



# DECISION

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

**Audrey Campbell**

v

**GOLD TIGER LOGISTICS QLD Pty Ltd**  
(U2023/8739)

COMMISSIONER DURHAM

BRISBANE, 9 APRIL 2024

*Application for an unfair dismissal remedy – Jurisdictional objection – Whether employee dismissed – Jurisdictional objection dismissed – Application granted – Reinstatement not appropriate – Compensation reserved for further consideration*

[1] On 12 September 2023 Ms Audrey Campbell (**Ms Campbell/the Applicant**) made an application to the Commission for an unfair dismissal remedy under section 394 of the *Fair Work Act 2009* (**the FW Act**). Ms Campbell alleges that she was unfairly dismissed from her employment with GOLD TIGER LOGISTICS QLD Pty Ltd (**Gold Tiger/the Respondent**) on 11 September 2023. Ms Campbell seeks reinstatement with associated orders for lost wages and continuity of service, but acknowledges that the relationship between the parties may deem this unworkable.<sup>1</sup> In the alternative, she is seeking financial compensation for lost earnings from the time after her payment was received until she is either successfully employed or reaches retirement age.<sup>2</sup> The Respondent also submits that reinstatement is inappropriate.<sup>3</sup>

## **When can the Commission order a remedy for unfair dismissal?**

[2] Section 390 of the FW Act provides that the Commission may order a remedy if:

- (a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and
- (b) the Applicant has been unfairly dismissed.

[3] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

## **When is a person protected from unfair dismissal?**

[4] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:
  - (i) a modern award covers the person;
  - (ii) an enterprise agreement applies to the person in relation to the employment;
  - (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

### **When has a person been unfairly dismissed?**

[5] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission 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.

[6] A person has been unfairly dismissed if the Commission is satisfied that the person has been dismissed, the dismissal was harsh, unjust or unreasonable, the dismissal was not consistent with the Small Business Fair Dismissal Code and the dismissal was not a case of genuine redundancy.

[7] There is no dispute between the parties that the Small Business Fair Dismissal Code did not apply, that this was not a case involving genuine redundancy and that the application was made within the period required, however the Respondent is of the view that Ms Campbell is not a person protected from unfair dismissal as she was not dismissed. Subsequently, the Respondent has raised a jurisdictional objection which must be determined before I consider the merits of Ms Campbell's unfair dismissal application.

### **Background**

[8] The uncontested factual background to the matter is as follows:

- Ms Campbell commenced employment with Gold Tiger on 6 October 2020 as a full-time Customer Service & Logistics Co-ordinator. Ms Campbell's annual remuneration was \$64,000.00.<sup>4</sup>

[9] There being contested facts involved, the Commission is obliged by s.397 of the FW Act to conduct a conference or hold a hearing.

[10] I considered it appropriate to hold a hearing for the matter (s.399 of the FW Act).

[11] I issued directions on 16 November 2023, for the parties to file their material.

[12] The question of whether Ms Campbell was dismissed was dealt with alongside the merits of the application at a Hearing on 17 January 2024. Ms Campbell represented herself, and was accompanied by her support person Mr Charles Greenhill, while Mr Antoine Sandroussi, Gold Tiger’s legal department manager represented the Respondent.

### *Witnesses*

[13] Ms Campbell gave evidence on her behalf and did not call any witnesses.

[14] The following witnesses gave evidence on behalf of the Respondent:

- Mr Mark Heness (State Manager);
- Ms Josiane Jackson (Customer Services Assistant); and
- Ms Pesesio (Pesi) Jackson (Operations Manager).

### *Evidence of the parties*

[15] Ms Campbell filed submissions in the Commission on 30 November 2023 and 17 December 2023. The Respondent filed submissions in the Commission on 14 December 2023 and 21 December 2023.

### **The position advanced by the Respondent**

[16] Gold Tiger’s submissions and evidence can be summarised as follows:

- On or about Monday 28 August 2023, Mr Heness met with Ms Campbell “In the depot” where she informed him that:<sup>5</sup>
  - She had an argument with her supervisor Ms Pesi Jackson,
  - She was over “this whole thing, that’s it” and that she “was going home and was not sure if she will be coming back”.
- Following this discussion, Mr Heness spoke to Ms Pesi Jackson, who confirmed that there had been an argument between her and Ms Campbell. Ms Pesi Jackson stated that before leaving the office, Ms Campbell said “I have had enough, and I quit. I will be telling Mark”.<sup>6</sup>
- Later that day, Ms Campbell lodged a formal complaint against Ms Pesi Jackson.<sup>7</sup> This prompted Mr Heness to undertake a thorough investigation of the matter and question all those who were present and witnessed the argument.<sup>8</sup>
- On 28 August 2024 Mr Heness spoke to all those who were present during the incident and asked them to recount in writing what they had witnessed.<sup>9</sup>
- As part of the investigation, Mr Heness sent some inquiries to Ms Campbell.<sup>10</sup>
- At the conclusion of the investigation, Mr Heness formed the view that Ms Campbell had resigned and, in view of her behaviour (which, in his view, amounted to serious misconduct), accepted her resignation.<sup>11</sup>
- In light of the above, Gold Tiger maintain that Ms Campbell was not dismissed, rather she resigned.<sup>12</sup>

- Further, Ms Campbell's resignation was not forced as there were plenty of other options available to her apart from telling her supervisor that "she quits" however she chose not to avail herself of these.<sup>13</sup> Gold Tiger merely accepted her resignation after having conducted a thorough investigation into the incident that gave rise to the resignation.<sup>14</sup> As such, there was no dismissal.

