



DECISION

Fair Work Act 2009
s.365—General protections

Katrina Sayce

v

The Trustee For Mag Unit Trust T/A Mag Apprenticeships
(C2023/7220)

COMMISSIONER WILSON

MELBOURNE, 22 FEBRUARY 2024

Application for the Commission to deal with a dismissal dispute under s.365 of the Act – jurisdictional objection that there was no dismissal – jurisdictional objection upheld – substantive application dismissed.

[1] This decision deals with the question of whether Ms Katrina Sayce (the Applicant) was “dismissed” within the meaning of the *Fair Work Act 2009* (the Act) from her employment with The Trustee for Mag Unit Trust T/A MAG Apprenticeships (MAG Apprenticeships, or the Respondent) and thus eligible to make a general protections application involving dismissal to the Fair Work Commission (the Commission).

[2] MAG Apprenticeships objects to Ms Sayce’s application on the basis that there was no dismissal as defined. With such objection having been made the Commission is required to determine whether the applicant was dismissed before the application can proceed any further.

[3] For the reasons set out below, I find Ms Sayce was not “dismissed” within the meaning of the Act.

PRELIMINARIES

[4] The Respondent’s objection was the subject of a hearing before me on Monday 15 and Wednesday 24 January 2024 at which Ms Sayce was represented by Ms Sophie Coleman, a lawyer and friend of the Applicant. Ms Sayce gave evidence and made submissions on her own behalf and Mr Daniel Santoro, a former colleague, also gave evidence on her behalf. MAG Apprenticeships was represented by Mr Rob Tooth, of Counsel, instructed by Agility Law Group. Evidence was received from Mr Shaun Jones, Director and Secretary of the Respondent, and Mr David Dunning, General Manager of the Respondent during the Applicant’s employment.

[5] Ms Coleman and Mr Tooth appeared with permission for legal representation having been given by me to both parties pursuant to the provisions of s.596(2)(a) of the Act for the reason I was satisfied it would enable the matter to be dealt with more efficiently, taking into

account the complexity of the matter. I was further satisfied it was appropriate in all the circumstances to exercise my discretion and permit representation of each party by lawyers.¹

[6] Mr Michael Facciolo, Apprenticeship Consultant of the Respondent during the Applicant's employment, and Mr David Hudson, Director and Secretary of the Respondent during the Applicant's employment also provided written witness statements, however they did not give oral evidence.

RELEVANT LEGISLATION

[7] Section 365 of the Act outlines when the Commission can deal with a general protections application involving dismissal:

“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.”

[8] The term “dismissed” is defined in s.12 of the Act which in turn refers to s.386, with the section providing this definition:

“386 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."

[9] Section 365 states that if a person has been dismissed, and the person alleges that the dismissal was in contravention of Part 3-1, he or she may apply to the Commission to 'deal with the dispute'.

[10] The Commission's usual process with general protections matters is to deal with the dispute by conducting a conciliation conference by a staff conciliator. If it is satisfied that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful, the Commission will issue a certificate that allows the applicant to commence proceedings in a court (s.368(3)) or by arbitration in the Commission if consent is given by each party (s.369). However, in an application where the respondent denies that it dismissed the applicant and objects to the application on this basis, the Commission is required to determine whether the applicant was dismissed.²

[11] Consistent with the Commission's usual practice on these matters³, this matter has been allocated to me to determine whether or not there was a dismissal. A person must have been dismissed to be entitled to make a general protections dispute application and before the Commission can exercise powers under s.368 to deal with a dispute.⁴

BACKGROUND

[12] Ms Sayce made a general protections application involving dismissal to the Commission pursuant to s.365 of the Act on 20 November 2023.

[13] In 2018 Ms Sayce commenced working for Mr Jones and Mr Hudson in another company at which Mr Jones and Mr Hudson were joint Directors and Secretaries. It was in or around June 2019 that Ms Sayce commenced employment with the Respondent in the role of

Managing Director. Her evidence is that from around August 2022 she worked in the role of National Operations Manager.⁵

[14] MAG Apprenticeships is engaged in providing the construction industry across Australia with access to apprenticeships and trainees. There are several entities comprising the group, which operates in both Victoria, where it trades as MelRec and Queensland, where it trades as QueRec.

[15] Ms Sayce's case is that her employment was terminated on 17 November 2023 having been forced to resign due to conduct, or a course of conduct engaged in by the Respondent and Mr Jones since she notified them of her pregnancy⁶ including reassigning her duties, being excluded from an all-staff meeting, and refusing to accommodate a flexible working arrangement.

[16] MAG Apprenticeships argues that the Commission has no jurisdiction to deal with Ms Sayce's claim because no dismissal occurred.

[17] Ms Sayce details a timeline of events which on her evidence demonstrates a deteriorating working relationship with Mr Jones that resulted in an extended period of absence from the workplace on personal leave and culminated in the cessation of the employment relationship. The Respondent refutes the allegations made by Ms Sayce and alleges that Ms Sayce was absent from the workplace due to the pregnancy related illness she was experiencing as well as that her interactions with staff had become hostile.⁷ Mr Jones views his relationship with Ms Sayce as amicable until the communication on 21 August 2023 when her request for a flexible working arrangement was refused.⁸

[18] Ms Sayce advised Mr Hudson in May 2023 of her pregnancy and she says that she and Mr Hudson agreed on an individual to perform her role whilst she was on maternity leave.⁹ She later informed Mr Jones of her pregnancy.¹⁰ Mr Jones however says that he was aware of her pregnancy prior to her notification directly to him.¹¹

[19] On 14 July 2023, Ms Sayce was notified that the various entities owned by Mr Jones and Mr Hudson would be divided and that Mr Jones would become the sole Director of MAG Apprenticeships (previously the role was shared with Mr Hudson). She was also informed that a different individual would be performing her role whilst she was on maternity leave to the person she believes had been agreed with Mr Hudson. She says she was not consulted about this decision when she would in the usual course be involved in such recruitment decisions. Mr Jones refutes this saying that it was not unusual for Ms Sayce to not be consulted about staff employment.¹²

[20] Ms Sayce says that from when she notified Mr Jones of her pregnancy until 21 July 2023, with the exception of the 14 July 2023 conversation, that she had minimal contact with him forcing her to feel excluded from the business¹³ and he started calling her by her full name rather than the shorter abbreviation usually used.¹⁴ Mr Jones disagrees there was a decrease in communication between the pair or that he changed his manner of addressing Ms Sayce.¹⁵

[21] Ms Sayce's evidence is that she agreed with the Respondent to commence maternity leave on 17 November 2023 however she was notified on 25 July 2023 that her replacement

would be taking over all duties with immediate effect;¹⁶ that she was excluded from a staff meeting convened in Queensland which started on 27 July 2023; and that she was not offered a new employment contract or provided with a new email signature block when every other employee was.¹⁷

[22] The Respondent submits that it was always the intention for Ms Sayce's maternity leave replacement to commence early to allow for training and assistance prior to the commencement of the maternity leave and that Ms Sayce was still required for tasks that were not to be completed by her replacement.¹⁸ It is the Respondent's position that the meeting in Queensland was a consultant's meeting and Ms Sayce was not required to attend as she was an administrative staff member. Further it is refuted that all staff members were issued with new employment contracts, rather this was limited to two employees, and Mr Jones was unaware Ms Sayce had not received the correspondence containing the updated email signature block as this was distributed by a consultant and Ms Sayce did not raise the matter directly with him.

