DECISION

Fair Work Act 2009
s.365—General protections

Won Woo Shin
v
The Trustee For G Capital N0. 1 Trust
(C2023/5868)

COMMISSIONER CRAWFORD SYDNEY, 5 FEBRUARY 2024

General protections dismissal dispute - jurisdictional objection alleging no dismissal - objection dismissed

BACKGROUND

[1] Won Woo Shin (**Mr Shin**) has made an application to the Fair Work Commission (**Commission**) under s.365 of the *Fair Work Act 2009* (Cth) (**FW Act**) for the Commission to deal with a dispute arising out of Mr Shin's allegations that he has been dismissed from his employment with G Capital No. 1 Pty Ltd as trustee for G Capital No. 1 Trust (**G Capital**) in contravention of Part 3-1 of the FW Act.

[2] G Capital operates the Casa Ristorante Italiano restaurant in Sydney. Mr Shin commenced employment as a cook with G Capital on 27 October 2015.[1] Mr Shin was a full-time employee from at least 2018.[2]

[3] On 14 September 2023, G Capital's payroll department sent an email to Mr Shin which stated:

> "Dear Won Woo Shin,
>
> Good day and hope this email find you well, it has now been more than 12 months since you stopped work at Casa Ristorante Italiano by 28/08/2022 and your lodged work cover claim, following that period there have been attempts by your superior and your employer to follow up your recovery and estimated return to work time in addition to requesting you returning your work place keys you hold in October 2022 for other staff members to use for accessing the shop which you haven't responded nor returned the keys, in November 2022 your employer was advised by your Work Cover Case Management specialist that your psychologist informed she doesn't believe you will be capable of returning to work with your employer as the insured, however, the company didn't take further actions with ending your employment to give further time for your recovery and perhaps resume work, the company after 12 months have come to certain

> conclusion that you are not willing to return to employment at Casa Ristorante Italiano anymore and your employment is now considered terminated.
>
> We again wish you the very best with your well being and your future endeavours.
>
> For your kind attention please."[3]

[4] Mr Shin filed a Form F8 general protections application involving dismissal on 26 September 2023.

[5] On 20 October 2023, G Capital filed a Form F8A response to Mr Shin's application. The Form F8A raised a jurisdictional objection to Mr Shin's application on the basis that he was not dismissed by G Capital. G Capital submitted that the email sent to Mr Shin on 14 September 2023 constitutes an acceptance of Mr Shin's renunciation of the employment contract. G Capital argues the employment relationship ended because Mr Shin abandoned his employment constituting a renunciation of his obligations under the employment contract. As a result, Mr Shin was not dismissed by G Capital within the meaning of s.365(1)(a) of the FW Act.

[6] G Capital's jurisdictional objection must be resolved before the Commission's conciliation powers under s.368 of the FW Act are exercised.[4]

[7] I issued directions for the filing of material in relation to the jurisdictional objection on 2 November 2023 and listed the matter for hearing on 5 December 2023. The parties generally complied with the directions. Regrettably, the hearing had to be adjourned because the Korean interpreter booked to interpret for Mr Shin cancelled with little notice. I relisted the jurisdictional objection for hearing on 29 January 2024 via video. Given the delay, I also provided the parties with an opportunity to file additional material in response to issues that were raised with them in an email dated 5 December 2023. Both parties filed further material on 17 January 2024.

[8] The directions issued on 2 November 2023 included a direction for any party seeking permission to be represented at the hearing to file submissions in support of the request and provided an opportunity for the other party to oppose the granting of permission. G Capital filed submissions in support of a request for permission to be legally represented on 10 November 2023. On 22 November 2023, Mr Shin filed a submission opposing G Capital's request for permission to be represented. On 1 December 2023, I advised the parties I had decided to grant permission for G Capital to be represented because I was satisfied it would enable the matter to be dealt with more efficiently in accordance with s.596(2)(a) of the FW Act. I formed this view because the legal issue I need to determine has complexity and because I considered based on the material filed that having a lawyer appear in the proceeding was likely to assist me in trying to conduct the hearing in a procedurally fair manner.

[9] Mr Shin represented himself at the hearing. G Capital was represented by Kylie Stone from Barry Nilsson Lawyers.

