DECISION

Fair Work Act 2009
s.365—General protections

Jaidyn Daniel James Livesey
v
ULL WA Pty Ltd
(C2023/7419)

DEPUTY PRESIDENT BEAUMONT PERTH, 5 FEBRUARY 2024

Application to deal with contraventions involving dismissal; Ayub and agency; Communication of dismissal to a third party

1 The dispute and outcome

[1] On 20 September 2023, Mr Jaidyn Daniel James Livesey (the **Applicant**), a seventeen year old, obtained a job with ULL WA Pty Ltd (the **Respondent**), after having moved in with his stepfather, Hunter Burnett. Mr Burnett was said to have worked for the Respondent for the last seven years on a casual basis, but working full-time hours. Mr Burnett appears to have 'sublet' a house located in the Respondent's work yard. The agreement to reside in the rental house was with Thomas and Kathryn Dzodzos, the directors of the Respondent and 'lessors' of the work yard on which the Respondent conducted its business. The Applicant, having moved in with his stepfather, subsequently obtained a position working with the Respondent.

[2] All appeared to be going well in the job, until the Applicant apparently attempted to report to Ms Dzodzos a verbal and physical assault that was said to have occurred on 8 November 2023 and was carried out by a work colleague. The seriousness of the alleged assault cannot be understated. The Applicant said that the following occurred:

> 1. I went to work in a truck with my dad Hunter Burnett and Ryan.
> 2. We were working on the verges, I was using the blower to clean up clippings behind Ryan and Dad who were mowing and snipping.
> 3. At one point Ryan approached me and was angry, he was swearing, calling me names and speaking down to me about not being happy with the work I was doing. He ripped the blower out of my hands aggressively and proceeded to rant about it as he went back over the work I had done.
> 4. I stayed quiet as I didn't want to upset him further and was intimidated by what he was doing.
> 5. Ryan walked about 50m away and then stopped, turned to me and said "what are you doing you useless cunt, come clean this shit up", at this stage I was too scared to go to him.
> 6. This aggravated him further and he came storming towards me and tried shoving the blower into my hands/chest/abdominal [sic].

7. I then said to Ryan "hey, fuck off mate" and this is when Ryan hit me and at the same time grabbed my shirt and shoved me in to the bushes.
8. My Dad and a member of the public tried to help.
9. I was yelled at to get into the truck. Ryan was driving and we drove back to the work yard.
10. I went inside the house and tried to call Kate several times but she didn't answer…[1]

[3] The Applicant, having not been able to reach Ms Dzodzos, called his mother, Heather Livesey, in a state of worry and asked her to contact Ms Dzodzos. The Applicant said that his mother sent a text message to Ms Dzodzos informing her of what had taken place and that she would be the point of contact given the Applicant was seventeen years old, and felt out of his depth with respect of how to deal with the incident.

[4] What occurred next is at the centre of the factual dispute between the parties. The Applicant contends that having reported the incident, he was stood down instantly and thereafter lost his job. The Respondent contends, through Ms Dzodzos, that she did not dismiss the Applicant and was unaware the Applicant thought he had been dismissed until such time as she received the general protections application.

[5] The Respondent has objected to the general protections application on the ground that the Applicant was not dismissed within the meaning of s 386 of the *Fair Work Act 2009* (Cth) (the **Act**).

[6] The Respondent's objection has implications for the application on foot because it is accepted that a person *must* have been dismissed to be entitled to make a general protections dismissal dispute application.[2] Section 365 relevantly provides:

> **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.

[7] Where there is a dispute about whether a person was dismissed, the Commission is obliged to determine that point before exercising its powers under s 368 of the Act.[3] Therefore, the discrete issue for determination is whether the Applicant was 'dismissed' from his employment within the meaning of s 386(1)(a) or/and (b) of the Act.

[8] The short answer to that question is that the Applicant was 'dismissed' by the Respondent.

2 Background

[9] In support of the application, the Applicant, his stepfather, Mr Burnett, and his mother, Ms Livesey, gave evidence. The Respondent relied upon the evidence of Ms Dzodzos.

[10] The catalyst to the purported dismissal of the Applicant is the incident that occurred on 8 November 2023, as described by the Applicant at paragraph [2] of this decision. What is purported to have followed that incident is set out below.

