DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Amanda Davis

v

Wrekton Pty Ltd
(U2023/12309)

DEPUTY PRESIDENT MASSON MELBOURNE, 25 MARCH 2024

Application for an unfair dismissal remedy

[1] This decision concerns an application made by Ms Amanda Davis (the Applicant) for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009* (the Act). The Applicant who was employed by Wrekton Pty Ltd (the Respondent) alleges she was dismissed on 26 November 2023. The unfair dismissal application was lodged by the Applicant on 11 December 2023.

[2] On 22 December 2023, the Respondent filed its Form F3 response to the unfair dismissal application in which it raised two jurisdictional objections to the application, the first being the Applicant was not dismissed. The second jurisdictional objection raised was that the application was filed outside the statutory 21-day filing period based on the termination of employment having taken effect on 26 October 2023. An extension of time would in these circumstances be required for the filing of the Applicant's unfair dismissal remedy application.

[3] Conciliation of the matter before the Commission failed to achieve a resolution, and consequently, the matter was listed for conference/hearing on 20 March 2024. After hearing from the parties, I determined to conduct a hearing pursuant to s 399 of the Act. Both parties filed material in advance of the hearing on 20 March 2024 in accordance with directions issued.

[4] The Applicant appeared on her own behalf and gave evidence while Vince Scopelliti (Managing Director) appeared for the Respondent and called Janet Costa (Corporate Service Manager) to give evidence.

Background and evidence

Applicant's employment

[5] The Respondent operates a business known as 'Wise Workplace' which provides specialist investigation services across Australia. Its services are stated to include investigations into; workplace misconduct, misconduct in the disability, childcare and aged care sectors, reportable conduct, child abuse and grooming, bullying harassment and discrimination, misuse

of social media and misuse of authority. It has offices in Sydney, Melbourne, the ACT, Brisbane, Hobart and Perth.

[6] The Applicant commenced employment with the Respondent in Hobart on 22 July 2019 in the position of Senior Workplace Investigator on a base salary of $109,000. Over the ensuing 5 years, her role title and duties changed on a number of occasions. Her role titles included State Manager, Principal Reviewer and at the time of her cessation of employment she held the position of Principal Investigator. During her employment she received salary increases in November 2022 and again in August 2023, which took her base salary to $132,000 which she was in receipt of on termination of employment. Her hours of work also changed over the period of the Applicant's employment. Having started on the basis of normal office hours of 8.30am to 5.30pm Monday to Friday, she was approved to move to a 9-day fortnight in October 2020 and then was approved to move to a 4-day week effective from 27 February 2023[1].

[7] The Applicant states that the work undertaken for the Respondent is at times both challenging and confronting and that a large part of the work involves investigations into abuse of children and people with disabilities for example. According to the Applicant, interviewees in investigations often suffer from psychological harm and/or require considerable emotional support during investigations. She claims that this leaves investigators exposed to vicarious trauma and psychological harm. Against this background she claims that the Respondent has no system of risk analysis or mitigation procedures in place, no peer support or other support function, and no co-ordinated approach to health and safety[2].

[8] The Applicant states she was exposed to three particularly traumatic events[3];

(1) At some time in 2020/2021, she claims that a teacher who was the subject of an investigation and a positive finding in respect of sexual harassment and assault of a student, harassed the Applicant over a period of several weeks.

(2) On 26 January 2022, the Applicant's home property was vandalised with the word 'Bitch' spray painted on buildings and fences. The person responsible for the vandalism was never identified although the Applicant suspected the perpetrator may have been a person she had interviewed during the course of an investigation.

(3) In early 2023, the Respondent was engaged in an investigation into an incident in which a disability client poured petrol over himself and self-immolated. The relevant Disability Support Worker (DSW) being interviewed by the Applicant was not advised prior to the interview that the client had passed away. This led to severe emotional distress of the DSW which the Applicant needed to manage.

[9] The Applicant states that support from Management after these events was nothing more than kind words, the incidents to her knowledge were never properly recorded, that a request for a new form to update medical issues and emergency contacts was not actioned and that while an Employee Assistance Program (EAP) had been introduced, it had never been used to her knowledge[4]. The Applicant also states that the workload and hours of work required were oppressive necessitating long days and regular weekend work[5]. Regrettably, no timesheets, billable hours records or calendar records of hours worked were produced in evidence by either party to support or disprove the general claim made by the Applicant regarding her hours of

work. The Applicant conceded during cross-examination that she had complete flexibility in her hours of work and in particular choosing whether she worked from home, subject to the requirement to attend the office for the purpose of conducting interviews.

[10] On 25 January 2023, the Applicant wrote to Mr Scopelliti seeking to move to a 4-day week;

> "……
>
> Unfortunately I've got a witness scheduled over our catchup today – I've been chasing her for ages and didn't want to lose her.
>
> As to other things, I'm working far too hard and too many hours to make this workable. I appreciate the recent pay rise, and I used it to hire a little help on the farm, but it's not enough.
>
> I'd like to ask to work a four day week every week. As it is I'm already doing at least some work on my Fridays "off", and on most weekends and evenings. I'll still work that pattern, but not being expected to be available on Fridays will free me up to manage when I do the work better, and will allow me to get things done during the day – particularly setting up health appointments. I have a flare up of a chronic auto immune disease that I'm trying to manage (stress is NOT helpful), mental wiring that can sometimes be dodgy (again, stress not helping), and now I have a back issue that I need to get on top of. I can't manage health and property and workload and animals.
>
> Is a four day week acceptable to you, provided I'm still getting the work done?
>
> ……."[6]

[11] In responding to the Applicant by email on 22 February 2023, Mr Scopelliti noted the following relevant matters in considering the Applicant's request to move to a 4-day week;

> "…….
>
> Within your email of 25 January 2023, you set out that you:
>
> - wish to work a four-day week, rather than your current nine-day fortnight;
> - have been undertaking work when you are not scheduled to be at work, on every second Friday;
> - have been undertaking work on 'most weekends and evenings';
> - are managing flare up of a chronic auto immune disease;
> - have a back issue you wish to address;
> - are unable to manage your health, property, workload and animals under the current arrangements.
>
> Whilst considering your request, I have reviewed your employment file and note the following:

- You commenced employment with us on 22 July 2019, in the role of Senior Investigator
- On 5 October 2020 you requested to move to a 9-day fortnight, and this was approved, effective from 1 January 2021. No amendment was made to your total remuneration package to reflect the shortened working hours. We note that, as part of your request you highlighted you were overworked and exhausted.
- On 11 November 2022 you requested a salary increase
- On 15 November 2022, you were provided with a $10,000 salary increase, effective immediately.
- On 25 January 2023, you submitted your current request for a change to working hours.

……"[7]

[12] Mr Scopelliti went on his email dated 22 February 2023 to agree to the Applicant's request to move to a four day week subject to the following conditions;

- all billable hours were to be recorded in Trackops (the billable hours recording application) by the Applicant;

- information was sought by the Respondent from the Applicant in relation to the auto immune and back condition referred to by the Applicant's in her 25 January 2023 email;

- completion by the Applicant of a catch-up template prior to each weekly meeting;

- advice of sub-standard work to be highlighted each week by the Applicant; and

- recording of excess hours on a monthly basis by the Applicant and use of time off in lieu (TOIL) to manage those excess hours.[8]

[13] The Applicant goes on to state that changes to her hours of work in terms of the 9-day fortnight and 4-day week did not materially improve matters as she claims no measures were taken by Mr Scopelliti or Ms Costa to ensure the Applicant had the benefit of the day/s off and as an example Mr Scopelliti regularly scheduled meetings on her days off to which she was required to attend[9]. She claims that none of the conditions referred to in Mr Scopelliti's 22 February 2023 email were implemented[10]. She did however accept in cross-examination that she also took no steps to implement the measures set out in the 22 February 2023 email, save for ensuring she recorded her billable hours in Trackops. She also agreed that by February 2023, the working hours demands had declined to more manageable levels. There is also no evidence that the Applicant supplied further information regarding her auto immune and back condition as requested by Mr Scopelliti in his 22 February 2023 email.

