



DECISION

Fair Work Act 2009
s.365—General protections

Nicole Swetnam

v

Goulburn Valley Health T/A GV Health Shepparton Hospital
(C2023/5395)

COMMISSIONER YILMAZ

MELBOURNE, 25 JANUARY 2024

Application to deal with contraventions involving dismissal— jurisdictional objection - whether Applicant dismissed – no dismissal - resignation.

[1] On 4 September 2023, Ms Nicole Swetnam lodged an application pursuant to s.365 of the *Fair Work Act 2009* (the Act) against Goulburn Valley Health (the Respondent). In this application, Ms Swetnam alleges that she was forced to resign following conduct by the employer that she submits constitutes dismissal. She submits that she exercised a workplace right by enquiring about reasonable adjustments to her position. Further in the alternative, she submits that the Respondent took adverse action by the dismissal or in contravention of her taking personal and/or carer’s leave, because of her physical disability or because of her temporary absence.

[2] The Respondent objects to the application stating that Ms Swetnam voluntarily resigned giving two weeks’ notice. It also submits that on receipt of the resignation it contacted Ms Swetnam to discuss her resignation and encouraged her to reconsider and explore other job vacancies within the organisation. Further, it denies that it engaged in adverse action, discrimination, or dismissal on the basis of temporary absence, physical disability or entitlement to personal/carer’s leave as described by Ms Swetnam.

[3] Ms Swetnam was employed on 3 August 2015 as an enrolled nurse on a casual basis. From 27 January 2016 Ms Swetnam was employed as a Graduate Nurse for a 12-month period and on completion of the graduate program she was employed permanent part-time as a registered nurse.¹ Ms Swetnam’s last position was a grade 2 registered nurse in the medical unit.

[4] The threshold matter in dispute is whether Ms Swetnam resigned voluntarily or was forced to resign. A person may make a section 365 general protections involving dismissal application where that person was an employee who was dismissed from employment and they allege that the dismissal is a contravention of the general protections provisions. Whether Ms Swetnam’s termination of employment with the Respondent is a “dismissal” within the meaning of the Act is in dispute. This decision deals with the threshold matter in dispute and not pertaining to allegations of adverse action, which is also contested.

[5] Ms Swetnam gave sworn evidence on her own behalf. For the Respondent, the following witnesses gave evidence:

- Ms Kate Reid
- Ms Isabel Rowley
- Ms Melissa Williams
- Ms Nicole Cumming, and
- Ms Belinda Brown.

[6] Both parties were granted leave to be legally represented.

Was the Applicant Dismissed?

[7] It is not contested that Ms Swetnam tendered her written resignation on 14 August 2023 with two weeks' notice. The employment came to an end on 28 August 2023 at the conclusion of the notice period. However, Ms Swetnam contends that she was forced to resign.

[8] Taking into account all of the evidence and submitted material, I find that Ms Swetnam was not dismissed. This decision explains my reasons.

Applicant's evidence and submissions

[9] Ms Swetnam contends that the term "dismissed" includes where the employee is forced to resign because of conduct, or a course of conduct engaged in by the employer,² and a forced resignation is when the employee has no choice but to resign³ or the employer takes action with the intent of bringing the relationship to an end.⁴

[10] She further contends that despite the intent of the Respondent, its actions of pressuring her to take leave rather than return to work, failing to provide suitable alternative duties/positions or alleged hostility towards her and failure to communicate with her was conduct that forced the resignation.⁵ She further submits that the post-employment conduct is evidence of a forced resignation.

[11] Ms Swetnam worked at the Shepparton Campus Medical Ward and Medical Day Stay Unit (MDSU), however on or around 21 March 2023 she contracted a respiratory illness and was hospitalised.⁶ The hospitalisation was followed by absences on personal leave, annual and long service leave. Despite her absence, she submits that she genuinely made attempts to return to work. On or about 20 May a return to work failed after working with a mask presented breathing difficulties and no alternative duties were implemented.⁷ Ms Swetnam had contacted the HR Department in May inquiring about duties without the need for a mask or whether the option to work from home could be accommodated. Ms Swetnam gave evidence that HR informed her to contact her Nurse Unit Manager (NUM) about alternative duties and advised of her eligibility to use her long service leave from 1 July 2023.⁸

[12] On 8 June Ms Swetnam alleges she was medically cleared to return to work but was to avoid lengthy periods of exertion and to avoid wearing a face mask. While this did not result

in any alternative duties offered, Ms Swetnam contends that the reasons advanced by the Respondent in its general protections response were not communicated to her, particularly issues pertaining to why she could not wear a face shield in place of a mask or the option of duties other than usual nursing tasks.⁹ Ms Swetnam submits that the Respondent took the view that she was unable to perform her regular nursing duties therefore required her to remain on leave. She contends that the lack of communication with her, left much to be desired.

