



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

David Gourlay

v

Sydney International Container Terminals Pty Limited
(U2024/12357)

COMMISSIONER SLOAN

SYDNEY, 31 MARCH 2025

Application for an unfair dismissal remedy – employee tendered resignation – whether resignation effective to terminate the employment – whether in acting on the resignation the employer dismissed the employee – no termination at the initiative of the employer

[1] David Gourlay worked as a stevedore for Sydney International Container Terminals Pty Ltd, which trades as Hutchison Ports. In the early hours of 26 September 2024, he sent an email to Hutchison Ports stating that he resigned that day. Hutchison Ports accepted¹ the resignation that morning.

[2] Mr Gourlay claims that he did not intend to resign. He says he submitted his resignation unknowingly, when he was suffering from paranoid delusions. He attempted unsuccessfully to have Hutchison Ports “disregard” his email. Attempts by two co-workers and his union representative to persuade Hutchison Ports to allow him to retract his resignation were similarly unsuccessful.

[3] On 16 October 2024, Mr Gourlay commenced these proceedings by filing an unfair dismissal application under section 394 of the *Fair Work Act 2009*.²

[4] Hutchison Ports has raised a jurisdictional objection to the application. It contends that Mr Gourlay was not dismissed. Rather, it argues that the employment came to an end as a result of the resignation communicated in Mr Gourlay’s email.

Determination

[5] I have determined that I must uphold Hutchison Ports’ objection. These are my reasons.

The factual context

[6] Mr Gourlay commenced employment with Hutchison Ports on 17 October 2016. He worked at the Port Botany container terminal (“Terminal”).

[7] During his employment, Hutchison Ports had placed Mr Gourlay on six “absence management plans”. These are plans implemented by the company once an employee exceeds their annual entitlement to personal leave, under which the employee is generally required to provide medical evidence for any absence.

[8] On 25 September 2024, Mr Gourlay returned to work after approximately 10 weeks off. During his shift, he was told that due to a downturn in work, the Maritime Union of Australia division of the Construction, Forestry and Maritime Employees Union (“MUA”) had agreed with Hutchison Ports that all stevedores would have their hours reduced.³ Mr Gourlay took this to mean that his income was about to be reduced.⁴

[9] Mr Gourlay said that this news caused him stress, and exacerbated an existing psychological condition. He said he could not sleep that night and began having paranoid thoughts. He said he sent multiple emails to co-workers, accusing them of conspiring against him.

[10] At about 4.31am on 26 September 2024, Mr Gourlay sent an email to “Human Resources” at Hutchison Ports at the address HR@hutchisonports.com.au. The email stated (reproduced verbatim):

“To whom may concern.

I, David Gourlay resignation as of today.”

[11] At about 11.02am that day, Aaron Stockdale, Manager – HR & IR at Hutchison Ports, sent Mr Gourlay an email from the Human Resources address to which Mr Gourlay had directed his email. Mr Stockdale’s email stated in part:

“Dear David,

We refer to your resignation from your employment with Hutchison Ports Sydney, given today 26 September 2024.

This email response is to confirm receipt of your resignation and confirm that your last day of employment will be 26 September 2024. We advise that payment of your outstanding wages will be paid into your usual bank account. ...

... We would like to take this opportunity to thank you for your hard work during your employment at Hutchison Ports Sydney and wish you well in your future endeavours.”

[12] At some point after sending his email at 4.31am, Mr Gourlay must have fallen asleep. He stated that when he awoke, he saw the email that he had sent at 4.31am. He claimed to have no recollection of sending it. He also saw the email from Mr Stockdale.

[13] At about 11.24am Mr Gourlay sent an email to Human Resources in these terms (reproduced verbatim):

“Sorry disregard my previous email. I wasn’t thinking straight due to stress. i’ll be in tonight for a night shift.”

[14] Two of Mr Gourlay’s co-workers, Barry McGrath and Dan Hanford, became aware of his resignation. Each of them had conversations with Geoff Hughes, the Manager Terminal Operations of the Port Botany terminal, in the late afternoon and early evening of 26 September 2024. Those conversations were in similar terms: Mr McGrath and Mr Hanford voiced their concerns regarding Mr Gourlay’s mental health; said that they did not consider that he was in the right frame of mind to make a rational decision to resign from his employment; said that in their opinion Mr Gourlay required medical help; and they asked Mr Hughes to speak to Mr Gourlay.