2.1 The Applicant's evidence

[11] On 8 November 2023, having contacted Ms Livesey to report the alleged assault by 'Ryan' and ask that she contact Ms Dzodzos, the Applicant said that later in the day Ms Livesey called him to advise that Ms Dzodzos and Mr Dzodzos would be coming to the work yard.[4]

[12] In his witness statement, the Applicant said that did not occur, notwithstanding that both he and Mr Burnett waited at the rental house for the remainder of the day.[5] At hearing, the Applicant acknowledged that following the incident with 'Ryan' he returned to the rental house and started 'gaming'. Whilst 'gaming', the Applicant said he was wearing noise cancelling headphones.

[13] On 9 November 2023, the Applicant did not attend work as he was waiting to hear from Ms Dzodzos and Mr Dzodzos regarding what was going to happen, and he was too scared to work with 'Ryan'.[6] The Applicant said that Ms Livesey messaged him to ask what was happening with 'Ryan', and he informed her that nothing had happened and that he was not at work given 'Ryan' would still be there.[7]

[14] The Applicant said he missed calls from Ms Livesey around midday on 9 November 2023.[8] At 12:52 PM on that day he received a message from Ms Livesey stating that she had spoken to Ms Dzodzos and that both he and Mr Burnett were fired and that Ms Livesey was to pick them both up as they were to move out of the rental house too.[9]

[15] The Applicant noted that at 2:00 PM, Mr Burnett returned to the rental house and told the Applicant that they had just been sacked and that they had one week to move out of the house.[10]

[16] The Applicant conceded at hearing that at no point did Ms Dzodzos or Mr Dzodzos notify him he was dismissed.

2.2 Mr Burnett's evidence

[17] Mr Burnett's account of the events on 8 November 2023, aligns with that of the Applicant.

[18] As to what unfolded on 9 November 2023, Mr Burnett said he presented to work without the Applicant and at the end of the workday, around 2:00 PM, Ms Dzodzos attended the premises where the Applicant resided and told him that both he and the Applicant were sacked and had one week to vacate the premises.[11]

[19] Mr Burnett gave evidence that Ms Dzodzos made claims to him that she had been disrespected and told how to run her business by the Applicant's mother and was not going to tolerate such a thing.[12] Mr Burnett said that night, on 9 November 2023, he and the Applicant began packing up the house and put plans in place to move.[13]

[20] At hearing, Mr Burnett acknowledged that Ms Dzodzos had, prior to the events of 8 November 2023, advised him that he would need to move out of the rental house, but that his moving out would not impact his employment.

2.3 Ms Livesey's evidence

[21] On 8 November 2023, Ms Livesey sent a text message to Ms Dzodzos outlining the incident and noting she would be the point of contact for the Applicant. Ms Livesey said that Ms Dzodzos responded by text message, asking if the Applicant was okay and that both her and Mr Dzodzos were off to the work yard to deal with the matter.[14]

[22] Ms Livesey stated that on 9 November 2023 she contacted the Applicant to follow up regarding the incident that had occurred on 8 November 2023.[15] She said that the Applicant informed her that he had not heard from Ms Dzodzos and Mr Dzodzos.[16]

[23] According to Ms Livesey she sent a text message to Ms Dzodzos on 9 November 2023 at 12:29 PM that read, 'Hi Kate, just following up from yesterday's events,' to which Ms Dzodzos is said to have replied shortly after by text message, '[w]hat do you want me to do'.[17]

[24] Ms Livesey stated that she was in the middle of composing a reply text message when Ms Dzodzos called her at 12:32 PM and proceeded to scream and yell at her, informing her that she (Ms Dzodzos) was unable to fire 'Ryan' as he had a license and tickets to do the work and that the Respondent business would be incapacitated if they lost Ryan.[18] Ms Livesey stated that she asked Ms Dzodzos who she thought she was talking to, to which Ms Dzodzos purportedly responded:

> You can get fucked, you can come and get your fucking son, your man and this fucking dog and get them the fuck out of this house because they no longer have a job, fuck off![19]

[25] Ms Livesey said that at 1:50 PM on 9 November 2023 she received a phone call from the Applicant and Mr Burnett advising that Ms Dzodzos had attended the premises and they had been fired as well as evicted – with one week to vacate the rental house.