[23] On 21 August 2023, Ms Sayce made a request to Mr Jones to consider a flexible working arrangement to allow her to work one day per a week from home to allow her to manage her pregnancy related nausea, a condition she had suffered from for the duration of her pregnancy. Her request for a flexible work arrangement was refused¹⁹ and she says that other employees were permitted to work from home.²⁰ Mr Jones says that Ms Sayce's role was adapted to accommodate her inability to work on a computer screen all day due to her pregnancy related illness,²¹ and the request to work from home was therefore not able to be accommodated by the business as it was not possible for Ms Sayce to complete her modified role remotely as she was responsible for the in-person training of staff. It is further put by the Respondent that it does not have any employees with regular work from home arrangements.

[24] Ms Sayce took a personal leave day on 22 August 2023 for which the Respondent requested a medical certificate. Ms Sayce saw a medical professional and was advised to take four weeks personal leave.²² Ms Sayce says that she notified Mr Facciolo, an employee of the Respondent, of her absence however received notification from Mr Jones that she must inform him directly of any absence, treatment she says is different to other employees. The Respondent however contends that the request for a medical certificate was due to ongoing discussions surrounding the Applicant's health.

[25] On 31 August 2023, Ms Sayce informed Mr Jones of her resignation and requested to end her employment on 17 November 2023 with the remaining period of employment to be gardening leave. This was agreed to by the Respondent. Ms Sayce described gardening leave as being away from work and paid, as well as being available and contactable by telephone during the transition period.²³ The Respondent's conduct indicates it understood that having agreed to gardening leave it was able to request the Applicant to return and perform work for various reasons, including to cover staff shortages.²⁴

[26] On 7 September 2023, the Respondent offered to pay-out Ms Sayce's leave and close-off their employment relationship at the time of the next pay run. This offer was not accepted.

[27] On 13 September 2023, the Respondent requested Ms Sayce return to work due to staff shortages and requested a certificate of capacity to be provided prior to returning to work. In response Ms Sayce re-sent the medical certificate provided on 22 August 2023 which covered

the period to 25 September 2023. Ms Sayce says she did not “agree to vary the terms of our agreed cessation of employment as I was still being contacted by my team on my personal mobile about the transition and I wanted to fulfill (sic) these obligations. In addition, I would be disadvantaged from a tax perspective”.²⁵ Mr Jones explains his motive for the proposal as being related to the training of another, newly engaged employee: “the reason for making the proposal was that I had employed new staff members and was required to travel to Melbourne in order to assist and train in Ms Sayce's absence. Following Ms Sayce's rejection of my proposal to pay her out on 7 September 2023, the new staff member abandoned her employment and was terminated accordingly the following week”.²⁶ How the Respondent's motivation would be assisted by an early end to Ms Sayce's employment relationship is unclear.

[28] On 25 September 2023, the Respondent contacted Ms Sayce again and requested she provide a certificate of capacity prior to returning to work. Ms Sayce provided a further medical certificate covering the period to 9 October 2023. Mr Jones denies any contention made by Ms Sayce that the request to return to work was associated with an attempt to withhold her pay. The Respondent maintains that wanting to ascertain Ms Sayce's fitness for work was reasonable in the circumstances, “and this conduct cannot be seen to result in either a resignation, or constructive dismissal.”²⁷

[29] Ms Sayce sent Mr Jones a proposal to end her employment immediately on 28 September 2023 as she had taken her accrued personal leave. Mr Jones rejected her proposal and advised that she may take annual leave if she was unfit to return to work.²⁸

[30] The Respondent's case is in short that Ms Sayce voluntarily resigned on 31 August 2023 and purported to do so again on 28 September 2023 due to her inability to obtain clearance to return to work from medical leave.

[31] Ms Sayce's employment ended on 17 November 2023 and the final payment was made to her that day.

CONSIDERATION

[32] The matter for determination in this decision is whether Ms Sayce has been “dismissed” within the meaning given to that word by s.386 of the Act. The enquiry to be made in that regard is whether Ms Sayce's employment with MAG Apprenticeships was “terminated on the employer's initiative” (s.386(1)(a)), or whether she resigned from her employment “but was forced to do so because of conduct, or a course of conduct, engaged in by” MAG Apprenticeships (s.386(1)(b)).

[33] In *Mohazab v Dick Smith Electronics Pty Ltd (No 2)*²⁹ it was recognised that a termination will be at the initiative of the employer where the act of the employer results directly or consequentially in the termination of employment – that is had the employer not taken the action, the employee would have remained in employment; and the employment is not voluntarily left by the employee.”³⁰

[34] There is no claim on the part of Ms Sayce that her resignations came about in the heat of the moment and given there were two plainly they did not. Her case therefore turns on the

provisions of s.386(1)(b), about which the Full Bench said this in *Bupa Aged Care Australia Pty Ltd v Shahin Tavassoli*:³¹

“A resignation that is “forced” by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probably (sic) result of the employer’s conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element.”³²

[35] The actions of an employer in relation to a termination of employment are not the only points of consideration. It is also necessary to consider the circumstances giving rise to the termination; the seriousness of the issues involved; and the respective conduct of the employer and employee.³³

[36] Assessment of MAG Apprenticeships’ objection is assisted by the summary of the general principles enunciated recently by Deputy President Hampton in *Tao Yang v SAL HR Services Pty Ltd* (Tao Yang):

- The question as to whether there was a dismissal within the meaning of the FW Act is a jurisdictional fact that must be established by the Applicant;
- A termination at the initiative of the employer involves the conduct (or course of conduct) engaged in by the employer as the principal constituting factor leading to the termination. There must be a sufficient causal connection between the conduct and the resignation such that it “forced” the resignation;
- The employer must have engaged in some conduct that intended to bring the employment relationship to an end or had that probable result;
- Conduct includes an omission;
- Resignations that are clear and unambiguous may be treated on face value unless special circumstances are present which warrant the employer confirming the intention of the employee;
- Considerable caution should be exercised in treating a resignation as other than voluntary (forced) where the conduct of the employer is ambiguous and it is necessary to determine whether the employer’s conduct was of such a nature that resignation was the probable result such that the employee had no effective or real choice but to resign; and
- In determining the question of whether the termination was at the initiative of the employer, an objective analysis of the parties’ conduct is required.”³⁴

[37] Ms Coleman, acting for Ms Sayce summarised the basis of her submission that she was forced to resign in the following way:

“The applicant submits that on the evidence in these proceedings, the respondent's conduct since the applicant announced her pregnancy in May 2023 was objectively so different to how she was treated in the five years of employment prior and so egregious as to leave no other options than resignation, firstly to protect her health and the health of her baby ... and also because it was manifestly clear to the applicant that the employment relationship was irreparably broken. In summary, the evidence shows that she was excluded from a critical work meeting, she was never informed that someone had been appointed to a senior position which included taking part of her duties, she was denied a reasonable request to accommodate her pregnancy-related nausea even though at that time all of her duties could be performed remotely and she was generally treated more poorly by Mr Jones, including in the way that he addressed her and demanded medical certificates for the first time in her employment with Mr Jones.”³⁵

[38] The above submission identifies four potential elements of force, broadly sequenced and identified as follows: maternity leave arrangements and related changes to duties; poor treatment from Mr Jones; exclusion from the July 2023 meeting; and the request to partly work from home.

