

[2024] FWC 699

The attached document replaces the document previously issued with the above code on 18 March 2024.

A reference to Ms Plew that was intended to be Ms Cristol has been corrected in paragraph [65].

Associate to Commissioner Thornton's Chambers

Dated 4 April 2024.





# DECISION

*Fair Work Act 2009*  
s.394—Un

fair dismissal

**Ms Sally Plew**

**v**

**The Trustee for the Cristol Family Trust**

U2023/9368

COMMISSIONER THORNTON

ADELAIDE, 18 MARCH 2024

*Application for an unfair dismissal remedy – jurisdictional objection – no dismissal or in alternative dismissal in accordance with Small Business Fair Dismissal code – Dismissal in accordance with the Small Business Fair Dismissal Code - Dismissal at the employer’s initiative – application filed prematurely – validity of application considered.*

[1] Ms Sally Plew lodged a claim for unfair dismissal on 27 September 2023 by filing a Form F2.

[2] On 14 October 2023, the Respondent filed a Form F3 advising they objected to the application on jurisdictional grounds, being that there was no dismissal and that the Applicant had “*walked off the job*”. In addition, the Respondent indicated a further jurisdictional objection under question 2.2, ticking the box “other” and noting “*Evidence of theft within the business.*”

[3] The matter was listed for directions on 7 November 2023 by video conference. There was attendance at the directions hearing from Ms Cristol of the Respondent and Mr Gepp who advised he was the Applicant’s partner. There was no personal appearance from the Applicant, despite my requests that she appear.

[4] The Respondent filed their material in accordance with the initial directions, but the Applicant failed to comply with the directions and the matter was listed for non-compliance hearing on 18 December 2023. There was no appearance from the Applicant on that date.

[5] The Commission communicated with the parties by email on 19 December 2023 advising the Applicant that the jurisdictional objection would proceed to hearing on 8 January 2024 as listed, requesting that she file material and attend for the hearing via videoconference on the above date. The Applicant was advised that if she failed to attend or submit material that I would proceed to make a decision on the evidence before me.

[6] The hearing proceeded on 8 January 2024 with no appearance from the Applicant. Ms Cristol appeared on behalf of the Respondent.

[7] It became evident that the respondent was a small business within the definition of section 23 of the *Fair Work Act 2009* (Cth) (the Act) and in indicating its jurisdictional objection “*Evidence of theft within the business*” it was necessary for me to consider whether the dismissal, if in fact there was a dismissal, was compliant with the Small Business Fair Dismissal Code (“the Code”).

[8] In advance of the hearing the Commission provided a copy of the Code to the parties and asked that the parties address the application of the Code to this case in the hearing.

[9] Following the hearing I asked the Respondent make submissions with reference to the Code in writing, which Ms Cristol did the same afternoon. I then provided the Applicant with a further seven days to provide any response or submissions in reply but did not receive a response.

[10] For the reasons set out below, I find that the Applicant was ultimately dismissed by her employer. I find that the actions of the Respondent were consistent with the Code, and in accordance with section 385 of the Act, the Applicant was not unfairly dismissed.

[11] Given my finding that the Applicant was in fact dismissed from her employment, on the facts of this case the Applicant filed her unfair dismissal claim prior to her actual dismissal.

[12] As I have found that the Applicant’s dismissal was in accordance with the Code, it is not necessary that I make findings with respect to the validity of the prematurely filed application. However, I note that the application is not necessarily an invalid application on account of its premature filing, but rather, its premature filing is an irregularity. Whilst the Commission has discretion to waive the irregularity, I note that I would otherwise not exercise my discretion to do so.

[13] I provide my reasons below.

### **Background factual matters and evidence**

[14] The Respondent operates a beauty salon. Ms Cristol, the sole director of the company, manages the business. Ms Cristol is not herself a trained beauty therapist and employed, at the time the Applicant’s employment came to an end, two permanent part-time beauty therapists, including Ms Plew, and a third casual beauty therapist.

[15] Ms Cristol gave evidence in this matter, which I found to be open, responsive and credible. Ms Cristol answered questions directly and made concessions where appropriate.