### **The position advanced by the Applicant**

[17] Ms Campbell's evidence and submissions can be summarised as follows:

- Ms Campbell maintains that she did not offer her resignation from her role either verbally or in writing.<sup>15</sup>
- Ms Campbell does not dispute that she was involved in a heated discussion with Ms Pesi Jackson, but submits that Ms Pesi Jackson inflamed the initial discussion by making antagonising and humiliating statements which caused the discussion to become heated, leading to Ms Campbell leaving the office in tears.<sup>16</sup>
- Ms Campbell then left the building to find Mr Heness and informed him of the situation.<sup>17</sup>
- After talking to Mr Heness, she left the workplace to see her doctor. Later that same day, Ms Campbell provided a medical certificate indicating that she would not be fit for duty until 11 September 2023 and lodged a formal complaint about the altercation.<sup>18</sup>
- On 4 September 2023, Ms Campbell received correspondence from Mr Heness confirming that he was undertaking an investigation. In this same correspondence, Mr Heness sought clarification of three points.<sup>19</sup> Ms Campbell provided the requested information via reply email on 5 September 2023.<sup>20</sup>
- Ms Campbell reached out to Mr Heness on 8 September 2023, to discuss her return to work and was advised that as he had not yet made a final determination, she was to take Monday 11 September off as a day in lieu.<sup>21</sup>
- On 11 September 2023 Ms Campbell received correspondence regarding her complaint (**the Outcome Letter**), this correspondence addressed the altercation but also raised other issues that she maintains had not been brought to her attention previously.<sup>22</sup> The Correspondence ended with Mr Heness accepting Ms Campbell's resignation, effective immediately.<sup>23</sup>
- Ms Campbell asserts that she has been denied procedural fairness and natural justice as she has had no access to view, understand or question the three statements made by employees who witnessed the altercation, which she claims were relied upon by Gold Tiger as the basis for her termination.<sup>24</sup>
- Ms Campbell submits that her termination may be an opportunity for Gold Tiger to reduce cost, in reference to a cost reduction comment mentioned in the Outcome Letter.<sup>25</sup>

## Observations on the Evidence

[18] Determining this matter turns in large part on exactly what was said and done during an altercation that occurred between Ms Campbell and her supervisor, Ms Pesi Jackson on 28 August 2023. There is no dispute between the parties that this altercation occurred, however there are clear differences as to what was said. The parties agree that four people were present during the altercation, Ms Campbell, Ms Pesi Jackson, Ms Josiane Jackson, and Ms Donna-Marie Parker. It is also of note that Ms Josiane Jackson is the daughter of Ms Pesi Jackson. As submitted by Mr Sandroussi in his closing oral submissions, due to this relationship, the only truly independent witness to the altercation is Ms Parker, however Ms Parker has not provided a witness statement, nor did she attend the hearing.

[19] I note Gold Tiger submits that Ms Parker did not lodge a statement because, she and her partner had received a text message from Ms Campbell's partner stating "I'm coming for you You Lying [sic] bastard. Watch your back" and that this can be inferred as a threat with the intention to scare Ms Parker and prevent her from providing evidence.<sup>26</sup> Given the wording used and the heated emotions involved in this matter, I find it unlikely that this text message had the intention of preventing Ms Parker from providing any evidence, nor would have prevented Ms Parker from at the least providing a written statement.

[20] Additionally, there is conflicting evidence as to what was said during the altercation, and as will be discussed further, I observed some inconsistencies between the written statement provided by Ms Josiane Jackson and her oral evidence. In determining what occurred, I have found it necessary to prefer the evidence of one witness over another.

## Timeline leading to the alleged dismissal

[21] On 28 August 2023 at approximately 9.00am, Ms Campbell was approached by Ms Josiane Jackson, who asked her about the drivers run sheets.<sup>27</sup> Ms Campbell states that she told her that they had not been completed as she had been very busy the past week due to Ms Josiane Jackson having been on leave and having several new customers.<sup>28</sup>

[22] Ms Pesi Jackson, Ms Campbell's immediate line manager and mother of Ms Josiane Jackson, joined the conversation. Ms Campbell alleges that Ms Pesi Jackson said to her "What do you do, you worked late every night last week and did nothing".<sup>29</sup> Ms Campbell stated that this comment was repeated three times in a raised voice which prompted her to also raise her voice when trying to explain why the run sheets had not all been completed.<sup>30</sup>

[23] Ms Campbell states that the discussion continued to be hostile, moving to disagreements regarding breaks and overtime.<sup>31</sup> Ms Campbell and Ms Pesi Jackson both state that the other was shouting at them. There is also disagreement as to what occurred prior to Ms Campbell leaving the office. The evidence of all parties supports that the argument occurred.

[24] Whilst some of the minor details regarding precisely what was said and who stood where differ slightly, it is clear that the altercation commenced as a discussion between Ms Josiane Jackson and Ms Campbell and that it related to the work done by Ms Campbell on the run sheets in the previous week, whilst Ms Josiane Jackson had been on leave. It is also not in contention that Ms Pesi Jackson inserted herself into the discussion, at which point things escalated. As

such, I do not consider any inconsistency in the evidence up to this point, or the evidence relating to the specifics of each other's roles, to be of any consequence to the determination of this matter.

[25] Where the recollection of the parties differs significantly, is when it comes to what Ms Campbell said immediately prior to leaving the office. Although the statement's provided confirm that Ms Campbell lifted the run sheets paperwork from her desk and either placed or threw them on Ms Pesi Jackson's desk. Specifically, Ms Campbell stated:<sup>32</sup>

"I lifted the incomplete Run Sheets paperwork from my desk and placed them on Pesi Jackson's desk saying, "this is shit", "you can do this" and "I'm leaving to tell Mark". At no point during the altercation with Pesi Jackson did I ever state that I was resigning or terminating my employment."

While Ms Josiane Jackson stated:<sup>33</sup>

"Audrey then threw a pile of timeslots onto Pesi's desk saying "I quit & see if you can do the timeslots as I've had enough" Audrey then left the office."

Meanwhile Ms Pesi Jackson stated:<sup>34</sup>

"She then grabbed a significant number of timeslot paperwork up and threw them down on my desk and then said "Here you do them, because I have had enough and I quit and I will be telling Mark"

[26] Ms Campbell left the building and found Mr Heness, outside in the depot. She informed Mr Heness of the situation. Mr Heness acknowledged how upset she was and advised her to go home.<sup>35</sup>

[27] Following his discussion with Ms Campbell, Mr Heness states that he sought out Ms Pesi Jackson to discuss what had happened.<sup>36</sup>

[28] On the same day, Ms Campbell visited her general practitioner who advised her to take at least two weeks off work for her mental health and subsequently provided her with a medical certificate for this period.<sup>37</sup> Later that day, Ms Campbell sent the medical certificate to Mr Heness, and at the same time, Ms Campbell lodged a formal complaint about the altercation that morning,<sup>38</sup> however this was not received by Mr Heness until 30 August 2023.<sup>39</sup>

[29] Ms Campbell received a reply from Mr Heness regarding her complaint on 4 September 2023 asking for clarification of the following three points:<sup>40</sup>

"There are several areas that require clarification in the information gained through this process prior to finalizing the matter and presenting a response to the matter.

1. It has been raised that you stated that your only job was to do time slots as well as a statement in your complaint stating you were employed to do the time slots. Is this a correct presentation of the statement that you made during this issue and you're (sic) understanding if (sic) your role in the company?

