked for leave on Monday, Tuesday, Wednesday, Thursday, between 24 and 27 October?
- Mr Stewart: Correct, Commissioner.
- Commissioner: And he's asked you, 'Am I dismissed', and you know he's not at work. So what do you think is happening to him?
- Mr Stewart: With Joe's previous no-shows and no contact I was unsure of what Joe was doing, Commissioner.
- Commissioner: He's asking you, 'Have I been dismissed'? You're the correct person to ask?
- Mr Stewart: I haven't got the authority to dismiss anybody. I have to get approval from the general manager, Commissioner.
- Commissioner: Well, he's not at work and he's asking you, 'Have I been dismissed'?
- Mr Stewart: That's when I stopped all my communication, when I was upset with him on Sunday, 23 October at 6.09 pm.

- Commissioner: You didn't tell anybody senior to you what you had done?
- Mr Stewart: I hadn't done anything, Commissioner.
- Commissioner: You'd sent lots of text messages, Mr Stewart?
- Mr Stewart: Correct, Commissioner.
- Commissioner: You didn't tell anybody that you had done that?
- Mr Stewart: Sent him text messages?
- Commissioner: Yes?
- Mr Stewart: No, Commissioner.
- Commissioner: Do you think that you should have?
- Mr Stewart: In hindsight, yes, Commissioner.
- Commissioner: You said you don't care if he goes to court?
- Mr Stewart: Absolutely I care, Commissioner.
- Commissioner: That's not what you wrote?
- Mr Stewart: I was very frustrated and emotional, Commissioner.
- Commissioner: You didn't tell anybody else that you'd written that?
- Mr Stewart: No, because the conversation was between myself and Joe, Commissioner.
- Commissioner: Well, you wrote – and you're his manager – 'See you at court if you want. Your box is in the road'?
- Mr Stewart: I was very frustrated and angry, Commissioner.
- Commissioner: All right, but you didn't tell anybody else within your organisation. It took Mr Geiger to alert management that you had sent that?
- Mr Stewart: Correct, Commissioner – because I was unaware that he was in – was contacting Leanne and HR and communicating.
- Commissioner: Yes?
- Mr Stewart: So I didn't know that it had gotten to this extent, Commissioner.

[47] Mr Stewart was released from giving video evidence, however following submissions made by the Respondent and further evidence of Mr Geiger, it became necessary to have Mr Stewart return and give further evidence.

[48] Mr Geiger stated in further oral evidence that when he came to collect his toolbox on the afternoon of Tuesday, 25 October 2022, Mr Stewart was there. Mr Stewart pushed Mr Geiger's toolbox out of the workshop, and Mr Geiger then pushed it onto the street and into his car. Mr Geiger considered that he conducted himself in a decent manner and bid farewell.

[49] In oral submissions, the Respondent put that because Mr Geiger had sent a text saying he had 'walked away in a decent manner' and he was 'sorry that it's like this', it implied that there was acknowledgement of 'culpability'. On account of the submissions put by the Respondent, I asked Mr Geiger the following:⁷

Commissioner: Culpability, all right – what do you think, Mr Geiger? This hasn't been – it hasn't been put to you in cross-examination that you're culpable in ending the employment so what do you say?

Mr Geiger: I reached out to HR to get some sort of resolve and to find out what was going on. Now, I was under the assumption I was terminated. Now, under that assumption I picked my toolbox up, I gracefully left, (indistinct) as I was told. I would have just assumed that Dylan would have passed on the information to HR, HR would have then done their job to then pay out the payroll and we wouldn't have gone to this extent right now. We would have left on a mutual term, we would have ended things as they were and I was (indistinct) from walking away. That's what I was assuming. That's what I was saying in my text. I wasn't saying that, you know, 'I want to come back'. I didn't want to leave my job but that's all I was trying to get through, was, 'You terminated me. Why is it taking this extent for me to just be able to walk away from the company'?

Commissioner: Where you say, 'I walked away in a decent manner and thought that I would just be paid out all entitlements upon separation of employment so it stays amicable', what did you mean by that?