[16] According to the Applicant’s form F2, she was first employed by the Respondent on 10 March 2022.

[17] Ms Cristol gave evidence that the Applicant was employed on a permanent part-time basis for regular shifts each week. Ms Cristol told the Commission that Ms Plew was employed to work Wednesday, as the only therapist in the business, between 9:00am and 7:00pm in the evening, finishing her work day at the conclusion of the appointment with the last client. Ms

Plew was also engaged to work Thursday from 9:00am until the last client appointment of the evening, which could be up to 9:00pm, Fridays between 2:00pm and 7:00pm and Saturdays between 9:00am and 4:00pm. On Thursdays, Fridays and Saturdays Ms Plew worked with at least one other beauty therapist.

**[18]** Ms Cristol confirmed that she opened the premises each morning, started the computer and EFTPOS machine and was often present during opening hours to assist with customer service, product management, ordering and other duties. Ms Cristol gave evidence that she worked alongside Ms Plew most of each Wednesday when she was the only beauty therapist working.

**[19]** Ms Cristol told the Commission that she did not have a need to issue rosters for work to her employees because the employees worked the same shifts each week. She confirmed that the Applicant had worked the same shifts, as described above, from the commencement of her employment.

**[20]** Ms Cristol also gave evidence that on occasion, she would send a text message to the beauty therapists advising they could come into work later if there were no client appointments first thing on their workday. If Ms Cristol had not sent a text message in advance conveying permission for a later start, the beauty therapists, including Ms Plew, attended for work in accordance with their permanent shift pattern.

**[21]** Ms Cristol explained that the employed beauty therapists, including Ms Plew, had staff access through a business software application whereby they could view client appointments booked in for any given day. The beauty therapists had access to a page in the application titled 'My Appointments'. They are not able to manipulate the data on that page, make or cancel appointments or access client contact information. Ms Cristol's evidence was that she encouraged the therapists to access the 'My Appointments' page so each therapist knew in advance what clients they were seeing and knew what work they were doing on the following day. However, she was clear in her evidence that the application was not used to inform employees when they were required to attend for work.

**[22]** Ms Cristol gave evidence that just prior to the end of the Applicant's employment, she employed two part-time beauty therapists, Ms Plew and Ms Nikki Zacharia, a casual beauty therapist she referred to as Bella, and for a short period of time, she employed her daughter Ms Smith to work on reception for three Saturday shifts when Ms Cristol took a period of leave for an overseas holiday from approximately 9 September 2023, returning on or about 23 September 2023. In addition, Ms Smith's role involved checking all the receipts generated against the appointments booked and reconciling the income of the business for the previous week, a role usually performed by Ms Cristol. Her daughter did not continue her employment beyond 23 September 2023.

**[23]** Ms Cristol's evidence was that before she left for her trip, she asked each employee if they wanted to purchase any of the beauty products sold by the business so that she could arrange the authorised deductions from wages for payment prior to her absence. She says that she clearly told her employees that they would be unable to purchase product while she was away. She told the Commission that Ms Plew indicated that she wanted products worth approximately \$200.00 but would wait until Ms Cristol returned from leave. Ms Cristol says she arranged for Ms Zacharia to do regular stock takes of the products to ensure that her directions were followed.

[24] Ms Cristol gave evidence that while she was overseas, Ms Zacharia had sent her a text message confirming she had done the regular stocktakes and that she had become concerned that products had gone missing after a shift she was working with Ms Plew. Ms Cristol did not submit the text message from Ms Zacharia in evidence as she says that she deletes all of her text messages after reading them.

[25] Ms Cristol recounted speaking with Ms Zacharia on the telephone after she returned from overseas, regarding Ms Zacharia's concerns and then attending at the business to meet with her in person on 25 September 2023. Ms Zacharia expressed her concerns to Ms Cristol and advised her that she had raised the alleged taking of products directly with Ms Plew.

[26] The Respondent submitted a witness statement from Ms Zacharia that included the following statements: *"I conducted stocktakes before and after every shift that Sally [Plew] was working, as instructed by Anastasia Cristol. On Sat[urday], September 23<sup>rd</sup>, I discovered that several retail products were missing. Sally [Plew] admitted to taking certain items, but she did not disclose all the missing products."* Ms Zacharia was on leave at the time of the hearing and did not attend for evidence, but I have no reason to question the veracity of the statement.