[39] Before turning to these matters, I note that the evidence shows an implosion of the working relationship proximate to 22 August 2023.

[40] Viewed in the overall context of the parties' relationship and irrespective of its basis, the need for personal leave around this time, and the working from home request made the day before, is a tipping point between an ongoing viable relationship and one that was not viable.

[41] Before then, in the period between June when Ms Sayce informed Mr Jones of her pregnancy and 22 August 2023, their working relationship had begun to deteriorate.

[42] In June, Mr Jones said when Ms Sayce informed him of her pregnancy that he already knew, but that:

“I did not bring this to the attention of the Applicant earlier as I believed she would tell me of her pregnancy in due course. However, prior to becoming aware of the Applicant's pregnancy, I noted that the repeated absences and changes in the Applicant's behaviour, and surmised that she may have been pregnant.”³⁶

[43] In itself, such is not an unusual response on the part of a manager and is plausible evidence on the part of Mr Jones.

Maternity leave arrangements and related changes to duties

[44] After her announcement, in June Ms Sayce, Mr Hudson and Mr Jones discussed advertising for a replacement for Ms Sayce for when she took maternity leave. The evidence includes that initially the business thought about moving a current employee, Charlotte Pritchett, into her role and then later they spoke of advertising externally for a replacement. Even then Mr Jones changed his mind and appointed another already employed person to take over Ms Sayce's duties, being Ms Eryn Muscat - Presti. Ms Sayce is critical of the change of

mind and the speed with which it came about. On 14 July 2023, Mr Jones had called her and told her:

“... that MAG & MelRec/QueRec will be split between himself & David, with Shaun taking over as the sole Director of MAG. Shaun also advised me that Eryn Muscat-Presti (who was located in Queensland) was taking over my duties while I was on maternity leave, and Shaun and I discussed how I would train her. I was not consulted on the change from Charlotte to Eryn in relation to my role, which was unusual as the hiring of internal employees within MAG was something I would usually have management of.”³⁷

[45] She was also surprised because of the announcement on 25 July 2023 that Ms Muscat – Presti would take over all duties in relation to MAG Apprenticeships immediately, and:

“I had assumed that I would continue in my role until 17 November (which was 4 months away), with a gradual training of and transition over to Eryn. This email on 25 July reinforced the feeling that I was being excluded from the business as a result of my pregnancy.”³⁸

Poor treatment from Mr Jones

[46] Part of the exclusion from the business referred to by Ms Sayce included her belief that Mr Jones had withdrawn contact after she had informed him of her pregnancy and stripped away her duties.

[47] By this time Ms Sayce’s duties had changed, although the extent to which this occurred is contested. Ms Sayce says she was told on 25 July 2023 that Ms Muscat – Presti would be taking over all her duties in relation to MAG Apprenticeships and would become the sole administrative support for the business.³⁹ She puts forward that she was “stripped” of her operations duties which were assigned Mr Dunning.⁴⁰ Ms Sayce also says that from 1 August 2023 she was “not given any work to do”,⁴¹ a claim which is rejected by Mr Jones,⁴² and which Ms Sayce herself accepts is incorrect.⁴³

[48] Ms Sayce points to Mr Santoro’s evidence as supporting her contention that her work was being taken away from her, however such evidence as given by Mr Santoro is relatively general in his witness statement and not substantially elaborated upon in his oral evidence. His oral evidence also confirms that while employed alongside Ms Sayce, he was not directly working with her or involved in her interactions with Mr Jones. Nonetheless he contends that Ms Sayce’s duties changed:

“I observed Ms Sayce being treated differently by Mr Jones after she announced her pregnancy in about May 2023. I observed her duties being taken from her (operations duties were assigned to Mr Dunning and administrative duties were assigned to Ms Muscat-Presti) and I observed that she was less included by Mr Jones in business decisions and discussions. I would describe her as being “frozen out” of the business by Mr Jones.”⁴⁴

[49] Mr Jones’ argues that he never treated Ms Sayce poorly:

“... nor was she stripped of her work duties or excluded from being part of the team. In my correspondence with the Applicant leading up to her taking leave, we were making arrangements for the Applicant’s maternity leave and return to work, and reimbursing the Applicant for her further education. Where appropriate, I enquired after her health and gave her well wishes with regards to her pregnancy. [and] we sought confirmation of the Applicant’s return to work, stating:

“Very excited for you Kat and looking forward to meeting the new addition to the Sayce clan. As also discussed we look forward to welcoming you back post leave and will await to hear the particulars of when and in what capacity you will be able to rejoin us.”⁴⁵

[50] On 25 July 2023, Mr Jones sent an email to Ms Sayce, Ms Muscat – Presti and others setting out a comprehensive plan for a “3-month handover” with its contents including the following:

“Subject: 3 month handover

Good morning,

Just a quick email in relation to the next 3 months plan and the handover prior to kat's maternity leave.

Effective immediately Eryn will be taking over all duties in relation to MAG apprenticeships and will become the sole admin support for the business. Until Kat leaves us to welcome bubs it will be her responsibility to train and expose Eryn to all aspects of MAG admin procedures, oversee everything that Eryn is doing and ensure it is being done correctly.

Obviously this will take time and mistakes will be made given the volume of learning Eryn will be undertaking and in a short period of time.

I expect that Eryn will be on the phone to Kat continuously throughout the working day and appreciate [K]at patience in assisting Eryn get up to speed.

Kat [w]e will still need you to assist both MAG and the labour hire businesses with any OHS/Workcover claims, look into the online timesheets from Quickbooks, assist Angela with any final requirements for GTO if required. Outside of that just purely helping Eryn and wrapping everything up as best as possible before you are out.

I would like everyone to be able to focus on their individual tasks without any distractions from other colleagues and their tasks. So unless it is admin related any other queries please politely ask them to discuss with direct manager or myself.

I will arrange in the coming weeks for either Eryn to come to Melbourne or (if able to fly and ok to fly) Kat to come to queensland (sic) for some solid 1 on 1 time with each other.