Mr Geiger: Exactly that, Your Honour – sorry, exactly that, Commissioner, was basically that after I was told on the 21st that, you know, (indistinct words), blah, blah, and I tried contacting Dylan up to the 24th, just to say, 'What's' – then I showed up to pick up my toolbox late that afternoon on the Wednesday. What I meant by that message was just purely that since I went and picked up my toolbox (indistinct words) just expecting them to just pay me out that week, not - - -

[50] Mr Geiger stated that he sent the text message on 26 October 2022, “*So y am I still on the payroll if U have fired me ?*” because he had received a pay advice with zero payment. He said that he expected to have been paid out his entitlements on this day, including annual leave. In oral evidence, he considered that perhaps there had not been enough time for payroll to process his termination payment, so he reached out on 2 November 2022, the next pay day, to inquire why he hadn’t been paid his entitlements.

[51] During the hearing, Mr Geiger provided the pay advice dated 26 October 2022 for the period 19 October 2022 – 25 October 2022. It demonstrates he was paid 2.9 hours for ‘sick with cert’, together with some weekly allowances.

[52] During the hearing, Ms Richardson kindly provided evidence of time records sent by Mr Stewart to payroll on 25 October 2022. The email was sent by him at 10:10am. He had recorded Mr Stewart as sick for all of the days between 19 – 25 October 2022 inclusive.

[53] On 1 November 2022, Mr Stewart sent a further time sheet to payroll for the period 26 October 2022 – 1 November 2022 inclusive. Mr Geiger was no longer on this spreadsheet. He no longer had a row allocated to his name and hours. It appears Mr Geiger didn’t receive a pay advice for that period.

[54] When Mr Stewart returned to give evidence, the following was given in respect of the payroll records for Mr Geiger:

- | | |
|---------------|-----------------------------------------------------------------------------------------------------------------------------|
| Commissioner: | Very good. So the payslip. Your pay run is from Wednesday to Tuesday? |
| Mr Stewart: | Correct. |
| Commissioner: | And on Monday 24th and Tuesday 25 October, you've recorded, Mr Geiger as sick leave. Do you recall doing that? |
| Mr Stewart: | No, I don't, Commissioner. |
| Commissioner: | All right. Well, I've got before me the Hervey Bay service department, where you've put 38 hours of sick carer's leave? |
| Mr Stewart: | If it's on that (indistinct) Commissioner it'd be – (indistinct) – it would be correct. That's what I've done. |
| Commissioner: | Right. Okay. So that covers him for Monday 24 and Tuesday 25 October. So did you think he was still employed, did you? |
| Mr Stewart: | I didn't know what was going on, Commissioner. |
| Commissioner: | All right. I've been told that you helped him wheel his large toolbox down the street on Tuesday 25 October, is that right? |
| Mr Stewart: | No, Commissioner. |

- Commissioner: Well, what did you – Mr Geiger, you can ask him questions?
- Mr Geiger: When I showed up on that day, to get my toolbox, did you not walk up to my tool box with me and assist me to walk it out of the workshop and explained to me there and then that – sorry, it didn't work out, mate, you know, you had to be at work? We've got a place to run and see you later? Did you not?
- Mr Stewart: No, no. I had Gavin [Fletcher], my general manager beside me. And you parked next to the fire hydrant out the back of the dealership and you got your toolbox by yourself and I said to you, all you needed to do was communicate and we wouldn't be having this situation, unfortunately, mate.
- Mr Geiger: So (indistinct). Thank you.
- Commissioner: Well, did you assist him at all, Mr Stewart?
- Mr Stewart: Not in removing his toolbox. No, Commissioner.
- Commissioner: You watched him - - -?
- Mr Stewart: Bringing his toolbox in – pardon?
- Commissioner: What did you do?
- Mr Stewart: I helped him bring his toolbox when he started employment, but I did not help him remove his toolbox or wheel his toolbox out of the dealership, Commissioner.
- Commissioner: Did you do it yourself, Mr Geiger?
- Mr Geiger: I wheeled my toolbox to my car, yes. That's – yeah, I had to load it up. I had to get it out of there. He watched me do it. Like, watched me – and telling me that, you know, sorry it didn't work out. As far as I knew, I was fired on the 21st. I was there to pick my toolbox up, that afternoon.
- Commissioner: Right. So what do you then do, Mr Stewart, about that? If you form the view on 24 October, sorry, 25th. Tuesday 25th October, that the toolbox has been collected as you had put to him, what then? What happens next?
- Mr Stewart: I was waiting to see what would come of Joe, whether he still wanted employment or not, Commissioner. Because there's a pattern of Joe just disappearing and not coming back. And then he would show up out of – unexpectedly.

Commissioner: Right. And then he texts you the next day? He says, 'So why am I still on the payroll if you have fired me'?

