



DECISION

Fair Work Act 2009
s.365—General protections

Paul Hoang

v

The Trustee For Ultrarad No 2 Unit Trust
(C2024/4808)

COMMISSIONER SIMPSON

BRISBANE, 2 SEPTEMBER 2024

Application to deal with contraventions involving dismissal – jurisdictional objection – not dismissed – jurisdictional objection upheld – application dismissed.

[1] On 12 July 2024, Mr Paul Hoang (**Mr Hoang/ the Applicant**) applied to the Fair Work Commission (**the Commission**) under section 365 of the *Fair Work Act 2009* (Cth) (**the Act**) for an application to deal with a general protections dispute involving dismissal. The Respondent in the matter was named as The Trustee For Ultrarad No 2 Unit Trust (**the Respondent**).

[2] The Respondent raised a jurisdictional objection that the Applicant was not dismissed, and instead that the employment ceased at the Applicant’s initiative when he failed to attend for work or respond to communication from the Respondent, effectively repudiating the employment contract. To avoid confusion for the purposes of this decision I will refer to the Respondent who is the Applicant in the jurisdictional matter as the Respondent, and the Applicant who is the Respondent in the jurisdictional matter as the Applicant.

[3] On 5 August 2024, I issued a Notice of Listing and Directions to the parties regarding the jurisdictional objection. A jurisdictional hearing was held by Microsoft teams video on 26 August 2024.

[4] Mr Tobey Knight, a solicitor from Source Legal sought permission to appear on behalf of the Respondent and Mr Paul Hoang as the Applicant appeared on his own behalf. Leave was granted to the Respondent to be legally represented on the grounds in section 596(2)(a) that it would assist the matter to be dealt with more efficiently given the level of complexity involving the jurisdictional objection based on alleged abandonment of employment.

Background

[5] A large portion of the submissions made by the Applicant were not squarely relevant to my determination of the jurisdictional question and focussed on whether he had been discriminated against and pushed out of the workplace. The focus of the dispute before me is whether the Applicant repudiated his contract by failing to be contactable and failing to attend

his rostered shifts as expected under his employment contract. As such, I have not traversed in detail the submissions that are of only peripheral relevance to the jurisdictional issue for determination.

Evidence and Submissions

[6] The Applicant commenced working for the Respondent on 25 July 2022 in the role of Administration Officer – Human Resources as a permanent employee. His role and the nature of his tenure changed to that of Administration Officer – Operations as a casual employee from 25 March 2024.

[7] The Applicant submitted that in December 2023 or January 2024 he had had a meeting with Mr Kyle Austin, Senior Human Resources Business Partner about his personal wellbeing issues and mental health as an effect from the death of a close family member.

[8] The Applicant did not file a witness statement as such. He filed written submissions on 19 August 2024,¹ including a short witness statement from the Applicant's partner, Ms Kathryn Cox in addition to a document titled 'Record of Events'.² The Respondent did not require Ms Cox for cross examination, and I indicated to the parties the content of her statement would be considered as it was without requiring her to give evidence.

[9] Ms Brittany Beatty provided a witness statement in the Respondent's case dated 11 August 2024,³ as did Ms Lauren Bennett dated 12 August 2024.⁴

[10] The Applicant was referred to his evidence in the Record of Events document under the heading 'Beginning of Feb'. He agreed this was referring to a discussion with his previous manager Mr Austin concerning leaving the Respondent after obtaining a graduate role. He said this had always been discussed from the start of his employment and he was always forthcoming about this.

[11] Ms Bennett gave evidence that in or about mid-March 2024, Mr Austin told her that the Applicant had expressed interest in joining the Operations team as it better aligned with his desired career path as an engineer. Ms Bennett said at the time, there was an unfilled position in the Operations team as an Administration Officer – Operations which was to provide administrative support to some of the functions with the Operations team. Ms Bennett said that she informed Mr Austin that the Applicant might be appropriate for this position.

