



DECISION

Fair Work Act 2009
s.365—General protections

Iosif Zamfir

v

Thiess Pty Ltd
(C2024/920)

COMMISSIONER SCHNEIDER

PERTH, 25 JUNE 2024

Application to deal with contraventions involving dismissal

[1] Mr Iosif Zamfir (the Applicant) has made an application pursuant to section 365 of the *Fair Work Act 2009* (Cth) (the Act) to deal with a general protections dispute involving his alleged dismissal by Thiess Pty Ltd (the Respondent).

[2] The Respondent has raised a jurisdictional objection to the application being that the Applicant was not dismissed.

[3] The Applicant does not dispute that he resigned but claims that he was forced to resign from his employment due to conduct of the Respondent.

[4] The Commission must determine if the Applicant was dismissed before the matter may proceed.

[5] The jurisdictional objection was the subject of a Hearing on 11 April 2024.

[6] At the Hearing, the Applicant gave evidence on his own behalf alongside two of his previous coworkers, Ms Bianca Hicks (Ms Hicks) and Ms Donna Kent (Ms Kent). Ms Jane Hope (Ms Hope) gave evidence on behalf of the Respondent.

Background

[7] The Applicant commenced employment with the Respondent on 23 August 2021.

[8] The Applicant was employed in the position of Payroll Team Lead. The Applicant led a small team of approximately nine (9) employees. The Applicant reported to Ms Hope, the Payroll Manager.

[9] Commencing in around mid-2023, concerns were raised by colleagues regarding a possible conflict of interest between the Applicant and one of his direct reports (hereafter referred to as DR). The Respondent undertook an investigation in response to the concerns that

there may have been a breach of its *Personal Relationship Procedure*. No breaches or allegations were substantiated, and it appears efforts were made to remedy the concerns informally.

[10] There were further concerns raised in regard to the Applicant providing an unsolicited gift to a colleague. Again, no formal action was taken against the Applicant, and it appears the Respondent's management made efforts to remedy the concerns informally.

[11] The Applicant alleges that the workload, working environment, and organisational culture lead to toxicity and stress, in turn leading to difficulty in completing work and psychological injury. Further, the Applicant sites structural and remuneration issues further contributing to a negative work experience.

[12] The Applicant claims that he raised several concerns arising from these issues which were ignored by the Respondent.

[13] Further, the Applicant is of the position that the procedures followed in investigating and remedying the concerns raised against him were not appropriate and left him to deal with the fall out.

[14] The Applicant resigned from his employment with the Respondent on 19 January 2024.

[15] The Applicant's final day of employment with the Respondent was 25 January 2024.

Legislation

[16] 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.”

[17] The meaning of “dismissed” is provided at section 386 of the Act:

“386 Meaning of dismissed

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

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

[18] This decision deals only with the jurisdictional objection to be determined.

Submissions and Evidence - Respondent

[19] The Respondent submits that the Applicant was not dismissed for the purposes of section 365 of the Act.

[20] The Respondent notes that the Applicant resigned from his employment on 19 January 2024 and proceeded to work out a notice period of one week before his employment ended on 25 January 2024.

[21] The Respondent submits that the Applicant has not provided any factual evidence to support the contention that the Applicant had no choice but to resign from his employment with the Respondent due to its conduct.

[22] The Respondent submits that the Applicant has not provided any evidence to show his employment was at risk of termination or similar in the lead up to his resignation.

[23] The Respondent submits that the Applicant resigned from his employment after careful consideration and having obtained alternative employment with a new employer.

Evidence of Ms Jane Hope

[24] Ms Hope was the Applicant's direct manager for the duration of his employment and speaks of their working relationship fondly.

[25] Ms Hope states that she had conversations with the Applicant and from those it was apparent that he held her in high regard as a manager and, as an employee, she viewed him similarly, stating he was a valued employee and would regularly go above and beyond in the exercise of his duties.

[26] Ms Hope states that she enjoyed working with the Applicant and did not instruct or suggest that he end his employment with the Respondent or that his employment would be terminated.

[27] Ms Hope states that she was aware the Applicant wanted to progress in his career and was interested in more senior management roles, like that of her own.

[28] Ms Hope gave evidence that she sent the Applicant job advertisements for Payroll Manager positions with other organisations.