[27] Ms Cristol submitted text messages that were purportedly between Ms Zacharia and Ms Plew including on 24 September 2023, where Ms Plew says: *"I've been thinking can you just put the starter kit on my bill and Ana won't get upset ok"* and later *"Is that ok?"* and *"I understand that it makes me look like I took the products but I swear on my daughter (sic) life I never did. I just want Ana to be happy when she gets back. So if I have to pay for it I will."*

[28] Ms Cristol then recounted that also on her return from leave on 23 September 2023, Ms Smith advised her of a discrepancy in the EFTPOS journals as compared against client records that she identified on 16 September 2023. Ms Cristol stated Ms Smith advised her that the client records reflected that a Mr Wood had attended for a treatment on 9 September 2023 but no EFTPOS receipt was recorded confirming his payment.

[29] Ms Smith provided a statement in these proceedings that included the assertion: *"Sally [Plew] subsequently admitted she had forgotten to process the payment for the treatment. I recommended that Sally contact the client to facilitate payment over the phone, but she reported being unable to reach him. My follow-up conversations with Sally indicated that she could not get hold of the client."* Ms Smith did not attend to give evidence but again I have no reason to doubt the veracity of her signed statement.

[30] On 25 September 2023, Ms Cristol sent an email to Mr Wood advising him that she did not have any record of a payment being made for his treatment and asking him to confirm if he recalled paying by credit card or cash, and how much he paid. Mr Wood responded to the email saying: *"I paid \$100 cash (1x100 note), the total came to ninety-something and I left the rest as a 'tip'."* A copy of the email was submitted as evidence of the correspondence with Mr Wood.

[31] Ms Cristol gave evidence, which was supported by the witness statements of Ms Zacharia and Ms Smith, that as of July 2023, she had made it very clear to all staff that cash payments were no longer being accepted at the business and clients were required to pay by EFTPOS.

[32] Ms Cristol gave evidence that she tried to contact Ms Plew on multiple occasions on 25 and 26 September 2023 by telephone and text message to discuss her concerns about what she suspected at this time was theft, however, Ms Plew failed to respond to any contact from Ms Cristol. Again, Ms Cristol confirmed she had deleted the text messages she says she sent to Ms Plew. Ms Cristol gave evidence that she became concerned that Ms Plew might not attend for work on Wednesday, 27 September 2023 and that she would not have a beauty therapist to see the clients who had appointments.

[33] Ms Cristol confirmed that she attended the residence of Ms Plew in the afternoon of 26 September 2023 to discuss the allegations of theft because she was unable to reach Ms Plew any other way. She gave evidence that she saw Ms Plew's car in the driveway, and the screen door was open but she was greeted by a dog that she described as "*hostile*" and that caused her to be "*alarmed*". She then decided to return to her car and beep her car horn to attract Ms Plew's attention. This approach was unsuccessful as Ms Plew did not come to the door. There is likely a factual dispute about how long Ms Cristol blew her horn (noting the Applicant submitted it was continuously for 15 minutes in her application), however, there is no need to resolve that dispute because Ms Cristol admits she attended Ms Plew's house and blew her horn.

[34] Ms Cristol gave evidence, and outlined in her witness statement, that after being unable to contact Ms Plew, she made the "*difficult decision*" to reschedule Ms Plew's clients booked for treatments on 27 September 2023.

[35] Ms Plew did not attend for work on Wednesday, 27 September 2023 or any day thereafter. She filed her unfair dismissal claim on 27 September 2023.

[36] The Applicant claimed in her application that she was dismissed without explanation and only became aware of her dismissal by "*going into the online portal where I discovered I had been locked out of appointment portal & all my appointments for my next shift had been cancelled.*"<sup>1</sup>

[37] Ms Cristol gave evidence that she received a text message from Ms Plew's partner, Mr Gepp, on 28 September 2023 advising that he had left Ms Plew's work uniform on her car in the carpark.