[14] Ms Costa was questioned on the Applicant's hours of work and was asked to respond to the Applicant's claim that no steps were taken by the Respondent to manage the Applicant's working hours. Ms Costa responded that the Applicant routinely failed to record her billable hours in Trackops both before and following the 22 February 2023 email and also failed to properly record her hours in her outlook calendar as requested. She further stated that the Respondent was simply unable to ascertain the hours worked by the Applicant. She also acknowledged that the Applicant did request days off from time to time based on excessive

hours but in considering those requests Ms Costa was unable to verify her hours. She also confirmed that the TOIL arrangements along with other "conditions" set out in the 22 February 2022 email were not implemented, including for the reason that the Applicant failed to properly record her hours of work.

[15] When pressed on the Applicant's use of Trackops, Ms Costa agreed that Trackops was the application through which the Respondent recorded data for billing purposes and that if an employee/contractor failed to utilise Trackops for recording billable hours the accounts department would have to follow up with the relevant employee. She stated that she was unaware of whether the Respondent's accounts team had followed up with the Applicant. Nor was she able to point to any records of that having occurred. She reaffirmed that most employees also used Trackops for non-billable hours but agreed it was not a mandatory requirement.

[16] The Applicant rejects Ms Costa's evidence that she failed to input her billable hours into Trackops. She accepts that she had not been inputting non-billable hours because firstly, she was not required to input non-billable hours and secondly, she did not have sufficiently reliable access to the VPN to do so. She states Ms Costa was aware the Applicant was not recording non-billable hours for this reason[11]. Ms Costa stated during cross-examination that she could not recall the issues of the computer and VPN being raised being raised by the Applicant. I note however that Ms Costa emailed the Applicant on 13 April 2023 and stated as follows;

> "……..
>
> James has forwarded me your email and I am aware of your computer issues. It is unusual for a laptop not to last at least 5 years - we are at the 3 year mark with yours. You are not using the one that Ed had that one broke.
>
> However, in order to make life easier, we will send you a new laptop and once you receive it and it is up and running you can use the same box to send it back to us. That way IT can hopefully do some work on it so that we can re-use it here.
>
> IT will let you know how to keep it in good working order - and we do understand the VPN issues - we need to sort out SharePoint for Tas - I imagine that Tess is the best person for James to speak to about getting that sorted?
>
> Hopefully the trust will return .. keep smiling.
>
> ……"[12]

[17] The Applicant states that at some time in 2022, her role title changed from State Manager to Principal Reviewer. She says the purpose of the role change was that she would be the primary reviewer for all reports and investigations and that the new role would involve a large training, mentoring and upskilling component. The change also had the intended effect of reducing her operational investigation work. However, over several months following the role change, she states that the purpose of the role was eroded by the necessity for her to focus on full-time operational requirements which she claimed led to her again working excessive hours in handling her own investigations across the country, rather than just Tasmania[13].

[18] In May/June 2023, the Applicant states that Mr Scopelliti announced an organisational restructure that directly affected her role without any prior consultation with her. She says the effect of the change was that the Principal Reviewer role she held would be scrapped and that she would return to full-time operational investigations. She claims this had a devastating effect on her as she had expected she would return to her preferred role of dealing with documents rather than people. She states that by 5 June 2023, she had a number of meetings with Mr Scopelliti and Ms Costa about the proposed changes and that they were well aware she was acutely unwell and exhausted. She says that while Mr Scopelliti subsequently made some changes to the proposed structure, she says that nothing certain was ever provided to properly detail what the new structure would be[14].

[19] Subsequent to the above announced changes, the Applicant states that she informed Mr Scopelliti that she was unable to continue in an operational role and that if her review role was not maintained or restored she would have to seek alternate employment, but committed to remaining with the Respondent until she found a new role[15]. She states she immediately commenced seeking a new role and attended a number of interviews, including a Director of Workplace Relations role with the University of Tasmania, of which she informed Mr Scopelliti and requested that he act as a referee for her[16]. It was also agreed with Mr Scopelliti that she would take a period of annual leave from 9 July – 11 August 2023[17].

[20] The Applicant was questioned on how she felt she was capable of applying for and if successful performing what would have been a demanding role with the University Tasmania as Director of Workplace Relations in circumstances where she states she was suffering from "vicarious trauma" and "PTSD". She responded by stating that had she been successful in that application she would not have been responsible for conducting any investigations and the role would have been more one of oversight. She also stated she was attracted to the enterprise bargaining component of the role.

[21] Immediately prior to the Applicant's return from annual leave in August 2023, discussions took place on 4 August 2023 involving the Applicant, Mr Scopelliti, and Ms Costa regarding the Applicant's return to work options. An email[18] was subsequently sent to the Applicant by Mr Scopelliti on 7 August 2023 in the following terms;

> "……..
>
> The purpose of the meeting was for us to gain a better understanding from you as to what you required to continue working with Wise after taking a break. As requested we have considered your feedback and now put in writing some options which we hope will align with your needs as well as ours and convince you to agree to continue working with us. The options we propose are as follows:
>
> 1. You return in a fixed full time role with a new title and position description in which your primary role will be report writing, proofing, quality assurance and conducting reviews. This will be a 9am – 5pm job although it can be tailored to be a flexi hours. We note that you already have flexibility with your current role in a hybrid working arrangement home/office. This would continue with all hours being logged in Trackops, so we can support your safe working conditions.

We will also seek to support you in this role and reduce any non-productive tasks.

2. We understand that flexibility is important to you but you need job security. We therefore believe that the option of a consultancy role with a provision of agreed minimum hours could also accommodate your needs as well as the requirements of your position. A consultancy role which would allow you to pick and choose the work that you want to take on and you get paid for the hours you work. We understand that you want security in a role however, we believe we have plenty of work to offer you the hours you require and as a casual you would still be entitled to superannuation. We can provide you with an agreed minimum hours as well to ensure you maintain your security.

You have also requested a salary review. We have also given this thought and looked at the business carefully and we can offer you the following salary arrangements for the above 2 options:

If you choose option one to return full time we would be able to offer you an increase your base salary by 10% to $132,000 plus superannuation providing you with a package of $145,200 incl.

If you choose option two we would be able to pay you an hourly rate of $90.00 plus superannuation.

…….”

[22] In accepting the first option proposed, the Applicant then responded at 8:49am on 9 August 2023 to Mr Scopelliti’s 7 August 2023 email in the following terms;

“…….

My apologies, I have only just seen this – I am not actively monitoring work emails while on leave and I have actually been quite unwell for the first part of this week.

I would like to add a little to the record of why we met, because I raised some points I felt were important regarding support, but I need a bit of time to compose those thoughts.

In the meantime, I would like to try and make option 1 work. It will assist if you have some work ready for me to commence with on Monday so that I’m not feeling disengaged. I would also like to have a couple of weeks if possible without substantial client / witness contact as I’m still very likely suffering from a little burnout and vicarious trauma.

I anticipate returning on Monday if this is suitable.

I will make some other notes to round out the summary of our discussion in the near future.

……..”

[23] When cross-examined on the restructure, the Applicant agreed she was unhappy with her initially proposed role although she agreed that an organisational restructure was necessary. She particularly objected to the manner in which she was informed of the change in that it was announced in a meeting that her role of Principal Reviewer would no longer exist. While unhappy with the proposed new role of going back to investigations, she accepted that she and the Respondent continued to discuss her concerns which ultimately led to Mr Scopelliti’s proposal on 7 August 2023 which she accepted. The Applicant also agreed that the Respondent had agreed to changes in her hours of work and had increased her salary in 2022 and 2023 and accepted that the Respondent at the time had been seeking to retain her and attempted to accommodate her needs.

[24] Following receipt of the 9 August 2023 email from the Applicant, Mr Scopelliti replied at 12.39am on 10 August 2023 as follows;

> “…….
>
> Thank you for your email. We are pleased that you are keen to return to work next Monday. We certainly have enough work to keep you busy with over the next few weeks with minimal or no client or witness contact. However, given your reference to your health and burnout and vicarious trauma we feel that it is our duty of care to ensure you are well enough to return to work. Please provide us with a medical clearance from your doctor to return to work.
>
> It also seems that you want to raise more points that you feel are important regarding support. We feel it is imperative that you provide us with these prior to you returning to work so that we can consider them and ensure that we are able to support you should you return to work in the new role. We will add you leave for this week into the leave planner which will be confirmed via email.
>
> Once the above is completed we are happy to send you an email ready for Monday with a list of matters you can get started on.
>
> ……”[19] (emphasis added)

[25] The Applicant was unhappy with the Respondent’s request for her to provide a medical clearance. She responded as follows on at 4.46am 10 August 2023;

> “……..
>
> Re doctor’s clearance, sure….
>
> But this is Tasmania, where a doctor’s visit is akin to a miracle.
>
> I’d say a couple of things: I’ve been telling you for a while that I am struggling with both the amount and the content of the caseload, and you’ve not requested a clearance before.