[15] After these conversations, Mr Hughes called Mr Gourlay at about 6.24pm and had a short conversation with him. I will return to that conversation.

[16] At about 6.32pm, Mr Hughes had a conversation with Paul Keating, the Divisional Branch Secretary of the MUA. Mr Keating told Mr Hughes that he had spoken to Mr McGrath, Mr Hanford and Mr Gourlay, and that he thought that Mr Gourlay was having a mental health crisis. He expressed the view that Mr Gourlay could not voluntarily have resigned because he was not lucid enough to make such a decision. He asked Mr Hughes whether he would allow Mr Gourlay to rescind the resignation. Mr Hughes stated that Hutchison had already processed the resignation and Mr Gourlay’s final payment. He said that Mr Gourlay had not been a reliable employee over the years, which had been a challenge for the business, and with economic conditions as they were, he would not agree to reinstating him.

[17] Meanwhile, at 6.09pm that day, Mr Stockdale had sent another email to Mr Gourlay in these terms:

“Dear David,

Your resignation has already been accepted and it has been processed through our payroll for payment.”

The relevant law and principles

[18] For the Commission to find that a person has been unfairly dismissed, it must be satisfied (amongst other things) that the person was dismissed: section 385(a). The term “dismissed” is defined in section 386(1). That section provides that a person may be dismissed in one of two ways: first, where their employment was terminated on the employer’s initiative (section 386(1)(a)), or second, where they resigned from their employment, but were forced to do so because of conduct, or a course of conduct, engaged in by their employer (s 386(1)(b)).

[19] Mr Gourlay did not argue that he had been forced to resign. Rather, he contended that despite having ostensibly resigned, the termination of his employment was on the initiative of Hutchison Ports.

[20] A termination will be “on the employer’s initiative” if it is brought about by the employer without the employee’s agreement. The question is whether an action on the part of

the employer was the principal contributing factor which resulted, directly or consequentially, in the termination of the employment.⁵

[21] The Commission has long recognised that in certain circumstances, a termination may be on the initiative of the employer despite the fact that the employee tendered their resignation. Such circumstances were described by the Full Bench in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli*⁶ (“*Bupa Aged Care*”) as follows:

“[35] Additional but not unrelated to the concept of ‘forced’ resignation is a line of cases concerned with the circumstances in which an ostensible indication of an intention to resign on the part of an employee may not be effective to terminate the employment on the employee’s initiative. Where the resignation is ineffective, purported acceptance of the resignation by the employer forthwith, without clarifying with the employee whether resignation was truly intended, will constitute a termination of employment at the initiative of the employer. The usual position is that where an employee uses unambiguous words of resignation, the employer is entitled to treat this as an effective resignation which operates to terminate the employment. However an expression of resignation which cannot reasonably be regarded as voluntary may not operate as an effective resignation capable of acceptance by the employer. ...”

[22] The Full Bench went on to consider a number of authorities that had examined circumstances in which a purported resignation might be regarded as a termination on the employer’s initiative.⁷ Having traversed those authorities, and relevant to section 386(1)(a), the Full Bench concluded:

“[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.”

[23] The Full Bench’s phrase “could not reasonably be understood to be conveying a real intention to resign” raises the question: “Understood by whom?” To my mind, the answer that question is: “A reasonable person in the position of the parties”. That is, what would a reasonable person in the position of the parties have understood to be the objective position, in light of the surrounding circumstances?⁸

[24] It follows that 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

The basis of Hutchison Ports’ objection

[25] The basis of Hutchison Ports’s objection can be summarised in three points. First, Mr Gourlay’s resignation was unambiguous. It did not contain any complaint, grievance or discontent. Second, at the time it received the resignation, Hutchison Ports was not aware of anything that could rationally have led it (or a reasonable person in its position) to conclude that Mr Gourlay had not freely given the resignation. Third, it followed that it was entitled to treat the resignation as such and act on it.

[26] Mr Gourlay urged the Commission to reject those arguments. He submitted that “there are special circumstances that should have given rise to a reasonable suspicion that [he] didn’t intend to resign his position”.¹⁰

When did Hutchison Ports purport to accept the resignation?

[27] To address the parties’ cases, it is necessary to determine the point in time at which Hutchison Ports purported to accept Mr Gourlay’s resignation. I find that it did so prior to Mr Stockdale’s email to Mr Gourlay at 11.02am on 26 September 2024. The language of that email makes it clear that Hutchison Ports had by that time accepted the resignation.