MATERIAL FILED

G Capital

Anttwan (Tony) Akillian

[10] G Capital relied on a witness statement from Anttwan (Tony) Akillian (Payroll Officer) dated 10 November 2023, which contained the following annexures:

- TA 1: A payslip for Mr Shin for the period of 15 August 2022 to 28 August 2022.
- TA 2: Emails between Mr Shin and G Capital's payroll department sent on 2 September 2022 concerning his absence from work due to his son being ill. A medical certificate was also attached.
- TA 3: Email from Mr Shin to G Capital's payroll department on 6 September 2022 indicating he is not fit to work. Mr Shin attached a medical certificate which confirms he was suffering from hypertension and anxiety.
- TA 4: An email from Mr Shin which states he remained unfit for work and attached a medical certificate which confirms he was suffering from acute stress related illness, sleep disorder, blood pressure fluctuation and had been referred for treatment.
- TA 5: A WorkCover certificate dated 28 September 2022. This states Mr Shin has no work capacity from 1 September 2022 to 5 October 2022.
- TA 6: An introductory letter from icare to Mr Akillian regarding Mr Shin's workers' compensation claim.
- TA 7: An email from G Capital's payroll department to Mr Shin dated 26 October 2022. The email refers to Mr Shin's prolonged absence and requests that he return his keys for the restaurant.
- TA 8: WorkCover certificate dated 2 November 2022. The certificate states Mr Shin has no work capacity from 3 November 2022 to 17 November 2022.
- TA 9: Emails between Mr Akillian and a case manager from EML on 16 and 18 November 2022. The emails deal with rectifying issues concerning payments to Mr Shin. The email from EML also relevantly states:

  > "Also, I have spoken with Won Woo's psychologist who informs me that when Won Woo has capacity to work, which will likely not be until late December, that she doesn't believe he will be capable of returning to work with you as the insured. I am informing you of this as we recently spoke about your company possibly needing to hire a replacement for Won Woo which I believe may be required heading into the busy periods."

- TA 10: Emails between Mr Akillian and an EML case manager on 30 November 2022. The EML case manager's email relevantly states:

  > "Dr Bommasani stated there is improvement in Mr Shin's psychological symptoms and functioning with psychological intervention. He should be able to participate in a graded return to work plan in about four to six weeks with ongoing psychological intervention.
  >
  > Won Woo stated he does not want to work for his previous employer. Dr Bommasani agreed that he should work for a different employer in the field he is comfortable working."

Mr Akillian relevantly responded:

> "Not sure if you can assist with this and considering Won Woo's statement below, thought asking if you (if you are in contact with Dr Bommasani) can ask the Dr. to advise Won Woo Shin to notify his employer about his not willing to work anymore noting that the employer is not willing to terminate his employment without his request."

- TA 11: WorkCover certificate dated 3 May 2023. The certificate states the following in relation to capacity for activities (typographical errors corrected):

> "(severe anxiety, anger, insomnia) He becomes very anxious when exposed to any circumstances or events which may be related or potentially associated with his mental injury, such as passing the suburb he worked, the job or even a conversation about his previous work or about new job. So his travelling to overseas is not because he has a good capacities but rather can be part of treatment at this stage."

  The certificate also states Mr Shin has "some capacity for suitable duties from 4/5/2023 to 31/5/2023 for 5 hours/day 3 days/week, with above capacities for activities (but duties to be not associate with PI duties). Currently on TAFE study, if coping well, consider increasing hours on next visit."

- TA 12: There are two letters from icare and EML to Mr Akillian dated 27 June 2023. One letter states a decision has been made that Mr Shin is no longer eligible for weekly payments. The other letter states Mr Shin has current work capacity for suitable employment but that his weekly workers' compensation payments would not be affected. There is also a page containing calculations which appears to indicate Mr Shin would receive compensation payments of $504.00 per week.
- TA13: This is a further copy of the email from Mr Akillian to Mr Shin dated 14 September 2023.

I marked Mr Akillian's statement and annexures **Exhibit R1**.

[11] Mr Akillian answered some questions from me during the hearing and was cross-examined by Mr Shin. Mr Akillian confirmed in response to a question from me that the payroll department did not take any steps to contact Mr Shin after learning he may have some work capacity on 3 May 2023.

Hendra Bun

[12] G Capital also relied on a witness statement from Hendra Bun (Head Chef at Casa Ristorante Italiano), which contained the following annexures:

- HB 1: A copy of text messages between Mr Bun and Mr Shin on 5 and 11 September 2022 regarding Mr Shin being unfit for work.
- HB 2: Further text messages between Mr Bun and Mr Shin on 20 September 2022 regarding Mr Shin being unfit for work.
- HB 3: Additional copies of the text messages sent on 20 September 2022.
- HB 4: A copy of text messages between Mr Bun and Mr Shin on 10 October 2022 regarding Mr Bun being a referee for a rental application.