2.4 Ms Dzodzos' evidence

[26] Ms Dzodzos gave the following evidence:

a) the Applicant started work with the Respondent as a casual labourer in or around early October 2023, and was paid cash until 26 October 2023, when he was paid through the payroll system;[20]
b) the Applicant started living with Mr Burnett in the rental house in about September 2023;
c) as a causal employee, the Applicant worked the hours that the Respondent required, where were usually about 38 hours per week;[21]
d) the Applicant only worked for the Respondent for six weeks before he stopped turning up for work;[22]

e) she received a text message from the Applicant's mother on 8 November 2023 advising of an incident regarding 'Ryan' and the Applicant;[23]
f) 'Ryan' is a senior employee who started working with the Respondent around the same time as Mr Burnett and both were good mates;[24]
g) at the time she received the text message from Ms Livesey, she did not have her reading glasses on and misunderstood the content to suggest an incident involving Mr Burnett and 'Ryan', and therefore asked if Mr Burnett was okay, and that Ms Livesey responded by stating that the Applicant did not say anything but that the Applicant had mentioned that Mr Burnett was still out working with 'Ryan';[25]
h) having re-read Ms Livsey's text message, she telephoned the Applicant at 12:27 PM on 8 November 2023, but he did not answer;[26]
i) at 12:28 PM on 8 November 2023, she made another call to the Applicant, asked if he was okay, and he explained that 'Ryan' had picked him up and thrown him into some bushes. When asked if he needed to go to the doctors, the Applicant said no;[27]
j) in the aforementioned phone call, she advised the Applicant that she would visit the yard with Mr Dzodzos and discuss the incident and start an incident report;[28]
k) she arrived at the yard at around 2:00 PM on 8 November 2023, and could hear voices inside the rental house but the door was locked and despite knocking and calling, there was no response;[29]
l) on 9 November 2023, Ms Dzodzos understood from her conversation with Mr Dzodzos on that day, that the Applicant and Mr Burnett had confirmed that they would be fine to work – with the Applicant agreeing to work if separated from 'Ryan' – and that Mr Dzodzos had confirmed with 'Ryan' that he would be back later in the afternoon to sort everything out;[30]
m) on 9 November 2023, Ms Livesey sent her a text message following up on the previous day's events and she responded '[w]hat do you want me to do' – as she was seeking advice on what actions she would like her to take as the Applicant and Mr Burnett appeared to be fine;[31] and
n) at 12:32 PM, she called Ms Livesey and during the call asked Ms Livesey to collect her car, and a dog and cats, and informed her that Mr Burnett owed her a lot of money for gas, power and rent. The call then ended.[32]

[27] In her evidence Ms Dzodzos stated that 'as the text messages from Heather continued, I decided not to respond to them as the messages were aggressive and persistent.'[33] Ms Dzodzos said that she did not want to engage any further with the threatening text messages.[34]

[28] In respect of the call with Ms Livesey at 12:32 PM on 9 November 2023, Ms Dzodzos said that she did not allow Ms Livesey the opportunity to speak as she was stressed from also having to deal with various family issues and that her intention was to tell Ms Livesey to collect her belongings from the property and this is what she did.[35]

[29] Ms Dzodzos said that later in the afternoon on 9 November 2023 she visited the yard alone, as her husband was unwell. Ms Dzodzos said that Mr Burnett and 'Ryan' were there and she spent some time with them, but then left as she had to collect her son from school.[36] Ms Dzodzos recalls that at that time Mr Burnett informed her that he had heard that Ms Livesey was causing issues for her and apologised and she informed him that she did not like receiving threatening text messages.[37] Ms Dzodzos added that she informed Mr Burnett that he could

still work for the Respondent but he needed to remove his car and belongings as she was picking up another truck and needed the room – and that she had previously informed Mr Burnett that the lease on the premises was ending and the Respondent would be moving out.[38]

[30] Ms Dzodzos gave evidence that a few days later she visited the yard and noticed that the cars and belongings were no longer there (presumedly Mr Burnett's belongings), which she was relieved about as she could now access her belongings and concentrate on clearing them out before the lease ended.[39]

[31] Ms Dzodzos said that she was expecting the Applicant to return to work after he had moved out of the residence and that when he did not present for work, she did not follow up because Mr Burnett would sometimes not come to work and she thought he was just doing what Mr Burnett did as a casual employee.[40]

3 Relevant principles

[32] Before considering the Applicant's particular circumstances, the legal framework and relevant principles first warrant consideration.