[28] For completeness, I consider that the email that Mr Stockdale sent to Mr Gourlay at 6.09pm that day was in response to that of Mr Gourlay sent at 11.24am. Its purpose was to confirm to Mr Gourlay that the resignation had “already been accepted” and could not, as Mr Gourlay had requested, be “disregarded”.

Were there “special circumstances” in this case?

[29] I will deal in turn with the factors which Mr Gourlay claimed gave rise to “special circumstances”.

Mr Gourlay’s mental health

Mr Gourlay’s submissions

[30] Mr Gourlay submitted that:

- 1) Hutchison Ports was aware that Mr Gourlay suffered from mental health problems;
- 2) he had sent his resignation email to Hutchison Ports “while in a delusional and paranoid state of mind”;¹¹

- 3) from the conversations he had in the late afternoon and early evening of 26 September 2024 referred to above, Mr Hughes knew that Mr Gourlay had been in that state of mind when he sent the email;
- 4) despite having that knowledge, Hutchison Ports accepted the resignation “as if it was given by an employee who was lucid and rational”;¹² and
- 5) while it may be inconvenient for Hutchison Ports to continue to employ someone who has excessive absences resulting from a genuine medical condition, it is appalling for a company to try to accept the supposed resignation of such an employee when it is fully aware that it was given during a mental health crisis.

The evidence of Mr Gourlay and his witnesses

[31] Mr Gourlay gave evidence that he has “long suffered from mental health issues”.¹³ He is being treated, and takes medication, for stress, anxiety and paranoia. He stated that his condition had required him to take a lot of time off work. This included the 10 week period prior to 25 September 2024, which had become necessary “due to seriously paranoid thought processes that [he] was having”.¹⁴

[32] Mr Gourlay stated that his condition sometimes puts him into a “manic” state in which he believes that everyone in the workplace has been conspiring to spy on and harm him. When he is in such a state he has trouble sleeping and spends hours “sending text messages to people letting them know that [he is] onto their plot to do [him] harm”.¹⁵ Mr Gourlay deposed that he was in such a state on the night of 25 to 26 September 2024.

[33] Mr Hanford, Mr McGrath and Mr Keating all offered their opinions regarding Mr Gourlay’s mental health, both generally and at the time he sent the resignation. Hutchison Ports objected to that evidence. I accept the premise of the objections, namely that none of the witnesses are qualified to express a clinical opinion as to Mr Gourlay’s mental health or any conditions from which he might suffer. I have, however, determined to accept the evidence to the extent that it reflects the observations of lay observers.

[34] Mr Hanford’s evidence included the following:

- 1) Mr Gourlay “suffers from mental health issues and exhibits...psychotic behaviour when he becomes overly stressed”;¹⁶
- 2) in the 10 week period prior to 25 September 2024, Mr Gourlay “was completely irrational and clearly unwell”. Mr Hanford received “delusional text messages” from Mr Gourlay “that were extremely paranoid in nature and accused us of being involved in conspiracies against him”;¹⁷
- 3) on Mr Gourlay’s return to work on 25 September 2024, it was “obvious that he wasn’t doing well”;¹⁸
- 4) at about the same time that Mr Gourlay sent his resignation to Hutchison Ports, he had sent a number of irrational text messages to Mr Hanford. Included in the messages was a screenshot of his resignation email and text message that said “go and celebrate”; and

- 5) when he saw the messages, Mr Hanford called Mr Gourlay. During the conversation, Mr Gourlay “was paranoid and delusional and was obviously in the midst of a mental health crisis”.¹⁹

[35] Mr McGrath gave evidence that he was aware that Mr Gourlay had suffered from mental health issues in the past. He said that he spoke to Mr Gourlay on the afternoon of 26 September 2024 and that it “was clear that he was delusional and going through psychosis”.²⁰ Mr McGrath stated that it was clear to him during that conversation that Mr Gourlay “needed urgent medical attention”.²¹

[36] Mr Keating gave evidence that he was aware that Mr Gourlay “suffers from mental health conditions and that he is prone to psychotic episodes” and that, when he is “suffering psychosis”, Mr Gourlay sends him dozens of text messages to the effect that others are spying on him and plotting to get him.²² Mr Keating stated that on 26 September 2024 he had been told by Mr Hanford and Mr McGrath that Mr Gourlay had tendered his resignation “while in a psychotic state”.²³ He described Mr Gourlay as being at that time in a “mental health crisis”.²⁴