[12] Ms Bennett was asked if Mr Austin approached her about this, or Ms Bennett approached him. Ms Bennett said that she and Mr Austin were communicating in their weekly Human Resources Operations forum, and she was expressing frustration that she had been unable to fill this position for some time. Mr Austin informed her that the Applicant and himself had been having conversations about the Applicant's future career path, and they had discussed the potential of the Applicant being engaged in this role, as it better aligned to the Applicant's desired career path, and the Applicant's graduate position.

[13] Ms Bennett said on or about 18 March 2024 the Applicant contacted her to express his interest in the Operations Position and she met him in the afternoon to discuss the role. Ms Bennett said during the discussion she told the Applicant that:

- (a) there was an immediate need for support as the position was currently unfilled;
- (b) She had recently interviewed a candidate for the position, and it was likely that someone would be commencing in the position on a full time, permanent basis on 27 May 2024;
- (c) the position being offered to him would be on a temporary casual basis, given someone was commencing in the role on a permanent basis;
- (d) the first 6 to 8 weeks would be at a full time capacity prior to the commencement of the new employee and then there may be some further on-going casual work while the new employee was being trained;
- (e) the preferred hours of work were 9am to 5pm, but there was some flexibility in start times to suit individual needs.

[14] Ms Bennett said the Applicant told her that he had been applying for graduate positions with other organisations and had been attending interviews for these positions. Ms Bennett said that she proposed that for the first 6 to 8 weeks in the Operations Position, the Applicant would be rostered full time hours, but if he had an interview for a graduate position they could be flexible with his hours, as long as he communicated this in advance, and the Applicant agreed to this.

[15] Ms Bennett said the Applicant accepted the employment in the Operations Position, which he commenced on 25 March 2024 and she provided a copy of the employment contract dated 27 March 2024. Ms Bennett said the Applicant reported to her in this position.

[16] The Applicant was referred during his oral evidence to what he said in the Record of Events document under the heading 'Mid Mar' about transitioning to his new casual role. He was asked about the expectation of keeping his normal working schedule but with flexibility to attend or schedule personal days, professional interviews or meetings. He agreed that was what was discussed. He also accepted that it was agreed that he would give Ms Bennett notice where he had to take a day off.

[17] The Respondent submitted that when the position was offered to the Applicant, he was informed that the Respondent expected to engage an additional Administration Officer on a full-time permanent basis from 27 May 2024 but that he would continue to be offered some casual work in the Operations position.

[18] The Applicant was rostered to work 9:00am to 5:00pm between 25 March 2024 and 28 June 2024 with some flexibility in start time to suit his needs and if he was required to attend an interview for a graduate position.

[19] Between 25 March 2024 and 18 April 2024, the Applicant attended work for his rostered shifts subject to flexibility and graduate position interviews.

[20] Between 19 April 2024 and 23 April 2024, the Applicant did not attend his rostered shifts.

[21] On 23 April 2024, Ms Bennett contacted the Applicant about his absence. The Applicant apologised and informed Ms Bennett that he had been looking after his puppy who

had been to the emergency vet. Ms Bennett requested that the Applicant let her know when he planned to return to work. The Applicant did not reply to this request.

[22] The Applicant did not attend work or make contact with the Respondent until 29 April 2024, 5 days later when he attended work. On the same day, Ms Bennett reminded the Applicant that he needed to notify the Respondent prior to not being able to attend work. In his oral evidence the Applicant said he could not confirm the exact date of this conversation with Ms Bennett however he said the conversation amounted to him popping by Ms Bennett's door, and having a brief conversation with Ms Bennett where he said he apologised for his abrupt absence from work the week prior. The Applicant said he did not recall if Ms Bennett reminded him that he needed to let her know if he was going to be absent from a rostered shift.

[23] The Applicant agreed that he attended two interviews for other positions during the period after he had converted to a casual position.

[24] From 9 May 2024 onwards, the Applicant again did not attend shifts or notify the Respondent that he intended to be absent or take leave.

[25] The Applicant was asked if he recalled receiving a phone call from Mr Austin on 13 May 2024. He said he had no record of receiving that call.