[33] The Applicant asserts that he was dismissed notwithstanding that the Respondent contends that it never communicated to the Applicant that he had been dismissed.

[34] Section 386(1) of the Act defines what constitutes a dismissal for the purpose of Part 3-2, which concerns unfair dismissal. That section is relevant for present purposes given the Commission's acceptance that the definition of the word 'dismissed' in s 386(1) is equally relevant to the meaning of the term as used in s 365 of the Act. The word 'dismissed' as defined in ss 12 and 386 of the Act reads:

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

[35] There are exceptions under s 386(2) regarding when a person has been dismissed; however, those exceptions are not relevant to this case.

[36] The definition of dismissal in s 386(1) of the Act has two elements, both of which have been subject to consideration. The first traverses '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'. This bifurcation was explained by the Full Bench in *Bupa Aged Care Australia Pty Ltd v Tavassoli* (**Bupa**),[41] and in *Lipa Pharmaceuticals Ltd v Jarouche*[42] the Full Bench endorsed the principles established in *Bupa* in respect of s 386(1)(b). In *Bupa* it was said:

> [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 probable 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.[43]

[37] While a summary of the position under s 386(1) was proposed in *Bupa*, a later decision of the Full Bench in *City of Sydney RSL & Community Club Ltd v Balgowan* considered the operation of s 386(1)(a):

> [10] It seems clear…that the concept of constructive dismissal is to be accommodated by s.386(1)(b) and that concept is not subsumed in s.386(1)(a).
>
> [11] Section 386(1)(a) seems plainly to be intended to capture the case law determining the meaning of termination (of the employment relationship) at the initiative of the employer. In *Mohazab* the Court considered that the expression "termination at the initiative of the employer" was:
>
> > ". . . a reference to a termination that is brought about by an employer and which is not agreed to by the employee. Consistent with the ordinary meaning of the expression in the Convention, a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship. We proceed on the basis that the termination of the employment relationship is what is comprehended by the expression ''termination of employment.''" (references omitted)[44]

[38] The Full Bench in *City of Sydney RSL* placed reliance on the decision of the Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd [No 2]* (**Mohazab**).[45] This is unsurprising given the Full Court of the Federal Court in *Mahony v White* observed that the Act had retained the use of the phrase and that the judgment in *Mohazab* remained good authority as to the connotation of that formula.[46]

[39] While finding it unnecessary and undesirable to endeavour to formulate an exhaustive description of what constituted 'termination at the initiative of the employer', the Court in

Mohazab identified that an important feature was that the act of the employer resulted directly or consequentially in the termination of the employment and the employment relationship was not voluntarily left by the employee.[47] Furthermore, while a termination of employment may involve more than one action, it is important to ask oneself what was the critical action or actions which constituted a termination of employment.

4 Consideration

[40] Before making several findings in this matter, it is important to clarify from the outset that I prefer the evidence of Ms Livesey over that of Ms Dzodzos. I consider Ms Livesey to be a credible witness for reasons I will shortly detail. Further, it has been necessary at times to draw inferences, and in this respect, I note having given deference to the principles on drawing inferences from evidence – as detailed in the decision of the Full Bench in *DesignInc (Sydney) Pty Limited v M Xu*.[48]

[41] The Respondent's representative drew to the Commission's attention the text message that Ms Livesey had sent to her son, prior to having any discussion with Ms Dzodzos on 9 November 2023. I note the following exchange of text messages between the Applicant and Ms Livesey on the morning of 9 November 2023:

9:07 AM on 9 November 2023

Ms Livesey	What is happening with Ryan

9:39 AM on 9 November 2023

Applicant	Don't know I am not working with him today
Ms Livesey	But he is at work ?
Applicant	Yes
Ms Livesey	So what disciplinary action was taken?? Fuck those cynts I'm bringing their entire house down…[49]

[42] Ms Livesey admitted that she sent the text message at 9:39 AM on 9 November 2023 to her son, the Applicant. Initially, at hearing, she appeared to rationalise the content as being responsive to the phone call she had with Ms Dzodzos on 9 November 2023. However, the representative for the Respondent, appropriately in my view, pointed out to Ms Livesey that her messages to her son at 9:39 AM were prior to the call between her and Ms Dzodzos that took place at 12:32 PM. Ms Livesey latter explained that the content was responsive to there having been no disciplinary action taken against 'Ryan' and that she was not going to let this fall by the wayside again. Ms Livesey did not concede that regardless of what happened, she was going to making life difficult for Ms Dzodzos and Mr Dzodzos. I accept Ms Livesey's evidence in this respect, and consider it plausible that she was expressing anger in the text messages to the Applicant, in response to circumstances where a man, who had purportedly assaulted her seventeen year old son, was back at work, and that the incident had apparently not been addressed by the Respondent.