[29] Ms Hope states that she sent these job openings to the Applicant to support his professional development and strongly denies that she did so in attempt to push him out of the organisation. Ms Hope highlights that the natural progression for the Applicant within the Respondent's organisation would be promotion to her own role and, as she had no intention of retiring in the near future, she sent external opportunities his way to better support his ongoing professional development. As it was her intention to remain in her current position until retirement, the only positions available for the Applicant to reach his career goals would be external.

[30] Ms Hope provided evidence regarding the instance of the Applicant giving an unsolicited gift to a coworker. The Applicant had provided a coworker with a gift equivalent to \$700 prior to the coworker leaving for holiday abroad. Ms Hope states she warned the Applicant of gifting in this manner, on assumption that the coworker was in need, as it had apparently made the coworker uncomfortable.

[31] Ms Hope details the history of concerns raised regarding the potential conflict between the Applicant and DR. Ms Hope detailed the feedback regarding concerns over favouritism and

general discomfort in response to what colleagues interpreted as a close personal relationship between the two.

[32] Ms Hope notes that herself and other managers initially opted to observe the two prior to escalating any issues with HR. Ms Hope's observations aligned with the concerns raised by the Applicant's colleagues.

[33] Accordingly, Ms Hope elected to raise the issues with HR, seeking guidance on how to proceed with the sensitive situation. The Respondent's HR team suggested that the issues be discussed with the Applicant and not his direct report, noting his leadership role.

[34] Following this, Ms Hope notes that the Applicant had a period of annual leave planned. Prior to the Applicant taking leave, Ms Hope had a discussion with the Applicant about temporary changes upon his return.

[35] Ms Hope states that, as the Applicant had previously expressed interest in professional development, she offered that he would undertake training to expand his knowledge and experience in executing payroll. Ms Hope gave evidence that the Applicant seemed receptive and positive towards this proposition.

[36] Ms Hope confirmed in her evidence that the change would not result in any material change to his employment terms and conditions and was primarily for the purpose of upskilling the Applicant.

[37] Ms Hope also noted a temporary informal change in reporting lines, which would result in DR reporting to another leadership staff member. Ms Hope gave evidence that she believed this measure would assist in remedying the concerns of favouritism by reducing proximity between the Applicant and DR.

[38] In June 2023, the Applicant and two of his direct reports (including DR) executed some site visits.

[39] Following the site visits, Ms Hope received further feedback regarding the concerns over the Applicant's relationship with DR. The concerned employee noted the close nature of the relationship between the two which made the concerned employee uncomfortable. The experience of the concerned employee also led her to question the previous promotion of DR as potentially the result of favouritism. Ms Hope undertook further monitoring of the Applicant and DR in consideration of the relevant procedure.

[40] In August 2023, a formal complaint was lodged regarding concerns of favouritism from the Applicant in relation to DR by another team member. Around this period of time, the employee who accompanied the Applicant and DR on the site visits tendered their resignation, apparently citing their discomfort working with the two as a contributing factor.

[41] Subsequently, Ms Hope was informed by HR that that they were satisfied there was no conflict of interest with regard to the promotion of DR. However, HR informed Ms Hope that there was a conflict of interest with regard to a *perceived* relationship between the Applicant and DR and suggested she discuss this perception with the Applicant.

[42] Ms Hope gave evidence regarding the private discussion held with the Applicant concerning the perceived relationship with DR.

[43] Ms Hope states that she suggested the Applicant take steps to manage the perceptions by implementing distance between himself and DR or make effort to involve others when socialising with DR.

[44] Ms Hope states that the Applicant was defensive and insistent that nothing of concern had occurred. The Applicant further discussed some personal issues with Ms Hope, and, in response, she encouraged and supported him to take leave if he needed time away to focus on his personal life.

[45] Ms Hope rejects any assertion that the Applicant was excluded from team events.

[46] In response to the Applicant's submission that he raised mental health issues with Ms Hope which were ignored, Ms Hope states that she was unaware of the Applicant ever formally raising any psychological injury to her (prior to the incident in early 2024).

[47] The Applicant provided a copy of a text message, communicating distress, sent to Ms Hope which he asserts was ignored. At the Hearing, Ms Hope clarified this communication was received while she was unwell and on personal sick leave. Ms Hope detailed the virus and infection she was afflicted with at the time, noting that it progressed into pneumonia and resulted in complications related to other pre-existing illnesses.