Very excited for you Kat and looking forward to meeting the new addition to the Sayce clan. As also discussed we look forward to welcoming you back post leave and will await to hear the particulars of when and in what capacity you will be able to rejoin us.

Hopefully both business are well and truly flying by then

Any queries regarding this email please contact me directly

Thank you

Shaun Jones”.⁴⁶

Exclusion from the July 2023 meeting

[51] Ms Sayce had informed the business of her maternity leave intentions on 21 July 2023 when she sought approval for leave commencing on 17 November 2023 and for a period of six months. A week later there was to be a staff meeting in Queensland starting on 27 July. Ms Sayce was asked by Mr Jones to book flights for all Melbourne staff with the exception of her. When she queried this two days later:

“He responded that it was a “sales meeting and only consultants were to attend” and that I wasn’t required. He also told me that my replacement, Eryn, would not be attending the meeting.”⁴⁷

[52] Ms Sayce learned later that Ms Muscat – Presti in fact did attend the meeting, which Mr Jones concedes, arguing that she attended “solely for her to take minutes of the meeting”⁴⁸ a matter which is corroborated in the witness statement of Mr Santoro who gave evidence on behalf of Ms Sayce. At the time Ms Muscat – Presti worked in Queensland with Ms Sayce located in Melbourne.

Request to partly work from home

[53] The denial for Ms Sayce to work from home or to otherwise be given a flexible work arrangement follows a request from Ms Sayce to Mr Jones on 21 August 2023 that he permit her to work one day per week from home as she was still experiencing “low grade but constant pregnancy nausea”. Ms Sayce says about her request that she:

“asked to work one day per week from home as I was still experiencing low grade but constant pregnancy related nausea which made it difficult for me to travel to the office, and it was uncomfortable for me to perform my duties in an open work environment”⁴⁹

[54] Ms Sayce’s recollection when Mr Jones refused the request was that:

“he told me instead that “he didn’t pay people to work from home”. He further suggested I should reduce my hours or use personal leave that I had accrued if I was unwell. This conversation ended abruptly and I experienced a panic attack while at work”.⁵⁰

[55] In submissions for Ms Sayce, her lawyer Ms Coleman put forward that “she was denied a reasonable request to accommodate her pregnancy-related nausea even though at that time all of her duties could be performed remotely”.⁵¹

[56] Mr Jones’ recollection about his reasons for declining the request, which he characterises as a work from home arrangement differs from Ms Sayce’s. While he accepts that her duties had changed, he does not go so far as to say that all of her duties could be performed remotely, putting forward:

“The Respondent was not able to facilitate a work from home arrangement for the Applicant. I further state that the reason for this was that the Applicant’s work activities had changed, and it was not possible for her to complete the new role remotely. As the Applicant had spoken with me and advised that she was unable to look at computer screens for any period of time without feeling sick, she was transitioned to training and working directly with the internal support consultants. This role did not include any direct computer work but did require the Applicant to be physically present in order to complete her duties. I discussed with the Applicant that, if she was unwell and unable to complete her work duties, she had personal leave available that she would be able to utilise.”⁵²

[57] While noting these submissions, which extend to Ms Sayce’s duties, there is a lack of clarity in the evidence about her precise duties when she made the request. Plainly some had been reallocated to Ms Muscat – Presti, with Mr Dunning undertaking others as well. However, Ms Sayce does not consider those duties that were left precluded granting her request. For example, she puts forward that training Ms Muscat – Presti in the duties she had performed was not a full time role⁵³ and that it was not true to say that her role was transitioned to train and work with the internal support consultants as there were none at the time.⁵⁴ However she accepts that her claim she had not been given any work to do from 1 August 2023 is wrong. It is also unclear from the evidence that all of Ms Sayce’s duties could be performed remotely.

[58] Ms Sayce notes about the refusal that prior to announcing her pregnancy she had been permitted to work from home if required.⁵⁵ After noting that Ms Sayce had previously reported to Mr Hudson and not him, Mr Jones’ response is that working from home arrangements were not a practice facilitated within the businesses he controlled and that none of his employees had any regular work from home arrangements.⁵⁶

[59] The subject of working from home had arisen over a year earlier on 22 July 2022 and was not discussed only on 21 August 2023. On the earlier date Ms Sayce had written to Mr Hudson detailing issues associated with her perception of the workplace culture and a need for assistance with her caring responsibilities. Part of her correspondence included this request:

“During the school holidays I have the kids one full week. Most of the time I am ok with care but if I can during this week have the ability to WFH (with the exception of Monday/Tuesday) it would be appreciated.”⁵⁷

[60] Mr Hudson, then the Victorian Director, responded on 27 July 2022 suggesting she may wish to consider moving to a senior recruitment consultant role, as well as rounding out that working from home was not an option:

“Working from home is not and will not be a viable option in our business, we are just too busy, however as you well know, consultants do enjoy more flexibility regarding start and finish times as they are required to have their phones on and work extra hours if and when it is required. This will obviously apply to you also (school drops and collections etc. you will be able to comfortably work your work days around this). All we ask is that you let us know what way your days are going.

We see the base wage for you for this role at \$100,000 package (no other MAG consultant gets anywhere near this as you know but given your experience and loyalty to us, we feel this is very fair) plus you will receive a commission structure to enable you to potentially earn more than what you are on now and in a role that will give you the satisfaction you are looking for. Once you receive your region to manage, you will also receive the current apprentices working for those clients. We envisage you will inherit between 20-30 apprentices which will probably put you straight into comms territory but it will be on you to manage and expand your region. We fully believe that with two great MAG electrical consultants we can quite easily grow each desk to be running at 50+ apprentices per week and generating up to 2000+ hours per week.”⁵⁸

[61] Mr Jones points to the conversation he had with Ms Sayce on 21 August 2023 as a turning point in their relationship:

“My relationship with the Applicant was completely amicable up until the telephone call on 21 August 2023 ... The Applicant became enraged that I would not permit a working from home arrangement. This was denied on the basis she was to be available to train staff in person. I refer to H, wherein the advertisement was forwarded to the Applicant for her input as she would be doing the hiring and training process for the new staff member in Melbourne. I advised the Applicant that the business would not be able to send staff to her house for training. The Applicant then became more frustrated and began yelling “I can’t look at the fucking screen for more than two minutes and you’re not willing to at least let me be in the comfort of my own home”. I informed the Applicant that if it was in fact the screen making her feel poorly, then being at home would not solve this problem, however training the internal staff in person would not require her to look at the screen. I also offered to transfer the Applicant to part time employment due to her health and informed her again that I could not permit working from home. As the Applicant would have no tasks that could be completed remotely, this was not a viable option, and note all the prior indulgences afforded to her by the companies in good faith.