2. It has also been stated that you verbally handed in your resignation during this interaction. This was not presented to me until I asked for the statements of facts from those that were witness to this.
3. You have presented that there are many rumors (sic) regarding staff cuts and you then continue to state that “if you leave the family member will get my job”. Can you please advise where this chain of thought comes from? I do not recollect discussing with anyone in the depot realigning roles through this means.” (emphasis added)

**[30]** Ms Campbell replied by email on 5 September 2023 to clarify the three points as follows:<sup>41</sup>

“Thank you for your reply to my complaint submitted on 28<sup>th</sup> August, I would like to provide clarification of key points 1, 2 and 3.

1. At no time have I ever stated doing Time Slots was my only job. I did say “this is the job I am employed to do” however I also indicated in my letter that I undertook other jobs when/if required e.g. answering phones, dealing with new customers. Regarding my understanding of my role within the company, when I started with the company I did not have a defined role, the company was in start up mode in Qld and for several weeks I did all of the office work. When new staff were employed I continued to do Time Slots and then took on doing customer service, I see my role as doing these tasks and any other tasks as required.
2. At no time during the conversation I had with Pesi Jackson did I say I was resigning, as I said in my letter of complaint I put paperwork on her desk and said to her “you can do this” and indicated I was going home (I omitted to say previously that I grabbed my bag and rushed out as by this time I was in tears). I would ask that if I had made such a statement about resigning why you as the Manager was not informed of this immediately rather than you finding out through statements of fact?
3. As stated in my previous letter rumour mongering is something that happens in workplace as generally the people who start the rumours deny all knowledge of them if approached. I can see no real benefit to anyone if I say who said what to who. Whether or not there is going to be a realignment of roles is not really something I need to know about until it happens, I have worked long enough to know that Managers have to make decisions in the best interests of the company, employees and customers.” (emphasis added)

**[31]** After hearing nothing further, Ms Campbell sent an SMS message to Mr Heness on 8 September 2023 to arrange her return to work.<sup>42</sup> Mr Heness advised he had not made a final determination regarding her complaint and advised her to take 11 September 2023 as a day off in lieu, to allow him time to finalise the outcome of his investigations.<sup>43</sup>

[32] On 11 September 2023, Ms Campbell received an email containing the Outcome Letter outlining the terms of Mr Heness' determination of her complaint. Within the letter, Mr Heness confirms that:<sup>44</sup>

- he was not present and has therefore relied on information supplied by all parties involved and present at the time along with "other factors that would be contributing input to the result of the day".
- That he had sought statements from all witnesses and that all parties had confirmed that "you walked over to Pesi Jacksons desk with the relevant paperwork" and "dropped it" on the desk saying "You can do this" along with the statement "I quit, I'm telling Mark I'm leaving". This may be an excited utterance which you omitted in your statement however it was heard by all in the room at the time".
- With respect to Ms Campbells arguments about her workload at the time, Mr Heness points out that "there is an implied amount of overtime built into her salary".

[33] Mr Heness further states as follows:<sup>45</sup>

"During my investigation into this event, I have found the following:

1. Pesi was within her rights to ask you why the sheets had not been completed or checked yet. You state that you stayed back to do the extra work and this was part of it. The non completion of these caused a significant delay in our ability to meet compliance parameters and these forms were only given to me on Friday after I asked for them. It was clear to me that they had been collated for filing and little to nothing else was done to them.
2. Comments regarding you eating at your desk is not acceptable and I have counselled Pesi Jackson on this matter, however comments regarding her leaving to have lunch are equally not appropriate.
3. There are a number of areas in the time slot allocation and preparation that was not up to scratch and I have previously asked regarding the flexibility of this information to be able to better coordinate deliveries etc. A significant number of timeslots were not actioned causing further delays in the delivery of the product.
4. I have previously spoken to Pesi Jackson regarding a negative report that we received within the Zendesk area (Customer Service) which is also one of your responsibilities and comments regarding your main focus being time slots does support a lack of focus in this area.

Respect is earned and not just given with that said I believe every person in the office was given respect as the workload can at times be extremely heavy and fast paced. You do not fulfill (sic) the years of service that you have done with Gold Tiger and your previous employers without a level of respect being earned.



Given the above points I will not be seeking an apology from Pesi Jackson at this time however if she freely chooses to give one that is in her domain.

I have removed timeslots from the role that you are employed for since reviewing the situation after your absence, as a closer fit for the role that is currently doing it.

I accept that you may be distressed by this response as it does not meet your requirements in your complaint however, I believe it is the right thing to do at this time. I understand you have stated that you did not resign however all parties in the room heard this declaration clearly from you and, as you know, I refuse to negotiate with this type of statement so I accept your resignation effective immediately and will process through any entitlement owed to you.

I wish you well in the future in whatever venture you choose to follow.”

[34] Ms Campbell replied by SMS message to arrange collection of her property that remained in the depot and received her final termination pay by bank transfer.<sup>46</sup> However, Ms Campbell notes that she did not receive her superannuation which she brought to Mr Heness’ attention twice by SMS message, but at the time of hearing this still had not been addressed.<sup>47</sup>

### **Has the Applicant been dismissed?**

[35] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

### **Relevant Legislation**

[36] Section 385 of the FW Act provides:

#### **“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.”

[37] Section 386 defines ‘dismissed’ as:

#### **“386 Meaning of dismissed**

(1) A person has been dismissed if:

- (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
- (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."

[38] Relevantly, in *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli*, the Full Bench explained the two limbs in section 386(1) as follows:<sup>48</sup>

*"(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 probably 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."*

[39] Additionally, in *Sharp v MCG Group Pty Ltd*, it was found that:<sup>49</sup>

*"Essentially, termination at the initiative of the employer involves an important feature, that the act of the employer results directly or consequentially in the termination of the employment, so that the employee does not voluntarily leave the employee relationship. That is, had the employer not taken the action, the employee would have remained in the employment relationship.*

*The term "initiative" should not be given a narrow meaning. Even where an employee does some act which is the first in a chain of circumstances that leads to termination, the focus should be on the step or steps that effectively terminated the employment, or the critical action or actions."*

## **Consideration**

[40] With respect to whether Ms Campbell resigned from her role, it was strongly contested by the Respondent, that before she left the office, Ms Campbell said "I quit". Whilst there were

three witnesses to the altercation, other than Ms Campbell, only two of them provided witness statements and oral evidence.