[48] Ms Hope further clarified that she specifically recalled receiving the text message in question and having thought to the importance of a reply. However, as Ms Hope explained, she was so unwell at the time of receipt she did, inadvertently, not respond.

[49] Ms Hope asserts that the Applicant was aware of the state of her health and could have reached out to other management staff. Ms Hope concluded that she discussed the issue with the Applicant upon her return.

[50] Ms Hope details the discussions she had with the Applicant regarding his eventual resignation.

[51] In late December 2023, the Applicant approached Ms Hope to give her the heads up that he was actively pursuing other roles with the view to leave his employment at the Respondent.

[52] Ms Hope states that, while she assured the Applicant that he did not need to leave the Respondent, she was supportive and optimistic in regard to his ability to secure a role.

[53] Ms Hope notes that the Applicant said another employee had questioned him regarding his relationship with DR following rumours the employee had heard from others.

[54] Following this *heads up* conversation, the Applicant kept Ms Hope up to date with the progression of his job search.

[55] Ms Hope acknowledges that, at some point in January 2024, the Applicant informed her of a tragedy involving a close friend that had impacted him. Ms Hope states that she suggested he take leave, in response to which the Applicant indicated that continuing to work was helping him cope. Ms Hope states that this was the only instance of a psychological injury she recalls the Applicant raising.

[56] In mid-January 2024, the Applicant informed Ms Hope that he had secured alternative employment. Ms Hope states that she congratulated the Applicant on his new role and offered to arrange his notice period so that he could have a break prior to commencing in his new role.

Submissions and Evidence - Applicant

[57] The Applicant submits that his resignation was forced by the Respondent and as such he was dismissed consistent with section 386(1)(b) of the Act.

[58] The Applicant outlined several contributing factors which he claims left him with no alternative but to resign from his employment with the Respondent. The contributing factors are a combination of both work related and interpersonal issues – in summary, the Applicant referenced the following as contributing to a course of conduct which led to his resignation:

- Organisational structure issues; including fears over job security, high workload, and issues related to reporting lines.
- Concerns about mental health being raised and ignored.
- Poor procedure followed in response to complaints against the Applicant.
- Several interpersonal issues; including exclusion, rumours, and sexism.

[59] The Applicant provided the Commission with a statement on his own behalf, as well as two supporting witness statements.

[60] The Applicant provided evidence by way of screenshots and photos.

[61] Further, the Applicant provided a Letter of Support from his treating psychologist. The Letter of Support outlines that the Applicant had, at the date of the letter, attended three sessions in February and March of 2024 in which the Applicant discussed his work-related stress.

Evidence of Iosef Zamfir

Organisational issues

[62] The Applicant provides a background of his employment with the Respondent and the overall culture and structure of the workplace.

[63] The Applicant outlines interdepartmental issues, specifically between the HR and Payroll teams, which allegedly caused friction in the workplace. The Applicant states that his manager would discuss such issues with him as well as the personal effect it had on his manager.

[64] The Applicant gave evidence regarding the job advertisements his manager sent him, in the context of these issues.

[65] The Applicant infers that the tension in the workplace caused concern for his manager and for the wider payroll team and the advertisements were forwarded to him in this context.

[66] According to the Applicant, it appears that redundancy was a concern for several employees (himself included).

[67] The Applicant gave evidence about his direct manager raising several concerns arising from the organisational restructure with more senior management.

[68] Various terminations in the business lead to changes in reporting lines, including that of the payroll team who's higher up was changed. The Applicant provided evidence regarding the new higher up's comments about an oversaturation of men in upper management, seemingly leaving the Applicant with concerns about sexism due to him being the only male included in that discussion.

[69] The Applicant had attempted to secure additional remuneration for his team in late 2023. His attempts proved unsuccessful.

[70] The Applicant notes several other changes in reporting lines. One of the Applicant's direct reports was eventually promoted to the same role as him. The Applicant gave evidence that this coworker made disparaging comments regarding him to other direct reports which made work difficult. The Applicant believes that this coworker may have stood in the way of various attempts of his to discharge his duties or recommend improvements. These issues are explored in further detail in the *interpersonal issues* section below.

[71] The Applicant notes some apparent failures of management, in approving leave requests, which lead to notable overworking of the Applicant and others on the Payroll team. The Applicant notes that the Respondent engaged several labour hire employees to assist the team. The Applicant believes that these employees were not correctly managed, and this further contributed to significant overworking.