[13] Following a discussion on 28 July about return to work and forming the view that the communication with her was hostile, on 14 August 2023, Ms Swetnam resigned. During the lead up to the resignation there was a lack of communication about the return to work and Ms Swetnam was concerned that the Respondent would not allow a return to work because of her physical disability and/or parental responsibilities for her 3 young children.¹⁰ Following the resignation, Ms Swetnam gave evidence that she received a call from a member of the employee relations team. After discussing her need to find alternative work or claim Centrelink payments she was informed of alternative job opportunities in the hospital. She considered disingenuous or a token reaction and this in her view indicated that the Respondent had not made genuine efforts to retain her employment.¹¹

[14] The general protections provisions in the Act relied on by Ms Swetnam are the following:

- s.340 Protection of workplace rights,
- s.351 Discrimination and
- s.352 Temporary Absence – illness or injury.

Respondent's evidence and submissions

[15] The Respondent submits that the Commission has no jurisdiction on the basis that there was no dismissal as required by s.365 of the Act. Rather it submits that Ms Swetnam had a choice and chose to resign “in her own best interests because her illness prevented her from performing her role with the Respondent and she had run out of paid leave.”¹² It contends that she was not forced to resign because of the actions of the employer.

[16] The Respondent submits that Ms Swetnam was employed as a grade 2 Registered Nurse in the Medical Unit at the hospital. She had been hospitalised a number of times due to a respiratory illness and had to take paid leave and unpaid leave. It submits that the resignation was tendered while Ms Swetnam was still unwell and unable to resume her duties as a Registered Nurse. A fitness for work procedure was yet to be implemented and not concluded at the time of resignation..¹³

[17] It submits that the legal principles require more than an assertion of dismissal, it must be a jurisdictional fact in a s.365 application.¹⁴ On the matter of a forced resignation and the conduct of the employer in relation to s.386(1)(b), the Respondent relies on two decisions of this Commission. Firstly, the Full Bench decision in *Bupa Aged Care* which found the test was “whether the employee engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer’s conduct such that the employee had no effective or real choice but to resign ...

the requisite employer conduct is the essential element.”¹⁵ Secondly, “it is not enough that an employer’s conduct be the cause of an employee’s decision to resign; rather, it must be intended to bring the employment to an end, or the resignation must be the probable result of the conduct.”¹⁶

[18] The Respondent submits that its own conduct was not the cause of the resignation, rather because of Ms Swetnam’s circumstances in which she was in, she chose to resign. The Respondent submits the following in relation to Ms Swetnam’s circumstances:

- She had not yet recovered from an illness that prevented her from wearing a mask while undertaking moderate physical duty as a grade 2 registered nurse,
- The inherent requirements of the job require the wearing of a face mask for infection control and the role requires the capacity to undertake moderate physical activity,
- She had a number of upcoming medical appointments and as she had exhausted her leave entitlements this would have required unpaid time off work, and
- Having utilised all sick and annual leave entitlements, use of long service leave would be at the ordinary rate as she would not be entitled to penalties or shift allowances.
- The Respondent did not apply pressure to the Applicant to return to work, rather it permitted Ms Swetnam to recover from her illness by accessing her leave entitlements.¹⁷

[19] The Respondent disputes that its intention was to force a resignation or to bring the employment relationship to an end, its conduct in supporting Ms Swetnam with flexible working arrangements following periods of parental leave assisted a return to work while caring for her young children.¹⁸ It submits that the circumstances that led to the resignation were different and it had concerns that Ms Swetnam had not recovered from her illness to perform her job. It submits that it was supportive of Ms Swetnam’s position as it accommodated her absence with access to leave other than personal leave to enable paid absences to recover from her illness. It notes no alternative duties were identified at the time of the resignation, but it had no obligation to create a role other than make suitable adjustments once the fitness for work procedure was implemented.¹⁹