[43] Turning to Ms Dzodzos' evidence and the issues that I have with it. First, in her written witness statement, Ms Dzodzos refers to having received a text message from Ms Livesey following up the incident that occurred on 8 November 2023. Ms Dzodzos responds to that text message by stating, '[w]hat do you want me to do'. Ms Dzodzos further explains, in respect of this text message, she was seeking advice from Ms Livesey as to what to do because the Applicant and 'Ryan' appeared to be fine. Ms Dzodzos further gives evidence that by 9 November 2023 she had already commenced an incident report process[50] – because typically when a bullying incident is reported, she would ask the employee to fill out an incident report form to start the investigation process.[51] Then Ms Dzodzos states that the Applicant had not filled out the incident form and that she was ready to start filling out the form with him – noting that as the Applicant did not answer the door to the rental house the previous day, she could not make any progress with the process.[52]

[44] Ms Dzodzos' evidence is unconvincing. Ms Dzodzos had just had a seventeen year old worker purportedly assaulted in the workplace. Instead of trying to ensure she speak to him or for that matter, his father, she purportedly presented to the rental house on 8 November 2023 and left when no response is said to have been forthcoming. The next day, she permitted 'Ryan', the alleged assailant, to continue work. She did not present to the workplace and seek to speak to the Applicant and ascertain his version of what occurred that morning. In the afternoon she presented to the workplace and whilst able to find time to speak to the workers, she had not, contrary to her assertion that she had already commenced an incident report form, started, or otherwise progressed, an incident report form. As an employer, she should be cognisant of what to do in circumstances of an alleged assault between workers. Asking the mother of the Applicant what to do, in my view, was not a legitimate enquiry of process but rather a comment of exasperation. In this respect, Ms Livesey's account that Ms Dzodzos called her at 12:32 PM and proceeded to scream and yell at her, informing her that she was unable to fire 'Ryan' as he had a license and tickets to do the work and that the Respondent business would be incapacitated if they lost Ryan,[53] appears to have occurred more likely than not. That is, I am of the view that the circumstances appearing in the evidence give rise to a reasonable and definite inference that this is what occurred.

[45] At paragraph [37] of Ms Dzodzos' written witness statement, she states that the text messages from Ms Livesey continued and that she decided not to respond to them as the messages were aggressive and persistent. However, at 12:32 PM on 9 November 2023, after having received only one text message from Ms Livesey at this point – which relevantly stated, 'Hi Kate, just following up from yesterday's events', and replied by asking what Ms Livesey wanted her to do, Ms Dzodzos called Ms Livesey. Acknowledging that she did not provide Ms Livesey with the opportunity to speak, Ms Dzdozos' evidence is that she asked Ms Livesey to collect her car, and a dog and some cats, and informed her that Mr Burnett owed her a lot of money for gas, power, and rent.[54] There is a significant incongruity between the question asked in the text message of Ms Livesey and the response proffered by Ms Dzodzos in the telephone call. I simply do not believe that in circumstances where a mother has politely enquired whether there is any update in respect of the alleged assault of her son in the workplace that the response is that the mother is told to move her car, a dog, and cats. Whilst I do not disbelieve the evidence that Ms Dzodzos advised Mr Brunett prior to the incident on 8 November 2023 that he would need to vacate the rental house or that she may have had a truck arriving the next day and she required room for the truck, the proposition that this was the content of the call between the two is unconvincing.

[46] After the call at 12:32 PM on 9 November 2023, Ms Livesey took the self-serving step of creating an evidence trail, such that she sent the following text:

> So your answer to a man assaulting my underage son who is employed by you – is to now fire him and his stepfather – because you need a liscence [sic] driver to operate your business? That is what you have just told me.[55]

[47] When asked to the effect whether the text message reflected the content of the call at 12:32 PM, Ms Dzodzos obfuscated and I cautioned her as such. She was evasive with her answer until such time as she was cautioned, at which point she gave evidence that the text message was not reflective of the phone call. As will be evident by now, I find Ms Dzodzos' evidence on this point unpersuasive and therefore I find that more likely than not Ms Livesey's version of the telephone call is the one to be believed.