This feels like a bit of HR tick the box rather than a request designed to genuinely assist me or to do anything meaningful. This is frustrating because it feels like another obstacle to a return to work.

Secondly, it will cost me almost $100 ($91.50, to be precise) to see a doctor, which I feel is an unnecessary expense given I have no medical need to see a doctor – unless you wanted to cover it?

Finally, and most importantly, my regular doctors are available in late September and early October respectively (see below).

There is one other doctor who I have seen once in the past who is available in around two weeks. I could see any GP at that practice sooner, but (a) they may be unwilling to write a return to work clearance given they've never met me before, and (b) any such clearance could not possibly have any meaningful purpose. All they could possibly do is write down that I told them I felt I was fit for work. What would be the point?

If I'm to remain on leave until I can see a doctor, could you please change my leave type to sick leave? I don't want to run down all my annual leave when this is no holiday. I'd also ask this week to be changed to sick leave at least for Monday-Wednesday as I was unwell.

This is actually feeling quite punitive rather than supportive."[20]

[26] Mr Scopelliti then relented in relation to the request for a medical certificate and replied as follows the same day at 5.38am on 10 August 2023;

"…….

We are certainly not wanting to raise any obstacles for your return to work only to ensure you are ready to do so. We haven't requested a clearance from you before as you were not off work on sick leave previously. When you refer to doing something meaningful below can you explain what you mean and if there is any other support that we can offer you?

If you are well enough to return to work next Monday without a clearance certificate then we are happy for you to do so but will just need to monitor this to ensure that you are ok with the work.

Sorry to hear that you have been sick for 3 days this week and we hope you are now feeling better. We are happy to amend your leave records accordingly but in accordance with our policy we will need a medical certificate for this period.

In the meantime we will arrange some work for you to commence with on Monday as requested.

……."[21]

[27] The Applicant states that on her return to work on 13 August 2023 she did so based on the assurance from Mr Scopelliti in his 9 August 2023 email that *'We certainly have enough work to keep you busy with over the next few weeks with minimal or no client or witness contact.'* She further states that in the following two weeks she completed two to three reports which she believes were not of high quality and was not up to her usual standard. She says the poor reports were reallocated to another investigator. In the last week of August 2023, she states that despite her return to work being based on limited client/witness contact she was allocated what Mr Scopelliti described as a 'simple classification review matter' for the Friends school in Hobart (the Friends Review). On commencing the process of arranging for the scheduling of witnesses as part of the review, she called a witness who was distressed which the Applicant says she was not prepared for[22]. Following this discussion, the Applicant says she left the workplace and returned home and requested on 5 September 2023 that the case be reallocated to another investigator.[23]

[28] During cross-examination the Applicant accepted that she had agreed to take on the Friends Review on the basis that it was a simple matter and that she had previously worked with that client. She stated that contrary to Mr Scopelliti's assurance in his 10 August 2023 email that she would have limited client contact on her return to work, she found herself immersed in a far from simple matter in which she was exposed to distressed interviewees. She also disagreed with the proposition put to her that a bullying aspect found to be present in the matter was not within scope of the investigation.

[29] On 7 September 2023, Ms Costa reached out to the Applicant by email in the following terms;

> "……
>
> Just reaching out to you to see how you are feeling. Vince did try to call you and left you a message.
>
> We note from your correspondence below that you don't anticipate being back to work this week. In the circumstances to ensure we are looking after your health and wellbeing we will put an out of office message on your emails and monitor them internally and amend your access on Trackops as it is not appropriate for you to have to monitor your work whilst you are unwell. We do appreciate that you have been forwarding important emails on thank you.
>
> If you could also assist us by applying for your leave through the leave planner as soon as possible. We do hope that you are ok and look forward to catching up with you when you are feeling better.
>
> ……"[24]

[30] The issue of the Applicant's access to Trackops and her work email was the subject of competing evidence. Ms Costa confirmed during cross-examination that Trackops access was removed when the Applicant was off work from 7 September 2023 based on the Respondent's belief that it was not appropriate for the Applicant to be accessing work related matters while

she was off on personal leave. As regards access to emails, the Applicant claimed that she was unable to access her work email account from on or about 9 October 2023. Ms Costa rejected this and stated that the Applicant's access to her email account was not removed until 1 November 2023 when Ms Costa instructed IT to remove access[25].

[31] The Applicant attended her medical practitioner on 7 September 2023 and obtained a medical certificate that covered the period up to 24 September 2023. The medical certificate did not specify the nature of the medical condition. On 10 September 2023, the Applicant forwarded the medical certificate to Ms Costa which was subsequently acknowledged by Ms Costa on 12 September 2023. In acknowledging receipt of the medical certificate Ms Costa also requested advice from the Applicant as to what form of leave she was seeking as she had exhausted all of her personal leave[26]. A further medical certificate was subsequently provided by the Applicant to cover the period from 24 September – 9 October 2023.

[32] In the period between 5 September – 9 October 2023 when the Applicant was off work, she claims that the Respondent apart from acknowledging her medical certificates made no contact with her to discuss her return to work. The Applicant further states that she returned to work on 9 October 2023, greeted her colleagues, caught up on what was happening in the office and joined her colleagues for a morning coffee. She further states that she was unable to log in to Trackops on that day[27]. Having received no contact from Mr Scopelliti or Ms Costa the Applicant left and returned home[28].

[33] The Applicant conceded in cross-examination that she had not contacted Mr Scopelliti or Ms Costa either before or on arrival at work on 9 October 2023 to let them know she had returned to work. It was also put to the Applicant that it may be difficult or inappropriate to contact staff during a period of leave. The Applicant rejected that proposition on the basis that she claimed Mr Scopelliti had contacted her previously while she was on leave.

[34] At 9.36am on 11 October 2023, Ms Costa sent the Applicant an email to her work email address which the Applicant claims she was unable to access. The email was subsequently redirected to her private email address and stated as follows;

> "……
>
> We write to you given the expiry of your medical certificate dated 21 September 2023 which certified you as unfit for work from 25th September 2023 to 9th October 2023.
>
> You have been absent from the workplace since 6th September 2023, a total number of 26 days as at the date of this email.
>
> We have not heard from you to apprise us of your status, since your submission of the above certificate via email on 22nd September 2023.
>
> Your medical certificates do not provide any indication of the likely duration of your absence or on what date you are likely to be fit to return to work.
>
> Your medical certificates were not accompanied by any advice or information about your status or likely duration of absence.

> We note you have 192 hours of annual and 70.9 hours of personal leave remaining. Please advise us whether you intend to apply for further leave, and on what basis.
>
> Whilst we regret you have been ill, Wise needs to make arrangements to operate the business in your absence and to make an assessment of whether you will be fit to return to your duties within a reasonable period of time, and what Wise can do to support and assist your return.
>
> Please note we are obligated to make all reasonable efforts to ensure your safety and the safety of others in the workplace. Accordingly, once you anticipate a return, we will require you to produce a report from your treating doctor providing medical advice as to when and if you are fit to perform the inherent requirements of your role. This will also enable Wise to consider what supports and adjustments we can make to assist your safe return to work.
>
> We are willing to pay for the reasonable cost of the production of the report from your medical practitioner confirming whether you are fit to perform the inherent requirements of your role and look forward to receiving your advice in this regard so that we can provide you with the necessary information to submit to your doctor in order to prepare the report.
>
> We are committed to assisting you to safely return to work and look forward to hearing from you.
>
> ……..”[29]

[35] The Applicant also sent an email that same day at 2.03pm on 11 October 2023 to Mr Scopelliti in the following terms;

> “…….
>
> I'm not certain if you're aware, but I was actually supposed to return to work on Monday. The lack of inquiry into even my whereabouts, let alone my welfare, is confirmation (if I needed any) about the level of care for employees at WISE / LKA.
>
> I had fully expected a phone call from yourself or Janet on Friday asking me how I was and telling me what I would be working on, or welcoming me back, or seeing what support etc I might need to return to the job.
>
> When it didn't occur on Friday, I came to work on Monday, read my emails, found nothing there, waited briefly for someone to make contact, and then left.
>
> To have made no contact at all over so many weeks, in circumstances where you are aware (whether you agree with my conclusion or not) that I believe the workplace has harmed me, and where you are certainly aware that I am not travelling well, is not something I have a word for.

