DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Karren Burns
v
M & R Clayton Pty Ltd
(U2025/12454)

DEPUTY PRESIDENT DEAN CANBERRA, 1 DECEMBER 2025

Application for an unfair dismissal remedy – whether Applicant was dismissed – resignation given in the heat of the moment.

[1] Ms Karren Burns (Applicant) has made an application for an unfair dismissal remedy. She claims that she was dismissed from her employment with the M & R Clayton Pty Ltd (Respondent).

[2] The Respondent raised a jurisdictional objection on the ground that the Applicant voluntarily resigned and was therefore not dismissed within the meaning of s386 of the Act.

[3] Section 386 of the Act relevantly provides that 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.

[4] The application was heard on 13 November 2025. The Applicant was self-represented and Mr Clayton appeared for the Respondent.

[5] For the reasons outlined below, I find that the Applicant was dismissed within the meaning of the Act, and that her dismissal was unfair.

When is a person 'dismissed'?

[6] In *Bupa Aged Care Australia Pty Ltd v Shahin Tavassoli*[1] (*Bupa*), a Full Bench of the Commission examined the relevant authorities as to what constitutes 'dismissed' under s.386(1) which included the following:

(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.

[7] In *Lance Gunther & Michele Daly v B & C Melouney T/A Easts Riverside Holiday Park*[2] Deputy President Sams noted the following when considering whether the applicant in that matter was dismissed:

a. Jurisdiction can only exist where termination of employment at the initiative of the employer has occurred. 'Initiative' is relevantly defined in the New Shorter Oxford Dictionary as: "the action of initiating something or of taking the first step or the lead; an act setting a process or chain of events in motion; an independent or enterprising act."

b. This definition was considered in *Mohazab v Dick Smith Electronics Pty Ltd*[3] (*Mohazab*) where a Full Court of the Industrial Relations Court of Australia said, '… a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship.'

c. In *Mohazab*, the Full Court also said:

'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.'

d. A Full Bench of the AIRC in *Stubbs v Austar Entertainment Pty Ltd*[4] said, '… to constitute termination at the initiative of the employer the termination must be the direct or consequential result of 'some action on the part of the employer intended

> to bring the employment to an end and perhaps action which would, on any reasonable view, probably have that effect ...' [*Rheinburger v Huxley Marketing*, 16 April 1996 per Moore J].

[8] An employee seeking to establish that their employer should not have accepted their resignation will need to demonstrate two things: first, that there were circumstances that would cause a reasonable person in the employer's position to question whether the employee was conveying a real intention to resign; and second, their employer was or ought to have been aware of those circumstances. In the absence of such considerations, where an employee resigns in clear and unambiguous terms, the Commission cannot and should not intervene.

[9] Finally, it is the case that "considerable caution should be exercised in treating a resignation as other than voluntary where the conduct of the employer is ambiguous and it is necessary to determine whether the employer's conduct was of such a nature that resignation was the probable result such that the employee had no effective or real choice but to resign".[5]

Background and events leading to resignation

[10] The Applicant was employed from 2019 on a part time basis, three days per week.

[11] The Respondent operated a podiatry clinic in Canberra and employed the Applicant and one other employee as receptionists.

[12] On Wednesday 16 July 2025 Mr Clayton advised the Applicant to go home for the afternoon as no patients were scheduled. She asked if she was going to be paid for the afternoon and was told by Mr Clayton that she was not.

[13] A short time later Mr Clayton also informed her he was going to cut her hours back to 2.5 days per week. The Applicant mis-heard him and thought he said "two half days" per week. She became very upset and a "short, heated discussion" then took place, in which the Applicant told Mr Clayton that she may as well quit. She said she was extremely upset and anxious. The Applicant left the premises a short time later.

[14] An email exchange then took place between the parties over the next few days as follows.

[15] Mr Clayton sent an email to the Applicant on 16 July saying:

> "Hi Karren
> I am sad and sorry we ended our employer/employee relationship the way we did. You have always been my best employee, and I respected you for your work ethic and helping me in circumstances out of your work scope and I will always remember you for that. God Bless you in your new endeavours. The reason I cut your hours this winter (only) was because business was considerably down this year, so I had to cut, wages and superannuation are my biggest expense and have been increasing every year. I understand this does not help you. You have expenses and it is right that you look for another job. Once again thank you for your help over the years I have enjoyed you as a employee.