*What was said?*

[41] Ms Pesi Jackson's oral evidence is consistent with her statement in which she alleges witnessing Ms Campbell walked towards her and throw the paperwork on her desk before stating that she does the timeslot paperwork and that Ms Campbell quits. Specifically, Ms Pesi Jackson's statement provides:<sup>50</sup>

“She then grabbed a significant number of timeslot paperwork up and threw them down on my desk and then said "Here you do them, because I have had enough and I quit and I will be telling Mark"

[42] However, I note in Ms Josiane Jackson's oral evidence that she failed to mention Ms Campbell advising of her resignation. When asked by Mr Sandroussi regarding what happened prior to Ms Campbell leaving the office, the alleged time when Ms Campbell said she resigned, Ms Josiane Jackson stated:

“Umm, she's basically saying like she's had enough. She was going to speak to Mark and I think Mark was in the office.”

Mr Sandroussi subsequently pressed Ms Josiane Jackson for further details to which she stated:

“She was basically saying like, see if you can do it, after she threw it **(the paperwork)** on her desk.

...

I've had enough. I'm going to see Mark.”

[43] I note an inconsistency between Ms Josiane Jackson's written statement and her oral evidence as she has omitted from her oral evidence, that she allegedly witnessed Ms Campbell throw the paperwork on to Ms Pesi Jackson's desk and saying "I quit & see if you can do the timeslots as I've had enough."<sup>51</sup>

[44] Interestingly, Ms Josiane Jackson's oral evidence is consistent with Ms Campbell's written statement which provides:<sup>52</sup>

“I lifted the incomplete Run Sheets paperwork from my desk and placed them on Pesi Jackson's desk saying, “this is shit”, “you can do this” and “I'm leaving to tell Mark”. At no point during the altercation with Pesi Jackson did I ever state that I was resigning or terminating my employment.”

*Was Ms Campbell misheard?*

[45] During her oral evidence, Ms Campbell sought to rely on her written statement, but did additionally note that it was possible that Ms Pesi Jackson may have misheard her, given Ms Campbell has a thick Scottish accent. Ms Campbell in her statement notes that this has occurred previously, where Ms Pesi Jackson has repeatedly misheard or misinterpreted her

communications at work.<sup>53</sup> Ms Campbell states that mishearing her has become something of a standing joke in the office.<sup>54</sup> Additionally, during Ms Pesi Jackson's cross-examination, Ms Campbell asked her if she had ever misheard her words in the past to which Ms Pesi Jackson stated no. However, later, during Ms Campbell's cross examination, it was clear that Ms Pesi Jackson was struggling to understand what Ms Campbell was saying. Ms Campbell asked:

“So what was GTLS process system for monitoring or reporting excessive workloads? Did you have a process in place for that?”

To which Ms Pesi Jackson stated:

“Pardon, sorry. Can you repeat the question?”

Ms Campbell clarified by saying:

“Yeah, that GTLS have a process or a system for monitoring or reporting excess workloads. Did you have a process?”

Ms Pesi Jackson responded:

“Excess what sorry?”

[46] Having observed the interactions between Ms Campbell and Ms Pesi Jackson during the hearing, and noting that the discussion at this point was heated, I consider it is highly likely that Ms Campbell was misheard. Viewed objectively, and noting the inconsistencies observed in Ms Josiane Jackson's evidence, I accept Ms Campbell's submission that she said “this is shit”, and that it is likely that Ms Pesi Jackson may have heard this as “I quit”.

### ***Did Ms Campbell resign?***

[47] In addition to vehemently denying that she said the words “I quit”, Ms Campbell raises a number of other points regarding why it is unlikely that she resigned as alleged.

[48] Firstly, Ms Campbell raised the question of why, if she had just resigned, she would not have mentioned this to Mr Heness when she met with him immediately after the altercation. I agree with Ms Campbell on this point. The evidence of Mr Heness supports that Ms Campbell made no mention of having resigned when she met with him, or later that day when she provided her medical certificate and lodged her official complaint. Mr Heness has also confirmed that the first time he was made aware that Ms Campbell had resigned was when he talked to Ms Pesi Jackson. I find it hard to rationalise that Ms Campbell would have resigned, then walked out of the office in tears to find Mr Heness, yet not mentioned to him that she had in fact resigned, nor that she would have failed to mention this when emailing him later that day.

[49] Further to this point, Mr Heness does not dispute Ms Campbell's evidence that after their discussions, he suggested that she look after herself and see a doctor. I again find it hard to reconcile that if Ms Campbell had resigned, she would have lodged a medical certificate, or gone to the trouble of lodging a formal complaint about the altercation earlier that day. It is also

of note that the complaint email outlined the things that Ms Campbell felt were necessary to be addressed prior to her return to the office.<sup>55</sup>

[50] That Mr Heness accepted her medical certificate and undertook an investigation into the altercation are both actions that would reasonably be taken by an employer with respect to an ongoing employee, not one that had resigned.

[51] Importantly, the evidence clearly shows that immediately it became evident to Ms Campbell that Mr Heness was of the view that she had resigned, she took steps to clarify that this was not the case.

[52] It is also of note that at the time, Ms Campbell was sixty four (64) years of age and was openly planning to retire within the next nine months. Ms Campbell in her email, dated 26 September 2023, responding to the jurisdictional objection raised in the Respondent's Form F3 states:<sup>56</sup>

“I do not agree that I mentioned resigning. I am due to retire next year why would I resign. The confrontation was due to the Operations Manager shouting at me at the TOP of her voice in front of the other staff.”

[53] Furthermore, Ms Campbell stated regarding the remedy sought:<sup>57</sup>

“Re-instatement of my former role would be considered as an option but given the recent past this may not be possible for all to consider.

This option would be preferred as currently I find myself in the position of ongoing unemployment and finding the chances of gaining employment in the coming months increasingly difficult as my expected retirement date should occur in June 2024.”

[54] In these circumstances, I find it highly unlikely that Ms Campbell, would have voluntarily resigned.

[55] Viewed objectively, and having considered the above, I prefer Ms Campbell's evidence regarding what occurred before she left the office that day, noting that it aligns with the oral evidence of Ms Josiane Jackson. Consequently, I have found that Ms Campbell did not verbally resign from her role prior to leaving the office, nor did she resign, either verbally or in writing at any time following.

[56] In the alternative, if I had found that Ms Campbell did say that she quit during the incident on 28 August 2023, I look to *Mr Sumeet Thakur v Assetlink Services (11) Pty Limited* which considered whether resignation is effective in the heat of the moment, specifically:<sup>58</sup>

“[54] A resignation that is given in the heat of the moment or under extreme pressure may constitute special circumstances such that a reasonable period of time should be allowed to elapse and/or further enquiries made as to whether the resignation was not intended. If a resignation is not withdrawn within a reasonable time, this may suggest the resignation was intended.