[26] The Respondent submitted that Ms Bennett attempted to make contact with the Applicant on three occasions by text message and call between 10 and 15 May 2024. The Applicant agreed he had received text messages; he did not agree he had missed calls. Ms Bennett referred to a four page document titled 'Phone Records Between Lauren Bennett and Paul Hoang' in the Digital Court Book⁵, confirming the first three pages were a record of text messages between herself and the Applicant, and the last page was a screenshot of telephone records from her phone to the Applicant. Ms Bennett said the records were an accurate reflection of record of contact with the Applicant.

[27] Ms Bennett said the typical way she would contact staff members when they are not at work was by text message, and this was also the way she would usually contact the Applicant if she needed to get in contact with him. Ms Bennett said she had no awareness of the Applicant having a mental health condition or any medical health concerns during his casual period of employment when she was his manager.

[28] Ms Bennett was asked why the outbound call she made to the Applicant on 15 May 2024 was only two seconds in duration. The Applicant also said he had no record of having received a call from Ms Bennett on 15 May 2024. Ms Bennett said her recollection was the call did connect however she could not explain why the duration of the call was only 2 seconds. Ms Bennett said she did not recall leaving a voicemail message. Ms Bennett said from her recollection there were a few rings and when there was no answer she hung up.

[29] On 16 May 2024, Ms Brittany Beatty, Human Resources Advisor spoke to the Applicant's emergency contact person, his partner Ms Kathryn Cox. Ms Cox confirmed that she received this call and that this was the first wellness check call she had received or heard about for the Applicant. Ms Cox stated that she would let the Applicant know to contact Ms

Beatty and did so. Ms Beatty said she was fairly sure she sent a text message to the Applicant after the phone call with Ms Cox.

[30] Later that day, Ms Beatty spoke to the Applicant who advised that he had received some bad news about his father. Ms Beatty said this occurred at 5:10pm after she finished work. Ms Beatty's evidence was that she asked the Applicant if he wanted her to pass on any information to Ms Bennett and Mr Austin, to which the Applicant responded that he would respond to Ms Bennett's messages. The Respondent submitted that Ms Beatty's call was for the purpose of a welfare check, not to discuss the Applicant's intent to return to work or continue his employment. Ms Beatty agreed during her oral evidence that she believed she was first person to be successful in making contact up to that point.

[31] The Applicant submitted that during this time 'due to further personal issues in relation to the health of another member of his close immediate family, he experienced a mental breakdown and was not able to attend his normal working day schedule.' Ms Cox, the Applicant's partner submitted that the Applicant had been in an extremely vulnerable mental state and deteriorating physical state and was not even well enough to leave the apartment for weeks or months on end. She stated that in this state, the Applicant found it increasingly difficult to operate on a day-to-day basis and withdrew from all personal and professional contacts and communication.

[32] The Applicant alleged that the call between himself and Ms Beatty was the only call he had received from the Respondent during this period. He submitted that during the call, Ms Beatty 'offered to convey his emotional and mental state and difficulties as a gesture of goodwill.' He stated that this was 'in consideration of any possible embarrassment or inability to do so himself, as he had noted he had trouble even barely holding on and had not even exited his apartment since these issues began.'

[33] The Applicant was asked whether during his conversation with Ms Beatty he told her that he intended to return to work. The Applicant said he told Ms Beatty that he was struggling to function even at a basic level, and he did not expect to be back at work anytime soon. He said he believed that was it. The Applicant agreed he told Ms Beatty that he was aware Ms Bennett had been trying to get in contact with him via text, and he said he asked Ms Beatty to convey his apology to Ms Bennett. The Applicant said Ms Beatty offered to convey his situation to Ms Bennett and responded to Ms Beatty saying this would be helpful for her to do it on his behalf. He said he did make known his intent to reply to Ms Bennett although he did not do so until 20 June 2024.

[34] Ms Beatty submitted that at no time during the call did the Applicant mention being on approved leave, and she stated that if he had been on approved leave, she would not have contacted him to conduct a welfare check. The welfare check had been conducted as no one at the Respondent had been able to contact the Applicant since he had last attended work on 8 May 2024. In her oral evidence Ms Beatty said that as Mr Austin and Ms Bennett were quite keen to hear if everything was okay, she conveyed to them immediately after hanging up on the phone call with the Applicant that he had said he was okay and he would be getting in contact with Ms Bennett to respond to her messages at his earliest convenience.