The Applicant told me that she would not consider part time employment as she wanted all of her money prior to her maternity leave commencing on 17 November 2023. I advised the Applicant that as her employer, I have a duty of care toward her and that if she was feeling as badly as she was stating, that we would need to come up with another arrangement as I could not ignore what she had told me.”⁵⁹

[62] Mr Jones’ refusal to consider a working from home arrangement precipitated the personal leave Ms Sayce took the following day, 22 August 2023. When she notified the leave she advised Mr Facciolo, believing that to be consistent with a direction given by Mr Jones to

a range of staff including Ms Sayce on 1 August 2023. The same correspondence – to a broad range of staff – also reiterated that “[w]e do not permit working from home arrangements at this time”.⁶⁰ Mr Jones then texted her to require that future personal leave absences needed to be notified to him. Ms Sayce is critical of Mr Jones for what he communicated in this exchange, which in turn precipitated a further and more lengthy absence:

“I experienced a second panic attack after this exchange, and went to my doctor who provided a medical certificate for 4 weeks for work related stress and anxiety as a result of the physical and psychological impact of the discrimination and poor treatment by Mr Jones. It was not because of the pregnancy related nausea I had been managing since becoming pregnant”.⁶¹

[63] Ms Sayce also claims that Mr Facciolo had a working from home arrangement and relies on Mr Santoro’s evidence to support her belief. Mr Santoro’s written witness statement included that Mr Facciolo worked from home every Thursday afternoon, but accepted in his oral evidence that Mr Facciolo’s absences from the office could have been for other reasons. Mr Jones rejects that Mr Facciolo worked from home.⁶² Mr Facciolo’s statutory declaration, accepted without oral evidence, puts forward the following as an explanation for his absences from the office:

“Part of my role involves visiting construction sites at least one (1) day per week, which I typically do on Thursdays. This is a hybrid role in which I was required to visit various sites, and was not a working from home arrangement. In addition to this, I have been required to fly to the Gold Coast for internal staff training at our Queensland office.”⁶³

Resignation

[64] When Ms Sayce resigned on 31 August 2023 she did so by email with the following content:

“Hi Shaun & Huddo,

Please see attached a new medical certificate with an extension to my personal leave.

There have been a number of factors contributing to my need to take leave and it's important to me at the moment that I focus on my health and wellbeing.

As I can not confirm when I will be cleared to return to work I would like to propose an option of resigning from my role at MAG Apprenticeships and being placed on gardening leave up to my intended maternity leave date of 17/11/23. During this time I would remain on my current salary, and will be entitled to a payout of accrued leave upon termination. In return I will remain available to you when requested.

I look forward to hearing your thoughts and please can communication remain confidential via email or text. I appreciate your understanding.

R,

Kat”.⁶⁴

[65] Within the hour the Directors, Mr Jones and Mr Hudson, had accepted the resignation and the request for paid “garden leave”, with the approval in these terms:

“Hi Katrina,

Thanks for your email.

We accept your resignation.

Your accrued annual leave will be paid out on the 17th of November 2023.

Until then you will be paid as per your current terms of employment and paid on a fortnight basis.

We also accept your proposal of commencing gardening leave with immediate affect (sic) until your cessation date of the 17th of November 2023 and if required during work hours you make yourself available to answer any queries our staff may have.

We wish you well with your future endeavours.

Kind regards
Shaun Jones
Managing Director
MAG Apprenticeships”.⁶⁵

[66] The approval of the proposed paid “garden leave” is generous: at the time the leave was approved there were 11 weeks to run on the notice period.

[67] Ms Sayce complains about her post-resignation treatment in several ways: that her personal effects were boxed-up and were to be delivered to her and that she was required to return her laptop and work phone; and that her staff knew of her resignation before she was able to tell them. She was distressed by those actions.

[68] She also believes that a request during September for her to return to work was for an ulterior motive. Mr Jones had requested she may be required to return to work, but that she needed to provide a certificate of capacity before doing so. As the request was within the four-week period covered by an earlier certificate she considered the earlier certificate to cover her situation; however:

“36. Around this time, I had a conversation with David who told me that Shaun had sought advice from Employsure, who had advised Shaun that if an employee is on gardening leave and they refuse to return to work if requested, then their pay can be withheld.

37. Recalling the way I was treated on 2 September 2023 (when Shaun confiscated my work phone and laptop, and prohibited me from returning to the office to collect my

personal belongings), I concluded that Shaun was asking me to return to work, knowing I was too unwell to return, only to provide justification to stop paying me when I could not return.”⁶⁶

[69] Mr Jones rejects the characterisation of these matters and the ascribed motive, putting forward that the business was suffering staff shortages for several reasons. Ms Sayce’s contention of things said to her by Mr Jones about legal advice he had received was not put to him in cross-examination.

[70] On 28 September 2023, Ms Sayce communicated a further resignation to Mr Jones:

“Hi Shaun,

Hope all is well.

I know you previously accepted my request to be placed on gardening leave until my maternity leave date (17/11/23) and was prepared to pay my salary up until this time (which I was very grateful for) however I am still uncertain when I will be cleared to return to work.

I understand you have requested I return due to staff shortages and as I can’t commit to a return date would you be willing to accept the below termination payout that will end my employment effective immediately?

- 1 week personal leave to cover 25/09 to 29/09
- 4 weeks in lieu of my notice
- All accrued annual leave including hours missed from pay period ending 24/9/23.

I would really like to see my time at MAG closed amicably so I do hope you see this as a fair and reasonable proposal.

If you do agree to this I would really appreciate the payment to be processed across two pay runs so I am not disadvantaged by payroll tax.

I look forward to your response.

Kind regards,

Kat”.⁶⁷

[71] Mr Jones responded the following day, rejecting the proposal:

“Hi Katrina,

Thank you for your email and I hope you are feeling better.

I do not agree to your proposal and as stated in prior emails /texts we are currently experiencing staff shortages and require all available staff on payroll to work if available.

Of course we do not expect anyone who is unfit for work to come in hence why I have requested a certificate of capacity to ensure your health and well-being are looked after.

Although you have used up your remaining sick leave you have plenty of stored annual leave if you are unable to attend work we can utilise that if you wish.

Alternately as we have already passed the required 4 week notice period I can terminate your employment at the completion of next weeks sick leave and pay out annual leave.

I don't feel that requiring someone to work for money they wish to receive is in any way unacceptable and therefore hope you are able to complete your time with us amicably.

Regards".⁶⁸

[72] Mr Jones then notes in his evidence that Ms Sayce's employment with MAG Apprenticeships ended on 17 November 2023.

[73] I accept from the evidence there was only one effective resignation, being the one given by Ms Sayce on 31 August 2023. In effect Ms Sayce's 28 September 2023 communication was a proposal to modify the terms of the already operative notice of termination of employment she had given MAG Apprenticeships on 31 August 2023. The Respondent was under no obligation to accept the proposal and it did not.

Whether forced resignation

[74] For the Commission to find there has been a forced resignation there must be a finding that the asserted act or acts of the employer results directly or consequentially in the termination of the employer. Further, there must be a sufficient causal connection between the conduct and the resignation such that it "forced" the resignation. There must be some conduct that intended to bring the employment relationship to an end or had that probable result.

