



DECISION

Fair Work Act 2009
s.365—General protections

Kerri Anne Hughes

v

Alcoa Portland Aluminium Pty Ltd
(C2023/5849)

COMMISSIONER ALLISON

MELBOURNE, 5 JANUARY 2024

General protections application to deal with alleged contraventions involving dismissal – jurisdictional objection – whether Applicant was dismissed within the meaning of the Act – does expiry of a time-limited or outer-limits contract terminate the employment relationship

1. What this Decision is about

[1] This decision relates to an application filed by Ms Kerrie Anne Hughes (**Ms Hughes or the Applicant**) under s.365 of the *Fair Work Act 2009* (**the FW Act**). The application is for the Fair Work Commission to deal with a general protections dispute involving dismissal. Ms Hughes alleges that she was unlawfully dismissed in contravention of ss 340 and 351 of the Act by Alcoa Portland Aluminium Pty Ltd (**Alcoa or the Respondent**).

[2] Alcoa has raised a jurisdictional objection to the Commission proceeding to deal with the dispute – namely, that Ms Hughes was not dismissed for the purposes of s.365 of the FW Act. Alcoa argues that Ms Hughes was engaged on a ‘fixed-term’ or ‘time-limited’ contract which had reached its expiry date, and accordingly, her employment ended by reason of agreement between her and Alcoa, not by dismissal. If no dismissal took place the Commission has no jurisdiction to progress the dispute under s.368 of the FW Act and the application must be dismissed.¹

[3] Accordingly, this decision considers whether the Applicant was dismissed within the meaning of the FW Act.

[4] For the reasons set out below, having considered the circumstances surrounding this matter and the submissions and evidence before me, I have ultimately determined that Ms Hughes was not dismissed within the meaning of the FW Act. I have found that the employment contract and the employment relationship came to an end as a result of a genuine agreement between the parties that the time-limited employment contract expire on a particular date. The consequences of this finding are confirmed at the end of this decision.

2. Background based upon the submissions and evidence before the Commission

[5] The parties to this matter sought that the Commission deal with the jurisdictional objection on the papers, and I considered it was appropriate to do so. Accordingly, I have made my determination based on the written material filed with the Commission. In addition to the original application (F8 Form) and response (F8A Form), both parties provided written submissions. The Respondent also provided a witness statement from Human Resources Manager, Lester Rozario. The Applicant was content to allow Mr Rozario's statement to go into evidence unchallenged. Accordingly, there are no contested facts in this matter. In the following paragraphs, I have set out the relevant procedural history leading to the Applicant's termination.

[6] On 22 August 2022, the Applicant commenced employment as a 'fixed-term' or 'time-limited' employee with the Respondent in the role of Operator. Her contract of employment dated 26 July 2022 relevantly provides the following:²

"We have pleasure in offering you a fixed term employment contract with Portland Aluminium Pty Ltd (the Company) on the terms set out in this letter.

*Your appointment is to the full-time position of **Operator** at Portland Aluminium, effective 22 August 2022. Unless terminated earlier in accordance with the terms of this contract, your employment terminates on 5 March 2023, when this contract will cease. You or the Company may terminate your employment prior to 5 March 2023 by providing notice in accordance with the terms and conditions of this contract. You acknowledge that no representation has been made to you at any time that this contract or your employment will be extended beyond the 5 March 2023.*

The terms and conditions of your employment are set out in this letter. In addition, the Portland Aluminium (Operators) Enterprise Agreement 2018 (the Enterprise Agreement), also currently applies to your employment...

...

TERMINATION OF EMPLOYMENT

You have been employed on a fixed term contract. Your employment will cease on 5 March 2023 unless terminated earlier. Your employment may be terminated earlier than the 5 March 2023 by you or the Company providing the appropriate period of written notice to the other party, or:

- *in the case of the Company, by payment in lieu of notice.*
- *in the case of the employee, forfeiture of pay the employee would have received.*

The required period of notice will vary depending on your age and length of service as specified in the Enterprise Agreement or legislation, whichever is the greater.