> My next doctor's appointment is tomorrow. I had expected to discuss my first week back and/or get clearance for a full return, but I imagine now we will be talking about a workers' comp claim.
>
> Could you please let me know how much leave (sick and annual) I have left.
> You.
>
> ……"[30]

[36] Mr Scopelliti replied to the Applicant at 3.31pm on 11 October 2023 in the following terms;

> "……..
>
> Apologies for the lack of communication - we were unsure if you were coming back to work this week. Janet did send an email to you yesterday to your Wise email asking about your plans and detailing your outstanding leave etc.. I have asked her to resend this to your personal email.
>
> I am still unsure of your future work plans as you have discussed applying for other jobs and we were not sure what your plans were about returning to Wise. I would like discuss this with you further. Let me know when you are free to discuss - maybe tomorrow?
>
> ……"[31]

[37] On 13 October 2023, the Applicant furnished a further medical certificate which stated the Applicant "has a medical condition and is unfit for work" and which covered the Applicant for the period from 10 October – 24 October 2023[32].

Applicant's 'resignation'

[38] The Applicant states she attended her doctor on 12 October 2023 expecting to commence a workers compensation claim process, during which consultation her medical practitioner expressed caution about pursuing a workers compensation as it could cause more harm. After much consideration, the Applicant states she concluded that the Respondent could not provide a safe workplace[33]. Following the medical certificate sent to the Respondent on 13 October 2023, the Applicant made no further contact with the Respondent until she sent a resignation email (the Resignation Email) to Mr Scopelliti on 22 October 2023 in the following terms;

> "…….
>
> Thank you for your call on Friday, apologies that I didn't reach it in time.
>
> As you know I don't agree with a lot of what has been said and done in the last few months, and I had a much longer email drafted, but I'm not certain there's any point in it.
>
> I have spoken with my partner and my doctor, and have reached the conclusion that there is really no way back to WISE for me. There simply isn't the mechanism, nor

perhaps the willingness, to create a safe workplace. The only model you have is to burn people out and churn on to the next one, and I've witnessed this with so many employees before me that I can't hope for any change. There is simply insufficient support for what is often very difficult work to be able to keep it up for an extended period.

I also don't see any prospect of being able to work well with Sadie - while I find her quite likeable on a personal level, I can't stomach the level of disrespect when she disagrees, and I can't work in an environment where the only allowable conclusion is the one that Sadie agrees with.

I've also seen enough through the investigations and agree with my doctor's advice that the workers compensation process often compounds the harm already done, so I will fund my own recovery rather than submit a claim.

I know Janet provided me with some leave figures, but I can't now find them. If possible I would like to remain on annual leave until it runs out, and to have my resignation effective at that time. I will need a little time to clear out my office and return my computer, phone, etc, and I'm not currently keen on attending the office.

I'm very sad to be leaving WISE, and this has been a difficult decision. I do feel that something that I enjoyed and was good at has been unjustly taken away through some very poor management decisions, and a punitive approach to employee wellbeing that places all the responsibility on the employee and none on you as an employer. WISE's approach to psychological safety at work is stuck in the 1990s, and I would really encourage you to assist Janet to bring her HR practice into line with modern standards.

I wish you and everyone at WISE / LKA all the best.

……."[34]

[39] Mr Scopelliti replied to the Applicant's Resignation Email on 26 October 2023 in the following terms;

"…….

Thank you for your email of 22 October 2023.

We understand your position and, in the circumstances, I acknowledge, confirm and accept your resignation.

We note your request to use your annual leave and we therefore suggest that we us this period as your notice period. In accordance with section 23.5 (a) of the employment Agreement (the Agreement), we would like to make payment to you in lieu of the notice period, as defined.

Please note that unless I hear from you otherwise I propose that your payment in lieu of notice will include any unused leave entitlements owing to you, and I propose to have this be processed to your nominated bank account by close of business on Tuesday 31th October 2023.

> Please ensure all property belonging to the company in your possession, custody or control, including, without limitation; keys, , Confidential Information, software, devices, data, reports, proposals, lists, correspondence, materials, equipment, computers, monitors, hardware, software, hard drives, paper, books, records, documents, memoranda, manuals, e-mail, electronic or magnetic recordings or data, are returned to the Hobart office by Friday 3 November 2023. I have attached a list of assets that IT Department has provided us for your confirmation and return.
>
> It would have been great if we could have discussed some of these matters but appreciate your position. I also acknowledge you feedback and will be working with Janet to assess how we approach these matters in future.
>
> In the meantime I would like to take the opportunity to thank you for your contribution to the business and to wish you well in your future endeavours.
>
> ……..”[35]

[40] Having received no response to Mr Scopelliti’s email of 26 October 2023, the Respondent proceeded to pay out the Applicant’s notice period which represented payment of her accrued annual leave that she had proposed to exhaust. In paying out the notice period the Respondent relied on clause 23.5(a) of the Employment Contract which relevantly states as follows;

> “23.5 The Employer at its sole discretion may do any combination of the following:
>
> (a) Elect to make a payment in lieu of notice;
>
> (b) Require the Employee to take annual leave during the notice period;
>
> (c) Require the employee to undertake such alternative duties and responsibilities as may be required by the Employer, including undertaking no duties during the notice period.”

[41] The Applicant returned her keys on 30 October 2023[36], her access to the Respondent’s email system was removed on 1 November 2023[37] and her equipment was returned to the Respondent on or about 9 November 2023[38]. The Applicant’s final pay was processed and paid into her bank account on 2 November 2023[39].

[42] The Applicant states that while she accepted an invitation to attend the Respondent’s Hobart office on 30 October 2023 to have a coffee with a colleague and debrief, she became extremely unwell after 30 October 2023. She claims to have suffered from sleep disturbance, extreme anxiety and flashbacks. She further states that she refused normal social engagements and became quite depressed and was unable to deal with any work related issues for several weeks. While she acknowledged that Mr Scopelliti sent an email on 26 October 2023, she claims to have not read it until her health improved in early December 2023[40].

[43] When cross-examined on her resignation, the Applicant conceded that she had resigned of her own free will, acknowledged the right of the Respondent to pay out the notice period,

and didn't dispute that Mr Scopelliti's response to her resignation was received by her on the 26 October 2023. She maintained that by reason of her medical condition she simply did not read any emails for several weeks after she sent her resignation email on 22 October 2023. Nor she stated did she check her bank account and was unaware that her notice period had been paid out. She further denied that she returned her office key and equipment in response to the requirement stated in Mr Scopelliti's email of 26 October 2023. On the basis of the foregoing, she believed that her resignation was due to take effect on exhaustion of her annual leave on or about 26 November 2023.

[44] In relation to her claimed medical condition, the Applicant conceded in cross examination that she had not at any stage provided the Respondent with any medical report or certificates that supported her claim that she was suffering from "vicarious trauma and PTSD" as a result of her work with the Respondent. She also agreed that the medical certificates supplied to the Respondent prior to her resignation made no reference to her mental health issues. She further agreed that despite claiming that she was totally incapacitated following her resignation, she did not seek medical treatment between 25 October and 10 December 2023 and did not in fact see a medical practitioner until 6 March 2024, the delay in which she attributed to difficulty in securing an appointment. She pointed to a 6 March 2024 medical appointment she made on 22 December 2024[41].