Regards Mark Clayton"

[16] The Applicant replied on 17 July 2025 in the following terms:

"Hi Mark
Thanks for your email, firstly I too am saddened by what happened yesterday, it was not my intention to react the way I did but feel you put me in a position that was not in the best interest for either of us. It was a discussion that should have taken place in private and between just the two of us not a discussion as your walking out the door and in front of another staff member.
What I heard you say is that you were cutting my hours down to two half days not 2 ½ days hence why I was taken aback, once again if the discussion had taken place in a more acceptable place maybe the confusion would not have happened.
I would like to continue my employment and am happy to discuss the reduced hours etc in a more contusive (sic) environment, could you please advise going forward.
Kind Regards
Karren"

[17] On 18 July 2025 Mr Clayton replied as follows:

"Dear Karren,
Thank you for your email. I think we are both upset that our working relationship ended the way it did. However, it has enabled me to reevaluate my situation, with the current cost of living crisis and my practice winding down. The business cash flow has reduced (more than normal) and as you are aware that I am entering my last year of my working life. I have decided to reduce the overall hours that the reception desk is manned and may even reduce the practice hours, everything is on the table now. I therefore feel that it is in the best interests of both of us to stay with the decision you made on Wednesday.
Once again thank you for your service.
Regards Mark"

[18] On 21 July 2025 the Applicant sent an email to Mr Clayton in the following terms:

"Dear Mark
Thank you for your email on Friday 18th July 2025, I would like some clarification with regards to my employment, as advised in my previous email there was confusion in the conversation regarding the hours that you wanted to cut and in that discussion I said a few things that I didn't mean to converse and clarified this in my email on Thursday 17th July advising I would like to continue my employment and did not wish to resign.
Your email on Friday in my understanding was that due to company restructure my position has been made redundant and therefore I am no longer required and if this is the case could you please confirm my notice of termination formally and if you would like me to return to my duties until termination date.
With regards to altering my work hours the following should have taken place as per our employment under the Health Services Award (MA000027):
[Clause 35 Consultation about changes to rosters or hours of work was set out in the email]

I have been advised that as I do not have a formal employment agreement that my employment reverts back to and follows the Health Services Award by which I am engaged under.
Based on the information provided, could you please clarify your position in regard to my employment by return email by end of business hours today.
Kind Regards
Karren Burns

[19] The Applicant attended the workplace on 22 July 2025. She said Mr Clayton was sitting at reception when she arrived. She then started unpacking her bag and Mr Clayton told her she had no right to be there because she had resigned, and asked her to leave. The Applicant says that she told Mr Clayton she had not formally resigned and that she had a right to be at work. Mr Clayton then asked her to return the keys to the clinic and leave, which she did.

[20] Later that day, Mr Clayton sent an email to the Applicant saying:

"Dear Karren
On Wednesday 16th July 2025, I raised with you returning to your original hours of 2 and 1/2 days / week during the winter period when historically business is slower and this has been agreed in the past to decrease your hours during winter. At that time, it was very clear that I was talking about returning to 2 and 1/2 days per week NOT 2x 0.5 days per week which you have since claimed and makes no sense. You immediately resigned, without notice, which I accepted, and you further clarified this by clearing out your desk before leaving that afternoon.
In my email dated Friday 18th July 2025, I did NOT state that your position had been made redundant, rather I took the opportunity of your resignation, to look at the reception hours required and the workload of other employees, to keep my business financial. Regarding the Health Services Award quoted :
I proposed changing your hours to 2 1/2 days / week which was the original agreement at the beginning of your employment.
You gave me your view regarding the proposed changes which was to resign your position immediately.
I considered your view and accepted your resignation on the spot.
You did not offer any notice of termination which I also accepted at the time.
As an employer, I have the right not to accept a withdrawal of resignation if I think it is in the best interests of the business.
And I did not think that your position was tenable after your reaction last Wednesday.
You have not been happy working for me for some time.
I will discuss with the accountant any holiday pay owing to you and send it to you as soon as possible.
Once again, I wish you all the best for your future endeavour
Kind Regards
Mark"

[21] The Applicant replied a few hours later saying:

"Dear Mark

> With reference to your email received today, I must respectfully disagree with your interpretation of some parts of the conversation.
> As per my previous emails I would like to convey that I have not resigned and that the conversation that took place to me advising you I will quit if my hours were reduced to 2 half days (not 2 and a half days) which was my interpretation of what you said took place in an extremely stressful environment and in the heat of the moment, I also advised that if I was going to quit I would put it in writing that afternoon and give you notice, after 8 years of loyal service I would have thought you would have given me the opportunity to have a reasonable period of time to 'cool off' and reflect on the conversation that had taken place as per my email on Thursday.
> I attended work today as I still considered to be employed as I had not handed in a written resignation and had sent an email on Monday and text today (Tuesday) and received nothing in return, when I arrived I was asked by yourself to leave and to hand my key back and not to return and that I was no longer employed.
> Kind Regards
> Karren Burns"

[22] The Applicant submitted that her resignation was given in the heat of the moment.