[35] Ms Bennett said during oral evidence that during her conversation with Ms Beatty, Ms Beatty informed her that the Applicant would contact Ms Bennett, and informed her that the Applicant was dealing with a personal matter, being that the Applicant's father was sick, and that the Applicant would be in communication with Ms Bennett. On Ms Bennett's evidence, that was all Ms Beatty conveyed and she expected a response from the Applicant. The Applicant did not make contact with Ms Bennett.

[36] The Applicant was referred to his Record of Events document under the heading 'Mid May' where he said he received text messages from his new manager. He agreed he did not respond to these text messages. In his oral evidence he said he was not in a mental state to text anyone and that was why he had a phone call with Ms Beatty. The Applicant accepted the text messages between himself and Ms Bennett provided in the evidence were received by him. He said he did not reply to Ms Bennett until 20 June 2024.

[37] The Applicant was asked from mid May whether he was aware that he was rostered and expected to work. He appeared to accept that but maintained that he was unable to text anyone during that time. He said the only people he had spoken to during this time were Ms Beatty and his partner who he lives with. The Applicant was asked whether he asked his partner Ms Cox to contact his employer to let them know he was unable to attend work. He said his partner had queried if he would be alright being away from work, and he said to her that was not really his concern and he had things going on at the time and he said he did not ask Ms Cox to contact his employer at all.

[38] The Respondent submitted that Ms Bennett attempted again to make contact with the Applicant on 30 May 2024 and 11 June 2024 by text message.

[39] The Applicant submitted that he only received one further text message from Ms Bennett prior to receiving the termination letter.

[40] On 12 June 2024, the Respondent submitted that due to the Applicant not making contact with her, Ms Bennett formed the view that the Applicant did not intend to return to work and had abandoned his employment. Ms Bennett said in her oral evidence that she had no knowledge about whether the Applicant had obtained employment with another company, however made assumptions on the basis of his abandonment of employment based on previous conversations. It was put to Ms Bennett that the Applicant said to her that he would notify her if he found other employment. Ms Bennett said she did not recall such a conversation.

[41] On 14 June 2024, the Respondent sent a letter to the Applicant informing him that his employment would be terminated effective 21 June 2024 due to his abandonment of employment and lack of communication. The letter stated:

“...
Queensland X-Ray has tried to contact you on numerous occasions with no response, this has included reaching out to your emergency contact. We are intending to terminate your Casual Employment Agreement dated 26 March 2024 between yourself and Queensland X-Ray (UltraRad Pty Ltd).

The termination effective date will be 21 June 2024 which is in line with your notice period outlined in your contract. The termination is due to the time elapsed since your last day of work, the lack of response to communication and the unavailability to offer you any further casual shifts.

In light of our intention to terminate, we offer you the opportunity to reach out to us by the effective 21 June 2024, should you have any questions or concerns.

...”

[42] The Applicant accepted during his oral evidence that he did not seek to reach out to the employer after receiving the correspondence of 14 June 2024. He said this was because the email sending the letter, and the letter itself made it seem as if it was just a notice and he was not aware that he could argue a notice of termination. At that point he thought there would be no point. The Respondent said as the Applicant did not respond to the letter to indicate that he intended to continue working for the Respondent, on 21 June 2024 the Applicant’s employment ended.

[43] The Applicant submitted that he felt he was ‘personally powerless’ to overturn the decision. He contended that his lack of response or rebuttal to the letter did not constitute acceptance of the notification of the acceptance of the repudiation of the contract.

[44] On 20 June 2024, the Applicant contacted the Respondent to arrange to collect his personal belongings. On 21 June 2024, the Applicant attended the workplace to collect his belongings.

[45] The Applicant submitted that not once during the final week of his employment was he contacted about the circumstances of the termination or any avenues to amendment, reconciliation or alternative employment within the business. He stated that he was never approached to see if he would be interested or willing to work in any similar or other roles with the Respondent.