[75] The evidence in these important regards is mixed.

[76] Observably the parties' working relationship deteriorated sharply in the months before 31 August 2023 when Ms Sayce notified her resignation. Mr Jones behaviour to her was likely colder than in the months before May or June. There was most certainly some hopping around about who would replace Ms Sayce after she commenced maternity leave, and she was plainly out of the loop not only about her replacement but also when that person would commence.

[77] For Ms Sayce to be informed in July that Ms Muscat – Presti would be taking over her role "effective immediately" when there were at least three months to run before she took maternity leave would inevitably raise in the Applicant's mind that she was being frozen out and probably because of her pregnancy. On the other hand, the business is small and its options

to deal with staff vacancies, even a temporary one, were likely limited. To that end the decision to allocate Ms Sayce's duties or some of them to Ms Muscat – Presti or Mr Dunning and to do so earlier rather than later has some logic and is thus defensible, even if the lack of consultation with Ms Sayce is not. Those matters though do not lead to a finding that resignation was an intended or probable result.

[78] While the refusal to allow Ms Sayce to work from home one day a week could be viewed as uncaring and inflexible, the decision has consistency with the businesses' circumstances, methods of work and policies. The company's policy on the subject was made absolutely clear on 27 July 2022 and again on 1 August 2023. While there could and should have been rational discussion and consideration of the subject by Mr Jones his refusal is unable to be characterised as being intended to bring the employment relationship to an end or having that probable result. He was reacting to a circumstance and made a poor and uninformed decision. While his decision-making may have consequences for him and MAG Apprenticeships if the merits of this matter were ever considered I am not able to find that it founds a claim of forced resignation or is an element in such a finding.

[79] The claim that Ms Sayce had her work stripped away from her is poorly made out and the best that may be said about it is that her work changed after June and probably because of the decision to switch Ms Muscat – Presti and Mr Dunning into her duties earlier rather than later. These decisions are likely attributable to a desire by Mr Jones to protect the business and swing in replacements for Ms Sayce as soon as he could. The email from him to Ms Sayce, Ms Muscat – Presti and others dated 25 July 2023 sets out a comprehensive plan for a "3-month handover" Overall, the email is measured, plausible and far from a possible characterisation of being intended to bring about Ms Sayce's resignation or having that result. While accepting that elements of the commitments made in the email may not have been followed through (for example "Kat to come to queensland (sic) for some solid 1 on 1 time with each other") I am not able to find that in the 6 weeks between the sending of the email and Ms Sayce's resignation either that what was outlined was an inadequate body of work for someone in Ms Sayce's position or that the committed duties were stripped away to the point that resignation was the only option.

[80] The exclusion of Ms Sayce from the Queensland staff meeting is answered by Mr Jones with his response that it was intended to be a meeting for consultants and that Ms Sayce was not required as she was an administrative staff member.⁶⁹ Against Mr Jones' narrative is Ms Sayce's evidence that she was told by Mr Jones that Ms Muscat – Presti would not be attending the meeting.⁷⁰ Further, there is evidence both that Ms Sayce attended a meeting, held in March 2023 which fitted her administrative responsibilities and that Ms Muscat – Presti attended the July 2023 meeting as the result of a "last-minute decision", the "purpose of which was solely for her to take minutes of the meeting".⁷¹ I accept that Mr Jones ruled out attendance of Ms Sayce at the July 2023 meeting as it was a consultants meeting and she worked in an administrative role.⁷² That Ms Muscat – Presti was invited at the last minute to take minutes is a matter to be taken into account by me, however it does not change my ultimate finding. Again, I am unable to find that this element of Ms Sayce's case reasonably shows her resignation was forced.

[81] This decision is concerned with the conduct or course of conduct of MAG Apprenticeships such that it intended to bring the employment relationship to an end or had that probable result.

[82] For the reasons explained I am not satisfied that the matters relied upon by Ms Sayce either individually or in combination reasonably found the proposition that she had no effective or real choice but to resign.

[83] Some of the conduct complained of before 22 August 2023 is trivial and certainly not established as sufficient to found a forced resignation finding.

[84] For example, beyond the matters referred to by me in detail Ms Sayce claims Mr Jones began referring to her as “Katrina” instead of the diminutive “Kat” and that following the July meeting in Queensland she was not invited to amend her email signature block. These matters are adequately answered in Mr Jones’s evidence. About these matters he says that he used different names and nicknames for Ms Sayce at various times,⁷³ and pertinent to the email signature block another employee volunteered in the consultants’ meeting to create and send a revised signature block but apparently omitted to send it to Ms Sayce.⁷⁴

[85] I now consider the conclusions which may be drawn from the evidence and submissions about Ms Sayce’s four heads of complaint which she says forced her resignation: maternity leave arrangements and related changes to duties; poor treatment from Mr Jones; exclusion from the July 2023 meeting; and the request to partly work from home.

[86] There is little question from the evidence that Mr Jones and MAG Apprenticeships handled the decision over Ms Sayce’s maternity leave replacement poorly. There was indecisiveness over who it would be, coupled with a lack of consultation. The timing of the decision to have Ms Muscat – Presti take over Ms Sayce’s duties “effective immediately” lacks a persuasive explanation by Mr Jones beyond that she was already employed and that “it was always the intention for Ms Muscat-Presti to start early so that Ms Sayce could provide adequate training and assistance prior to her maternity leave”.⁷⁵ It may well have been a sensible decision to bring her in three months early for business continuity purposes, however that was not explained to Ms Sayce at the time. To simply tell Ms Sayce, without consultation or planning as to the consequences was discourteous. In context though the decision was unlikely one that would be seen by other staff as a demotion of Ms Sayce. Her contention that she was not assigned any work to complete from 1 August 2023 was accepted by her to be wrong and to the extent that it is actually a contention that her work duties changed or reduced from that time is obviously directly related to the assignment of Ms Muscat – Presti to her role and the reallocation of some duties to Mr Dunning. Inevitably her workload would reduce, however I am not persuaded that either that it was stripped or that such change as occurred should objectively be a cause of a resignation.

[87] While Ms Sayce had a right to feel aggrieved by these decisions, I am unable to find there is a sufficient causal connection between the conduct and her resignation such that it “forced” the resignation.

[88] While I am satisfied that Mr Jones’ acted differently to Ms Sayce after she announced her pregnancy, I do not find that his treatment of her was poor overall. His reassignment of

duties could have been undertaken better, however that observation is far from an adverse finding on the subject. While the conversation on 21 August 2023 was likely heated there is no evidence of a pattern of such conversations, and it is likely Ms Sayce contributed to the heat as much as Mr Jones.

[89] The failure to invite Ms Sayce to the Queensland staff meeting in July 2023 is answered by Mr Jones’s evidence that she was not invited as it was a consultants’ meeting and she worked in an administrative role. Again, I do not find that this was conduct sufficient for there to be no effective or real choice on the part of Ms Sayce but to resign.