Mr Stewart: Because I didn't know what was going on, Commissioner. And I didn't respond because I didn't know what quite to say. Because I didn't know what was actually happening.

Commissioner: So you've told payroll that he was on sick leave, have you? On the Monday and the Tuesday?

Mr Stewart: If that's what has been put down, Commissioner. I don't know. It's too far (indistinct), sorry.

Commissioner: Do you know what you did next with payroll, the timesheets?

Mr Stewart: When are you referring to, Commissioner?

Commissioner: After that, after Tuesday the 25th October, do you know – do you recall what you did the following week?

Mr Stewart: No, I don't, sorry, Commissioner.

Commissioner: All right. Ms Richardson, do we have that yet?

Ms Richardson: Should be in your email. The payroll – oh, I've sent both.

Commissioner: Yes. Hang on, I think I have now for the first - - -

Ms Richardson: Sorry.

Commissioner: - - - and copy of Hervey Bay, 1 November. That's what I'm interested in. Yes, I'm just going to open that up now. Okay. Right. We've lost Mr Geiger off the – off that spreadsheet then, Mr Stewart. He's gone?

Mr Stewart: Okay. I was unaware of that, Commissioner.

Commissioner: But you put this together, don't you?

Mr Stewart: I sort it out and send it through to payroll every – every Tuesday. Correct, Commissioner.

Commissioner: So you – you're the one who removed him?

Mr Stewart: I have to remove him to say the formula works correctly, Commissioner. Because I didn't know what to put in for his leave, Commissioner and I didn't, in my stupidity, didn't refer to HR for guidance or (indistinct).

[55] In re-examination, Mr Stewart gave the following evidence:

Ms Kannis: Now, I just – Dylan, when Joseph left employment, like left with his toolbox, you – that's when you thought he was not – obviously he'd gone? Correct?

Mr Stewart: Correct. I was assuming that he was going to be – be leaving. Yes, correct.

Ms Kannis: But did you believe that he had been terminated by us or that he decided he was going?

Mr Stewart: No, I believed that he decided that he was just leaving and I didn't – wasn't aware that, well obviously HR hadn't been informed and I don't have authority to actually dismiss anybody unless I talk to yourself or – and the General Manager.

Commissioner: Is that your evidence, Mr Stewart? On the Tuesday when he came to collect his toolbox you thought that he was leaving his employment at his initiative?

Mr Stewart: Correct, Commissioner.

Commissioner: And you didn't tell anyone that that's what you thought?

Mr Stewart: I didn't realise I would have to do that Commissioner, sorry.

Commissioner: He's asking you about his annual leave?

Mr Stewart: For his entitlements, Commissioner. I'm not – I don't have that information. (Indistinct).

Commissioner: What do you know about when somebody finishes up whether it's at their initiative or the employer's initiative? What happens to their annual leave?

Mr Stewart: Well, they should – whatever's owing to them should be paid out via – by the payroll system, I believe, Commissioner.

Commissioner: Well, how would payroll know if you kept all this to yourself?

Mr Stewart: Well, Leanne was aware at the end, but, yes, probably my part, with Joseph picking up his toolbox on that day, I'm pretty sure, I'm not 100 per cent sure on the date, but I'm pretty sure that HR - - -

Commissioner: Well it's Tuesday, 24 October – sorry, 25 October. We know that?

Mr Stewart: Okay.

Commissioner: Yes?

Mr Stewart: Yes.

Commissioner: So what did you think was going to happen?

Mr Stewart: I wasn't too sure, to be honest. I should have let HR know that Joseph had picked up his toolbox and left the dealership.

Commissioner: And you would have reported, would you, that he was leaving?

Mr Stewart: Well, I had the General Manager standing beside me when we walked out the back and came across Joe wheeling his toolbox to his car, Commissioner. So we assumed that Joe was leaving the dealership.

Commissioner: What did you tell the General Manager?

Mr Stewart: That Joe's picking up his toolbox, he must be leaving, Commissioner.

Commissioner: Did you say why, did you say, 'I've sent him some text messages on Friday night? Close to midnight, saying, 'Come and get it off the road, don't care if you take us to court' Did you tell him that?

Mr Stewart: No, (indistinct) – did I tell the General Manager? No, Commissioner. I was upset and very frustrated (indistinct), well that evening, and not a clear – clean frame of mind.

Commissioner: No, but did you tell him on the Tuesday?

Mr Stewart: The General Manager, Commissioner?

Commissioner: Yes?

Mr Stewart: No, Commissioner.

Commissioner: Right.