[37] Each of Mr Gourlay, Mr McGrath, Mr Hanford and Mr Keating gave evidence as to separate conversations they had with Mr Hughes in the late afternoon and early evening of 26 September 2024. For his part, Mr Gourlay said that he made it clear to Mr Hughes that he “hadn’t been in [his] right mind when [he] sent the email and that [he] never intended to quit [his] job”.²⁵

[38] The evidence of the other witnesses was largely to the same effect: that they told Mr Hughes that Mr Gourlay had submitted his resignation at a time when he was suffering from mental health problems and that he was incapable of making a rational decision to terminate his employment. Mr Hanford and Mr Keating stated that Mr Hughes had agreed that Mr Gourlay was “in the midst of a mental health crisis”. Mr McGrath gave evidence that he received a text message from Mr Hughes in the evening of 26 September 2024 stating: “It doesn’t sound like Dave is in a good way at all.”²⁶

[39] Mr Gourlay placed reliance on two further factors. First, Hutchison Ports had placed him on six “absence management plans”. Second, he had made Mr Hughes aware some years ago that he was taking medication for depression.

Limited clinical evidence

[40] Hutchison Ports correctly submitted that there was limited clinical evidence to corroborate the evidence of Mr Gourlay and his witnesses as to his condition. The only evidence from a medical practitioner is contained in two documents.²⁷ The first is a letter from Dr Edgar Guanco of the Marrickville Medical Centre to Uplift Psychological Services dated 26 September 2024 (“First Guanco Letter”).²⁸ It appears to be a referral for Mr Gourlay to receive treatment under a mental health care plan. The letter describes Mr Gourlay as suffering from “stress anxiety and paranoia [*sic*]”. It states that his past medical history includes depression.

[41] An attachment to the First Guanco Letter is titled “BOIHMC Mental Health 3 Step Process, Part 1 – Assessment”. That attachment:

- 1) refers to the date of assessment as being 26 September 2024;
- 2) describes the “problem” as being “anxious, panic attacks, work stress” and the “diagnosis” as being “stress Anxiety, paranoia [*sic*]”;
- 3) contains notes which include “Irrational fears. Panic attacks. Compulsive behaviour. Delusions. Auditory hallucinations. Visual hallucinations”;
- 4) describes Mr Gourlay’s “ability to make rational decisions” as “bad”; and
- 5) contains a provisional diagnosis that Mr Gourlay has an anxiety disorder and depression, but not a psychotic disorder.

[42] The second document is a letter from Dr Guanco addressed “To whom it may concern” dated 29 September 2024 (“Second Guanco Letter”).²⁹ The letter states that Mr Gourlay “suffers from stress anxiety and depression [*sic*]” and that he “made the wrong decision to resign because of the above medical condition”.

[43] Dr Guanco was not called to give evidence. In the absence of a clinical explanation, it is difficult to know what significance to afford the attachment to the First Guanco Letter or what conclusions I should draw from it.

[44] Similarly, the basis for the opinion in the Second Guanco Letter that Mr Gourlay made the “wrong decision” is not properly explained. That is, how was the decision made “because of” Mr Gourlay’s condition? I also do not know whether there is any significance to that letter referring to “stress anxiety and depression”, as opposed to “stress anxiety and paranoia” as appeared in the First Guanco Letter.

[45] Overall, I accept that the First and Second Guanco Letters corroborate Mr Gourlay’s evidence that he is being treated for stress, anxiety and paranoia. However, the letters do not directly support the severity of Mr Gourlay’s condition as he and his witnesses described: namely, that he suffers from “*severe* bouts of paranoia” (my emphasis) leading to “manic” episodes, or that he suffers from psychosis. Significantly, the documents do not provide any real insight into Mr Gourlay’s mental health and state of mind on the night of 25 to 26 September 2024.

What did Hutchison Ports know, and when?

[46] Hutchison Ports disputed that, prior to 26 September 2024, it possessed the knowledge of Mr Gourlay’s mental health that he contended it had. Mr Hughes gave evidence to the effect that his knowledge was limited to the fact that Mr Gourlay was taking medication for depression. He stated that although Mr Gourlay had a number of absences from work on personal leave, the medical certificates that he provided in respect of those absences described the reason for the absence in non-specific terms such as “medical condition” or “unfit”.³⁰ This evidence was not challenged.