[45] In support of her claims to have been medically incapacitated following her resignation, the Applicant supplied a "Letter of Support" from her general practitioner (GP) (who was not called to give evidence), and which was dated 6 March 2024 and relevantly states as follows;

> "[The Applicant] has been consulting with me regards to work related issues since June 2023. She presented with mental health symptoms and I found her not fit to work for a period of time.
>
> She stated that she continued to have work related problems and her mental health deteriorated
>
> From 25 October 2023
>
> To 10 December 2023
>
> Her mental health symptoms were poor focus and concentrations, anxious, poor sleep and these symptoms were ongoing….."[42]

[46] The Applicant was challenged during cross-examination on how she was able to attend the Respondent's Hobart office on 30 October 2023 and return her keys but was unable to read and/or respond to Mr Scopelliti's email of 26 October 2023. She stated that while she was unable to deal with any communication from the Respondent, she was capable of meeting with her former colleagues which she recalled occurred in a coffee shop. She was further questioned as to what had changed such that she was able to make her application to the Commission on 11 December 2023 when the Letter of Support from her GP stated that as of 6 March 2023, her identified symptoms were ongoing. She responded that her condition had improved sufficiently by 10 December 2023 such that she was able to prepare and lodge her application. The

Applicant also confirmed that she started making some job applications in January 2024 and had recently secured employment, the start date for which was yet to be confirmed.

Has the Applicant been dismissed?

[47] A threshold issue to be determined in this matter is whether the Applicant has been dismissed from her employment. The circumstances in which a person is taken to be "dismissed" are set out in s 386 of the Act. Section 386(1) relevantly provides as follows:

> (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.

[48] Section 386(2) of the Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[49] The authorities in respect of the meaning of the term "dismissed" are well traversed and it is useful to detail some of them at this point. In a decision made prior to the passage of the Act, the Full Court of the Industrial Relations Court of Australia *Mohazab v Dick Smith Electronics Pty Ltd*[43] (Mohazab) was considering whether an employee had been forced to resign in circumstances where the employee signed a letter of resignation drafted by the employer shortly after being interviewed in relation to allegations of dishonesty. After setting out the findings of fact the Full Court said the following when considering the meaning of *'termination at the initiative of the employer;'*

> "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. This issue was addressed by Wilcox CJ in APESMA v David Graphics Pty Ltd ("David Graphics"), Industrial Relations Court of Australia, NI 94/0174, 12 July 1995, as yet unreported, Wilcox CJ. His Honour, at 3, referred to the situation an employee who resigned because "he felt he had no other option". His Honour described those circumstances as:-
>
> > "... a termination of employment at the instance [of] the employer rather than of the employee."
>
> and at 5:-
>
> > "I agree with the proposition that termination may involve more than one action. But I think it is necessary to ask oneself what was the critical action, or what

were the critical actions, that constituted a termination of the employment.'" (our emphasis added)"

[50] In a more recent Full Bench decision in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli*[44] (Bupa), the Full Bench was dealing with an appeal of a decision in which the member at first instance found that the dismissal was within the meaning of s.386(1) and that the dismissal was unfair. The Full Bench in Bupa was concerned with a "forced" resignation and how the passage of the Act impacted prior authorities when it stated as follows;

> **"[33]** Notwithstanding that it was clearly established, prior to the enactment of the FW Act, that a "forced" resignation could constitute a termination of employment at the initiative of the employer, the legislature in s.386(1) chose to define dismissal in a way that retained the "termination at the initiative of the employer" formulation but separately provided for forced resignation. This was discussed in the Explanatory Memorandum for the Fair Work Bill as follows:
>
> "1528. This clause sets out the circumstances in which a person is taken to be dismissed. A person is dismissed if the person's employment with his or her employer was terminated on the employer's initiative. This is intended to capture case law relating to the meaning of 'termination at the initiative of the employer' (see, e.g., Mohazab v Dick Smith Electronics Pty Ltd (1995) 62 IR 200).
>
> 1529. Paragraph 386(1)(b) provides that a person has been dismissed if they resigned from their employment but were forced to do so because of conduct, or a course of conduct, engaged in by their employer. Conduct includes both an act and a failure to act (see the definition in clause 12).
>
> 1530. Paragraph 386(1)(b) is intended to reflect the common law concept of constructive dismissal, and allow for a finding that an employee was dismissed in the following situations;
>
> - where the employee is effectively instructed to resign by the employer in the face of a threatened or impending dismissal; or
>
> - where the employee quits their job in response to conduct by the employer which gives them no reasonable choice but to resign."

[51] Having identified there were two elements to s.386(1) and after extensively considering the authorities, the Full Bench then said;

> **"[47]** Having regard to the above authorities and the bifurcation in the definition of "dismissal" established in s.386(1) of the FW Act, we consider that the position under the FW Act may be summarised as follows:
>
> (1) There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed

in the "heat of the moment" or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although "jostling" by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.

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

[52] In the present matter the Applicant articulated in the proceedings that she had been dismissed within the meaning of the second limb of s. 386(1) that being she had resigned from his employment with the Respondent, but was forced to do so because of conduct, or a course of conduct, engaged in by his Respondent.

Consideration

Whether Respondent's conduct or course of conduct forced the resignation of the Applicant (s. 386(1)(b))

[53] The Applicant contends that her resignation was forced by conduct, or a course of conduct engaged in by the Respondent. The conduct she points to is the nature of the work she was required to undertake, that of dealing with traumatic incidents and subject matter as well as the volume of work. She submits that the cumulative effect of the intensity and nature of the work was that she suffered a mental injury of which she says the Respondent was aware. She further submits that the steps purportedly taken by the Respondent to address her concerns were inadequate and failed to address the underlying issue of the intensity and nature of the work.

[54] Turning firstly to the nature of the work undertaken by the Applicant. She was initially engaged as a Senior Workplace Investigator which required her to conduct investigations into allegations of misconduct in workplace environments including childcare, education, aged and disabled care. I readily accept that some of the material dealt with by the Applicant and her colleagues may have been challenging and at times potentially confronting. The Applicant gave unchallenged evidence of certain traumatic incidents she experienced during her employment, the most recent cited incident being in early 2023 which involving a disabled client that self-immolated. The Applicant cites various failures of the Respondent to effectively support her during and following these traumatic incidents. The Respondent chose not to rebut the criticisms made of their response to the incidents the Applicant refers to in her evidence.

[55] The Applicant's role did change somewhat over time such that she stepped back from operational work (investigations) and undertook the Principal Reviewer role in 2022 which required her to be the primary reviewer for all reports and investigations. However, the intended step back from investigative work through her appointment to that role was frustrated by the organisational need for the Applicant to increasingly return her focus to investigative work. Against this background, the Respondent announced a restructure in mid-2023, the proposed effect of which on the Applicant was to move her back into a full-time operational investigative role. The Applicant was extremely unhappy with both substance of the role and the manner in which it was announced. This led her to warn the Respondent that unless she was able to maintain a reviewer role as opposed to an investigative role, she would feel compelled to seek alternate employment, which she proceeded to look for.

[56] What then followed the restructure announcement were various discussions between the Applicant and the Respondent culminating in a proposal made by Mr Scopelliti on 7 August 2023 that allowed the Applicant a choice as to whether she moved into a consultancy role or remained in a full-time role in which she would be primarily report writing, proofing, doing quality assurance and conducting reviews. The Applicant accepted the latter option and agreed to try and make it work.

[57] After returning from a period of several weeks annual leave on 11 August 2023 and having accepted the full time role outlined immediately above, the Applicant reluctantly agreed to undertake some investigative work in late August 2023. After conducting an initial interview with a distressed party on 5 September 2023 as part of that investigation, she left the workplace and apart from returning to work briefly on 9 September 2023, remained off work until her resignation on 22 October 2023. The Applicant contends that the request for her to undertake the investigative work was contrary to the assurance provided by Mr Scopelliti in his earlier communication. After going off on sick leave on or about the 5 September 2023 the Applicant submits there was limited further communication between the Respondent and herself apart from her providing medical certificates which were acknowledged by the Respondent. The Applicant also refers to the failure of the Respondent to make contact with her when she did return briefly to the office on 9 September 2023.

[58] I am prepared to accept the Applicant's evidence that the level of support offered to the Applicant by the Respondent in the immediate wake of the above-referred traumatic incidents may have left something to be desired. I do however accept that evidence with some caution in circumstances where there was no evidence of the actual communications between the Applicant and the employer in the immediate wake of the incidents. I also note the Applicant's acknowledgement of the introduction of EAP at some point although she does not appear to have made use of that service herself. Accepting that the Respondent's response and support at the time of the incidents may not have been up to the Applicant's expectation of contemporary HR practice, the temporal link of these incidents with the termination is tenuous at best, however.