These notice requirements will continue throughout your employment with the Company, notwithstanding any other changes to the terms of your employment. The Company may dismiss you without notice for serious misconduct. In such a case, you will be paid up to the date of dismissal only."

[7] The *Portland Aluminium (Operators) Enterprise Agreement 2018*³ (**the Enterprise Agreement**) referred to in the letter of engagement provides that fixed term employment can be used in the following circumstances:

“7.9 Fixed Term Employment

A fixed term employee is an employee who is formally engaged for a designated period or work project for a maximum period of 6 months, or longer by agreement with the AWU. With the exception of notification of termination of employment and redundancy, fixed term employees shall receive the same pay and conditions of employment as permanent employees engaged in the same classification and under the same roster arrangement.”

[8] I note that the 2018 Enterprise Agreement appears to have been superseded by the *Portland Aluminium (Operators) Enterprise Agreement 2021*⁴ which would have applied at the time of Ms Hughes engagement. The fixed term employment provision remains, in effect, the same.

[9] By letter dated 7 March 2023, the Respondent offered an extension to the Applicant’s time-limited contract to 3 September 2023.⁵ The Applicant agreed to the extension by signing a written acknowledgement on 24 March 2023.⁶

[10] On 1 September 2023, Mr Lester Rozario, Human Resources Manager for the Respondent, met with the Applicant and other Alcoa personnel. During that meeting, the Applicant was informed that she would not be offered further employment and her employment would come to an end on 3 September 2023.⁷

[11] In accordance with the extended ‘fixed-term’ or ‘time-limited’ contract, the Applicant’s employment came to an end on 3 September 2023.

[12] In addition to the procedural history leading to the Applicant’s termination, I note that both parties referred to several events in the period October 2022 – September 2023 which may have been relevant to the termination of the Applicant’s employment. Neither party choose to lead witness evidence on those events. Accordingly, while I have briefly set out these events below, **I have placed limited weight on them.**

[13] The Respondent submits that by late October 2022, it had noticed a number of concerns regarding Ms Hughes’ performance. On 10 March 2023, Ms Hughes attended a performance review meeting.⁸ At that meeting, the Respondent identified some of the alleged performance concerns, including that Ms Hughes was unable to perform certain parts of her role, particularly in relation to the furnace. The Respondent consequently informed Ms Hughes that she would not be offered a permanent position after the expiry of the time-limited contract. However, the Respondent told Ms Hughes that it was prepared to offer her a further 6-month time-limited contract to give her an opportunity to meet the reasonable standards expected of an Operator.⁹

[14] The Applicant states that at that time, she raised her concerns that she was being discriminated against due to her gender, and that one of the managers had suggested she change roster to be on a shift with more female employees.¹⁰

[15] On 9 May 2023, the Applicant was scheduled to undertake training in the furnace but the Applicant opted not to attend.¹¹

[16] On 27 May 2023, the Applicant was involved in an incident, in which a piece of equipment she was operating hit a bollard.¹² The Respondent submits that Ms Hughes failed to report this incident to her supervisor and therefore failed to comply with the requirements of her role. The Respondent undertook an investigation into the incident and stood the Applicant down on full pay during the investigation.

[17] On 22 June 2023, Mr Brian Anthony, Electrode Manager, sent a letter to the Applicant outlining the results of the investigation.¹³ The letter notified the Applicant that her failure to report the 27 May incident was of serious concern to the Respondent, and that it justified the termination of her employment. However, the letter provided the Applicant an opportunity to respond to the results of the investigation.

[18] On 23 June 2023, Ms Kathryn Oswald of Stratus Legal Group on behalf of the Applicant, sent a reply to Mr Anthony.¹⁴ The letter outlined the Applicant's views that she had been discriminated against and that the Respondent's systems and procedures had continuously failed to protect her and allow her to thrive, by reference to a list of other alleged incidents. The letter requested the Respondent provide evidence of other incidents relating to the bollard and training records and noted that the Applicant was considering whether to make an unfair dismissal or general protections application in relation to the proposed termination of her employment.