Mental Health

[72] The Applicant submits that the Respondent failed to provide him adequate support in response to concerns he raised about the impact that several work-related stressors had on his mental health.

[73] The Applicant states that he raised mental health issues on many occasions to Ms Hope and Ms Laure Gibbison (Ms Gibbison).

[74] The Applicant provided a screenshot of a text message to Ms Hope that he had sent regarding his distress, which was not responded to. The Applicant's assertion that this message was ignored is contested and further contextualised in the discussion of Ms Hope's evidence above.

[75] The Applicant gave evidence regarding the ongoing discussions he had with management regarding the allegations made against him. The Applicant asserts he was visibly overcome with emotion during such discussions, to the point that he cried.

[76] Although no formal action was taken as a result of the allegations, the Applicant states that he felt he was left to manage the fallout on his own which compounded the issue.

[77] The Applicant gave evidence that his manager had disclosed to him the negative impact that various terminations of her colleagues, in the broader context of the organisational restructure, had on her. The Applicant asserts these disclosures had an impact on him and further contributed to his work-related stress, and that, in the context, he did not share the fact that these discussions affected him with his manager.

[78] In regard to the Letter of Support provided in the Applicant's materials, the Respondent questioned the Applicant at length concerning its brevity and recent issuing. The Applicant gave testimony that no further specific information was included in the letter, such as a diagnosis, due to the Applicant's view that this would be inappropriate and breach confidentiality. The Respondent maintains that the Letter of Support is vague and does little to support the position of the Applicant.

Interpersonal issues

[79] The Applicant provided evidence pertaining to issues he had in his interactions with other employees of the Respondent.

[80] Paramountly, it appears that the Applicant had a notably strained professional relationship with Ms Jacquie Pasquale (Ms Pasquale).

[81] The Applicant cites a pattern of behaviour by Ms Pasquale which he asserts was disparaging towards him.

[82] The Applicant notes Ms Pasquale's senior position in the payroll team, and that her negative attitude was conveyed to her direct reports whom the Applicant also worked with.

[83] The Applicant concludes that the leave approvals, which resulted in a high workload, were orchestrated and enacted by Ms Pasquale to set him up for failure.

[84] The Applicant questions Ms Pasquale's involvement in several other issues faced during his employment, suggesting that Ms Pasquale's personal interests and goals motivated her to stifle his progression and professional ideas.

[85] The Applicant gave evidence about his involvement in the dismissal of Ms Hicks. The Applicant was consulted regarding the potential dismissal of Ms Hicks and eventually expressed his disagreement with such action. The Applicant acted as Ms Hicks' support person in a meeting, which he terminated after becoming concerned about Ms Hicks' wellbeing. The Applicant gave evidence that his action was met with negativity by Ms Hope and Ms Pasquale.

Allegations and Procedures

[86] The Applicant gave evidence regarding the allegations levied against him by coworkers.

[87] In relation to the accusation of giving an unsolicited gift to a coworker, the Applicant gave evidence to further contextualise the incident in question.

[88] The Applicant gave the gift to his coworker in late 2022 and states this was not raised as an issue until late 2023. The Applicant states that Ms Hope raised the issue with him, referencing Ms Pasquale as having raised it with her.

[89] The Applicant questioned the motivations of Ms Pasquale in raising this issue.

[90] The Applicant denies that he gave the gift due to his religious beliefs or out of any motivation to assist those worse off than himself.

[91] The Applicant states that he had given other coworkers gifts on various occasions during his employment with the Respondent. The Applicant states that, following the incident, he continued to give gifts to coworkers which were always well received and never refused.

[92] The Applicant states that no other coworkers had ever raised concerns over his gifting nature with him.

[93] The Applicant contends that Ms Hope stated that HR had not been formally involved in the gifting issue, and the Applicant had assumed the issue was not raised further after Ms Hope informed him it required no further investigation. The Applicant submits that the communication with him regarding this issue, and any investigation into the issue, is inconsistent with the evidence of Ms Hope.

[94] In response to the accusations arising from the site visit, the Applicant states that the contact between himself and DR on this visit was limited.

[95] The Applicant also provides background on the complainant employee, being that she was unhappy she had not received a promotion and DR had.

[96] The Applicant raises issue with any alleged photograph of himself and DR, asserting that any such photo was not taken with his consent.