[20] Ms Isabel Rowley, Employee Relations Consultant – People, Development and Engagement gave evidence that the Respondent accommodated Ms Swetnam in the past after a period of parental leave and because of the respiratory illness, periods of absence and hospitalisation had occurred. She further gave evidence that Ms Swetnam reported to her that her attempt to return to work on 20 May was impossible as she could not perform her role while wearing a mask. The email chain of 23 May between Ms Swetnam and Ms Rowley was also attached to the witness statement.²⁰ Ms Rowley sent advice to acting NUMs dated 20 June, and the medical certificate dated 8 June from Ms Swetnam’s GP was not cited at the time the advice was sent.²¹ Ms Rowley gave evidence of a discussion on 21 August after receipt of the resignation, where Ms Swetnam gave reasons for her decision including her grievances regarding Ms Kate Reid and the Respondent’s failure to accommodate a return to work. Ms Swetnam informed Ms Rowley that she did not wish to lodge a formal complaint. Ms Rowley also gave evidence that Ms Swetnam was also eligible to apply for any other vacant roles outside of clinical work should she decide not to proceed with her resignation.²² Ms Rowley confirmed that the bundle of fitness for work documents that were to be sent to

Ms Swetnam, inadvertently had not been sent. Attached was also the GV Health Covid-19 Guidance to staff which was relevant at the time of Ms Swetnam's employment.²³

[21] Ms Melissa Williams Registered Nurse Grade 3, Associate Nurse Unit Manager and Acting NUM gave evidence of a discussion with Ms Swetnam on 30 May about working in the MDSU. No decisions or undertakings were made knowing that Ms Swetnam was subject to a flexible working arrangement and on subsequently raising the matter with Ms Kim Read, Divisional Operations Director: Medical and Critical Care - Clinical Administration, it was learned that a position could not be accommodated without first obtaining a medical clearance including any restrictions. Ms Williams confirmed the requirement for all nurses to wear a face mask in any medical ward and on learning of the resignation, Ms Swetnam was asked if she would reconsider her resignation. Despite Ms Swetnam declining the offer, Ms Williams was a referee for job applications outside of the hospital in which Ms Swetnam was ultimately successful.²⁴

[22] Ms Nicole Cumming, Registered Nurse Grade 3 Associate Nurse Unit Manager and Acting NUM gave evidence that she did not say she would not be allowed to return as alleged by Ms Swetnam and having checked in on Ms Swetnam she was asked to assist with the request for long service forms by Ms Swetnam. Ms Cumming was also a referee for work opportunities outside the hospital.²⁵

[23] Ms Belinda Brown Registered Nurse Grade 3 Associate Nurse Unit Manager and Acting NUM gave evidence that she called Ms Swetnam on 19 June to enquire about her wellbeing and was informed that Ms Swetnam was still feeling short of breath and fatigued, they then also discussed the taking of available long service leave.²⁶

Consideration

[24] The issue to be determined is whether Ms Swetnam was dismissed as defined by the Act or voluntarily resigned as submitted by the Respondent.

[25] Section 365 of the Act deals with applications before the Commission and contains two limbs, one that there is a dismissal and secondly that the Applicant alleges that the dismissal occurred because of a contravention of general protections. Relevantly the Act at s.365 provides:

'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.'

[26] The term "dismissed" in s.365 of the Act is defined in s.386 of the of the Act.²⁷ A dismissal is to be at the initiative of the employer, or a person was forced to resign but a

dismissal does not include a range of situations (e.g. employment for a specified period of time or for a specified reason). The relevant extract from s.386 provides:

‘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 their employment but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.’

[27] The relevant provision in this matter is the application of subsection 386(1)(b) of the Act. There is no dispute that the exclusions in subsections 386 (2) and (3) do not apply, both parts of subsection 386(1) go to the employment coming to an end because of the employer’s conduct and there is no dispute that the application of subsection 386(1)(b), which Ms Swetnam relies on, is contested between the parties.

[28] To make a general protections dismissal application the person must have been dismissed as defined by the Act. Before exercising its powers under s.368²⁸ of the Act, the Commission must be satisfied that the person was dismissed *in fact*.²⁹

[29] The principle from the authorities is that the employer’s conduct is key to effect the resignation of the employee, and such that the employee had no choice but to resign.³⁰ A resignation because the employee simply disagrees with or dislikes the conduct is not sufficient to argue forced resignation. A quick acceptance by the employer of a resignation in the heat of the moment may be considered a dismissal, however, Ms Swetnam does not argue this, nor does the evidence support a heat of the moment resignation. A repudiation of the contract by the employer may also give rise to a termination caused by the employer. Neither of these situations are advanced by Ms Swetnam, instead she relies on the argument that because of conduct by her employer she was forced to resign.