[19] Following the 23 June letter, the Applicant's employment continued. The Applicant claims she was advised there would be consequences for the letter, but that these were never specified.¹⁵

[20] It was open to the Respondent to offer Ms Hughes ongoing employment after the expiry of the time-limited contract, but the Respondent decided not to do so. The Respondent stated this was because of the Applicant's alleged ongoing unwillingness to perform the whole of her role and alleged serious breach of safety requirements.¹⁶

3. Relevant Legislation and Legal Principles

[21] As noted above, this decision considers whether the Applicant was dismissed for the purposes of s.365 of the FW Act. An application under s.365 of the Act requires that "a person has been dismissed" as a threshold matter. An actual dismissal must occur – a mere allegation that a person has been dismissed is not sufficient.¹⁷

[22] The meaning of "dismissed" for the purposes of s.365 and other sections of the FW Act is set out in s.386 of the FW Act.

[23] Section 386 of the Act relevantly provides as follows:

“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; ...*

(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.”*

[24] The operation of s.386 in relation to time-limited contracts was considered in detail by a Full Bench of the Commission in *Saeid Khayam v Navitas English Pty Ltd t/a Navitas English*¹⁸ (*Navitas*).

[25] *Navitas* established the position that time-limited contracts which contain an unqualified right on the part of either party to terminate the contract at any time on notice, cannot be considered contracts for a “*specified period of time*”. This is because while the contract has a ‘maximum term’ there remains uncertainty about when the contract will end. Accordingly, such contracts are not contracts for a “*specified period*” and the exclusion in s.386(2)(a) of the Act does not apply.

[26] The majority in *Navitas* also confirmed the position that where there has been genuine agreement to enter into a time-limited contract (absent vitiating or other mitigating circumstances discussed below) then:¹⁹

*“... the employment relationship will have been terminated by reason of the agreement between the parties and there will be no termination at the initiative of the employer. Further, in those circumstances a decision by the employer not to offer any further contract of employment will not be relevant to the question of whether there was a termination of employment at the initiative of the employment (sic). **The decision not to offer further employment is separate and distinct from the earlier agreement between the parties to end the employment relationship on a particular date.**”*

(emphasis added)

[27] This position was more recently upheld by the Full Bench in *Isaac Howard v Falls Creek Ski Lift Pty Ltd T/A Falls Creek Ski Lift Group*²⁰ (**Falls Creek**) where it was held that an Applicant had not been dismissed when his time-limited contract came to an end and he was not offered a new contract for the following season.

[28] However, the majority in *Navitas* found that, in some instances, where an employee has been engaged under successive time-limited contracts, employment that ends at the expiry of a time-limited contract, may still constitute a dismissal for the purposes of the Act. The majority held at [75]:

“The analysis of whether there has been a termination at the initiative of the employer for the purpose of s 386(1)(a) is to be conducted by reference to termination of the employment relationship, not by reference to the termination of the contract of employment operative immediately before the cessation of the employment. This distinction is important in the case of an employment relationship made up of a sequence of time-limited contracts of employment, where the termination has occurred at the end of the term of the last of those contracts. In that situation, the analysis may, depending on the facts, require consideration of the circumstances of the entire employment relationship, not merely the terms of the final employment contract.

....

In circumstances where the parties to a time-limited contract have agreed that their contract will expire on a specified date but have not agreed on the termination of their employment relationship it may be the case that the termination of employment is effected by the expiry of the contract, but that does not exclude the possibility that the termination of employment relationship occurred at the initiative of the employer – that is, as a result of some decision or act on the part of the employer that brought about the outcome.”