[38] Ms Cristol gave evidence that by 5 October 2023, she determined that she needed to formally bring the employment relationship to an end and sent a letter to Ms Plew in which she confirmed she was '*writing to formally terminate your employment*', citing the following reasons:

- Ms Plew's unauthorised absence from work on 27 September 2023;
- The theft of \$100.00 in cash;
- Theft of retail products; and
- Breach of trust and ethical standards expected of employees.

[39] Ms Plew's employment was terminated on 5 October 2023, but the Respondent purported to make the termination effective as of 27 September 2023.

[40] The Respondent asserts that the Commission does not have jurisdiction to further deal with the Applicant's unfair dismissal claim because the Applicant was not terminated and, in the alternative, the dismissal was in accordance with the Small Business Fair Dismissal Code.

## Whether the applicant was dismissed

[41] In setting out what is an unfair dismissal, section 385 of the Act specifies that:

### “385 What is an unfair dismissal

A person has been **unfairly dismissed** if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Note: For the definition of **consistent with the Small Business Fair Dismissal Code**: see section 388.”

[42] As such, in order for an application of this kind to be determined on its merits by the Commission, as a threshold requirement, the person bringing the application must have been dismissed.

[43] Section 394(1) of the Act, in Division 5 of Part 3-2, headed ‘Procedural Matters’ is also of relevance to this matter. Section 394(1) provides:

### “394 Application for unfair dismissal remedy

- (1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.”

[emphasis added]

[44] In the matter of *Mihajlovic v Lifeline Macarthur*<sup>2</sup> (Mihajlovic) the Full Bench found:

*It is apparent that subsection (1) of s.394 establishes as the basic qualifying criterion for the making of an application that the applicant has to be “a person who has been dismissed”. Section 386(1) guides the interpretation of s.394(1) by defining the circumstances in which a person can be said under the Act to have been dismissed in the following terms:*

- (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.*



[45] The Full Bench in *Mihajlovic*, citing the Full Court of the Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd (No 2)*<sup>3</sup> referred to the following passage in the decision of the Full Court:

*“a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship.*

...

*In these proceedings it is unnecessary and undesirable to endeavour to formulate an exhaustive description of what is termination at the initiative of the employer but plainly an important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship.”<sup>4</sup>*

[46] There is no suggestion from either party that the Applicant in this case resigned from her employment. The Applicant’s claim set out in her Form F2, asserts that she was dismissed with “*no explanation*”. The Respondent asserts in their Form F3 response that there was no dismissal but adds to the form “*(She originally walked off the job).*” That is, the Respondent may have been asserting the Applicant abandoned her employment, (a matter not expanded upon in written or oral evidence or submissions), but has not asserted that the Applicant resigned. For reasons outlined below it is not necessary for me to make any findings as to whether there was an abandonment of employment. The focus for consideration in this matter is the application of section 386(1)(a). Section 386(1) is subject to exceptions in subsections (2) and (3) that are not relevant to this matter.

[47] The Applicant clearly formed a view that she was terminated from employment and she lodged her claim for unfair dismissal on the day she claims she was terminated. The Applicant did not attend for her regular shift on 27 September 2023 and then returned her uniform, via her partner, on 28 September 2023. Further, she lodged an unfair dismissal claim on 27 September 2023 and did not attend for work on any day thereafter. Ms Plew indicated in her Form F2 application that she had formed the view that her employment was terminated because she had been locked out of the appointment application and in addition had, whilst asserting she was locked out, also discovered that her appointments for her shift on 27 September 2023 had been cancelled.

[48] There was no termination at the initiative of the employer at the time the Applicant asserted her employment had been terminated. I do not accept that the Applicant’s employment was terminated on 27 September 2023 because her appointments for the following day had been cancelled and removed from the application. I accept the evidence given by Ms Cristol that the client appointment application used by the Respondent was not used for the purposes of advising employees when to attend work, nor did it act as a form of roster. I accept the evidence given by Ms Cristol that Ms Plew was a regular, permanent part-time employee with fixed shifts for which she was expected to present, in the absence of any communication to the contrary from her employer.