I marked Mr Bun's statement and annexures **Exhibit R2**. Mr Bun was not required for cross-examination.

[13] I note Mr Bun's statement includes at [10]:

> "I did not attempt to contact the Applicant again after 20 September 2022 about his return to work. This is because every time I had messages the Applicant to ask when he would return to work, he had advised that he was informing the payroll head office and sending his medical certificates to them, but then never returned."

Additional evidence

[14] G Capital attached a number of documents to the Form F8A it filed on 20 October 2023. These documents were generally then subsequently attached to Mr Akillian or Mr Bun's witness statements. However, I identified after the hearing that G Capital had filed additional documents that had not been annexed to the witness statements.

[15] Attachment TG-13 to the Form F8A is a series of documents regarding a work capacity decision made in relation to Mr Shin's workers' compensation claim on 8 June 2023. The documents include a letter from icare and EML to Mr Akillian dated 8 June 2023. The letter states a work capacity decision had been made in relation to Mr Shin and that his weekly payments would reduce to $504.00 from 11 September 2023.

[16] The documents also include a summary of the work capacity decision, which relevantly states:

> "Reasons for the decision
>
> We have made a decision under section 43(1)(a) of the Workers Compensation Act 1987 and we believe they are currently able to work in the suitable employment identified below 5 hours per day, 3 days per week.
>
> Mr Shin is currently able to work in the suitable employment identified below 5 hours per day, 3 days per week. The certificate of capacity dated 4 May 2023 signed by Dr Hajeong Lee certifies Mr Shin fit for 15 hours of work per week.
>
> We have made a decision under section 43(1)(b) of the Workers Compensation Act 1987 and we believe that the following vocational options are suitable employment for them.
>
> 1. Sales and Marketing Project Manager

> 2. Accommodation and Hospitality Manager
>
> Suitable employment is employment for which they are currently suited considering their age, education, skills, work experience, current capacity for work and current work status regardless of whether the employment is available or the nature of their pre-injury employment: section 32A of the Workers Compensation Act 1987.
>
> We rely on the Vocational Assessment report dated 31 May 2023 from Kairros that showed Mr Shin could earn the following in this suitable vocational of a Sales and Marketing Project Manager option identified above with the Vocational sign off from Dr Lee dated 22 May 2023.
>
> We have made a decision under section 43(1)(c) of the Workers Compensation Act 1987 and we believe that they can earn $600.00 a week in this suitable employment.
>
> The vocational option of Sales and Marketing Project Manager is considered to be the most suitable role based on Mr Shin's functional capacity, transferable skills and work history. Mr Shin does not require any licence and qualifications or any retraining. Mr Shin also does not require driving. The Employer contacted within the Labour Market Analysis, (Heart and Soul Hoops) has confirmed they can accommodate the hours of 15 hours per week and therefore, deemed ability to earn would be $40.00 per hour which is the highest labour market wage reported by 15 hours per week. Mr Shin's ability to earn is $40.00 x 15 = $600.00 per week which will bring Mr Shin's payment to $504.00 per week from 11 September 2023. Dr. Lee has provided endorsement of the role listed above as being functionally suitable with sign off dated 22 May 2023."

[17] As indicated above, I was not aware of this document during the hearing and did not mark it as an exhibit. However, it is clearly relevant to the case. I intend to take it into account in determining the jurisdictional objection. I do not consider any unfairness arises given the document was filed by G Capital.

[18] G Capital filed written submissions dated 10 November 2023 and 17 January 2024. Ms Stone also made oral closing submissions. Maral Simonian (Head Office Manager) supplemented these submissions.

Mr Shin

[19] Mr Shin filed a significant amount of material in support of his application. The material constituted a mixture of evidence and submissions. Much of the content was directed at grievances from Mr Shin in relation to his treatment by G Capital as opposed to whether or not he was dismissed.

[20] During the hearing, I expressed a provisional view that all the material filed by Mr Shin should be marked as exhibits reflecting their numbering in the hearing book and that G Capital would be entitled to cross-examine Mr Shin on the evidence. G Capital did not oppose this approach.

[21] I marked Mr Shin's initial filed material as **Exhibits A1 through to Exhibit A18** and then his further material as **Exhibit A25 and A26**.

[22] Mr Shin answered questions from me during the hearing and was cross-examined by Ms Stone. Mr Shin disputed that he was fit to perform work from 3 May 2023. In terms of returning to work for G Capital, Mr Shin denied he had no intention of returning but indicated it was contingent on his grievances being resolved.