[29] The majority in *Navitas* went on to identify a non-exhaustive list of relevant factors to consider when determining whether the expiry of a time-limited contract reflects genuine agreement to end the employment relationship. This included the following at [75] subparagraph (5):

(a) *“The time-limited contract itself may be vitiated by one of the recognised categories by which the law excuses parties from performance of a contract.”*

This may include evidence an employee entered into a contract because the employer engaged in misleading or unconscionable conduct; the employee entered into the contract as a result of a serious mistake about its content or subject matter; the employee entered into a contract due to duress or coercion; the employee lacked legal capacity to make a contract; or the contract was a sham.

(b) *“The time-limited employment contract may be illegal or contrary to public policy (for example, it contains relevantly objectionable terms as defined in s 12 of the FW Act or has the purpose of frustrating the policy or operation of the FW Act or preventing access to the Commission’s unfair dismissal jurisdiction). Whether the*

employment was constituted by successive short term contracts or the use of time-limited contracts was appropriate in the relevant field of employment may be some of the considerations relevant to an examination of the employer's purpose for entering into such contracts"

- (c) *The contract may have been varied, replaced or abandoned by way of a separate agreement, whether in writing and/or orally, such that its ostensible time limit no longer applies".*
- (d) *"The employment contract may not be limited to the terms of a written document and may...not represent the reality or the totality of the terms of the employment relationship."*
- (e) *"During the term of the employment relationship the employer may have engaged in conduct or made representations (for example, representing to the employee that the employment will continue subject to conduct and performance notwithstanding a contractual time limit on the employment) which provide a proper legal foundation to prevent the employer from relying upon the terms of the contract as the means by which the employment relationship has been terminated"*
- (f) *"The terms of the contract time-limiting the employment may be inconsistent with the terms of an award or enterprise agreement given effect by the FW Act which prohibit or regulate fixed-term employment, in which case the terms of the award or agreement will prevail over the contract."*

(Citations omitted)

4. Submissions

4.1 Alcoa

[30] Alcoa submitted that it did not terminate Ms Hughes, but that her employment ended on 3 September 2023 by previous agreement between the parties. It submitted that the terms of her employment were contained first in the contract of employment dated 26 July 2022, and extended in accordance with the extension letter and acknowledgement dated 24 March 2023. Under the extension the parties agreed the employment contract and relationship would come to an end on 3 September 2023.

[31] The fact Alcoa may have considered terminating Ms Hughes' employment in June 2023 had no bearing on the fact that ultimately Ms Hughes' employment ended on 3 September 2023 by way of the employment agreement expiring.

[32] Alcoa relied on *Falls Creek*²¹ in support of its position. It submitted that *Falls Creek* addressed "*the very issue that arises before the Commission in this matter*"²² and is binding on the Commission.

[33] lcoa submitted that its decision to not offer Ms Hughes further employment was not relevant to the question of whether there was a dismissal.

[34] Alcoa submitted that it did not rely on s.386(2) to demonstrate there was no dismissal. Rather it relied on the fact that the employment came to an end by agreement between the parties.²³

4.2 Ms Hughes

[35] The Applicant submitted that Ms Hughes was terminated at the initiative of the employer and therefore dismissed for the purposes of the FW Act.

[36] The Applicant argued that the Respondent could not rely on s.386(2)(a) of the FW Act to avoid a claim Ms Hughes had not been dismissed. In making this submission, the Applicant relied on s.386(3), which curbs s.386(2)(a) by ensuring it does not apply if “*a substantial purpose*” of employing a person under a contract for a specified period is to avoid the employer’s obligations under Part 3-2 – Unfair Dismissal.