[49] Ms Cristol gave evidence, which again I accept, that she made a number of efforts to contact Ms Plew to discuss the allegations of misconduct. Ms Plew ignored and avoided Ms Cristol's attempts at contact. Ms Cristol gave evidence to the effect that she intended to discuss her concerns with the Applicant on 25 and 26 September 2023. She did not suggest in her evidence that she was attempting to contact Ms Plew to terminate her employment.

[50] There was no evidence adduced, nor even a suggestion made by the Applicant in her application, that Ms Cristol communicated to Ms Plew on 27 September 2023 that her employment was terminated. The Applicant appears to have inferred a termination of employment (and filed an unfair dismissal claim) in circumstances where I find there was an absence of words or conduct from the Respondent that conveyed a termination of employment. Therefore, the Applicant filed her application for unfair dismissal at a time where there had been no termination at the initiative of her employer.

[51] However, there was a clear termination of employment conveyed by Ms Cristol to Ms Plew in correspondence dated 5 October 2023. In that letter, the Respondent uses very clear language to convey to the Applicant that her employment was terminated, including: "*I am writing to formally terminate your employment ... effective Wednesday 27/09/2023*" and "*your employment is hereby terminated effective 27/09/2023.*" In addition, the Respondent asserted that the termination of employment took effect as at the date Ms Plew last failed to attend for work. The termination of employment was conveyed to Ms Plew on 5 October 2023, but purported to take effect on 27 September 2023.

[52] This communication of termination did not occur until a number of days after the Applicant had filed her unfair dismissal application. Ms Cristol found it necessary to send written correspondence clearly terminating the Applicant's employment despite the Applicant's unfair dismissal claim having already been filed. Ms Cristol said in evidence that she felt she needed to formalise the end of the employment contract and "*have something in writing to say, okay, this is it, you are no longer working here.*" Ms Cristol also said that without the termination letter "*things would have been left up in the air, and I wouldn't have known what to do*". The Respondent took the step of communicating the dismissal to the Applicant after she had filed her claim but before the Employer Response Form was filed on 14 October 2023.

[53] Despite my finding that there was no dismissal at the time the Applicant's claim was filed, the Respondent subsequently took an action that was the principal contributing factor leading to the termination of the employment relationship on 5 October 2023. This action could only have been taken if the Respondent considered the employment relationship was still on foot. This communication terminating the Applicant's employment was made prior to the Respondent filing their Employer Response Form, in which they asserted that there had been no dismissal, later noting on the same form that the Respondent had notified the Applicant of her dismissal by email on 5 October 2023.

[54] The jurisdictional objection of the Respondent asserting there was no dismissal is dismissed. The relevant date of dismissal must be 5 October 2023 because a dismissal cannot take effect until the termination is conveyed to the Applicant.<sup>5</sup>

[55] I address the issue of the validity of the application later in this decision.

### **Small Business Fair Dismissal Code**

[56] As I have found the Applicant was in fact dismissed on 5 October 2023, I now turn to the Respondent's further and alternative objection. The Respondent asserts that if the Applicant was dismissed, the Respondent acted in accordance with the Code and therefore the dismissal is not an unfair dismissal.

[57] Section 385 of the Act states:

**“385 What is an unfair dismissal**

A person has been **unfairly dismissed** if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Note: For the definition of **consistent with the Small Business Fair Dismissal Code**: see section 388.”

[58] Section 388(2) of the Act provides that:

“A person's dismissal was consistent with the Small Business Fair Dismissal Code if:

- (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
- (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.”

[59] The Respondent is a small business employer as defined in section 23 of the Act, as at the date of the Applicant's dismissal, she employed three employees (noting Ms Smith had concluded her employment just days prior).

[60] The Code relevantly provides: *“It is fair to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal.”*

[61] The Respondent dismissed the Applicant from employment on 5 October 2023, by letter, purporting to back date the date of dismissal to the day Ms Plew failed to attend for work. The dismissal was without notice or warning, despite the Respondent making efforts to discuss the allegations with the Applicant on 25 and 26 September 2023.