[23] Mr Shin made oral closing submissions at the end of the hearing. As indicated above, much of the material filed by Mr Shin was more in the form of submissions than evidence. I have taken into account all of the material.

STATUTORY PROVISIONS

[24] Section 365(1) of the FW Act states:

> 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.

[25] The dictionary in s.12 of the FW Act defines "dismissal" by calling up the definition in s.386 of the FW Act. The definition in s.386 states:

> **Meaning of dismissed**
>
> (1) A person has been ***dismissed*** if:
>
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
>
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.
>
> (2) However, a person has not been ***dismissed*** if:
>
> (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
>
> (b) the person was an employee:

(i) to whom a training arrangement applied; and

(ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

and the employment has terminated at the end of the training arrangement; or

(c) the person was demoted in employment but:

(i) the demotion does not involve a significant reduction in his or her remuneration or duties; and

(ii) he or she remains employed with the employer that effected the demotion.

(3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

AUTHORITIES

[26] The Full Bench provided the following summary of the legal test where an employer is arguing an employee has abandoned their employment resulting in a renunciation of the employment contract in *Abandonment of Employment*:[5]

"[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.

[22] Where this occurs, it may have various consequences in terms of the application of provisions of the FW Act. To give three examples, first, because the employer has not terminated the employee's employment, the NES requirement in s 117 for the provision of notice by the employer, or payment in lieu of notice, will not be applicable. Second, if a modern award or enterprise agreement provision made pursuant to s 118 requiring an employee to give notice of the termination of his or her employment applies, a question may arise about compliance with such a provision. Third, if the employee lodges an unfair dismissal application, then the application is liable to be struck out on the ground that there was no termination of the employment relationship

at the initiative of the employer and thus no dismissal within the meaning of s 386(1)(a) (unless there is some distinguishing factual circumstance in the matter or the employee can argue that there was a forced resignation under s 386(1)(b)).”

CONSIDERATION

[27] Based on all the evidence and submissions, I consider the following facts to be clear:

(i) Mr Shin commenced employment with G Capital as a cook in 2015 and last worked a shift on 28 August 2022.[6]

(ii) Mr Shin was initially absent caring for his son from around 28 August 2022 to around 5 September 2022.[7]

(iii) Mr Shin has been absent from work due to mental illness since 6 September 2022.[8]

(iv) Mr Akillian sent an email to Mr Shin on 26 October 2022 requesting that he returns his keys for the restaurant. Mr Shin did not respond to this email.[9]

(v) Mr Shin had a workers’ compensation claim accepted in relation to his mental illness. The medical certificates indicate the injury/illness was incurred over a period of employment up to 28 August 2022.[10]

(vi) On 3 May 2023, Dr Hajeong Lee certified Mr Shin fit for suitable duties with capacity to work five hours per day, for three days per week. Dr Lee expressly stated: “but duties to be not associate with PI duties.” I consider “PI” must mean pre-injury duties and that Dr Lee did not determine Mr Shin was fit to return to work at the restaurant.[11]

(vii) On 8 June 2023, Mr Akillian was advised that Mr Shin’s workers’ compensation payments were being reduced to $504.00 per week because the insurer considered Mr Shin was able to perform 15 hours of work per week as a Sales and Marketing Project Manager or as an Accommodation and Hospitality Manager.[12]

(viii) On 27 June 2023, Mr Akillian was advised that Mr Shin’s workers’ compensation entitlements would cease immediately. It is not clear, but I assume that this was because Mr Shin was fit for suitable work and had not been seeking suitable work.[13]

(ix) No representatives from G Capital contacted Mr Shin from 3 May 2023 to 14 September 2023 to seek an update on what he wanted to do with his employment. The latest evidence I can identify of G Capital directly contacting Mr Shin is the email from Mr Akillian on 26 October 2022.[14]

(x) Mr Akillian sent an email to Mr Shin on 14 September 2023 which stated:

> "Good day and hope this email find you well, it has now been more than 12 months since you stopped work at Casa Ristorante Italiano by 28/08/2022 and your lodged work cover claim, following that period there have been attempts by your superior and your employer to follow up your recovery and estimated return to work time in addition to requesting you returning your work place keys you hold in October 2022 for other staff members to use for accessing the shop which you haven't responded nor returned the keys, in November 2022 your employer was advised by your Work Cover Case Management specialist that your psychologist informed she doesn't believe you will be capable of returning to work with your employer as the insured, however, the company didn't take further actions with ending your employment to give further time for your recovery and perhaps resume work, the company after 12 months have come to certain conclusion that you are not willing to return to employment at Casa Ristorante Italiano anymore and your employment is now considered terminated."[15]

[28] Although G Capital now argues the email was an acceptance of Mr Shin's repudiation of the employment contract, that is not what the language used by Mr Akillian suggests. The email refers to the company not taking further actions with "ending" the employment during the previous 12 months as being to Mr Shin's benefit and ends with a statement the employment is "now considered terminated". I consider the email suggests G Capital was making a decision to dismiss Mr Shin because they had concluded there was no prospect of him returning to work. I also consider the reference to Mr Shin being "not willing to return to employment" misstates the position. Mr Shin was too unwell to attend work at the restaurant.