[37] The Applicant argued that the Respondent had engaged Ms Hughes on a time-limited contract to avoid its obligations under Part 3-2 of the FW Act.²⁴ The Applicant stated this was supported by the fact that:

- The Operator role in the Respondent’s Enterprise Agreement requires that new Operators are required to spend at least 24 months training in all of the duties of an Operator prior to being considered eligible to progress,²⁵ and
- Alcoa has an ongoing operational need for Operators.²⁶

[38] The Applicant further submitted that:²⁷

“Navitas endorsed relevant principals (sic) as to when a purported outer-limits contract will be considered as meeting the threshold of the substantial purpose requirement under s.386(3), including:

- a. Any amendments of time;*
- b. The totality of the employment relationship between the parties; and*
- c. The substance of the decisions made by the employer that lead to the termination of the relationship.”*

[39] The Applicant argued that termination was at the initiative of the employer, rather than just the expiry of the employment contract, because Alcoa wanted to terminate Ms Hughes as a result of her exercising a workplace right to defend herself against allegations of misconduct. To support this, the Applicant referred to Alcoa’s F8A Response wherein it stated Ms Hughes was not offered a further contract as she had not “*satisfactorily demonstrated suitability for ongoing employment in her role as a result of her performance and training completion not being to the standard that could be reasonably expected.*”²⁸

5. Consideration - Was Ms Hughes dismissed?

[40] On initial consideration it appears the parties, through genuine agreement, have entered into a time-limited contract with an agreed expiry date. The terms of the time-limited contract as set out in [6] above are very clear and explicitly emphasise the time-limited nature of the contract on numerous occasions. This includes reference to expiry of both the contract and employment relationship as follows:

You acknowledge that no representation has been made to you at any time that this contract or your employment will be extended beyond the 5 March 2023.

[41] Ms Hughes' time-limited contract was extended to 3 September 2023 on the agreement that "*all other conditions of employment remain[ed] unchanged.*"²⁹

[42] The time-limited contract agreed by the parties was also in accordance with the relevant Enterprise Agreement which appears to tightly regulate the use of fixed term contracts stating that a fixed term contract can only be "*for a maximum period of 6 months, or longer by agreement with the AWU*".

[43] The case before me is significantly different to the factual scenario in *Navitas*. In *Navitas*, the applicant had been engaged as a casual employee for seven years prior to being engaged on successive time-limited contracts from 2012 – 2016. The applicant in *Navitas* was not offered a further contract based on an "*assessment of his performance and disciplinary record.*"³⁰ In this matter, Ms Hughes was engaged on one 6-month time-limited contract that was extended once. It appears clear given reference to the terms of the time-limited contract and the fixed term employment provision in the Enterprise Agreement that the employment contract and the employment relationship would expire on 3 September 2023, unless Alcoa decided to offer Ms Hughes a permanent role.

[44] Prima facie it appears that this case is similar to *Falls Creek* and that, as per the Respondent's submissions, there is no dismissal as the employment terminated because of genuine agreement to the time-limited contract.

[45] However, the Applicant, in essence, has presented two arguments against this conclusion – that the Respondent has incorrectly relied upon the exception in s.386(2)(a) of the FW Act to reach its position that the Applicant was not dismissed, or alternatively that the considerations in *Navitas*, when applied to Ms Hughes, should result in a finding that Alcoa dismissed Ms Hughes. I turn now to both arguments below.

s.386(2) and s.386(3)

[46] I note that Alcoa explicitly did not rely on the exclusion in s.386(2) to argue the termination was not a dismissal.³¹ In any event, this exclusion would not have been open to Alcoa, as the time-limited contract between Alcoa and Ms Hughes includes the unqualified right of either party to terminate the contract by giving notice – see above at [6]. Accordingly, as per *Navitas* the contract was not for a "*specified period of time*" within the meaning of s.386(2)(a) of the Act. As s.386(2)(a) is not applicable, it must follow that s.386(3), which is enlivened only in relation to s.386(2), is also not applicable.

[47] As I have concluded that s.386(2) and (3) are not applicable, the Applicant's argument regarding the Respondent's reliance on s.386(2) is rejected. With respect, the Applicant appears to have misconstrued the Full Bench's decision in *Navitas*. While *Navitas* does endorse principles which are relevant to outer-limit contracts at [75], these principles were discussed in the context of s.386(1) of the FW Act. Nowhere in the majority's decision was it held these principles were to be considered in relation to "*the threshold of the substantial purpose requirement under s.386(3)*" as argued by the Applicant.