[47] Similarly, Mr Hughes stated that although he had placed Mr Gourlay on six absence management plans, he did not derive much information regarding Mr Gourlay’s medical condition from them. He stated that as part of each absence management plan, he asked Mr Gourlay if he had an underlying health condition that Hutchison Ports may need to know

about. Mr Gourlay responded by saying only that he was “sick”, “unwell” or “unfit”.³¹ Again, this evidence was not challenged.

[48] I note that the First and Second Guanco Letters postdate the resignation. Mr Keating said that he provided the first letter to Mr Hughes on 10 October 2024. The evidence does not reveal when, or if, the second one was provided to Hutchison Ports (other than as an attachment to Mr Gourlay’s statement). There are no medical reports, medical certificates or similar documents in evidence that predate the resignation which evidence, or from which I might infer, that Hutchison Ports was aware of Mr Gourlay’s medical condition prior to the resignation.

[49] On the evidence, Mr Gourlay has not demonstrated that Hutchison Ports’ knowledge of his mental health extended beyond that described by Mr Hughes: that he had been taking medication for depression.

[50] Mr Gourlay placed significant reliance on the knowledge that Mr Hughes acquired following his conversations with Mr Gourlay and his witnesses in the late afternoon and early evening of 26 September 2024. Mr Hughes disputed some of that evidence.

[51] In relation to his conversation with Mr Gourlay, Mr Hughes denied that Mr Gourlay had said words to the effect that he “wasn’t in his right mind” or “never intended to quit”. He stated: “Dave seemed fine to me.”³² Under cross-examination, Mr Hughes stated that during the conversation, Mr Gourlay “seemed completely lucid”.³³ Mr Hughes understood Mr Gourlay to be saying only that he had changed his mind.

[52] I digress to observe that, to a degree, this is reflected in the email Mr Gourlay sent to Hutchison Ports at 11.24am on 26 September 2024. In that email, he asks the company to “disregard” his earlier email because he “wasn’t thinking straight due to stress”. This could hardly have been read as claiming that the email was sent while Mr Gourlay was in a manic state involving paranoid delusions. The email could well have been read as reflecting a change of mind.

[53] Mr Hughes also denied that in his conversations with Mr Hanford and Mr Keating he agreed that Mr Gourlay “was in the midst of a mental health crisis”. I am mindful, though, that neither Mr Hanford or Mr Keating was cross-examined.

[54] Mr McGrath stated that when he wrote in his text to Mr McGrath that it “doesn’t sound like Dave is in a good way at all”, he was reflecting the views that had been conveyed by Mr McGrath, Mr Hanford and Mr Keating. He said he was not purporting to suggest that he had formed the same conclusion.

[55] Ultimately, however, I do not need to resolve these evidentiary conflicts. The events involving Mr Hughes on which Mr Gourlay relied took place in the late afternoon and early evening of 26 September 2024. This was some hours after Hutchison Ports had accepted the resignation. Whatever information was provided to Mr Hughes, and whatever the extent to which he accepted it, can have had no bearing on the company’s action in accepting the resignation.

[56] The distinction between Hutchison Ports' decision to accept the resignation and that of Mr Hughes not to allow Mr Gourlay to retract it is a matter to which I will return.

Conclusions

[57] I am satisfied on the evidence that Mr Gourlay suffers from stress, anxiety and paranoia. However, there is little independent evidence to support his evidence and that of his witnesses as to the severity of his condition, particularly on the morning of 26 September 2024. That said, he was not cross-examined on his evidence.

[58] Mr Gourlay stated that his condition has led to episodes during which he sent many texts or emails to his co-workers accusing them of being in a conspiracy against him and seeking to do him harm. He said that he had done so on the night of 25 to 26 September 2024. There is only limited evidence of these texts and emails.

[59] The only documents that were provided in this regard were copies of text messages that Mr Hanford said he received from Mr Gourlay at about the same time as Mr Gourlay resigned. Some of them have the character described by Mr Gourlay. But they do not compel the conclusion that Mr Gourlay was at the time "manic", "psychotic", or "in the midst of a mental health crisis".

[60] The language of Mr Gourlay's email to Hutchison Ports at 11.24am also does not suggest that he was in such a state.