[48] Ms Livesey expressed twice in her text messages to Ms Dzodzos on 9 November 2023 that the Applicant had been 'fired'. Notwithstanding, Ms Dzodzos states at paragraph [50] of her witness statement that the first time she was aware that the Applicant believed he had been 'sacked' was when she received the application. It strikes me as unfathomably odd that Ms Dzodzos arrived at such a view in the face of Ms Livesey communicating to Ms Dzodzos twice on 9 November 2023 that the Applicant had been 'fired', and thereafter the Applicant did not present for work. Whilst Ms Dzodzos may defer to the point that the Applicant was casual and therefore it was not unusual for him not to present for work, it is not apparent from his short six week work history that the Applicant engaged in such unpredictability.

[49] It is appropriate at this juncture to address the Respondent's contention that Ms Dzodzos and Mr Dzodzos never notified the Applicant that he had been dismissed and that the Applicant readily concedes that he was advised of his dismissal by his mother and by his stepfather, Mr Burnett.

[50] It is accepted, in the Commission at least, that the decision of the Full Bench in *Ayub v NSW Trains* (**Ayub**)[56] is authority for the proposition that a dismissal takes effect when it is communicated to the employee (and not before it is communicated). In *Ayub* the Full Bench said:

> [49] In relation to a dismissal with notice, drawing on the common law principles earlier identified, the dismissal would take effect upon the date of the expiration of the specified period of notice. It is necessary however for that date to be clearly identifiable. This would equally apply to a conditional notice of termination. In the case of a dismissal with a payment in lieu of notice, the dismissal would need to be communicated to the employee in such a way that the employee knows, or at least has a reasonable chance to find out, that he or she has been dismissed. There may also be an additional requirement that the payment in lieu of notice has actually been received by the employee.
>
> [50] In a situation where an employee is informed by email that he or she has been dismissed, the employee can usually be regarded as knowing or having a reasonable opportunity to know of the dismissal when the email is received in the inbox of the employee's usual email address. We note in this connection that s.14A of the *Electronic Transactions Act 1999* (Cth) provides that an email is deemed to have taken place when the email becomes capable of being retrieved by the addressee at an email address designated by the addressee. There may be circumstances

> in which mere receipt of an email may not constitute a reasonable opportunity to become aware of a dismissal - for example when the employee has not read the email because of an incapacitating illness or is legitimately unable to access their email for other reasons. However a simple refusal to read an email would of course not operate to delay the date of effect of the dismissal.

[51] Notification to an employee that they have been dismissed is often predicated upon the notion that it is the employer who has communicated that message to the employee. The notification may take the form of a verbal discussion between employee and employer and/or written correspondence (whether electronic or other – regrettably, such as text message). However, it is generally understood that it is the employer who has, by its representative or employees, communicated that message to the employee. What is one to then make of a situation when notification of dismissal is not communicated directly between employer and employee, but in circumstances where a third party is involved. Obiter in *Ayub*, at paragraph [54], touches on this point.

[52] In *Ayub*, the applicant had, in his unfair dismissal application, nominated Ms Bellette of the RTBU as his representative, and the application appeared to have been prepared by the RTBU. However, at hearing the applicant was represented by his own lawyers. Evidently, NSW Trains had sent correspondence to Ms Bellette concerning the applicant's dismissal, and the Full Bench expressed:

> [54] NSW Trains' email to Ms Bellette on 18 January 2016 does not take the matter any further, since even if it was treated as a communication to Mr Ayub on the basis that the RTBU was acting as his agent, it could not for the reasons earlier discussed operate to give the dismissal a date of effect earlier than the date of the communication and thus make an extension of time necessary. In any event, we do not consider there was any evidence that could sustain the proposition that the RTBU was authorised to act as Mr Ayub's agent generally in relation to his dealings with his employer or specifically in relation to the receipt of any notice of termination of employment. The fact that the RTBU's request to the Panel for a review of the decision to dismiss Mr Ayub was printed on its letterhead and footer and carried its email address and phone and fax numbers was not an indication that the RTBU was holding itself out as having authority to operate as Mr Ayub's address for service in relation to the communication of his dismissal.