[90] The reasons for Ms Sayce’s flexible work request are put forward as being connected with her pregnancy, as set out above; however the reason for the personal leave from the following day is connected with her reaction to Mr Jones’ treatment toward her. In particular, she argues that “Mr Jones’ assertion that I took leave on 22 August 2023 on account of my “ongoing illness” is incorrect. I took leave on 22 August 2023 as a result of the physical and psychological impact of the discrimination and poor treatment by Mr Jones toward me as a result of my pregnancy”⁷⁶

[91] Both parties put forward versions of the critical conversation on 21 August 2023 in which the flexible work request was made which suggests the conversation was heated and nasty. However, of importance beyond that characterisation is the response given by Mr Jones, including to the effect that Ms Sayce’s duties could not be performed by her at home. Even if that contention was overstated, I do not accept that such would be sufficient for a finding that there was no effective choice but to resign. The Respondent’s views about working from home arrangements had been known since for over a year since 27 July 2022 and were reiterated generally on 1 August 2023. Its views are not unreasonable in the context of its operations or scale of its business.

[92] Ms Sayce complains about the Respondent’s conduct both after 21 August 2023 when the working from home request was refused, and 31 August 2023 when the first resignation was given. Her complaint about this intervening period relates to what she was required to do in the way of documenting her absence. I am unable to find that any such requests on the part of MAG Apprenticeships of Mr Jones were inappropriate or oppressive in any respect or more particularly that any were directed at bringing the employment relationship to an end or having that probable result. The same may be said about his communications after 31 August 2023.

[93] In overall context there were tensions in the employment relationship before 21 August 2023. Decisions affecting Ms Sayce had been poorly made and communicated by MAG Apprenticeships and she had a right to be aggrieved. The heated discussion between the two on 21 August 2023 about her working from home request and the documentation requests made in the following few days were a tipping point that led directly to her resignation. While signs of a difficult relationship which may be coming to an end, I do not accept though that the resignation was forced.

[94] The proximity of maternity leave and Ms Sayce’s request for “garden leave” which was agreed by the Respondent reinforce that hers was not a forced resignation. Ms Sayce had a choice to wait before ending her employment until her scheduled maternity leave commenced. The workplace conditions were not so dire as to remove that possibility as a viable choice for

her to take. Alternatively, Ms Sayce could take other forms of leave until her scheduled maternity leave commenced, or she could have applied to bring the leave forward.

[95] The application for an approval of “garden leave” reveals that Ms Sayce indeed had options other than resignation. I cannot see from the evidence how a person who seeks and is granted 11 weeks paid “garden leave” to take them up to the commencement of 6 months maternity leave is possibly in a situation where they are left with no effective or real choice but to resign. If anything, the request for an extended notice period coupled with “garden leave” was a negotiation term to which MAG Apprenticeships acceded. It provided both with space for a relationship which had become mutually frustrating. Having put it forward, Ms Sayce was exercising her choice about separation from her employer. There was no reason, other than freely given choice, as to why an 8-month break would not assuage each’s mutual aggravation.

CONCLUSION

[96] It follows that no finding of forced resignation can be made by me and as a consequence I must find that Ms Sayce was not “dismissed” within the meaning of the Act.

[97] An order dismissing Ms Sayce’s general protections involving dismissal application is issued at the same time as this decision.



COMMISSIONER

Appearances:

Ms S. Coleman, solicitor for the Applicant.
Mr R. Tooth, of Counsel for the Respondent.

Hearing details:

2024.
Melbourne (via Microsoft Teams):
January 15 and 24.

Printed by authority of the Commonwealth Government Printer

<PR771194>

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- ¹ *ERGT Australia v Mr Kevin Govender* [2021] FWCFB 268, [48].
- ² *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152, [67]; *Lipa Pharmaceuticals Ltd v Marouche* [2023] FWCFB 101, [23].
- ³ Following the decision in *Lipa Pharmaceuticals Ltd v Marouche* [2023] FWCFB 101 the Commission changed its case management practices from 1 June 2023 for General Protections cases involving dismissal where certain jurisdictional issues arise.
- ⁴ *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152, [54].
- ⁵ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [4], appearing at Digital Hearing Book p.17.
- ⁶ Exhibit A4, *Applicant Outline of Submissions*, filed 22 December 2023, [12], appearing at Digital Hearing Book p.46.
- ⁷ Exhibit R3, *Statutory Declaration of Shaun Jones declared 15 December 2023*, filed 15 December 2023, see for example [12], [33] – [35], [42] and [45], appearing at Digital Hearing Book pp.132, 134 – 135 and 136.
- ⁸ *Ibid*, [46], appearing at Digital Hearing Book p.136.
- ⁹ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [7], appearing at Digital Hearing Book p.17.
- ¹⁰ *Ibid*, [8], appearing at Digital Hearing Book p.17.
- ¹¹ Exhibit R3, *Statutory Declaration of Shaun Jones declared 15 December 2023*, filed 15 December 2023, [14], appearing at Digital Hearing Book p.132.
- ¹² *Ibid*, [16], appearing at Digital Hearing Book p.132.
- ¹³ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [10], appearing at Digital Hearing Book p.17.
- ¹⁴ Exhibit A4, *Applicant Outline of Submissions*, filed 22 December 2023, [13], appearing at Digital Hearing Book p.46.
- ¹⁵ Exhibit R3, *Statutory Declaration of Shaun Jones declared 15 December 2023*, filed 15 December 2023, [17], appearing at Digital Hearing Book p.132; Exhibit R4, *Statutory Declaration of Shaun Jones declared 4 January 2024*, filed 5 January 2024, [25(b)], appearing at Digital Hearing Book p.208.
- ¹⁶ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [12], appearing at Digital Hearing Book p.17.
- ¹⁷ *Ibid*, [12] and [15], appearing at Digital Hearing Book p.17.
- ¹⁸ Exhibit R3, *Statutory Declaration of Shaun Jones declared 15 December 2023*, filed 15 December 2023, [22], appearing at Digital Hearing Book p.133.
- ¹⁹ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [19], appearing at Digital Hearing Book p.17.
- ²⁰ Exhibit A4, *Applicant Outline of Submissions*, filed 22 December 2023, [13], appearing at Digital Hearing Book p.46.
- ²¹ Exhibit R7, *Respondent Outline of Submissions on Jurisdictional Objection*, filed 15 December 2023, [14], appearing at Digital Hearing Book p.121.
- ²² Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [23] – [25], appearing at Digital Hearing Book p.19.
- ²³ *Ibid*, [27], appearing at Digital Hearing Book p.19; Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, Attachment – Email and phone correspondence, appearing at Digital Hearing Book p.27.
- ²⁴ For example, see Exhibit R3, *Statutory Declaration of Shaun Jones declared 15 December 2023*, filed 15 December 2023, [39], appearing at Digital Hearing Book p.135; Exhibit R4, *Statutory Declaration of Shaun Jones declared 4 January 2024*, filed 5 January 2024, [30], appearing at Digital Hearing Book p.209.
- ²⁵ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [31], appearing at Digital Hearing Book p.20.
- ²⁶ Form F8A, *Response to General Protections Application Involving Dismissal*, filed 1 December 2023, Attachment Statement of Shaun Jones on behalf of the Trustee for MAG Unit Trust t/as MAG Apprenticeships, [28], appearing at Digital Hearing Book p.78.