[62] In the matter of *In Ryman v Thrash Pty Ltd T/A Wishart's Automotive Services*<sup>6</sup>, the Full Bench of the Commission considered the Code and said:

*“In assessing whether the “Summary dismissal” section of the Code was complied with, it is necessary to determine first whether the employer genuinely held a belief that the employee’s conduct was sufficiently serious to justify immediate dismissal, and second whether the employer’s belief was, objectively speaking, based on reasonable grounds. Whether the employer has carried out a reasonable investigation into the matter will be relevant to the second element.”<sup>7</sup>*

[63] The letter of termination issued by the Respondent to the Applicant on 5 October 2023 outlined three reasons for termination, one regarding an unauthorised absence on 27 September 2023 and two instances of theft of cash and retail products. The Respondent described these reasons in the letter as “a breach of trust” and actions that “violate the ethical standards and expectations we hold for all my employees.” In her evidence, Ms Cristol described the actions that she relied on to dismiss the employee as lacking “integrity and respect.” She gave evidence that she could not trust the Applicant.

[64] The evidence of Ms Cristol, including the evidence given at hearing and the letter of termination, in my view made clear that she genuinely held a belief that Ms Plew’s conduct was sufficiently serious to justify immediate dismissal. I accept that evidence and find that Ms Cristol’s belief that the conduct, including stealing products and cash, was sufficiently serious to justify immediate dismissal. It was also, objectively speaking, based on reasonable grounds.

[65] Ms Cristol arranged for stocktakes of retail products to be undertaken whilst she was away. The employee she asked to undertake the stocktakes, Ms Zacharia, reported that products were missing after a shift worked by Ms Plew. Ms Plew accepted in her text message communication with Ms Zacharia that she had taken the products and offered to make restitution from her wages. This offer did not detract from the likelihood that Ms Plew took the products in contravention of the lawful direction given by Ms Cristol, prior to her leave, that no retail products were to be taken by employees during her leave.

[66] Ms Cristol investigated the alleged theft of money paid to the Respondent for services to a client by contacting the client for confirmation of the method of payment. The client confirmed he made payment in cash. On the evidence given by Ms Cristol there was no record or receipt of the cash payment. Further, Ms Smith confirmed that she had identified the missing payment and asked Ms Plew to arrange payment by the client, which Ms Plew was either unable or unwilling to do.

[67] To my mind, Ms Cristol took appropriate steps to investigate the matter and identified possible theft by Ms Plew. The subsequent belief she formed that Ms Plew had taken products and cash from the Respondent was based on reasonable grounds.

[68] I find that Ms Plew has not been unfairly dismissed in accordance with section 385 of the Act as the dismissal was consistent with the Small Business Fair Dismissal Code.

### **Was the Applicant’s claim validly filed?**

[69] Having found that the Applicant was dismissed on the employer’s initiative on 5 October 2023, she meets the terms of section 394(1) as being a person who is dismissed and therefore being eligible to apply for an order granting a remedy. I have found that the Applicant was not unfairly dismissed in accordance with the Act, but in the event I am wrong in that

finding, I have also considered whether the premature filing of her unfair dismissal claim should result in the application being dismissed.

[70] Having decided that the Applicant was terminated on 5 October 2023, it follows that her application, as filed on 27 September 2023, was not made in accordance with the Act because the condition for making the application specified in section 394(1), being a dismissal, had not yet occurred. In accordance with the Full Bench authority of *Mihajlovic v Lifeline Macarthur*<sup>8</sup> (Mihajlovic):

*“...that is not the end of the matter because it remains necessary to determine whether, in light of the fact that there is now no doubt that Mr Mihajlovic is a “person who has been dismissed”, the prematurity in the lodgement of Mr Mihajlovic’s application has the consequence that it is invalid and a nullity, or merely subject to a defect or irregularity which is capable of being cured by the use of the Commission’s general powers”.*<sup>9</sup>

[71] The Full Bench ultimately held:

*“An application which was filed prematurely is properly to be characterised as one which was not made in accordance with s.394(1) of the Act. We do not consider that the Act evinces a purpose to render any such application automatically invalid and of no effect. Rather, the Commission is conferred with a discretionary power to dismiss such an application under s.587(1)(a), either on its own initiative or upon application. The Commission also has a discretion under s.586(b) to waive any irregularity in the form or manner in which an application is made.”*<sup>10</sup>