[97] The Applicant gave evidence that he was not well informed about the investigation into the perceived conflict issue and contends he merely “*joined the dots*” and inferred that the perceived issues between himself and DR were the subject of the enquiry.

[98] The Applicant states he was never provided the opportunity or instruction to address the alleged conflict.

[99] The Applicant contends that the Respondent did not follow the appropriate procedures in response to the allegations and that the course of action chosen did nothing to alleviate the concerns raised.

[100] The Applicant states that he was not explicitly informed of if the allegations were substantiated or unsubstantiated.

[101] The Applicant gave evidence that, when he initiated a conversation with Ms Gibbison regarding the allegations, he was informed that there were no breaches found, and it was merely the perception of others that the Applicant needed to manage.

[102] According to the Applicant, this lack of resolution further fuelled rumours in the workplace and, in turn, magnified his coworker's perception of any perceived conflict. The Applicant also notes an instance of a workplace relationship at the Respondent involving one of his coworkers.

Resignation

[103] The Applicant states that his resignation email was not a comprehensive account of his reasons in leaving the Respondent. The Applicant states that he had a verbal conversation with his managers about the reasons for his resignation.

Evidence of Bianca Hicks

[104] Ms Hicks commenced employment with the Respondent in late 2022, as a *temp*, and reported to the Applicant.

[105] Ms Hicks speaks positively of the Applicant and team structure in the lead up to mid-2023.

[106] Ms Hicks' evidence is that she noticed issues arising in the lead up to the Applicant's period of leave in mid-2023.

[107] Ms Hicks provides her perception that another team leader acted with animosity towards the Applicant.

[108] Ms Hicks highlights that the other team lead appeared to exclude the Applicant and critiqued his input, discouraging other team members from interacting with him or consulting him regarding work.

[109] Ms Hicks states she did not perceive any inappropriate relationship between the Applicant and DR.

[110] Ms Hicks details issues she had in effectively performing her tasks as a result of the allegedly toxic work environment and organisational structure issues.

[111] Ms Hicks' employment ended by way of termination which she believes was a result of her raising issues with management.

Evidence of Donna Kent

[112] Ms Kent provided evidence that she had perceived a change in the Applicant's emotional state during his employment with the Respondent.

[113] As a *Peer Support Worker*, Ms Kent states that she is trained to notice changes in behaviour and offer support to coworkers.

[114] In her testimony, Ms Kent confirmed the extent of her professional qualifications – being limited to a brief training course on the subject matter.

[115] Ms Kent states that she noticed increasing levels of stress in the Applicant which, in her opinion, was a direct reflection of the work environment.

Consideration

[116] Central to the consideration in this case is the operation of section 386(1) of the Act. The word *dismissed* is defined in section 12 of the Act as having adopted the meaning in section 386 of the Act.

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

“(1) A person has been dismissed if:

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

[118] This definition contains two elements.

[119] The first concerns termination on the *employer's initiative* and the second, *resignation* in circumstances where the person was *forced* to do so because of *conduct or a course of conduct*.

[120] The two tests were explained by the Full Bench in *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli*.¹

[121] In this matter, the Applicant did not resign in the heat of the moment (noting that the resignation was tendered after consideration and obtaining new employment), nor does there appear to be special circumstances giving rise to any additional obligation of the Respondent to ensure the resignation was legitimate in that regard.

[122] In my assessment of the circumstances, the relevant test is that under section 386(1)(b) of the Act.

[123] Having determined that section 386(1)(b) of the Act is the relevant test for this matter, I now turn to consider the conduct of the Respondent and the decision of the Applicant.

[124] The line distinguishing conduct that leaves an employee no real choice but to resign from an employee resigning at their own initiative is a narrow one.² In this case particularly, whether this line was crossed is not immediately transparent.

[125] The onus is on the employee to prove that the resignation was forced.³

[126] In my assessment of the evidence, it is clear that there was conduct from the Respondent that contributed to the Applicant's resignation. Whether this conduct results in the conclusion that the Applicant was left with no other option than to, or that it was the probable outcome that he would, tender his resignation must be closely examined.

[127] In my assessment, the conduct that is of most concern is that related to and arising from the Respondent's method of dealing with the workplace accusations. However, I will first address the other issues of alleged problematic conduct raised by the Applicant.

Mental health

[128] On assessment of the evidence before me, I am not satisfied that the conduct of the Respondent in regard to the Applicant's mental health concerns raised was inappropriate.