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- ²⁷ Exhibit R8, *Respondent Further Outline of Submissions in Reply*, filed 5 January 2024, [16], appearing at Digital Hearing Book p.195.
- ²⁸ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [39] – [40], appearing at Digital Hearing Book p.17.
- ²⁹ (1995) 62 IR 200, 205.
- ³⁰ Ibid.
- ³¹ [\[2017\] FWCFB 3941](#).
- ³² Ibid, [47].
- ³³ *Pawel v Advanced Precast Pty Ltd* (unreported, AIRCFB, Polites SDP, Watson SDP and Gay C, 12 May 2000).
- ³⁴ [\[2023\] FWC 1325](#), [53].
- ³⁵ Transcript, PN 890.
- ³⁶ Exhibit R3, *Statutory Declaration of Shaun Jones declared 15 December 2023*, filed 15 December 2023, [13], appearing at Digital Hearing Book p.132.
- ³⁷ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [9], appearing at Digital Hearing Book p.17.
- ³⁸ Ibid, [13], appearing at Digital Hearing Book p.18.
- ³⁹ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [9] – [13], appearing at Digital Hearing Book p.18; see also Exhibit R3, *Statutory Declaration of Shaun Jones declared 15 December 2023*, filed 15 December 2023, [22], appearing at Digital Hearing Book p.133.
- ⁴⁰ Exhibit A2, *Witness Statement of Katrina Sayce (pages 38-43 of Digital Hearing Book)*, filed 22 December 2023, [22] appearing at Digital Hearing Book p.40.
- ⁴¹ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [18], appearing at Digital Hearing Book p.18.
- ⁴² Form F8A, *Response to General Protections Application Involving Dismissal*, filed 1 December 2023, Attachment Statement of Shaun Jones on behalf of the Trustee for MAG Unit Trust t/as MAG Apprenticeships, [16], appearing at Digital Hearing Book p.77.
- ⁴³ Transcript, PN 210.
- ⁴⁴ Exhibit A3, *Statutory Declaration of Daniel Santoro*, filed 22 December 2023, [4], appearing at Digital Hearing Book p.51.
- ⁴⁵ Exhibit R3, *Statutory Declaration of Shaun Jones declared 15 December 2023*, filed 15 December 2023, [35], appearing at Digital Hearing Book p.135.
- ⁴⁶ Ibid, [22], appearing at Digital Hearing Book p.147.
- ⁴⁷ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [12], appearing at Digital Hearing Book p.18.
- ⁴⁸ Exhibit R3, *Statutory Declaration of Shaun Jones declared 15 December 2023*, filed 15 December 2023, [25], appearing at Digital Hearing Book p.133.
- ⁴⁹ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [19], appearing at Digital Hearing Book p.18.
- ⁵⁰ Ibid, [19], appearing at Digital Hearing Book pp.18 – 19.
- ⁵¹ Transcript, PN 890.
- ⁵² Exhibit R3, *Statutory Declaration of Shaun Jones declared 15 December 2023*, filed 15 December 2023, [30], appearing at Digital Hearing Book p.134.
- ⁵³ Exhibit A2, *Witness Statement of Katrina Sayce (pages 38-43 of Digital Hearing Book)*, filed 22 December 2023, [22], appearing at Digital Hearing Book p.40.
- ⁵⁴ Ibid, [30], appearing at Digital Hearing Book p.41.
- ⁵⁵ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [20], appearing at Digital Hearing Book p.19.

- ⁵⁶ Exhibit R3, *Statutory Declaration of Shaun Jones declared 15 December 2023*, filed 15 December 2023, [31] – [32], appearing at Digital Hearing Book p.134.
- ⁵⁷ Ibid, Attachment A, appearing at Digital Hearing Book p.138.
- ⁵⁸ Ibid, Attachment B, appearing at Digital Hearing Book p.141.
- ⁵⁹ Ibid, [46] – [48], appearing at Digital Court Book pp.136 – 137.
- ⁶⁰ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, Attachment Email and phone correspondence, appearing at Digital Hearing Book p.26.
- ⁶¹ Exhibit A2, *Witness Statement of Katrina Sayce (pages 38-43 of Digital Hearing Book)*, filed 22 December 2023, [33], appearing at Digital Hearing Book p.42
- ⁶² Exhibit A3, *Statutory Declaration of Daniel Santoro*, filed 22 December 2023, [6], appearing at Digital Hearing Book p.52; Transcript, PN 535 – 539.
- ⁶³ Exhibit R1, *Statutory Declaration of Michael Facciolo*, filed 5 January 2024, [3], appearing at Digital Hearing Book p.199.
- ⁶⁴ Exhibit A2, *Witness Statement of Katrina Sayce (pages 38-43 of Digital Hearing Book)*, filed 22 December 2023, appearing at Digital Hearing Book p.27.
- ⁶⁵ Ibid.
- ⁶⁶ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, appearing at Digital Hearing Book p.20.
- ⁶⁷ Exhibit R3, *Statutory Declaration of Shaun Jones declared 15 December 2023*, filed 15 December 2023, Attachment N, appearing at Digital Hearing Book p.185.
- ⁶⁸ Ibid, appearing at Digital Hearing Book p.186.
- ⁶⁹ Ibid, [19] – [20], appearing at Digital Hearing Book p.133.
- ⁷⁰ Exhibit A1, *Witness Statement of Katrina Sayce (pages 17-20 of Digital Hearing Book)*, filed 20 November 2023, [12], appearing at Digital Hearing Book p.18.
- ⁷¹ Form F8A, *Response to General Protections Application Involving Dismissal*, filed 1 December 2023, Attachment Statement of Shaun Jones on behalf of the Trustee for MAG Unit Trust t/as MAG Apprenticeships, [13] appearing at Digital Hearing Book p.76.
- ⁷² Ibid, [10], appearing at Digital Hearing Book p.76.
- ⁷³ Exhibit R4, *Statutory Declaration of Shaun Jones declared 4 January 2024*, filed 5 January 2024, [25], appearing at Digital Hearing Book p.208.
- ⁷⁴ Ibid, [38], appearing at Digital Hearing Book p.213.
- ⁷⁵ Form F8A, *Response to General Protections Application Involving Dismissal*, filed 1 December 2023, Attachment Statement of Shaun Jones on behalf of the Trustee for MAG Unit Trust t/as MAG Apprenticeships, [11], appearing at Digital Hearing Book p.76.
- ⁷⁶ Exhibit A2, *Witness Statement of Katrina Sayce (pages 38-43 of Digital Hearing Book)*, filed 22 December 2023, [29], appearing at Digital Hearing Book p.41.