*[55] Special circumstances may also exist where an employee is 'jostled' by the actions of the employer to resign such that the resignation in such circumstances is not effective.*

*[56] In all cases an objective view of the actions of the employer and employee is required."*

**[57]** Additionally, the effectiveness of a resignation given during the heat of the moment was also considered in *Mr Anil Kumar v Life Without Barriers* which provided:<sup>59</sup>

*"[48] There may be a dismissal within the meaning of s 386(1)(a) of the Act where, although an 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 distress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign.<sup>60</sup> If the employer treats the ostensible resignation as terminating the employment rather than clarifying with the employee, this may be characterised as a termination at the initiative of the employer."*

**[58]** Furthermore, in *Mr Philip Li v Michael Vaux Pty Ltd T/A Malvern Tyre & Service* it was found where an ostensible resignation was made in the heat of the moment, then it could not be reasonably understood to have conveyed a real intention to resign, further that it should be understood by an employer receiving a medical certificate stating an employee is unavailable to work for a period of time, that the employee does not intend to resign.<sup>61</sup>

**[59]** It is noted that Gold Tiger sought to clarify whether Ms Campbell intended to resign, by way of Mr Heness' letter to Ms Campbell dated 4 September 2023. Ms Campbell provided clarification of this point in her response to Mr Heness' email, stating:<sup>62</sup>

*"2) At no time during the conversation I had with Pesi Jackson did I say I was resigning. as I said in my letter of complaint I put paperwork on her desk and said to her "you can do this" and indicated I was going home (I omitted to say previously that I grabbed my bag and rushed out as by this time I was in tears). I would ask that if I had made such a statement about resigning why you as the Manager was not informed of this immediately rather than you finding out through statements of facts?"*

**[60]** I am satisfied, and find that Ms Campbell did confirm to Gold Tiger that she had no intention of resigning. Further, I have previously found that it is likely Ms Campbell did not say the words "I quit", however, if I had found in the alternative, I am satisfied that such a statement would have been made in the heat of the moment and not intended, noting that Ms Campbell had been involved in a heated exchange with Ms Pesi Jackson and was in tears by the time she left the office. Additionally, Gold Tiger concede in the Outcome Letter that this may have been an "excited utterance".<sup>63</sup> Further, that the exchange had affected her so much that she had sought medical assistance. In these circumstances, I am satisfied that Ms Campbell did not resign.

## **Conclusion on Jurisdictional Objection**

[61] As I have found that Ms Campbell did not resign from her role, I subsequently find that her employment was terminated at the initiative of Gold Tiger on 11 September 2023 by way of the Outcome Letter, and the jurisdictional objection is dismissed. I will now turn to the merits of the matter.

## **Merits**

### ***Was the dismissal harsh, unjust or unreasonable?***

[62] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.

[63] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.<sup>64</sup>

[64] I set out my consideration of each below.

### ***Was there a valid reason for the dismissal related to the Applicant's capacity or conduct?***

[65] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"<sup>65</sup> and should not be "capricious, fanciful, spiteful or prejudiced."<sup>66</sup> However,

the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>67</sup>

**[66]** Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.<sup>68</sup> "The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination."<sup>69</sup>

**[67]** The Respondent asserts that Ms Campbell resigned from her role and was not dismissed, however they further submit that, in the alternative, and if the Commission is of the view that there was a "Dismissal", Ms Campbell's conduct on 28 August 2023 amounted to serious misconduct.<sup>70</sup>

**[68]** In subsequently considering the reasons for the dismissal, I also note that the Outcome Letter highlighted a range of relevant factors including:<sup>71</sup>

"During my investigation into this event, I have found the following:

[1] Pesi was within her rights to ask you why the sheets had not been completed or checked yet. You state that you stayed back to do the extra work and this was part of it. The non completion of these caused a significant delay in our ability to meet compliance parameters and these forms were only given to me on Friday after I asked for them. It was clear to me that they had been collated for filing and little to nothing else was done to them.

[2] Comments regarding you eating at your desk is not acceptable and I have counselled Pesi Jackson on this matter, however comments regarding her leaving to have lunch are equally not appropriate.

[3] There are a number of areas in the time slot allocation and preparation that was not up to scratch and I have previously asked regarding the flexibility of this information to be able to better coordinate deliveries etc. A significant number of timeslots were not actioned causing further delays in the delivery of the product

[4] I have previously spoken to Pesi Jackson regarding a negative report that we received within the Zendesk area (Customer Service) which is also one of your responsibilities and comments regarding your main focus being time slots does support a lack of focus in this area."

**[69]** Gold Tiger also submit that there was a valid reason for the dismissal, based on their belief that Ms Campbell:<sup>72</sup>

- had an argument with her supervisor,
- exchanged challenging and unsavory words with her supervisor,
- placed (threw) the Timesheets on her supervisor's desk and told her (depending on the source) that:



- a. “this is shit”, “you can do this” and “I’m leaving to tell Mark”
- b. “I quit & see if you can do the timeslots as I’ve had enough”
- c. “I’ve had enough and I’m telling Mark I’m leaving ... I quit had enough.” or
- d. “Here, you do them, because I have had enough and I quit and I will be telling Mark”

- she left her work and her desk and went to the depot.

[70] Based on the above, the Respondent concluded that Ms Campbell had dealt with her supervisor in a “less-than ethical, less than respectful and less than professional manner”, which they say amounts to a breach of Gold Tiger’s Policy and Ethics.<sup>73</sup> Further, they argue that Ms Campbell’s behavior was in contravention of the employees’ duties per the Employee Induction Manual.<sup>74</sup>

[71] I note that though employers can circulate policies and give directions to employees as they see fit, they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in the particular circumstances of an individual case, be harsh, unjust and unreasonable.”<sup>75</sup>

[72] Additionally, Mr Heness’ written statement contains the following:<sup>76</sup>

“22. After I concluded my investigation, I firmly was of the view that:

- a. Ms. Campbell did inform her supervisor that she resigned/quit and
- b. Ms. Campbell's behaviour amounted to Gross and Serious misconduct

23. The above belief is what prompted my decision to accept her resignation.”

[73] Notwithstanding the apparent inconsistencies in the Respondent’s reasoning for the termination, it is evident that Ms Campbell’s alleged verbal resignation was not the sole factor that led to her employment being terminated, but her conduct was also a basis for the termination. I note that this is consistent with the Respondent’s submissions which state:<sup>77</sup>

“Following the above, and following a formal complaint made by the Applicant, the Manager for the Respondent undertook a very thorough investigation at the end of which he came to the conclusion that:

- a. The Applicant’s supervisor was within her rights to ask about the sheets,
- b. The Applicant’s contention that she stayed back to complete them was not true,
- c. The evidence points to the fact that the Applicant did state that she resigned and
- d. **As this conduct was unacceptable**, the resignation was accepted.”