[46] To summarise, the Applicant attended a total of 27 days of work between 25 March 2024 and 21 June 2024, when he was rostered to work 65 of those days. The Respondent submitted that all of the 38 days he did not attend work, the Applicant did not provide prior notice or apply for leave.

[47] The Respondent submitted that the Applicant had not been dismissed as the employment did not end at its initiative nor did the Applicant resign. But instead that the Applicant abandoned his employment amounting to repudiation of the employment contract, which the Respondent accepted on 14 June 2024 in the letter sent to the Applicant.

[48] The Respondent argued that the letter did not constitute a dismissal as the employment relationship had already ended due to the Applicant no longer fulfilling his obligation to attend work when rostered.

[49] The Respondent relied on the principles of abandonment of employment set out in ‘*Four yearly review of modern awards - Abandonment of Employment*’ [2018] FWCFB 139 at [21] and the concept of repudiation set out in *NSW Trains v James* [2022] FWCFB 55 at [125].

[50] Paragraph 21 of the *Four yearly review of modern awards* decision reads as follows:

“[21] “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.” (citations omitted)

[51] Paragraph 125 of the *NSW Trains v James* decision reads as follows:

“[125] The High Court has described repudiation as referring to conduct of a party ‘which evinces an unwillingness or an inability to render substantial performance of the contract’ or ‘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’. ‘Repudiation of a contract is a serious matter and is not to be lightly found or inferred’. 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.” (citations omitted)

[52] Further, the Respondent submitted that it had a Leave Policy which as an employee of the Respondent’s HR team for over 18 months, the Applicant was or ought to have been aware of his obligations under.

[53] The Respondent also relied on its submission that the Applicant had not been dismissed for exercising the workplace right of taking annual leave, in addition to or alternatively because he has a physical or mental disability.

[54] The Respondent contended that the Applicant had not applied for any leave for the 38 days he was absent, nor was he eligible as a casual employee, to accrue or take annual leave and therefore that attribute was not applicable. The Respondent also submitted that at no time prior to 14 June 2024 did the Applicant inform the Respondent that he had an impairment or disability or provide any evidence that indicated such.

[55] In his submissions, the Applicant stated that he was terminated in part due to a period of absence from his workplace due to sickness and that he was not in the right physical, emotional or mental state to make it a priority to provide a medical certificate to the Respondent.

[56] The Applicant alleged that his dismissal was also in contravention of section 352 of the Act, being while temporarily ill or absent, and that as his absence was less than the statutory three months, he was unjustly dismissed.

[57] The Applicant argued that he had previously been a permanent employee and had been converted to casual employment in March 2024. He submitted that his employment conditions had been changed to his detriment and under duress due to his mental incapacity which differentiated from the Respondent's treatment of other employees.

[58] The Applicant submitted that he did not have the mental capacity to respond to text messages but was able to respond to calls when initiated by others. He submitted that he was disappointed that he had only received one call from the Respondent during his period of leave which he had returned and therefore he was responsive, contrary to what the Respondent alleged.

[59] The Applicant did not agree that he had repudiated his employment contract by failing to attend work without notice, and instead submitted that he was on annual leave, despite presenting no evidence of any leave request or approval correspondence with the Respondent to support this assertion.

[60] With regard to his mental health and incapacity, the Applicant submitted that the Respondent was or ought to have been aware of his condition through conversations with Mr Kyle Austin in or around December 2023 or January 2024, and with Ms Beatty on 16 May 2024. Ms Beatty's account of events does not demonstrate that she was aware of anything more than that the Applicant's father had passed away. Mr Austin did not lodge a witness statement in this matter.

[61] The Applicant contended that he believed the Respondent had moved to convert his employment to casual from permanent to his detriment and because of his mental incapacity. The Applicant did not provide evidence of how his condition was part of the reason for the conversion of employment or how he believed it was the reason for his dismissal.