[72] The matter was then remitted from the Full Bench to Vice President Hatcher, as he then was, to determine whether discretion should be exercised to dismiss the application or to waive the irregularity.<sup>11</sup> The Vice President exercised discretion in favour of the Applicant for reasons including that he had prosecuted his claim, the Respondent was on notice of the claim since the time the dismissal took effect, the matter was not without merit, and should discretion not be exercised the Applicant would be forced to file his claim again and seek an extension of time. If that extension was opposed further cost, inconvenience and effort would be expended by both parties in further disputation, and ultimately a significant injustice may be done to the Applicant *“for no discernible public policy reason.”*

[73] Despite the matter of Mihajlovic involving the filing of an unfair dismissal claim during a period of notice, when the dismissal had been communicated but not effected, I consider that it has application in this matter. Ms Plew had not been informed of her dismissal at the time she lodged her unfair dismissal claim, but nonetheless she later became a person ‘who has been dismissed’ as required by section 394(1) of the Act to make an application for a remedy. Ms Plew filed her claim prematurely but it is not, in accordance with the Full Bench authority, automatically invalid.

[74] In accordance with Mihajlovic, it is for the Commission to determine whether it ought to exercise discretion to either dismiss the application, (on its own initiative in this case given the absence of an application by the Respondent), or waive the irregularity in the date of filing to allow the application to proceed.

[75] Had I not dismissed the application for another jurisdictional reason, it would be for me to consider whether to dismiss the application or exercise discretionary power to waive an irregularity.

[76] Should it have been necessary, I would have determined to dismiss the application of my own initiative in accordance with section 587(3)(a) of the Act. Ms Plew has not engaged in the proceedings since the initial directions hearing before me on 7 November 2023. On that date, she refused to appear in person and instead her partner appeared on her behalf. She has not expressed an intention to prosecute her claim since she filed her application in September 2023.

[77] Further, I have already found the dismissal is not unfair and therefore the application has no prospects of success. Ms Plew is unlikely, given her conduct in these proceedings, to re-file her claim and seek an extension of time.

[78] These matters are distinguishable from the considerations given to the exercise of discretion in Mihajlovic by Vice President Hatcher, as he then was, and persuade me that I should exercise my discretion differently in this matter.

### **Conclusion**

[79] I dismiss the jurisdictional objection made by the Respondent that the Applicant was not dismissed and find that the Applicant was terminated on the Respondent's initiative.

[80] The dismissal of the Applicant is not unfair because the Respondent acted consistently with the Small Business Fair Dismissal Code.

[81] Despite the application being made before the dismissal occurred, the application is not necessarily invalid. Despite my finding that the dismissal is not unfair, I would otherwise not exercise my discretion to waive the irregularity in the filing date and would dismiss the application because the Applicant has failed to engage in the proceedings and has otherwise not persuaded the Commission that she intends to prosecute her claim.

[82] The Applicant's claim for an unfair dismissal remedy is dismissed. An order to this effect will be issued separately.



COMMISSIONER

*Appearances:*

*A Cristol* for The Trustee for the Cristol Family Trust.

*Hearing details:*

Adelaide (Video via MS Teams)

2024

8 January.

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<sup>1</sup> Form F2 at paragraph titled - *What happened and why does the Applicant think it is unfair?*

<sup>2</sup> [\[2014\] FWCFB 1070](#) at [10].

<sup>3</sup> (1995) 62 IR 200.

<sup>4</sup> Above note 2 at [13].

<sup>5</sup> *Burns v Aboriginal Legal Service of Western Australia (Inc)* AIRCFB (Print T3496) at [24]. More recently referred to in *Spencer v Surfside Buslines Pty Ltd T/A Surfside Buslines Pty Ltd* [\[2017\] FWCFB 1975](#) at [3] and described as a ‘well-established principle’.

<sup>6</sup> [\[2015\] FWCFB 5264](#).

<sup>7</sup> As above at [41].

<sup>8</sup> [\[2014\] FWCFB 1070](#).

<sup>9</sup> Above at [21].

<sup>10</sup> Above at [42].

<sup>11</sup> *Mihajlovic v Lifeline Macarthur* [\[2014\] FWC 1871](#).