[129] It is clear that the Applicant and his direct manager had a close relationship, and that they often discussed their mental state with each other.

[130] I do not believe that any significant mental health concerns were raised and then ignored in any egregious manner.

[131] It appears that the Applicant's manager was proactive in supporting her team and sought to discuss personal issues directly. I do not believe this method of dealing with the Applicant's stress was irresponsible.

[132] On the evidence before me, I am not satisfied that the Applicant made any informal or formal notification of psychological injury that was ignored by the Respondent in the manner suggested.

[133] However, I do not doubt the Applicant's claims about his declining mental health. I am simply not satisfied that there was concerning conduct from the Respondent in response to such issues.

Interpersonal issues

[134] The Applicant and Ms Pasquale clearly were not compatible as coworkers.

[135] However, I am not satisfied that the conduct of Ms Pasquale or that of the Respondent in recognition of any issues was conduct that forced a resignation.

[136] It is normal for coworkers to not get along, even to the extent it makes work somewhat unenjoyable. It is likewise normal for coworkers to be inconvenienced by each other's professional decisions or failures.

Organisational issues

[137] On assessment of the evidence before me, it is clear that the Respondent's organisation underwent not insignificant changes and restructuring during the Applicant's employment.

[138] I accept that these changes influenced employee morale, this much is clear from the witness evidence in this matter.

[139] However, when inspecting this evidence, I am not satisfied that the organisational changes had such an effect that it could have resulted in the probable outcome of the Applicant having no other option than to resign.

[140] I am not satisfied that the conduct of the Respondent in actioning the restructure is conduct that would force a resignation or end in that probable result.

[141] When a business undergoes change, it is normal for there to be growing pains and fears associated with the process from employees. Simply because an employee fears being made redundant and therefore obtains other employment does not mean there was conduct from the employer that left that employee with no other option but to resign.

[142] It does not appear that the Respondent acted in such a manner that the Applicant himself was reasonable in an assumption that his employment was under imminent threat.

[143] I am also not satisfied that Ms Hope voicing her fears about the restructure and resulting terminations was anything more than a reflection of the close relationship the two had and simply amounts to normal venting between coworkers.

Allegations and procedures

[144] Although I have stated the above issues were not particularly egregious upon analysis, it is undeniable that the Applicant's experience with the pressure surrounding the restructure and his working relationships stifled his job satisfaction.

[145] The most problematic of the issues raised by the Applicant are those related to the accusations levied against him by coworkers and the processes of enquiry and resolution undertaken by the Respondent as a result.

[146] The gifting issue noted by the parties was seemingly a single issue brought to the Applicant's attention sometime after the incident took place. In my assessment, the Respondent's chosen course of action in dealing with the gifting issue was not inappropriate. The fact that the Applicant had a history of gifting coworkers and had not been reprimanded for doing so does not mean that the specific gifting incident, if it indeed made the coworker uncomfortable, should have been ignored. It seems that this issue was minor and was remedied informally and directly with the Applicant, in a manner that appears to be appropriate.

[147] The issues surrounding the Applicant and DR were considerably more pervasive during the course of his employment.

[148] It is clear that these issues were recurrent and raised concerns over potential policy breaches, and the Respondent understandably reacted to these allegations in a more formal manner.

[149] However, on assessment of the material before me, it appears the resolution of these issues by the Respondent with the Applicant was far too informal.

[150] On assessment of the evidence, I am satisfied that the Respondent's method of communication with the Applicant throughout this process was deficient and resulted in uncertainty for the Applicant. I am also satisfied that such uncertainty likely further tainted his experience overall at work.

[151] Employees subject to allegations that, if substantiated, could result in a breach of policy and jeopardise their ongoing employment should be carefully and thoroughly informed of any investigation and findings. The employee subject to the allegations should not be left wondering about the status or findings of any investigation.

[152] On the evidence before me, it is clear that the Applicant was not properly informed that any allegations against him had not been substantiated.

[153] On assessment of the materials submitted by the parties, it appears that the Applicant, upon his own enquiry, was casually informed that no breaches had occurred and then placed with responsibility for mitigating the perceived conflict.

[154] On the evidence before me, it also appears that little was done to quell coworkers' concerns about the perceived the relationship by management. It is understandable that this would have resulted in the Applicant having an increased level of anxiety over the perception of his relationship with DR in the workplace.