[48] For completeness, I note that while not relevant to s.386(3) in particular, the considerations raised by the Applicant at paragraph [38] may be relevant to the analysis under s.386(1) of whether Ms Hughes was dismissed at Alcoa's initiative. These will be addressed in the below section regarding the *Navitas* considerations.

Navitas Considerations

[49] I will now turn to consider if there are any "*vitiating or other factor[s]*"³² of the type referred to in *Navitas*³³ and/or the Applicant's submissions which may suggest that despite the expiry of the contract, the termination was at the initiative of the employer.

Factors that vitiate the contract

[50] There has been no suggestion that the contract is not valid, or that Ms Hughes entered into the contract because of misrepresentations, unconscionable conduct or duress or coercion on the part of the Respondent.

Whether contract may be illegal or contrary to public policy

[51] There has been no submission that the time-limited contract is illegal or contrary to public policy. While the Applicant submitted (albeit in relation to s.386(3)) that Alcoa entered the time-limited contract to avoid obligations under Part 3-2 of the Act, the submission was not substantiated and no evidence was put to this effect. As noted above, the matter before me does not involve a scenario such as *Navitas* where an employee was engaged under successive time-limited contracts. Given that the Enterprise Agreement appears to tightly regulate the use of fixed term contracts – where such contracts are generally limited to six months with extension only by agreement with the Union - I do not find this allegation is substantiated.

Whether the contract has been varied, replaced or abandoned such that the time limit no longer applies

[52] There is no suggestion or evidence that the contract has been replaced, varied or abandoned so that the time-limit no longer applies. While the contract was extended by agreement, there was no evidence to suggest that the expiry date of the extended agreement did not apply.

Whether the contract does not represent the reality or the totality of the terms of the employment relationship

[53] The Applicant submitted that the Commission should have regard to the totality of the relationship. However, no submissions or evidence were put to me to suggest that the employment relationship should not have expired at the same time as the employment contract. On the contrary, the terms of Ms Hughes' employment contract and the acknowledgement signed by Ms Hughes stated that "*no representation has been made by the Company at any time that this contract or [Ms Hughes'] employment will be extended beyond the 5 March 2023.*" Alcoa's offer to extend Ms Hughes' employment by another 6 months reconfirmed the limited-time nature of the contract and stated that "*all other conditions of employment remain unchanged.*" On the evidence before me, in these particular circumstances, it seems clear that the contract and the following extension of the contract represented the totality of the employment relationship.

Conduct or representation which prevents the employer relying on the contract

[54] The Applicant appears to submit that representations had been made by Alcoa about ongoing employment if certain performance standards and training was met. While no evidence was put in relation to this matter, the Applicant referred to the Respondent's F&A Form which states that Ms Hughes was not offered ongoing employment as she had not "*satisfactorily demonstrated suitability for ongoing employment in her role as a result of her performance and training completion not being to the standard that could be reasonably expected.*" On the limited material before me, it appears both parties were aware that during the time-limited contract Ms Hughes' suitability for a permanent role would be assessed. This alone does not prevent Alcoa relying on the contract. As noted above, the case before me differs significantly to a situation such as in *Navitas* where the applicant had been subjected to successive time-limited contracts over a number of years. In the case before me, it appears both parties understood a purpose of the limited-time contract was to assess Ms Hughes' performance over a finite period of time. This period is regulated by the Enterprise Agreement which states time-limited contracts are "*for a maximum period of 6 months, or longer by agreement with the AWU*". Accordingly, I do not find that Alcoa's conduct or representations prevented it from relying on the time-limited contract.

Whether the time limited contract is inconsistent with the award or enterprise agreement

[55] While no evidence was put in relation to this matter, it appears that Ms Hughes time-limited contract was consistent with the provision in the Enterprise Agreement relating to fixed term employment. Even if I am wrong and the extension of the time-limited contract was inconsistent with the provisions in the Enterprise Agreement, I am satisfied that in the current circumstances, this would not change the termination of the employment to a dismissal.