[59] The incidents referred to by the Applicant occurred "sometime in 2020 or 2021 (pre-Covid)", "January 26, 2022" and early 2023. Reliance on these events by the Applicant also ignores other measures that were taken by the Respondent to address the Applicant's concerns in the intervening period. This included firstly moving the Applicant into the Principal Reviewer role in 2022, which although not ultimately successful from the Applicant's

perspective due to operational demands, was a step taken by the Respondent to allow the Applicant to step back from operational work. The second measure taken by the Respondent was its response to the Applicant's concern over the mid-2023 restructure. After various discussions, the Applicant was offered on 7 August 2023 an ongoing full-time position in which her primary role would "*be report writing, proofing, quality assurance and conducting reviews"*. The proposed role sought to address the Applicant's desire to undertake *"review"* type work rather than *"operational"* work. This was a reasonable step taken by the Respondent to address the Applicant's concerns over the type of work she undertook.

[60] The Applicant submits that despite the new role being review focussed she was allocated an investigation in late August 2023 which she claims was contrary to an assurance given to her by Mr Scopelliti. Contrary to the Applicant's claim, the Respondent gave no such assurance that she would not be required to do any investigations. In his email of 10 August 2023 Mr Scopelliti wrote to the Applicant on her return from annual leave and actually stated *"Thank you for your email. We are pleased that you are keen to return to work next Monday. We certainly have enough work to keep you busy with over the next few weeks with minimal or no client or witness contact"*. Noting the Respondent is in the business of conducting workplace investigations it is difficult to see how it could give any operational employee a *'pass'* on conducting investigations.

[61] It follows from the foregoing that I am not persuaded that the nature of the work and the Respondent's response to the Applicant's concerns over that work were such as to leave the Applicant no alternative but to resign from her employment. To the extent that the Respondent's earlier response to the traumatic incidents referred to by the Applicant may have been inadequate, by mid-2023 it had taken steps to address the Applicant's concerns over the work she performed by proposing a new role in which the Applicant would be primarily focussed on review work. I do not accept that the Respondent's conduct in relation to the Applicant's role was either intended to bring about her resignation or that it (her resignation) was likely to be the probable result. To the contrary, the Respondent sought to retain the Applicant as an employee (or in the alternative as a consultant) and took steps to make that attractive to her (or at least palatable) including by increasing her salary again in August 2023 despite only having recently increased her salary by $10,000 in late 2022.

[62] I now turn to the Applicant's submissions regarding her hours of work which she says required her to routinely work long hours including regularly working weekends. While acknowledging the Respondent's approval of her requests to move to a 9-day fortnight in 2020 and to a 4-day week in early 2023, she submits that the conditions agreed to for the 4-day week that were intended to support her manage her hours of work were not in fact implemented by the Respondent, thereby eroding the intended benefit of the reduced workdays per week. She submits this was further evidence of the Respondents failure to provide her with the necessary support to manage her workload. She did however concede that by about February 2023 when she moved to a four day week, the workload pressure and consequent hours of work demands had reduced. The following points may be made in relation to the Applicant's hours of work.

[63] Despite the Applicant claiming she consistently worked excessive hours of work, there were no records of hours worked produced in evidence by either party. The Applicant's evidence of hours worked was undermined by Ms Costa's evidence that the Respondent had no visibility of the Applicant's hours due to her not inputting that detail into Trackops or her

Outlook calendar. I approach with some caution Ms Costa' evidence on the use of Trackops for billable hours recording by the Applicant. That is because Ms Costa conceded that if the Applicant had failed to input her billable hours, that would have created additional work for the accounts staff which would have been followed up with the Applicant, of which follow up Ms Costa had no knowledge and produced no evidence.

[64] In the above circumstances I prefer the Applicant's evidence that at least from February 2023 when she was directed to input her billable hours into Trackops, she did so. That of course does not reveal the whole picture as non-billable hours, which Ms Costa states most employees put into Trackops, was not put into Trackops by the Applicant. The Applicant's evidence on her recording of non-billable hours was more equivocal and I accept that the Respondent did not have visibility of the full hours worked by the Applicant.

[65] The Applicant was also critical of the Respondent's failure to action condition (e) in Mr Scopelliti's email of 22 February 2023, that being the use of TOIL to manage any excess hours worked in each month by the Applicant. In truth, the responsibility lay with both parties to implement that condition and as I have already found above, the Applicant was not diligent in recording all of her hours of work, specifically her non-billable hours. Absent the accurate recording of her hours of work the Applicant can hardly complain at the Respondent's "failure" to implement the TOIL arrangement.

[66] There is no evidence that in the wake of Mr Scopelliti's email of 22 February 2023 that the Applicant raised a concern regarding excessive hours or that she requested to use TOIL to address excessive hours that she had worked in the previous month. The only evidence given was that of Ms Costa who stated that the Applicant had requested some time off occasionally, but Ms Costa was unable to reconcile those requests with the Applicant's hours of work records for the reasons earlier set out above. The fact that the TOIL arrangements were not actually implemented is more likely explained by the fact that the Applicant's hours of work had in fact reduced to a manageable level by early 2023, a point conceded by the Applicant during cross-examination.

[67] While there is no probative evidence of actual hours worked by the Applicant, I am prepared to accept that at various times during her employment with the Respondent she was required to work long hours. This claim was noted by Mr Scopelliti in his email of 22 February 2023 when dealing with the Applicant's request to work a 4-day week. However, I am satisfied that by early 2023 those hours of work had reduced. In these circumstances the claim that the hours of work required of the Applicant led to her resignation in October 2023 cannot be sustained. Moreover, the Respondent actually initiated changes designed to assist the Applicant manage her hours of work including by agreeing to allow her work a 4-day week and to ultimately place her in a position that was primarily a review role. I also note for the sake of completeness that arising from the COVID-19 pandemic period, the Applicant had considerable flexibility in her working arrangements, in terms of when she worked her hours and whether she worked from home or in the office, a point she accepted during cross-examination.

[68] I finally turn to the Applicant's submission that the demands of her work with the Respondent and the lack of support she received took a toll on her health such that she had no choice but to resign. The force of that submission is almost entirely undermined by the absence of evidence that would support the Applicant's claim that she suffered from *"vicarious trauma*

and PTSD" as claimed. The medical evidence is in fact limited to two medical certificates from September and October 2023 which did not specify the nature of her medical condition and the Letter of Support from her GP dated 6 March 2024.

[69] The Applicant conceded that despite various claims made by her to the Respondent during her employment, she had not provided the Respondent with any medical reports or diagnosis on which they could have acted to modify her role to accommodate any medical restrictions or limitations. Despite being critical of the Respondent, the Applicant consistently failed to provide requested information on her medical condition. This can be seen by her not responding to condition (b) in Mr Scopelliti's email of 22 February 2023, that being to provide information regarding her auto immune and back condition if it was likely to affect her ability to undertake her duties. Secondly, when the Respondent sought a medical clearance from the Applicant before her return to work in early August 2023, she resisted the request on the basis of the cost, inconvenience, and her perception that the Respondent's request was punitive rather than supportive. Finally, she did not respond to Ms Costa's email of 10 October 2023 in which the Respondent offered to pay for a required medical clearance report after her absence from work of several weeks.

[70] At least from early 2023, the Respondent was aware that the Applicant claimed to be suffering from various medical conditions. It sought information from the Applicant, requested medical clearances where it believed appropriate and also offered to pay for the reasonable cost of such a report in October 2023. Apart from providing non-specific medical certificates covering her absences, no other medical information was provided to the Respondent by the Applicant. In these circumstances there was no reasonable medical basis upon which the Applicant could have expected the Respondent to make adjustments to her work. At no stage did the Applicant provide the Respondent with a medical report that specified the duties she was not capable of performing because of her medical condition.

[71] Notwithstanding the absence of any medical evidence, the Respondent nonetheless agreed to changes to the Applicant's hours of work (in February 2023) and her role (in August 2023). These actions are not congruent with the Applicant's claim that the conduct or course of conduct engaged in by the Respondent was directed to securing her resignation or would have the probable result of achieving that outcome. A final point to be made is that the Applicant gave evidence that she had considered making a workers compensation claim but chose not to proceed with one based on caution expressed to her by her GP that for many people, making such a claim prolonged the harm. This was a conscious decision made by the Applicant and was not pressured or coerced by the Respondent.