Ms Richardson: I believe Mr Fletcher was aware of the situation when I called him post the conversation I had with Mr Geiger on the Thursday, 3 November.

Commissioner: Because he would have seen the text messages because Mr Geiger provided them to you, Ms Richardson.

Ms Richardson: Well, I brought them to Mr Fletcher's attention.

Commissioner: Yes, but I was asking Mr Stewart, did he tell him, on that Tuesday, when the toolbox is being collected, 'Oh, maybe there's a reason why Mr Geiger's collecting his toolbox'?

Mr Stewart: Gavin was aware that Joseph had gone AWOL, Commissioner.

Commissioner: Well, had you told him that, had you?

Mr Stewart: I told him that Joe had disappeared again, correct, Commissioner.

Commissioner: But he hadn't disappeared, had he? He'd been responding to your text messages on the Friday?

Mr Stewart: The late, yes, correct, Commissioner, correct. But he wouldn't answer his phone, Commissioner.

Commissioner: When were you calling him?

Mr Stewart: During the day. Not at – when the last group of text messages came through, Commissioner. But he wouldn't answer so it won't show up on my phone records, unfortunately, Commissioner.

.....

.....

Commissioner: Right, but you didn't tell your GM that there'd been this exchange of text messages, and what you had said to him?

Mr Stewart: I spoke - - -

Commissioner: And that might explain why he's collecting his toolbox?

Mr Stewart: I explained to Gavin that Joe had been missing and then he (indistinct) supplied the medical certificate, Commissioner.

Commissioner: Yes, but I think we've established, haven't we, you'd agree that you didn't tell him of the text messages that you'd sent to Mr Geiger on the Friday night?

Mr Stewart: Correct, Commissioner.

Commissioner: And if you had that might explain why he was picking up his toolbox?

Mr Stewart: Possibly, Commissioner.

Commissioner: Do you think you were honest with Gavin?

Mr Stewart: I should have been more forthcoming with the information I'd been exchanging with Joseph, correct, Commissioner. That's an error on my behalf.

Evidence of Mathew Harvey

[56] Mr Harvey made a brief witness statement. He stated that he witnessed Mr Stewart and Mr Luke Ambrose speaking with Mr Geiger on 26 September 2022 regarding the impact his absences were having on the workshop.

[57] Further, he witnessed Mr Stewart make numerous calls to Mr Geiger (on dates not specified) with no answer or reply.

Evidence of Luke Ambrose

[58] Mr Ambrose made a brief witness statement. He and Mr Stewart spoke with Mr Geiger on 26 September 2022 regarding the impact his absences were having on the workshop.

[59] Further, he witnessed Mr Stewart make numerous calls to Mr Geiger (on dates not specified) with no answer or reply.

The Respondent's submissions

[60] The Respondent provided a copy of Mr Geiger's attendance record, which demonstrated he was regularly absent, particularly through August and September 2022. There was a lot going on in his life at that time and he was often unreliable.

[61] The Respondent further submitted that it did not initiate the dismissal of the employee. This is based on the following reasons:

- that there had been a series of communications culminating in Mr Geiger believing he had been dismissed after the manager accused him of lying.
- after the manager had not been contacted by Mr Geiger even though it is clear that Mr Geiger did not immediately respond to Mr Stewart, in his own evidence there is no urgency to revive the working relationship.
- Mr Stewart had been frustrated by Mr Geiger not returning his calls.
- Mr Stewart did not believe Mr Geiger at that time because of the lack of communication in a timely manner with him.
- The toolbox was not in fact put on the footpath – that was a ruse to get a response from Mr Geiger which it achieved.

[62] It was submitted that because a meeting had been planned to have been held on 7 November 2022, Mr Geier effectively terminated his own employment on 3 November 2022 as he sent a text saying that he had ‘walked away in a decent manner’.

Consideration

[63] Section 386 of the Act provides that a person has been dismissed in several circumstances, including when their “employment” has been “terminated on the employer’s initiative”. Such a situation refers to a termination that is brought about by an employer and which is not agreed to by the employee.⁸

[64] When analysing whether there has been a “termination at the initiative of the employer” for the purpose of s.386(1)(a) of the Act, it is necessary for the analysis to be conducted by reference to termination of the employment relationship. It is not conducted by reference to the termination of the contract of employment in operation immediately before the cessation of the employment.⁹

[65] A “termination at the initiative of the employer” is when two criteria are satisfied:

1. the employer’s action “directly and consequentially” results in the termination of employment; and
2. had the employer not taken this action, the employee would have remained employed.¹⁰

[66] For there to be a “termination at the initiative of the employer” there must be action by the employer that either intends to bring the relationship to an end or has that probable result.