[61] In this respect, some of the contentions in Mr Gourlay's written submissions seek to paint a picture of the events which is not supported by the evidence. For instance, Mr Gourlay contended that he sent his resignation email "while he was consumed with fear that his co-workers were spying on him and plotting to do him harm".³⁴ He further submitted that Hutchison Ports was aware "that a mentally ill employee decided that the only way he could foil his workmates' conspiracy to harm him was to quit his job".³⁵ Those contentions are not supported by the evidence. In particular, they are inconsistent with Mr Gourlay's evidence. He claimed to have no recollection of sending the email. It follows that any submissions as to him being "consumed with fear" and why he "decided" to submit his resignation are the product of imagination.

[62] Having regard to all of the evidence, though, I am satisfied that the resignation was submitted when Mr Gourlay was in a state of "mental confusion" (to adopt the language of *Bupa Aged Care*).

[63] However, I am not persuaded that it was a matter of which Hutchison Ports was, or ought to have been, aware at the time it received and processed the resignation. It was not a matter that could rationally have led it (or a reasonable person in its position) to conclude that Mr Gourlay had not freely given the resignation.

The resignation "came out of the blue"

[64] Mr Gourlay placed significant reliance on the fact that his resignation had come "out of the blue".³⁶ He submitted that he had previously given no indication of his intention to resign,

and that there were no prior indications of dissatisfaction or grievances in the workplace. He had returned to work the previous day after a 10 week absence. He contended that it was “simply not credible to suggest that in fact it wasn’t out of the ordinary at all for a stevedore who was working there for eight years not to give any indication that he intended to resign”.³⁷

[65] Hutchison Ports disputed that Mr Gourlay had not previously flagged an intention to resign. It relied on an email that Mr Gourlay had sent to the company on 16 March 2023 which stated in part (reproduced verbatim):³⁸

“I wish to enquire about information regarding a possible future resignation settlement, and also information regarding the possibility of termination. With the current circumstances of the shipping lines reducing volume, my hours and employment status is uncertain.”

[66] Hutchison Ports contended that the circumstances referred to in that email were of the same kind as the news which had been communicated to Mr Gourlay on 25 September 2024. That is, that due to a downturn in volumes of work, his hours were to be reduced. To my mind, the connection between the email of 16 March 2023 and Mr Gourlay’s resignation is tenuous.

[67] Hutchison Ports also drew my attention to a text message that Mr Gourlay had sent to Mr Hanford which stated:³⁹

“I’ve taken time off for mental health and deciding if I want to move on or not Comrade.”

[68] The date on which the message was sent is not entirely clear, but appears to be 21 August 2024. The text message was not put to either Mr Gourlay or Mr Hanford. In the circumstances, and having particular regard to the text messages which appear to have preceded it, I have given no weight to that document.

[69] More relevantly, under cross-examination Mr Hughes gave the following evidence:

- 1) He accepted that over “the days, weeks and months” before he resigned, Mr Gourlay did not express to Mr Hughes any dissatisfaction with his job.⁴⁰ (I observe that in the 10 weeks prior to his resignation, Mr Gourlay had not been at work, other than on 25 September 2024.) However, Mr Hughes did “not necessarily” accept that a resignation would generally be offered in circumstances where the employee had expressed some sort of dissatisfaction, as “people resign for many different reasons”.⁴¹
- 2) He accepted that Mr Gourlay did not foreshadow to him any intention to resign. However, he said it was “generally the nature of resignation emails in this industry or this business in particular that a resignation email will come out of the blue. We don’t tend to get, you know, a forecast beforehand of when someone may wish to consider resignation. I just get an email from somebody saying they resign at a particular date or effective immediately. That’s not uncommon.”⁴² He also stated: “As I stated before when we get the resignation that resignation is final. People generally resign on the spot or give a date, and when somebody sends a resignation it’s not uncommon for that resignation to be accepted and processed on the day.”⁴³

[70] Mr Hughes also gave evidence that immediately prior to his resignation, Mr Gourlay had exhausted all of his leave entitlements, including long service leave.⁴⁴ This was one of the factors which for Mr Hughes “made sense” of the resignation.⁴⁵ He stated that it was “not uncommon to see people running out all of their entitlements and then resign at the end of that”.⁴⁶

[71] I accept Mr Hughes’s evidence. In Mr Gourlay’s circumstances, which include the manner in which things might be done at the Terminal, the fact that his resignation “came out of the blue” would not necessarily have put Hutchison Ports on notice that it may not have truly been intended and that further enquiries ought to be made.