[72] It follows from the foregoing that I do not accept that the Applicant *"had no effective or real choice but to resign"*. I accept that the demands of the Applicant's roles, both in the nature of the work and the hours, may have been great up to early 2023. The claimed impacts on the Applicant, unsupported as they were by medical evidence, led the Respondent to agree to changes both in the Applicant's hours of work and her role. These were steps taken by the Respondent in an effort to retain the Applicant. The fact that the Applicant ultimately resigned was not in my view caused by the conduct or course of conduct engaged in by the Respondent.

[73] It follows that the Applicant was not dismissed within the meaning of s 386(1)(b) of the Act. However, if I am wrong in that conclusion, it is appropriate for me to deal with the

second jurisdictional objection that the application was made out of time. For the reasons set out below I would also decline to grant an extension of time for the application to be made.

Should an extension of time be granted for the filing of the unfair dismissal application?

[74] As earlier stated, the Applicant filed her application for an unfair dismissal remedy on 11 December 2023. Section 394(2) of the Act states that an application for an unfair dismissal remedy must be made "within 21 days after the dismissal took effect", or within such further period as the Fair Work Commission (the Commission) allows pursuant to s.394(2). The Applicant states that the dismissal took effect on 26 November 2023 although this is disputed by the Respondent who states the termination of employment took effect on 26 October 2023.

[75] The contest over the termination date must be resolved as the period of 21 days will have ended at midnight on the 16 November 2023 if it is established that the date of termination was 26 October 2023. If, however, if it is established that the date of termination was 26 November 2023 as argued by the Applicant then the 21 days will have ended on 17 December 2023. Of course, it may be the case that the dismissal took effect on another date as well.

[76] If the dismissal is found to have taken effect on 26 November 2023 the application will have been filed within the 21-day period as it was filed on 11 December 2023. If, however the dismissal is found to have taken effect on 26 October 2023 as contended by the Respondent, it will be necessary to consider whether to grant a further period within which the application may be made under s.394(3) of the Act. I turn firstly to determine the date of the Applicant's termination of employment.

[77] The Applicant contends that she gave notice of her resignation on 22 December 2023 and in doing so sought to use her accrued annual leave to take her final date of employment up to 26 November 2023 which she states was the date her accrued annual leave would have been exhausted by. The language in her email of 22 October 2023 to Mr Scopelliti is important. She relevantly stated, "*If possible I would like to remain on annual leave until it runs out, and to have my resignation effective at that time".* By use of the words *"if possible",* the Applicant's email to Mr Scopelliti not only invited but required a response either confirming or rejecting the proposed resignation date. Mr Scopelliti subsequently responded on 26 October 2023 in which he accepted the Applicant's resignation. In doing so he foreshadowed to the Applicant that unless he *"heard otherwise"* from her, he proposed to pay out the notice period which he was entitled to do under clause 23.5 (a) of the Employment Contract. The Applicant did not respond to Mr Scopelliti's email of 26 October 2023.

[78] As set out earlier in the evidence, the Applicant accepted the Respondent's right under the Employment Contract to pay out her notice period and also accepted that she received Mr Scopelliti's resignation acceptance into her personal email account on 26 October 2023 although she states she didn't read that email until early December 2023. What followed was consistent with the Respondent electing to end the employment relationship by paying out the notice period. While there may be some doubt as to the final date of employment, it can be safely concluded that it occurred on or by 2 November 2023. This is evidenced by the Applicant's access to her work email being terminated on 1 November 2023, she did not undertake any further work for the Respondent after 22 October 2023, the Respondent accepted her resignation on 26 October 2023 and her final pay was processed on 2 November 2023. All

of these actions clearly point to the Applicant's dismissal taking effect on or by 2 November 2023.

[79] The Applicant's evidence that she was not aware of her dismissal is far from convincing. She claims to have been so unwell that she did not check her emails for several weeks and nor did she check her bank account. It is difficult to reconcile this claim with her arranging and then travelling into Hobart from her property outside of Hobart on 30 October 2023 to meet with her former colleagues for a coffee. She also returned her office keys on 30 October 2023 and her computer equipment was returned on 9 November 2023, both of these actions being consistent with directions given to her in Mr Scopelliti's email of 26 October 2023. Also, despite claiming to have been so unwell she did not get out of bed for some weeks, she did not seek any medical treatment in the period between her resignation and when she booked a 6 March 2024 medical appointment on 22 December 2023.

[80] Even if I am to accept the Applicant's evidence that she didn't look at her emails between 22 October and 10 December 2023, that was not the fault of the Respondent as it had taken reasonable steps to communicate acceptance of the Applicant's resignation and advise her of its intention to pay out her notice period. In circumstances where the Applicant proposed to exhaust her annual leave before her termination took effect and then failed to read Mr Scopelliti's responsive email on 26 October 2023, that does not render Mr Scopelliti's communication on 26 October 2023 of no effect. This leads me to conclude that the Applicant's claim that the dismissal took effect on 26 November 2023 is without merit.

[81] I am satisfied that the Applicant's dismissal took effect on or by 2 November 2023. Having reached this conclusion, it is necessary for me to now consider whether an extension of time for the filing of the application should be granted.

[82] The Act allows the Commission to extend the period within which an unfair dismissal application must be made only if it is satisfied that there are "exceptional circumstances." Briefly, exceptional circumstances are circumstances that are out of the ordinary course, unusual, special, or uncommon but the circumstances themselves do not need to be unique nor unprecedented, nor even very rare.[45] Exceptional circumstances may include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together can be considered exceptional.[46]

[83] The requirement that there be exceptional circumstances before time can be extended under s 394(3) contrasts with the broad discretion conferred on the Commission under s 185(3) to extend the 14-day period within which an enterprise agreement must be lodged, which is exercisable simply if in all the circumstances the Commission considers that it is "fair" to do so.

[84] Section 394(3) requires that, in considering whether to grant an extension of time, the Commission must take into account the following:

(a) the reason for the delay;

(b) whether the person first became aware of the dismissal after it had taken effect;

(c) any action taken by the person to dispute the dismissal;

(d) prejudice to the employer (including prejudice caused by the delay);

(e) the merits of the application; and

(f) fairness as between the person and other persons in a similar position.

[85] The requirement that these matters be taken into account means that each matter must be considered and given appropriate weight in assessing whether there are exceptional circumstances. I now turn to consider these matters in the context of the Application.

Reason for the delay

[86] For the application to have been made within 21 days after the dismissal took effect on 2 November 2023, it needed to have been made by midnight on 23 November 2023. The delay is the period commencing immediately after that time until 11 December 2023, although circumstances arising prior to that day may be relevant to the reason for the delay.

[87] The reason for the delay is not in itself required to be an exceptional circumstance. It is one of the factors that must be weighed in assessing whether, overall, there are exceptional circumstances.[47] An applicant does not need to provide a reason for the entire period of the delay although the absence of any explanation for any part of the delay will usually weigh against an applicant in the assessment of whether there are exceptional circumstances, and a credible explanation for the entirety of the delay will usually weigh in the applicant's favour, however all of the circumstances must be considered. Depending on all the circumstances, an extension of time may still be granted where the applicant has not provided any reason for any part of the delay[48].

[88] The Applicant states that the reason for her delay in filing her application can be attributed to her having been unaware of the date her termination took effect until on or about 10 December 2023 when she states she read Mr Scopelliti's email, following which she immediately completed and filed her application on 11 December 2023. She further argues that her medical condition in the wake of her resignation was such that she was incapable of preparing and filing her application.

[89] Dealing with the Applicant's medical condition first. Aside from the Applicant's self-diagnosis of "vicarious trauma and PTSD", the only relevant evidence before me is that of two medical certificates furnished on 12 September and 13 October 2023 which referred to an unspecified medical condition and the later Letter of Support from the Applicant's GP dated 6 March 2023. The Letter of Support was prepared over three months after the Applicant's resignation and while referring to the Applicant's treatment and general symptoms, merely states the symptoms that the Applicant reported to the GP that she suffered from in the period between 26 October and 10 December 2023.

[90] The medical practitioner was not called to give evidence and the Letter of Support which records statements made to the GP as to symptoms suffered by the Applicant was provided over

three months after the relevant period of claimed incapacity. This provides limited probative evidence as to the severity of the Applicant's medical condition in the period following her resignation. I am not persuaded on the basis of the evidence that the Applicant was so incapacitated in the wake of her resignation that she could not make her application at an earlier time than she did. There is also in my view some reason to doubt the Applicant's description of the severity of her symptoms in the wake of her dismissal for the reasons set out above at [79].