[67] In *Abandonment of Employment*,¹¹ the Full Bench of this Commission considered the meaning of the “abandonment of employment” in the context of the four-yearly review of modern award. However, the comments of the Full Bench are relevant here:

“‘Abandonment of employment’ is an expression sometimes used to describe a situation where an employee ceases to attend his or her place of employment without proper excuse or explanation and thereby evinces an unwillingness or inability to substantially perform his or her obligations under the employment contract. This may be termed a renunciation of the employment contract. The test is whether the employee’s conduct is such as to convey to a reasonable person in the situation of the employer a renunciation of the employment contract as a whole or the employee’s fundamental obligations under it. Renunciation is a species of repudiation which entitles the employer to terminate the employment contract. Although it is the action of the employer in that situation which terminates the employment contract, the employment relationship is ended by the employee’s renunciation of the employment obligations.

Where this occurs, it may have various consequences in terms of the application of provisions of the FW Act. To give three examples, first, because the employer has not terminated the employee’s employment, the NES requirement in s 117 for the provision of notice by the employer, or payment in lieu of notice, will not be applicable. Second, if a modern award or enterprise agreement provision made pursuant to s 118 requiring

an employee to give notice of the termination of his or her employment applies, a question may arise about compliance with such a provision. Third, if the employee lodges an unfair dismissal application, then the application is liable to be struck out on the ground that there was no termination of the employment relationship at the initiative of the employer and thus no dismissal within the meaning of s 386(1)(a) (unless there is some distinguishing factual circumstance in the matter or the employee can argue that there was a forced resignation under s 386(1)(b)).”

[68] Where the conduct of an employee amounts to a renunciation of the contract of employment, it is the conduct of the employee that terminates the employment relationship.¹² Renunciation is a species of repudiation which entitles the employer to terminate the employment contract.¹³ The difference between renunciation and repudiation was explained by Gleeson CJ, Gummow, Heydon and Crennan JJ in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited*¹⁴ as follows (references omitted):

“In its letter of termination, Koompahtoo claimed that the conduct of Sanpine amounted to repudiatory breach of contract. The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it... Secondly, it may refer to any breach of contract which justifies termination by the other party... There may be cases where a failure to perform, even if not a breach of an essential term ... manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words.”

[69] Mr Geiger was expected to return to work on 19 October 2022 after a period of two days’ annual leave. He didn’t attend, and I accept that Mr Stewart attempted to call him on this day. Mr Geiger did not telephone and explain his absence, or have his partner communicate his unavailability to attend for work due to illness. He repeated this action on 20 October 2022.

[70] His evidence is that he telephoned the workshop on 21 October 2022 to inform of his absence, however there is no evidence of that from his telephone records, produced after the hearing.

[71] Certainly, Mr Geiger should have communicated with Mr Stewart his absence.

[72] Late on the Friday night, Mr Stewart then sent the text message to Mr Geiger, informing him his toolbox was on ‘Islander Road’. Upon Mr Geiger providing a medical certificate covering his period of absence and a positive COVID-19 test result, Mr Stewart considered it necessary to inform his subordinate via text message:

- Don't care I can message
- You better go get it
- Done !
- Not my problem. Incorrect address lies and I said last chance. No phone call so I'm done sorry I have a business to control .See you at court if u want. Your box is on the road !
- Yet another lie. Sorry mate we're done
- I would rwc
- I would get check if ur toolbox
- Not my problem
- Not my problem. Your problem. Sick of you and being down rite rude towards me.

[73] Mr Stewart later stated in evidence that he was frustrated and emotional when he sent these messages to Mr Geiger.

[74] Mr Stewart told nobody of the text messages he had sent to Mr Geiger. He had Mr Fletcher present with him on 25 October 2022 when Mr Geiger came to collect his toolbox, as Mr Stewart had instructed, and effectively played dumb. He did not confess to Mr Fletcher that the reason Mr Geiger was picking up his toolbox was because Mr Stewart had sent aggressive, rude and disrespectful text messages to Mr Geiger days earlier, stating that Mr Geiger's possessions were left on a street at 10:00pm on a Friday night.