[30] The question of whether the employee had no real choice but to resign is not a matter where the employee did not agree with the circumstances, rather the action of the employer must be such that the employee had no real choice but to resign. Therefore due to the conduct of the employer, which has the effect of bringing the employment relationship to an end, a resignation by the employee was probable. It is important to consider the facts objectively, and where an employee does not like the circumstances, is uncomfortable, finds it difficult or distressing, such characterisations alone would not satisfy the principles in *Mohazab*.³¹

[31] Since *Mohazab*, a number of cases³² have considered forced resignation with the most recent authority being *Bupa Aged Care*.³³ The Full Bench reviewed the authorities in relation to s.386(1) and (2) of the Act. The relevant summary paragraph follows:

‘[47] Having regard to the above authorities and the bifurcation in the definition of “dismissal” established in s.386(1) of the FW Act, we consider that the position under the FW Act may be summarised as follows:

- (1) There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has

given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the “heat of the moment” or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although “jostling” by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.

- (2) A resignation that is “forced” by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probably result of the employer’s conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element.’

[32] Having considered the submissions and evidence, I am not satisfied that the conduct of the Respondent as described by Ms Swetnam left her with no option but to resign from her employment and its conduct was not intended to bring about a resignation or had the probable result of a resignation. Where an applicant complains that the employer forced the resignation the conduct of the employer must be scrutinised to determine if it is a forced resignation.³⁴ Ms Swetnam submits that the conduct of her employer left her with no choice but to resign. The conduct she alleges forced the resignation includes:

- After an attempt to return to work on 20 May, Ms Swetnam was unable to perform her duties while wearing a mask. No other duties were offered to her that did not require the wearing of a mask,
- Instead of providing suitable duties that did not require the wearing of a mask, she was forced to take personal leave, annual leave and long service leave,
- It is alleged there was a lack of communication with her, some of which goes to the reasons provided in these proceedings as to why nursing duties required the wearing of a mask or the failure to consider roles or positions outside of nursing, but otherwise also a lack of communication with her in general while she was absent,
- An alleged hostile interaction on 28 July 2023 and comments allegedly made questioning her parental responsibilities and the impact of continued absences because of her illness.

[33] Ms Swetnam alleges this conduct forced her resignation. Her submissions and oral evidence of a forced resignation was challenged by the Respondent’s witnesses. Nevertheless,

the employer's conduct as described is to be scrutinised in the context of the evidence before the Commission.

[34] I do observe that Ms Swetnam was highly regarded, and the Acting Nurse Unit Managers were sympathetic to Ms Swetnam's inability to resume her duties as a grade 2 registered nurse. There was no pressure on her to return to work.

[35] The circumstances of her illness were unfortunate, her physical symptoms prevented any work that required the wearing of a mask, and she was to avoid any lengthy period of exertion. While a medical certificate from Ms Swetnam's GP did not prevent a return to work, it is obvious that she was not cleared to perform her nursing duties. The certificate of 8 June 2023³⁵ makes clear that Ms Swetnam continues to suffer a chronic illness which makes it hard to wear a face mask and confirms that she is to "*avoid exertion activities.*" Further I observe that the certificate states that "*office duties might be the best options for employment at this stage till we get this medical condition under control.*"

[36] Ms Swetnam gave evidence that she was cleared to return to work but was to avoid wearing a mask and lengthy periods of exertion. The evidence does show that an attempt to return to work was made in May but was unsuccessful as breathing difficulties presented challenges to perform nursing duties. The witness evidence also shows that Ms Swetnam was keen to return to work and her family circumstances were a real pressure to return to paid work. However, the medical evidence is key to assessment of the actual capacity to return to her role as nurse. This certificate of 8 June 2023 makes clear a return to nursing duties should be avoided and rather than avoidance of lengthy periods of exertion, avoidance of exertion activities is advised. The inherent requirements of a nursing role are physical exertion and to wear face masks to control infection in medical wards. The suggestion that office duties is a best option is not a feature of the role held by Ms Swetnam. Ms Swetnam and her GP suggested the wearing of a face shield in place of a mask, but this was not an acceptable alternative to wearing a mask.