[91] Turning to the Applicant's claim that she was unaware of the Respondent's decision to pay out her notice period until on or about 10 December 2023, I have already found that evidence to be less than convincing for the reasons set out above at [79]. The Applicant's resignation email on 22 October 2023 invited a response from the Respondent which was forthcoming on 26 October 2023. The Applicant claimed to have not read Mr Scopelliti's response on 26 October 2023 until 10 December 2023. This speaks to a choice made by the Applicant to ignore emails from the Respondent, this "choice" being reinforced by the fact that she was apparently well enough to join her former colleagues in the Hobart office for coffee on 30 October 2023, that being only four days after Mr Scopelliti's email of 26 October 2023.

[92] In the above circumstances I am satisfied that the Applicant ought reasonably to have been aware of the communication of the effective date of termination of her employment. Her claim that she was unaware of the payment in lieu of notice is unconvincing. Even if it is true that she did not read Mr Scopelliti's 26 October 2023 email until several weeks later, her decision to ignore emails from the Respondent after her 22 October 2023 resignation email was not reasonable in the circumstances and does not provide an acceptable explanation for the delay in filing her application. I am not satisfied in the circumstances that the claimed lack of knowledge of the effective date of termination of her employment or the Applicant's medical condition provides an acceptable reason for the delay in the filing of the application. This weighs against a finding of exceptional circumstances.

Whether the person first became aware of the dismissal after it had taken effect

[93] I have found that the Applicant's employment ceased on 2 November 2023 and while she claims to have believed her termination of employment took effect on 26 November 2023, I have already concluded that the Applicant ought reasonably to have understood her termination took effect at the earlier time. She therefore had the benefit of the full period of 21 days within which to lodge her unfair dismissal application. This weighs against a finding of exceptional circumstances.

Prejudice to the employer

[94] The application was filed 18 days outside of the 21-day period. While such a delay is not insignificant, there is no material before me to suggest that such delay would cause significant prejudice to the employer. This factor weighs neutrally in my consideration.

Merits of the application

[95] The Act requires me to take into account the merits of the application in considering whether to extend time. The Applicant states that she had an unblemished employment record with the Respondent, evidence of which can be seen in the salary increases she received in 2022

and 2023. While the merits of the application may turn on contested points of fact that would need to be tested if an extension of time were granted, it is not apparent on the basis of the material before me that a valid reason for the Applicant's dismissal has been established. In these circumstances, I do consider that the merits of the present case tell in favour of an extension of time.

Fairness as between the person and other persons in a similar position

[96] This consideration may relate to matters currently before the Commission or to matters previously decided by the Commission. It may also relate to the position of various employees of an employer responding to an unfair dismissal application. However, cases of this kind will generally turn on their own facts.

[97] Neither party brought to my attention any relevant matter concerning this consideration and I am unaware of any relevant matter. In relation to this factor, I therefore find that there is nothing for me to weigh in my assessment of whether there are exceptional circumstances.

Summary on extension of time

[98] Having regard to the matters I am required to take into account under s.394(3), and all of the matters raised by the Applicant and outlined above, I am not satisfied that there are exceptional circumstances in this case, either when the various circumstances are considered individually or together. While the merits of the case tell in favour of an extension of time, all other factors either tell against an extension of time or are neutral considerations.

[99] Because I am not satisfied that there are exceptional circumstances, there is no basis for me to allow an extension of time. I decline to grant an extension of time under s.394(3) of the Act.

Conclusion

[100] The Applicant did not contend that she was dismissed within the meaning of s 386(1)(a) and I have found that the applicant has not been dismissed within the meaning of s. 386(1)(b) of the Act as contended by her. Accordingly, at the time the Applicant made the s 394 application, she was not a person who has been dismissed for the purposes of s 394 of the Act.

[101] I have further found that if I am wrong in my conclusion that the Applicant was not dismissed within the meaning of s 386(1) of the Act, I would decline to grant an extension of time for the filing of the application. The Respondent's jurisdictional objections are therefore upheld.

[102] The application is therefore dismissed. An order giving effect to this decision will be separately issued.

DEPUTY PRESIDENT

Appearances:

Ms A Davis for herself.
Mr V Scopelliti for the Respondent.

Hearing details:

2024
Melbourne (video)
March 20.

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[1] Exhibit R3, Email from Vince Scopelliti to Applicant, dated 22 February 2023, titled 'Review of working arrangements''.

[2] Exhibit A3, Witness Statement of Amanda Davis, dated 10 March 2023, at [4]-[5].

[3] Exhibit A3, at [9].

[4] Exhibit A3, at [10]-[13].

[5] Exhibit A3, at [13].

[6] Exhibit R2, Email from Applicant to Vince Scopelliti, dated 25 January 2023, titled 'Catchup move and other things'.

[7] Exhibit R3, Email from Vince Scopelliti to Applicant, dated 22 February 2023, titled 'Review of working arrangements'.

[8] Ibid.

[9] Exhibit A3, at [21].

[10] Exhibit A3, at [21].

[11] Exhibit A3, at [21], Attachment 7, Email from Janet Costa to Applicant, dated 13 April 2023, titled 'Computer Misbehaving'.

[12] Exhibit A3, Attachment 7.

[13] Exhibit A3, at [[14]-[15].

[14] Exhibit A3, at [25]-[30].

[15] Exhibit A3, at [30].

[16] Exhibit R4, Email from Applicant to Vince Scopelliti, dated 7 June 2023, titled "Director Workplace Relations PD (May 2023).

[17] Exhibit A3, at [31], Exhibit R24, Applicant leave records.

[18] Exhibit R5, Email from Vince Scopelliti to Applicant, dated 7 August 2023, titled 'Return to work options'.

[19] Exhibit R7, Email from Vince Scopelliti to Applicant, dated 10 August 2023, titled 'Re: Return to work options'.

[20] Exhibit R8, Email from Applicant to Vince Scopelliti, dated 10 August 2023, titled 'Re: Return to work options'.

[21] Exhibit R9, Email from Vince Scopelliti to Applicant, on 10 October 2023.

[22] Exhibit A3, at [37]-[39].

[23] Exhibit A3, at [40]-[41], Exhibit R10, Email from Applicant to Sadie Smith, dated 5 September 2023, titled 'Re: Email Introduction'.

[24] Exhibit R11, Email from Janet Costa.

[25] Exhibit R25, IT Exit Request, dated 1 November 2023.

[26] Exhibit R12, Email exchange between Applicant and Janet Costa, dated 10-12 September 2023.

[27] Exhibit A3, at [43]-[44].

[28] Exhibit A3, at [42]-[45].

[29] Exhibit R13, Email from Janet Costa to Applicant, dated 11 October 2023, titled 'FW: Medical certificate'.

[30] Exhibit A3, Attachment 11, Email from Applicant to Vince Scopelliti, dated 11 October 2023.

[31] Exhibit R15, Email from Vice Scopelliti, dated 11 October 2023.

[32] Exhibit R16, Medical Certificate dated 12 October 2023.

[33] Exhibit A3, at[47]-[48].

[34] Exhibit R17.

[35] Exhibit R18, Email from Vince Scopelliti, dated 26 October 2023.

[36] Exhibit R19, Email from Tess Yu to Janet Costa, dated 30 October 2023, titled 'Key Return Form'.

[37] Exhibit R25.

[38] Exhibit R20, Email from Tessa Yu to Janet Costa, dated 9 November 2023, titled 'Re: Key Return Form'.

[39] Exhibit R21, Respondent Bank Statement, Attachment R22, Applicant Pay slip for pay period 28/10-3/11/23.

[40] Exhibit A3, at [52]-[56].

[41] Exhibit A45, Medical Appointment, dated 22 December 2023.

[42] Exhibit A2, Letter of Support' from Dr Sonista Jasal, dated 6 March 2024.

[43] [1995] IRCA 625; 62 IR 200.

[44] [2017] FWCFB 3941.

[45] *Nulty v Blue Star Group Pty Ltd* [2011] FWAFB 975 at [13].

[46] Ibid.

[47] *Stogiannidis v Victorian Frozen Foods Distributors Pty Ltd* [2018] FWCFB 901 at [39].

[48] Ibid at [40].