Forced resignation?

[155] Although I am satisfied that the Respondent's failure to appropriately communicate the result of the investigation into the conflict allegations led to increased discomfort in the workplace for the Applicant, I am apprehensive to conclude that there was a dismissal at the initiative of the employer.

[156] The primary issue I am faced with in this matter is where to draw the line between conduct that can be held to contribute to a valid resignation and conduct that renders the resignation a termination at the initiative of the Respondent.

[157] I note the comments of the Full Bench in *ABB Engineering Construction Pty Ltd v Doumit*:

“Often it will only be a narrow line that distinguishes conduct that leaves an employee no real choice but to resign employment, from conduct that cannot be held to cause a resultant resignation to be a termination at the initiative of the employer. But narrow though it be, it is important that that line be closely drawn and rigorously observed. Otherwise, the remedy against unfair termination of employment at the initiative of the employer may be too readily invoked in circumstances where it is the discretion of a resigning employee, rather than that of the employer, that gives rise to the termination. The remedies provided in the Act are directed to the provision of remedies against unlawful termination of employment. Where it is the immediate action of the employee that causes the employment relationship to cease, it is necessary to ensure that the employer’s conduct, said to have been the principal contributing factor in the resultant termination of employment, is weighed objectively. The employer’s conduct may be shown to be a sufficiently operative factor in the resignation for it to be tantamount to a reason for dismissal. In such circumstances, a resignation may fairly readily be conceived to be a termination at the initiative of the employer. The validity of any associated reason for the termination by resignation is tested. Where the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary.”⁴ (emphasis added).

[158] The Full Bench in *Pawel v Advanced Precast Pty Ltd* provides a helpfully illustrative example of how an employer’s conduct may result in a resignation but does not necessarily render the resignation a dismissal at the initiative of the employer:

“Suppose an employee wants a pay rise and makes such a request of his or her employer. If the employer declines and the employee, feeling dissatisfied resigns, can the resignation be said to be a termination at the initiative of the employer? We do not think it can and yet it can be said that the act of the employer i.e. refusing the pay rise, has at least consequentially resulted in the termination of the employment.”⁵

[159] In the circumstances of the matter currently before the Commission, I am not satisfied that the Applicant’s resignation was a dismissal at the initiative of the Respondent.

[160] Despite the deficiencies noted above, I am not satisfied that the Respondent’s conduct (or course of conduct) resulted in the Applicant having no other option than to resign or that it would have that probable effect.

[161] Upon assessment of all the evidence before me, in the circumstances of this matter, I am inclined to conclude that the Applicant’s resignation was voluntarily given and, although influenced, not forced by the Respondent’s conduct.

[162] It is clear that the Applicant’s employment was negatively affected by interpersonal and organisational issues within the workplace, some related to the Respondent’s unsatisfactory conclusion of its investigation, alongside the fact that there was little to no room for career progression in the organisation.

[163] I am not satisfied that, if not for the Respondent's conduct, the Applicant would have remained in his employment.

[164] It is clear that the Applicant had strained relationships with other coworkers (outside of the influence of the Respondent), frustrations with the overall structure of the business, and very limited room to advance.

[165] It is my conclusion that the Applicant made the understandable decision to seek employment elsewhere, as his employment at the Respondent had turned stale and his job satisfaction had declined.

[166] Over the course of his employment with the Respondent, the Applicant had clearly formed close bonds with some of his coworkers and had contributed excellent work product to the payroll team.

[167] I am not satisfied that the Applicant had no option but to resign as a result of the Respondent's conduct, but it is understandable that the employment relationship was one that he no longer had a desire to maintain.

Conclusion

[168] Not being satisfied that the Applicant has been dismissed for the purposes of section 386 of the Act, I have no alternative but to dismiss the application for want of jurisdiction. The application is dismissed an Order reflecting this will be issued in due course. ⁶



COMMISSIONER

Appearances:

I Zamfir, Applicant.

K de Lange Savage, Respondent.

Hearing details:

2024.

Perth (by video):

April 11.

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¹ [\[2017\] FWCFB 3941](#).

² (1995) 62 IR 200, 206.

³ (2009) 185 IR 359, 367 [30].

⁴ (1996) Print N6999.

⁵ (1999) FCA 1660, Print S5904.

⁶ [\[PR749617\]](#).