[75] Mr Stewart didn't tell payroll or HR of his actions; instead he falsely recorded Mr Geiger as being on sick leave on 24 and 25 October 2022. Mr Stewart then removed him from the workshop's weekly timesheet spreadsheet for the period 26 October 2022 – 1 November 2022. Mr Stewart has no explanation as to why he didn't inform payroll or HR of his conduct.

[76] Mr Stewart asked for confirmation on 23 October 2022 that he had been dismissed. Mr Stewart failed to respond to him.

[77] On 24 October 2022, Mr Geiger declared he could leave his home after testing negative for COVID-19. He stated that he could collect his toolbox the following day, if that is what Mr Stewart wished. Mr Stewart failed to respond to him.

[78] On 25 October 2022, Mr Geiger alerted Mr Stewart to his proposed attendance at the workshop, and he'd be there to collect his toolbox. There was a brief, polite exchange between the two men when Mr Geiger wheeled his toolbox from the workshop to his car on the street and unloaded it into his vehicle.

[79] Mr Geiger was entitled to believe he had been dismissed on receipt of Mr Stewart's offensive text messages. They are clear and unequivocal. Where Mr Stewart attempted in oral evidence to say the text messages were about their friendship, and he didn't have authority to dismiss Mr Geiger, there is no explanation as to why Mr Stewart would say to Mr Geiger, "I have a business to control. See you at court if u want". Courts are not a place to measure whether two people's friendship is intact; Mr Stewart was unequivocally dismissing Mr Geiger from his employment whether he had authority to do so or not.

[80] In my view, Mr Stewart's conduct was disgraceful. He then hid his conduct from others within the business, and it took Mr Geiger to have to chase up payroll to request his termination payments. He was not on unpaid leave, as put by the Respondent, hoping to return to work. He was patiently awaiting his termination payment so that he could pay rent and bills.

[81] Upon Ms Richardson learning of the issues between Mr Geiger and Mr Stewart, and being shown the text messages sent by Mr Stewart, she attempted to try to restore the employment relationship. I am satisfied it was severed on 21 October 2022. Ms Richardson was entitled to attempt to piece it back together, but Mr Geiger was entitled to decline the invitation.

[82] The Respondent then sent Mr Geiger a termination of employment letter which is clearly worded with the employment ending at the Respondent's initiative, including payment of one week's wages in lieu of notice. Nowhere in the letter does it suggest that Mr Geiger ended his employment at his initiative. The Respondent's position that Mr Geiger was not dismissed is its own invention in response to this application.

[83] Any suggestion that because Mr Geiger referred to separation on mutual terms or in a decent way, meant that he had not been dismissed by the Respondent is rejected. Mr Geiger was speaking in general terms, about his own conduct and the manner in which he decently held himself before the Respondent. He wasn't aggressive, he wasn't abusive, and he politely collected his toolbox in the presence of Mr Stewart and Mr Fletcher.

[84] I am satisfied that Mr Stewart's action in sending the text messages to Mr Geiger on 21 October 2022 directly and consequentially resulted in the termination of Mr Geiger's employment relationship with the Respondent. I am satisfied that if Mr Stewart had not taken that action, Mr Geiger would have remained employed.

[85] I am satisfied that Mr Stewart's action intended to bring the employment relationship to an end. His words within the text message to Mr Geiger were unequivocal and spiteful.

Conclusion

[86] I am satisfied that Mr Geiger was dismissed from his employment at the employer's initiative and therefore s.386(1)(a) is satisfied. The jurisdictional objection is dismissed.

[87] Should the parties wish to engage in conciliation they should advise my Chambers by no later than 4:00pm (AEST) on 18 May 2022. If the matter does not resolve by conciliation, I will issue a certificate under s.368(3)(a) of the Act.



COMMISSIONER

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¹ [2020] FCAFC 152.

² Transcript PN 89-99.

³ Transcript PN 109-118.

⁴ Transcript PN 169 – 192.

⁵ Transcript PN 197.

⁶ Transcript PN 207 – 227.

⁷ Transcript PN 262 – 265.

⁸ *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162 at [75], see also *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200.

⁹ *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162 at [75].

¹⁰ *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200.

¹¹ [2018] FWCFB 139 [21]-[22].

¹² *Visscher v The Honourable President Justice Giudice* (2009) 239 CLR 361 at [53]-[55]; *NSW Trains v James* [2022] FWCFB 55 at [62]; *Abandonment of Employment* [2018] FWCFB 139 at [21].

¹³ *Abandonment of Employment* [2018] FWCFB 139 at [21].

¹⁴ [2007] HCA 61