Consideration

[62] The Applicant claimed that his employer was aware of his mental health condition and referred to conversations he had with his previous manager Mr Austin at an earlier time during his employment including at the start of 2024. The Applicant referred to the protection in section 352 of the Act in that regard.

[63] Having considered the evidence of both Ms Beatty and Ms Bennett I am not satisfied that the Respondent was aware that the Applicant was suffering from a mental health condition that was the cause of his failure to attend for work for a prolonged period of time, and the evidence also does not support a conclusion that the Applicant was dismissed because of his temporary absence from work because of illness or injury of a kind prescribed by the regulations.

[64] The Applicant maintained that having his employment converted to casual employment in March 2024 led the Respondent to believe they could terminate his employment for no reason at their discretion. The evidence supports the conclusion that the change from permanent to casual employment was of mutual benefit to the Applicant and Respondent and the Applicant entered the new employment contract willingly.

[65] The Applicant maintained that the Respondent was obligated to do more to check on his welfare before terminating his employment. The Applicant also said he had always been clear that he would be looking for other employment opportunities on graduation and had also made clear that he would try to make an easy transition at the end of his employment for the Respondent.

[66] Having considered the evidence I am satisfied that it demonstrates that the Applicant abandoned his employment when between the period of 9 May 2024 and 14 June 2024 he didn't attend for rostered shifts, didn't provide notice to his employer that he was not going to attend for work, and did not provide a proper explanation for his non-attendance. In doing so he repudiated the employment relationship. This was accepted by the Respondent on 14 June 2024 by its correspondence sent to the Applicant on that date. I accept on the evidence that the Applicant would have been suffering from poor mental health at the relevant time, but when the evidence is considered overall, his actions still amounted to a repudiation of his employment with the Respondent.

[67] The Applicant accepted that he was required to notify Ms Bennett if he could not attend for work. On the evidence I accept Ms Bennett reminded the Applicant of this requirement on 29 April 2024.

[68] It is also the case that the Applicant made clear to the Respondent including Mr Austin and Ms Bennett that he was actively seeking other employment opportunities, which was part of the reason that he had reached an agreement with the Respondent to change the status of his employment from permanent to casual, in order to facilitate the necessary flexibility he required to attend interviews with other potential employers at short notice.

[69] The Applicant has not provided any medical evidence to support his claim that he was prevented from being able to attend for rostered shifts for the extended period. If it is the case that the Applicant was unfit for work for the entirety of that period, the Applicant has also not provided any evidence to support a conclusion that he was so incapacitated that he was not capable of communicating with the Respondent at all in order to inform it that he would not be attending for work, or even requesting that his partner Ms Cox to do so on his behalf.

[70] There is no dispute that the Applicant and Ms Beatty had a telephone conversation on 16 May 2024. There is some conflict between the respective versions of this conversation given by Ms Beatty and the Applicant. Ms Bennett's evidence corroborates Ms Beatty's version. The Applicant's own evidence is consistent with Ms Beatty's to the extent that he agreed that in the course of the telephone call with Ms Beatty he told her that he would be contacting Ms Bennett. The Applicant did not do so. Overall, I am inclined on balance to prefer Ms Beatty's version of the call given all of the above.

[71] The Applicant took no steps to contact his employer at all, and even after receiving the 14 June 2024 letter from the Respondent did not object to the letter and did not indicate he had intended to continue to work for the Respondent.

[72] In the circumstances it was reasonable for the Respondent to conclude that the Applicant did not intend to return to work for it and that he had abandoned his employment. On that basis

I have concluded the application should be dismissed as the Applicant was not dismissed from his employment in accordance with section 386 of the Act. An order will be issued separately and concurrently with this decision to that effect.




COMMISSIONER

Appearances:

P Hoang, Applicant

T Knight, Solicitor of Source Legal for the Respondent

Hearing details:

2024

Brisbane (by video)

26 August.

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¹ Exhibit 5 Digital Court Book pages 7 – 10.

² Exhibit 6 Digital Court Book pages 34 – 36.

³ Exhibit 1.

⁴ Exhibit 2.

⁵ Exhibit 3 Digital Court Book Pages 126-129.