[37] In addition to the medical evidence, I observe that Ms Swetnam admitted in witness evidence that she was fragile, that she wanted and needed financially to return to work and wanted to cancel the use of her long service leave. In relation to communications at the time she describes that she wanted to feel welcome and for alternative arrangements to be made so that she could return to the workplace despite her incapacity to perform the duties of a registered nurse. In evidence during proceedings she admits to discussions about the requirement to perform CPR with Ms Cumming, that her view of working in MDSU was less physical but she had to work across the ward. This requirement reasonably required her to wear a mask (per staff guidance) and perform exerting duties- both of which were not advised by her medical certificate. She admits to not having a mobile phone over a 2 week period when the Respondent's evidence was that attempts to contact her went unanswered. Nevertheless Ms Swetnam's evidence was that she wanted to feel welcome and her criticism of communications was that she interpreted the intent that she was not welcome. I do observe that the evidence weighs in favour of a finding that Ms Swetnam was not forced to take long service leave, but rather it was not her preferred income option. She had the option to follow-up for the paperwork but chose not to and she admits that she formed a negative mindset. Further I do observe that a further hospitalisation period occurred on 14 August 2023. All of this evidence of alleged conduct that forced a resignation cannot be described as conduct by

the employer that had the intent of bringing the employment relationship to an end, nor that Ms Swetnam had any option other than to resign.

[38] Ms Swetnam gave evidence that the communication, or lack thereof, failed to clarify that a face shield was not a viable alternative to enable her to return to work. Perhaps some criticism may be levelled at the Respondent in terms of its communication, but objectively it is not conduct to force a resignation, there is no intention to bring about a resignation and resignation is not a probable result of the communication. I observe Ms Swetnam was aware of the high-pressure work environment and the less-than-ideal situation of sharing the NUM role presented challenges. I do accept that this added to Ms Swetnam's personal circumstances, but I do not accept that this conduct goes to a forced resignation. Nurses were required to wear a mask while performing duties, and physical exertion is an inherent feature of the position. Ms Swetnam suggested that she wear a face shield but this was inconsistent with the hospital's Covid-19 guidance to staff that was relevant at the time.

[39] Ms Swetnam further refers to an alleged hostile interaction that occurred on 28 July as one of the reasons she resigned.³⁶ The evidence of Ms Kate Reid³⁷ and Ms Swetnam of the events of 28 July shows recollections vary somewhat. It was not disputed that Ms Swetnam attended unannounced and it was not contested that the role of NUM is a busy one. Ms Swetnam gave evidence of Ms Reid's tone and reaction to her comments about a return to work. Ms Reid gave evidence that the return to work forms were inadvertently not sent to Ms Swetnam. While Ms Swetnam gave evidence that she was of the view she could return with limitations, from the information Ms Reid was provided, all she understood was that Ms Swetnam could not return to her nursing duties. Ms Reid gave evidence that rosters are made well in advance (at least 1-2 months), and Ms Swetnam's statements that she was ready to return to work the following week were surprising. Ms Reid described her astonishment that there was an expectation to return to work the following week, yet there were genuine concerns about Ms Swetnam's ability to perform her role across the ward. Again, I have observed the evidence of both Ms Swetnam and Ms Reid and I do not conclude that Ms Reid's communication to Ms Swetnam on 28 July is of the nature (even in consideration of the Respondent's other conduct) that forced a resignation.

[40] On Ms Swetnam's evidence alone, the difficulty as a result of the illness that prevented her return to work obviously added to her personal difficulties. Her interactions with Ms Reid did not help her to feel welcome while she was in such a vulnerable state. While she felt unwelcome and devalued, this was her feeling, it was not conduct of her employer that can be considered to intend to remove all options available to her but to resign.

[41] Ms Swetnam further submits that there was no attempt to offer alternative employment arrangements, but at that point in time, a fitness to return to work was not concluded and the NUM only assessed Ms Swetnam's capacity to perform her role as registered nurse, not other roles. Ms Swetnam conceded that she did not explore alternative non nursing roles in the hospital and the employer was not required to explore this option. Again in the circumstances of this matter, failure to explore different roles cannot be construed as conduct forcing a resignation. I am not satisfied that the conduct referred to by Ms Swetnam satisfies the test of a forced resignation, the conduct itself was not probable to bring the employment relationship to an end.