Substance of the decisions made by the employer that led to the termination of the relationship

[56] The Applicant submitted that the Commission should have regard to "*the substance of the decisions made by the employer that lead (sic) to the termination of the relationship.*" Again this argument was not substantiated and no evidence put to me to support an argument that the termination was at the initiative of the employer instead of the expiry of the time-limited contract. While I accept that Alcoa had concerns regarding Ms Hughes' performance and Ms

Hughes was entitled to defend allegations of misconduct, I do not find that these events were the primary reason for termination. I accept Alcoa's submission that the fact Alcoa may have considered terminating Ms Hughes' employment in June 2023 had no bearing on the fact that ultimately Ms Hughes' employment ended on 3 September 2023 by way of the time-limited contract expiring.

[57] Having considered the above matters, I find that Ms Hughes was not dismissed. Ms Hughes' employment relationship with Alcoa terminated in accordance with the terms of the time-limited contract she entered into. Alcoa's decision not to offer any further contract of employment to Ms Hughes is not relevant to the question of whether there was a termination of employment at the initiative of the employer.

6. Conclusions and consequences

[58] This decision deals with the narrow issue of whether the termination of Ms Hughes' employment with Alcoa was a dismissal. For the reasons given above, I have determined no dismissal occurred. In coming to this decision, I note that the FW Act envisages other circumstances, outside of dismissal, in which a person may seek a remedy against alleged adverse action in regard to other work-related activities. This includes against prospective employers.³⁴

[59] In any event, as I have determined that Ms Hughes was not dismissed within the meaning of the FW Act, there is no jurisdiction for the Commission to deal with a dispute under s.365 of the FW Act, or to issue a certificate as contemplated by s.368(3) of the FW Act. As a result the current application cannot proceed.

[60] Accordingly, I dismiss the application.



COMMISSIONER

Hearing details:

On the papers

Printed by authority of the Commonwealth Government Printer

<PR769998>

¹ *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152.

² Annexure LR-1.

³ AE500494.

⁴ AE513340.

⁵ Annexure LR-2.

⁶ *Ibid.*

⁷ Witness Statement of Lester Rozario, paragraph 6.

⁸ *Ibid* paragraph 6.

⁹ *Ibid* paragraph 7.

¹⁰ Form F8, Question 3.1, paragraph 2.

¹¹ *Ibid* paragraph 10.

¹² *Ibid* paragraph 11.

¹³ Form F8, Attachment A.

¹⁴ Form F8, Attachment B.

¹⁵ Form F8, Question 3.1, paragraph 4.

¹⁶ Form F8A, Question 5.1, paragraph 13.

¹⁷ *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152 at [54].

¹⁸ *Saeid Khayam v Navitas English Pty Ltd t/a Navitas English* [\[2017\] FWCFB 5162](#)

¹⁹ *Ibid* at [75]

²⁰ *Isaac Howard v Falls Creek Ski Lift Pty Ltd T/A Falls Creek Ski Lift Group* [\[2023\] FWCFB 154](#)

²¹ [\[2023\] FWCFB 154](#).

²² Respondent's Submissions, Paragraph 20.

²³ Respondent's Submissions in reply, Paragraph 5(b).

²⁴ Applicant's Submissions, Paragraph 13.

²⁵ *Ibid* Paragraph 12.

²⁶ *Ibid* paragraph 13.

²⁷ *Ibid* Paragraph 15.

²⁸ *Ibid* paragraph 17.

²⁹ Annexure LR-2.

³⁰ *Navitas*, paragraph [7].

³¹ Respondent's Submissions in reply, paragraph 5(b).

³² *Navitas*, paragraph [75] (4).

³³ *Ibid*, [75] (5) (a-f).

³⁴ See s.342(1) FW Act