[29] I do not consider the facts of this case represent what the Full Bench in the *Abandonment of Employment Decision* described as 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." To the contrary, the reason for Mr Shin not attending the workplace is crystal clear and G Capital has been aware throughout his absence. Mr Shin is suffering from a serious illness and has not been fit to attend the restaurant since at least 6 September 2022.

[30] I mistakenly thought during the hearing (and this was not corrected by the parties) that Mr Shin had been certified fit to return to the restaurant on reduced hours from 3 May 2023. That is clearly not the case. Mr Shin had been declared fit to work reduced hours as a Sales and Marketing Project Manager and as an Accommodation and Hospitality Manager. Dr Lee makes it clear in the certificate dated 3 May 2023 that any suitable duties could not "be associate with PI duties". This being the case, I am unclear why G Capital was referring to Mr Shin having some work capacity, but then failing to contact them about performing work from 3 May 2023 until 14 September 2023, as being a factor in favour of a finding that he had abandoned his employment. The evidence demonstrates Mr Shin was not fit to have any form of contact with the restaurant during this period.

[31] I am not satisfied Mr Shin abandoned his employment. I find Mr Shin's employment was terminated on G Capital's initiative via Mr Akillian's email on 14 September 2023. I dismiss G Capital's jurisdictional objection.

[32] I agree with Mr Akillian's statement during the hearing that what should have occurred with the employment given Mr Shin's prolonged absence can be described as a "grey area" and I accept Mr Akillian was trying to resolve the issue, rather than to cause further harm to Mr Shin. Further, there have been many arguments over the years regarding the doctrine of frustration of the employment contract, where employers would argue that when it becomes clear there is no prospect of the employee returning to work, the employment ends due to frustration of the contract and hence not at the initiative of the employer. However, based on the decision of the Full Bench of the New South Wales Industrial Relations Commission in *Pasovska v Hilton Hotels of Australia* (2003) 122 IR 428, that doctrine appears to have minimal relevance in circumstances where the National Employment Standards provide express minimum conditions concerning termination by employers and many awards, including the *Restaurant Industry Award 2020*, regulate termination by an employee. Presumably, that is why G Capital did not argue the doctrine of frustration was relevant. That Full Bench decision is likely to assist Mr Akillian in understanding how to navigate these circumstances in the future.

[33] I also recommend that Mr Shin seeks legal advice about his workers' compensation claim. Based on my observations during the hearing, I suspect the determination that Mr Shin is fit to work as a Sales and Marketing Project Manager and as an Accommodation and Hospitality Manager may need to be revisited.

CONCLUSION

[34] I determine that Mr Shin was "dismissed" by G Capital effective 14 September 2023 and dismiss the jurisdictional objection raised by G Capital.

[35] The dispute will proceed to be listed for a conference.

COMMISSIONER

Appearances:

Mr Shin representing himself.

Ms Stone representing G Capital.

Hearing details:

2024

Via video
29 January 2024

Printed by authority of the Commonwealth Government Printer

<PR770988>

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[1] This is the date provided in G Capital's Form F8A response.

[2] Exhibit A26.

[3] Attachment TA-13, Exhibit R1.

[4] *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152 and *Lipa Pharmaceuticals Ltd v Mariam Jarouche* [2023] FWCFB 101 at [23].

[5] [2018] FWCFB 139.

[6] Form F3 at 2.5 and Exhibit R2 at [4].

[7] Attachment TA 2 to Exhibit R1.

[8] Exhibit A5, report of Dr Jung Sook Kim dated 10 November 2023, page 30 of the hearing book.

[9] Attachment TA 7 to Exhibit R1.

[10] Attachments TA 8 and TA 9 to Exhibit R1.

[11] Attachment TA 11 to Exhibit R1.

[12] Attachment TG-13 to the Form F8A.

[13] Attachment TA 12 to Exhibit R1.

[14] Exhibit R2 at [10] and Mr Akillian's oral evidence.

[15] Attachment TA 13 to Exhibit R1.