[42] The onus to establish a forced resignation rests on the Applicant with then the scrutiny of the employer's conduct complained of. In this matter Ms Swetnam failed to present evidence to satisfy that onus to meet the definition of dismissed in accordance with precedent relating to the application of s.386(1)(b) of the Act.

Conclusion

[43] Having considered the evidence I am satisfied that Ms Swetnam was not dismissed within the meaning of s.386 (1)(a) or (b) of the Act.

[44] An order³⁸ to that effect will be issued with this decision.



COMMISSIONER

Appearances:

Mr L. Faust *for the Applicant.*
Ms S. Fitzgerald *for the Respondent.*

Hearing details:

Friday 10 November 2023
Microsoft Teams

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¹ Exhibit A1 Statement of Nicole Ann Swetnam, para 5-6.

² s.386 (1)(b) *Fair Work Act 2009* (Cth).

³ Applicant's outline of submission, para 8 referencing *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200, 206.

⁴ *Ibid* referencing *O'Meara v Stanley Works Pty Ltd* (2006) 58 AILR 100 [23].

⁵ *Ibid* para 10 and Exhibit A1 Statement of Nicole Ann Swetnam, paras 13 – 21, 23 – 33, 35 – 36.

⁶ Exhibit A1 Statement of Nicole Ann Swetnam, para 13.

⁷ *Ibid* para 14.

⁸ *Ibid* para 16.

⁹ *Ibid* paras 21 – 24.

¹⁰ *Ibid* 28.

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- ¹¹ Ibid 34 – 36.
- ¹² Respondent’s outline of submissions, para 2.
- ¹³ Ibid para 5.
- ¹⁴ Ibid para 7 referencing *Lipa Pharmaceuticals Ltd v Mariam Jarouche* [2023] FWCFCB 101, [4], applying *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152, [54].
- ¹⁵ Ibid paras 9 – 10 referencing *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosan v Tavassoli* [2017] FWCFCB 3941.
- ¹⁶ Ibid referencing *He v Smartech Systems Oceania Pty Ltd* [2023] FWC 932, [34] – [35] and [48].
- ¹⁷ Ibid paras 13 – 14 and Witness Statements of Isobel Rowley, Kate Reid, Belinda Brown and Nicole Cumming.
- ¹⁸ Ibid para 15 and Exhibit R2 Witness Statement of Isabel Rowley, para 6 and Attachment IR-2.
- ¹⁹ Ibid paras 15 – 17.
- ²⁰ Attachment IR-5.
- ²¹ Exhibit R2 paras 16 – 17 and Attachment IR- 6.
- ²² Ibid paras 21 - 23
- ²³ Attachment IR-9.
- ²⁴ Exhibit R3, Witness Statement of Melissas Williams.
- ²⁵ Exhibit R4.
- ²⁶ Exhibit R5.
- ²⁷ See Part 1-2 – Definitions in s.12 of the *Fair Work Act 2009*, which refers to s.386.
- ²⁸ Dealing with a dismissal dispute other than by arbitration.
- ²⁹ *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152, [54].
- ³⁰ See *Mohazab v Dick Smith Electronics Pty Ltd* (No 2) (1995) 62 IR 200; 39 AILR 3-234 at 205 (IR) per *Lee, Moore and Marshall JJ and O’Meara v Stanley Works Pty Ltd* (2006) 58 AILR 100-528 AIRC 496, [19] – [23].
- ³¹ Ibid.
- ³² *Bruce v Fingal Glen Pty Ltd* (in liq) [2013] FWCFCB 5279, *Pawel v Advanced Precast Pty Ltd* AIRC Print S5904 (12 May 2000), *O’Meara v Stanley Works Pty Ltd* AIRC Print PR973462 (11 August 2006) *ABB Engineering Construction Pty Ltd v Doumit* Print N6999, (9 December 1996) and *Rheinberger v Huxley Marketing Pty Ltd* (1996) 67 IR 154.
- ³³ *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Tavassoli* [2017] FWCFCB 3941.
- ³⁴ *Davidson v Commonwealth Department of Australia (represented by the Department of Climate Change and Energy Efficiency)* [2011] FWA 3610, 92.
- ³⁵ Attachment IR-6.
- ³⁶ Exhibit A1 Statement of Nicole Ann Swetnam, paras 28-29.
- ³⁷ Witness Statement of Kate Reid, paras 17-23.
- ³⁸ [PR770499](#)