[74] During closing submissions, Mr Sandroussi stated the following regarding the reason for the dismissal:

“The unsatisfactory performance wasn't the factor, the determining factor for the dismissal. It was the behaviour at the time that caused this, caused that decision to accept the quitting part.”

And further,

“We don’t want to get rid of employees, we want more. But Ms Campbell didn’t leave us any other alternative.”

[75] Noting that no further evidence was provided to suggest Ms Campbell’s performance was in question, I am satisfied and find that Ms Campbell’s performance was not a factor in her dismissal, however that still leaves the question of whether or not Ms Campbell’s conduct was significant enough to warrant summary dismissal.

[76] Whilst it is clear that an altercation took place, and there are differing recollections as to exactly what was said, it is of note that Ms Campbell was the only party to leave the altercation in tears. It is also of note that even though the focus of the witness statements of both Ms Pesi Jackson and Ms Josiane Jackson was the altercation, neither described any behaviour that would reasonably lead to a conclusion that Ms Campbell’s conduct amounted to gross and serious misconduct.

[77] Serious misconduct involves an employee deliberately behaving in a way that is inconsistent with continuing their employment, to the extent that it would be seen to repudiate their employment contract.<sup>78</sup> Essentially serious misconduct conferred the notion of wilful or deliberate behaviour which strikes at the heart of the employment relationship.<sup>79</sup>

[78] The *Fair Work Regulation 2009* at clause 1.07 defines serious misconduct as conduct that causes serious and imminent risk to the health and safety of a person or to the reputation, viability or profitability of the employer’s business. Serious misconduct is defined as including conduct such as theft, fraud, assault, sexual harassment, intoxication at work and the refusal to carry out lawful and reasonable instructions consistent with the employment contract.

[79] For such conduct to have been displayed, and not immediately reported does seem curious. Similarly, it is also noted that Mr Heness did not, at any stage, including in his 4 September 2023 email raise with Ms Campbell any allegations of serious or gross misconduct following the altercation and neither Ms Pesi Jackson nor Ms Josiane Jackson felt the need to immediately report Ms Campbell’s conduct to Mr Heness. Ms Campbell on the other hand, did report Ms Pesi Jackson’s conduct and lodged a formal complaint.

[80] The standard of gross and serious misconduct is based on the balance of probabilities, noting the principles in *Briginshaw v Briginshaw*:<sup>80</sup>

*“The standard of proof remains the balance of probabilities but ‘the nature of the issue necessarily affects the process by which reasonable satisfaction is attained’<sup>81</sup> and such satisfaction ‘should not be produced by inexact proofs, indefinite testimony, or indirect inferences’ or ‘by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion.’<sup>82</sup>*

[81] Having considered the evidence, on the balance of probabilities, I find that whilst the discussion between Ms Campbell and Ms Pesi Jackson was heated, and that neither party conducted themselves professionally, Ms Campbell’s conduct did not constitute gross and serious misconduct. As such Ms Campbell’s conduct was not a valid reason for the dismissal.

[82] Taking the above into account, it seems most likely that it was Mr Heness' personal views on "resignation" more generally that prompted the dismissal.

[83] This view is supported by Mr Heness' comments at the conclusion of his Outcome Letter, where he makes the following remarks:

"I understand you have stated you did not resign, however all parties in the room heard this declaration clearly from you and, as you know, I refuse to negotiate with this type of statement so I accept your resignation effective immediately...."

[84] When asked to clarify this statement during his oral evidence, Mr Heness stated:

"When somebody comes in to resign and that is sometimes used as a leverage tool from drivers and other people in the industry.

If somebody comes in to me and say, look, I quit, I at that point there it's not a negotiation part, it's about OK put it in writing and that's it to me it's not something that you can negotiate because of that reason." (emphasis added)

[85] This statement appears to indicate that Mr Heness' belief that Ms Campbell had resigned, was the major factor in his decision to dismiss her. For the reasons explored above, I have found that Ms Campbell did not resign and as such, Mr Heness' focussing on the words he believes were said, along with his strongly held views regarding how he responds to resignations, does raise questions regarding his objectivity when undertaking the investigation and reaching his final outcome.

[86] It is also noted that Mr Heness acknowledged that he would usually ask someone to put a verbal resignation in writing. That this did not occur in Ms Campbell's case, adds weight to Ms Campbell's contention that her "supposed resignation" was used as a convenient way to dismiss her.

[87] In all the circumstances, I find that there was no valid reason related to the Applicant's performance or conduct for the dismissal. I therefore find this factor to weigh in favour of the dismissal being unjust and unreasonable as the evidence and material before Gold Tiger did not support the conclusion that Ms Campbell resigned, and harsh because the outcome was disproportionate to the gravity of her conduct.

***Was the Applicant notified of the valid reason?***

[88] As I am not satisfied that there was a valid reason for the dismissal, this factor is not relevant to the present circumstances.<sup>83</sup>

[89] Though I do note that Ms Campbell first became aware of the decision to terminate her employment after receiving the outcome letter on 11 September 2023. The reason provided to her was that Gold Tiger accepted her resignation.

[90] It is of note, that whilst Gold Tiger did seek to clarify with Ms Campbell whether or not she had intended to resign, her response seems to have fallen on deaf ears. Having clarified that she had not said that “she quit” nor that she had intended to resign, Ms Campbell did not receive any other communication relating to this until the Outcome Letter. It would seem reasonable, in the circumstances that Ms Campbell would have presumed that, having addressed that question, that the only matter being investigated was her complaint. That this was not the case, adds weight to a finding that the dismissal was harsh, unjust and unreasonable.

***Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?***

[91] As I am not satisfied that there was a valid reason related to the dismissal, it is not necessary to fully explore this factor,<sup>84</sup> however I do note that an employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee’s employment.<sup>85</sup>

[92] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly.<sup>86</sup> Where the employee is aware of the precise nature of the employer’s concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.<sup>87</sup>

[93] Ms Campbell submitted that she did not have an opportunity to respond to any valid reason because her termination was effective immediately after receiving the Outcome Letter on 11 September 2023.<sup>88</sup> Though Gold Tiger submits that Ms Campbell’s conduct amounted to serious misconduct, issues of procedural unfairness may not be of such significance as to outweigh the substantive reasons for an employee’s dismissal, particularly in cases of misconduct where the proven misconduct is of such gravity (such as proven fraud) as to outweigh any other considerations in respect to ‘harshness’, such as age, length of service, employment record, contrition or personal and family circumstances.<sup>89</sup> However, as I have found Ms Campbell’s conduct did not constitute serious misconduct, I find that her immediate termination without being afforded to an opportunity to respond was harsh.

[94] I accept that Gold Tiger did seek a response to several queries relating to the investigation of her complaint, however I also accept that Ms Campbell was of the understanding that the investigation being conducted was regarding her complaint. I am satisfied, and find that at no time was she advised that the investigation was considering her conduct, nor that the result of the investigation could lead to her termination.

[95] I am satisfied and find that additional issues were raised in the Outcome Letter that had not been raised with Ms Campbell previously. Further, I find that Ms Campbell was not afforded an opportunity to respond to the Outcome Letter. I find that Ms Campbell was dismissed with immediate effect and was not provided any notice period.

[96] I therefore find this factor to weigh in favour of the dismissal being harsh, unjust and unreasonable as Ms Campbell was not afforded an opportunity to respond.

***Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?***

[97] There was no opportunity for Ms Campbell to request a support person to assist in any discussions as the decision to terminate her employment was simply announced without notice. Whilst this factor is not directly relevant due to no discussions being held, I do find Ms Campbell not being afforded such an opportunity weighs in favour of a finding that the dismissal was harsh, unjust and unreasonable.

***Was the Applicant warned about unsatisfactory performance before the dismissal?***

[98] I have already found that Ms Campbell's performance was not a factor in her dismissal, therefore consideration of this factor is not required.

***To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?***

[99] Neither party submitted that the size of the Respondent's enterprise was likely to impact on the procedures followed in effecting the dismissal and I find that the size of the Respondent's enterprise had no such impact.

***To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?***

[100] Neither party made submissions regarding this point.

[101] Gold Tiger did not have a dedicated human resource management specialist or expertise in the enterprise in the relevant Brisbane office, and this is likely to have impacted on the procedures followed initially. However, I do note that Mr Sandroussi is Gold Tiger's legal department manager and would have been able to advise regarding effecting the dismissal and the appropriateness of the actions taken by Gold Tiger.

[102] I therefore find this factor to weigh in favour of the dismissal being harsh, unjust and unreasonable given the Respondent has a legal department.

***Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?***

[103] I have made findings in relation to each matter specified in section 387 as relevant.

[104] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.<sup>90</sup> The majority of factors considered weigh in favour of a finding that Ms Campbell's dismissal was harsh, unjust and unreasonable given the overlap of concepts.<sup>91</sup>

### **Conclusion on Merits**

**[105]** I have made findings in relation to each matter specified in section 387 as relevant. I am satisfied that the Applicant was unfairly dismissed, and that the dismissal was harsh, unjust and unreasonable.

**[106]** I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

### **Remedy**

**[107]** Section 390 of the Act provides that the Commission may order a remedy for unfair dismissal:

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

- (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
- (b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:

- (a) the FWC is satisfied that reinstatement of the person is inappropriate; and I am satisfied that Ms Campbell is a person protected from unfair dismissal, that she has been unfairly dismissed and that she made an application under s 394.
- (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

### ***Is reinstatement appropriate?***

**[108]** Ms Campbell initially sought reinstatement with associated orders for lost wages and continuity of service, however, in her statement of evidence Ms Campbell noted that the employment relationship has been significantly damaged due to lack of natural justice and procedural fairness leading to distrust and disrespect.

**[109]** Gold Tiger agrees that reinstatement would not be appropriate noting the relationship had deteriorated further after Ms Campbell's husband's text message to Ms Parker and her partner on 16 November 2023. Ms Campbell maintains she was unaware that this text message had been sent, and that upon it being brought to her attention, she reached out to all concerned offering her apologies and expressing her disappointment in her husband's conduct. She does however acknowledge that because of this message, and the conduct of all parties since she lodged her unfair dismissal application, the relationship has deteriorated to the point that reinstatement may be unworkable. Considering the above, I am of the view that reinstatement would not be appropriate in this case.

## Conclusion

[110] As I have found that reinstatement is not appropriate, I shall now consider compensation. However, I will reserve my decision regarding compensation, in order to seek further information from Ms Campbell regarding her efforts to find alternative employment, and what income, if any, she has received since her dismissal. Pending this further information, I will subsequently issue a decision regarding compensation.



## COMMISSIONER

### *Appearances:*

*A. Campbell for herself*

*C. Greenhill for the Applicant (support person)*

*A. Sandroussi for the Respondent*

### *Hearing details:*

*2024*

*Brisbane*

*17 January*

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<sup>1</sup> P.20 of the DCB – Applicant’s Outline of Argument (Merits).

<sup>2</sup> Ibid.

<sup>3</sup> P.58 of the DCB – Respondent Submissions.

<sup>4</sup> P.10 & P.44 of the DCB – Applicant’s Witness Statement & Form F3.

<sup>5</sup> P.51 of the DCB – Respondent Submissions.

<sup>6</sup> Ibid P. 52.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> P.60 of the DCB – First Witness Statement of Mark Heness dated 21 September 2023.

<sup>10</sup> P.61 of the DCB – First Witness Statement of Mark Heness dated 21 September 2023 & P.29 of the DCB – Mark Heness correspondence to Audrey Campbell regarding complaint.

<sup>11</sup> P.28 of the DCB – Outcome Letter dated 11 September 2023.

<sup>12</sup> P.52 of the DCB – Respondent Submissions.

<sup>13</sup> Ibid P.53-54.

<sup>14</sup> Ibid.

<sup>15</sup> P.32 of the DCB – Applicant’s Outline of Argument (Jurisdictional).

<sup>16</sup> P.19 of the DCB – Applicant’s Outline of Argument (Merits).

<sup>17</sup> P.11 of the DCB – Applicant’s Witness Statement.

<sup>18</sup> Ibid.

<sup>19</sup> P.29 of the DCB – Mark Heness correspondence to Audrey Campbell regarding complaint.

<sup>20</sup> P.30 of the DCB – Audrey Campbell reply to Mark Heness correspondence.