[53] The circumstances in *Ayub* where the Full Bench observed that the evidence did not support the proposition that the RTBU was holding itself out as having authority to operate as the applicant's address for service in relation to the communication of his dismissal, significantly differ to the circumstances which I currently confront. The Applicant is said to be a seventeen year old male. This appears to be uncontroversial. The Applicant asserts that he was assaulted by 'Ryan' and reports the same to his mother, Ms Livesey, who then reaches out to the Applicant's employer by text message on 8 November 2023. I find that Ms Livesey unequivocally advised Ms Dzodzos that she was the point of contact for the Applicant and wanted to be kept informed about what action was being taken moving forward. Ms Dzodzos acknowledges Ms Livesey's communication. It therefore follows that when Ms Dzodzos notified Ms Livesey that her 'fucking son' no longer had a job, Ms Dzodzos had effectively notified the Applicant's agent. It is therefore this date that the Applicant was dismissed.

[54] Accordingly, I find that the termination of the Applicant's employment was at the initiative of the Respondent and that his dismissal took effect on 8 November 2023.

5 Conclusion

[55] I am satisfied the Applicant's employment was terminated on the initiative of the Respondent and I am therefore satisfied that s 386(1)(a) of the Act applies to the Applicant. My determination is that the Applicant was dismissed from his employment with the Respondent and the consequence of this is that there is jurisdiction for him to pursue a general protections application involving dismissal because the requirement in s 365(a) of the Act is satisfied.

[56] As a result of my determination, the application made by the Applicant pursuant to s 365 will shortly be programmed for a conciliation conference.

DEPUTY PRESIDENT

Appearances:

H Livesey for the Applicant
R Airey for the Respondent

Hearing details:

2024.
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[1] First Witness Statement of Jaidyn Daniel James Livesey (**First Livesey Statement)**; Digital Hearing Book, 14 (**DHB**).

[2] *Coles Supply Chain Pty Ltd v Milford* (2020) 279 FCR 591, 603 [54], special leave to appeal declined in [2021] HCASL 37.

[3] Ibid 602 [51].

[4] First Livesey Statement (n 1) [12].

[5] Ibid [12]–[13].

[6] Second Witness Statement of Jaidyn Daniel James Livesey, [2]–[3].

[7] Ibid [3].

[8] Ibid [6].

[9] Ibid.

[10] Ibid [9].

[11] Second Witness Statement of Hunter Thomas Burnett, [2].

[12] Ibid [2]–[3].

[13] Ibid [8].

[14] First Witness Statement of Heather Louise Livesey, [9].

[15] Second Witness Statement of Heather Louise Livesey, [1] (**Second Heather Livesey Statement**).

[16] Ibid [2].

[17] Ibid [5]–[6]; DHB (n 1) 36.

[18] Second Heather Livesey Statement (n 15) [9].

[19] Ibid [17].

[20] Witness Statement of Kathryn Hermione Dzodzos, [15] (**Dzodzos Statement**).

[21] Ibid.

[22] Ibid [17].

[23] Ibid [16].

[24] Ibid [17].

[25] Ibid [20].

[26] Ibid [21].

[27] Ibid [22].

[28] Ibid [23].

[29] Ibid [25].

[30] Ibid [29], [31].

[31] Ibid [33].

[32] Ibid [38].

[33] Ibid [37].

[34] Ibid [37].

[35] Ibid [39].

[36] Ibid [42].

[37] Ibid [43].

[38] Ibid [43].

[39] Ibid [44].

[40] Ibid [48].

[41] (2017) 271 IR 245 (**Bupa**).

[42] (2023) 324 IR 375.

[43] *Bupa* (n 41) 268–9 [47].

[44] (2018) 273 IR 126, 129–30 [10]–[11].

[45] (1995) 62 IR 200 (**Mohazab**).

[46] (2016) 262 IR 221, 228 [23].

[47] *Mohazab* (n 45) 205.

[48] (2012) 219 IR 367.

[49] DHB (n 1) 28.

[50] Dzodzos Statement (n 20) [36].

[51] Ibid [35].

[52] Ibid [36].

[53] Second Heather Livesey Statement (n 15) [9].

[54] Ibid [38].

[55] DHB (n 1) 86.

[56] (2016) 262 IR 60.