[23] The Respondent submitted that he accepted her resignation on the day it was given, and he chose not to accept the withdrawing of her resignation because she had not apologised for the way she had spoken to him and there was a history of increasingly disrespectful behaviour by the Applicant towards him.

Was the Applicant dismissed?

[24] As the decision in *Bupa* makes clear, there may be a dismissal where the employee has given a resignation in the 'heat of the moment', or when the employee was in a state of emotional stress, such that the employee could not reasonably be understood to be conveying a real intention to resign. 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.

[25] The evidence, in my view, supports a finding that the Applicant's resignation was given in the heat of the moment and she did not genuinely intend to resign. So much is clear from the email exchange set out above. In particular, she sought to clarify with the Respondent the following day that she had misunderstood what he had said, and she clearly stated she did not wish to resign. I am satisfied that this constituted a termination of her employment at the initiative of the employer.

[26] As a result, I now need to determine whether her dismissal was unfair.

Was the dismissal unfair?

[27] A dismissal is unfair if the Commission is satisfied on the evidence that the circumstances set out at s.385 of the Act existed. Section 385 provides the following:

"**385 What is an unfair dismissal**

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

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

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

[28] I have found that the Applicant was dismissed, and I am satisfied that subsections (c) and (d) do not apply.

Was the dismissal harsh, unjust or unreasonable?

[29] Section 387 of the 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.

[30] The ambit of the conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained in *Byrne v Australian Airlines Ltd*[6] as follows:

'... It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences

for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.'

[31] The onus is on the Applicant to prove that the dismissal was harsh, unjust and/or unreasonable.

[32] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[7]

[33] In respect of whether there was a valid reason (s387(a)), I have found that the Applicant was dismissed because her resignation was given in the heat of the moment and she did not genuinely intend to resign. The reason for her dismissal was therefore not due to her conduct or capacity and so this criterion is not relevant.

[34] Similarly, s.387(b) to (e) are also not relevant in this case.

[35] In terms of s.387(f) and (g), the Respondent was a small business with no dedicated human resources expertise, and this impacted on the dismissal because Mr Clayton genuinely believed he was entitled to accept the Applicant's resignation in the circumstances.

[36] Section 387(h) provides the Commission with a broad scope to consider any other matters it considers relevant. I do not consider there are other relevant matters that should be considered.

[37] Having considered each of the required matters, I am satisfied that the Applicant's dismissal was harsh and therefore unfair. This is because the Applicant did not intend to resign.

Remedy

[38] Having found that the Applicant's dismissal was unfair, it is necessary to consider what, if any, remedy should be granted. The Applicant seeks the remedy of compensation.

[39] Under section 390(3) of the Act, I must not order the payment of compensation unless:

a. I am satisfied that reinstatement is inappropriate; and
b. I consider an order for payment of compensation is appropriate in all the circumstances of the case.

[40] In this case, I am satisfied that reinstatement is inappropriate, and an order for payment of compensation is appropriate.

[41] In considering what is appropriate compensation, I must consider the factors which are set out in s.392(2) of the Act which include:

a. the effect of the order on the viability of the Respondent's enterprise;
b. the length of the Applicant's service;
c. the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;

d. the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;
e. the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;
f. the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and
g. any other matter that the Commission considers relevant.

[42] The evidence is clear that the Respondent's business had ceased operating around five weeks after the Applicant's employment ended (ie September 2025). In these circumstances, the Applicant's employment could not have extended beyond a further five weeks. The Applicant had had around eight years of service with the Respondent. There is no evidence that the Applicant took steps to mitigate her loss, nor is there any evidence of other remuneration earned by the Applicant.

[43] I am satisfied that the Applicant would have received a further five weeks' pay, that being the likely length of her employment had she not been dismissed. From this I must deduct any monies earned since termination (of which there is no evidence) and discount for contingencies. I do not consider it appropriate to make any adjustment for contingencies.

[44] In the circumstances, I order that the Respondent pay the Applicant 5 weeks' pay, being $4,090.50 gross less taxation required by law, to be paid within 14 days of the date of this decision. This figure is based on an average of 22.5 hours per week, reflecting her usual pattern of working between 20 and 25 hours each week.

DEPUTY PRESIDENT

Appearances:
K Burns on her own behalf.
M Clayton for M & R Clayton Pty Ltd.

Hearing details:
2025.
By video:
November 13.

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[1] [2017] FWCFB 3941.

[2] [2012] FWA 2473.

[3] 62 IR 200 [1995].

[4] Print Q0008, 9 April 1998.

[5] *Sathananthan v BT Financial Group Pty Ltd* [2019] FWC 5583.

[6] (1995) 185 CLR 410 at 465 per McHugh and Gummow JJ.

[7] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].