<sup>21</sup> P.11 of the DCB – Applicant’s Witness Statement.

<sup>22</sup> P.20 of the DCB – Applicant’s Outline of Argument (Merits).

<sup>23</sup> P.28 of the DCB – Outcome Letter dated 11 September 2023.

<sup>24</sup> P.20 of the DCB – Applicant’s Outline of Argument (Merits).

<sup>25</sup> P.20 of the DCB – Applicant’s Outline of Argument (Merits) & P.27 of the DCB – Outcome Letter dated 11 September 2023.

<sup>26</sup> P.58 of the DCB – Respondent Submissions.

<sup>27</sup> P.23 of the DCB – Complaint Letter dated 28 August 2023.

<sup>28</sup> Ibid.

<sup>29</sup> P.10 of the DCB – Applicant’s Witness Statement.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid at P.11.

<sup>32</sup> Ibid.

<sup>33</sup> P.75 of the DCB – Witness Statement of Josiane Jackson dated 14 September 2023.

<sup>34</sup> P.77 of the DCB – Witness Statement of Pesesio Jackson dated 14 September 2023

<sup>35</sup> P.60 of the DCB – First Witness Statement of Mark Heness dated 21 September 2023 & P.11 of the DCB – Applicant’s Witness Statement.

<sup>36</sup> P.72-73 of the DCB – Second Witness Statement of Mark Heness dated 8 December 2023.

<sup>37</sup> P.11 of the DCB – Applicant’s Outline of Argument (Merits).

<sup>38</sup> Ibid.

<sup>39</sup> P.73 of the DCB – Second Witness Statement of Mark Heness dated 8 December 2023.

<sup>40</sup> P.29 of the DCB – Mark Heness correspondence to Audrey Campbell dated 4 September 2023.

<sup>41</sup> P.30 of the DCB – Audrey Campbell reply to Mark Heness regarding three points dated 5 September 2023 (incorrectly dated 5 August 2023).

<sup>42</sup> P.11 of the DCB – Applicant’s Witness Statement.

<sup>43</sup> P.73 of the DCB – Second Witness Statement of Mark Heness dated 8 December 2023.

<sup>44</sup> P.26 of the DCB – Outcome Letter dated 11 September 2023.

<sup>45</sup> Ibid at P.27.

<sup>46</sup> P.11 of the DCB – Applicant’s Witness Statement.

<sup>47</sup> Ibid.

<sup>48</sup> [\[2017\] FWC FB 3941](#) at [47].

<sup>49</sup> [\[2010\] FWC 2357](#) at [24] and [25].

<sup>50</sup> P.77 of the DCB – Witness Statement of Pesesio Jackson dated 14 September 2023.

<sup>51</sup> P.75 of the DCB – Witness Statement of Josiane Jackson dated 14 September 2023.

<sup>52</sup> P.11 of the DCB – Applicant’s Witness Statement.

<sup>53</sup> Ibid.



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- <sup>54</sup> P.11-12 of the DCB – Applicant’s Witness Statement.
- <sup>55</sup> P.24 of the DCB – Letter of Complaint dated 28 August 2023.
- <sup>56</sup> P.34 of the DCB – Applicant’s Response to Form F3.
- <sup>57</sup> P.20 of the DCB – Applicant’s Outline of Argument (Merits).
- <sup>58</sup> [\[2023\] FWC 2550](#).
- <sup>59</sup> [\[2022\] FWC 2132](#).
- <sup>60</sup> *Bupa Aged Care Australia Pty Ltd (t/as Bupa Aged Care Mosman) v Tavassoli* [\[2017\] FWCFCB 3941](#); (2017) 271 IR 245 at [47](1).
- <sup>61</sup> [\[2024\] FWC 510](#) at [23].
- <sup>62</sup> P.30 of the DCB – Applicant email wrongly dated 5 August 2023 (sent 5 September 2023).
- <sup>63</sup> P.27 of the DCB – Outcome Letter dated 11 September 2023.
- <sup>64</sup> *Sayer v Melsteel Pty Ltd* [\[2011\] FWA FB 7498](#), [14]; *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].
- <sup>65</sup> *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
- <sup>66</sup> *Ibid.*
- <sup>67</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.
- <sup>68</sup> *Edwards v Justice Giudice* [1999] FCA 1836, [7].
- <sup>69</sup> *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFCB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].
- <sup>70</sup> P.52 of the DCB – Respondent Submissions.
- <sup>71</sup> P.27 of the DCB – Outcome Letter dated 11 September 2023.
- <sup>72</sup> P.56 of the DCB – Respondent Submissions.
- <sup>73</sup> *Ibid.*
- <sup>74</sup> *Ibid.*
- <sup>75</sup> *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* [1991] FCA 436; (1991) 39 IR 229.
- <sup>76</sup> P.73 of the DCB – Second Witness Statement of Mark Heness dated 8 December 2023.
- <sup>77</sup> P.53 of the DCB – Respondent Submissions.
- <sup>78</sup> *Emma Horan v Tren Trading Pty Ltd t/a Dubbo Early Learning Centre* [\[2019\] FWC 3249](#).
- <sup>79</sup> *Ibid.*
- <sup>80</sup> *Briginshaw v Briginshaw* [1938] HCA 34 (30 June 1938), [(1938) 60 CLR 336]; cited in *Barber v Commonwealth of Australia as represented by the Department of Parliamentary Services* [\[2011\] FWA 4092](#) (Thatcher C, 6 July 2011) at para. 33, [(2011) 212 IR 1]
- <sup>81</sup> *Briginshaw v Briginshaw* [1938] HCA 34 (30 June 1938), [(1938) 60 CLR 336].
- <sup>82</sup> *Ibid.*, [(1938) 60 CLR 336] at pp. 362–3]
- <sup>83</sup> *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFCB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [\[2013\] FWCFCB 762](#), [46]-[49].
- <sup>84</sup> *Ibid.*
- <sup>85</sup> *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFCB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].
- <sup>86</sup> *RMIT v Asher* (2010) 194 IR 1, 14-15.
- <sup>87</sup> *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.
- <sup>88</sup> P.20 of the DCB – Applicant’s Outline of Argument (Merits).
- <sup>89</sup> *Khoshaba v Woolstar Pty Limited t/a Sydney National Distribution Centre* [\[2020\] FWC 6596](#)
- <sup>90</sup> *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* [PR915674](#) (AIRCFCB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]-[7].
- <sup>91</sup> *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at para. 128 (McHugh and Gummow JJ), [(1995) 185 CLR 410 at p. 465].