[72] It is necessary to address a further submission that Mr Gourlay advanced at the hearing, namely:⁴⁷

“It’s one thing if the parties have a mutual understanding because they’ve had some back and forth between them, but when an email is sent out of the blue ending a career an employer should have an obligation. That in and of itself should be a special circumstance, and this wouldn’t overburden any employer to at least check in with the employee to say, ‘Is this really what you intended?’”

[73] I had the following exchange with Mr Gourlay’s representative at the hearing:⁴⁸

“THE COMMISSIONER: Mr Bond, can I just clarify something, and maybe I am reading too much into your submissions, but it seems that what you’re saying is the fact that there was an email resignation that comes out of the blue is of itself a special circumstance which put the respondent on notice at the very least to contact Mr Gourlay to ask if that was freely and consciously given. Is that right?”

MR BOND: I didn’t make that submission in my written submissions, but, yes, I’m making that submission - - -

THE COMMISSIONER: But that’s what I heard you to say just now.

MR BOND: That’s right, I believe that’s the case, because the case (indistinct) has developed and special circumstances based on the interactions between the parties. It was a unilateral communication from the employee to the employer on something as important of, ‘I’m giving up my career.’ Yes, I believe that should give rise to special circumstances where the employer at the very least give the employee a call and say, ‘Did you mean to submit your resignation?’ Yes, I do say that it’s special circumstances if an employee unilaterally quits their job with an email without any further communications with the employer. That certainly would not be a burden to someone, any employer.”

[74] I do not accept those submissions. In the first place, in tendering a resignation an employee is not necessarily “giving up their career”. But more significantly, the submissions require the Commission to presume that a resignation sent “out of the blue” does not convey a real intention to resign, requiring the employer to make enquiries of the employee. This would be the case regardless of the surrounding circumstances.

[75] It is not for the Commission to establish such a rule. The following observations of the Commission in *Jack Lipari v YPA Estate Agents Pty Ltd*⁴⁹ (after referring to *Bupa Aged Care*) are relevant in this regard:

“...the mere fact that a person resigns in circumstances of heightened tensions or strong emotions will not turn a rash or imprudent decision made by an employee into a dismissal at the initiative of the employer. Rather, if, applying the objective test referred to by the Full Bench, it can be said that the employee could not reasonably be considered to have conveyed a real intention to resign, then there may be a termination on the employer’s initiative if the employer treats the resignation as effective. The conclusion must be that objectively no such intention was evident, not simply that it is fair to allow the employee an opportunity to rethink the matter. There is no statutory ‘cooling off’ period for resignations. It is for the Parliament to create any such rule. The Commission cannot fashion one.”

The language and structure of the email, and the time at which it was sent

[76] Mr Gourlay further submitted that there were other factors that should have put Hutchison Ports on notice to make enquiries. First, he pointed to the errors in his resignation email – “To whom may concern” and “I David Gourlay resignation as of today”. He submitted that those errors suggested that it was hastily written, warranting further investigation. Second, he drew attention to the fact that the email was sent at 4.31am, being “the middle of the night”⁵⁰ and “the wee hours of 26 September 2024”.⁵¹

[77] As to its language, Mr Gourlay contrasted his resignation email with the one he sent to Hutchison Ports on 16 March 2023. In cross-examination, Mr Hughes accepted that the earlier email contained “coherent and properly written sentences”.⁵²

[78] However, Mr Hughes also gave evidence that “it wasn’t anything out of the ordinary to see a grammatical error in an email from Mr Gourlay or from other employees”.⁵³ (I observe that the email of 16 March 2023 is not without grammatical faults.) He also stated that quite often “a resignation is an email consisting of one sentence”.⁵⁴ He did not agree that the improper sentence structure in the resignation email suggested that it was hastily written.

[79] In Mr Gourlay’s situation, in the context of the Terminal’s operations, I am not persuaded that the format and language of Mr Gourlay’s email would have caused a reasonable person in the position of Hutchison Ports to question whether the resignation was truly intended.

[80] As to the time at which the email was sent, it was common ground that the Terminal operates on a 24/7 basis. Mr Gourlay gave evidence that he is rostered across the three shifts that operate on the site. The day shift starts at 6.00am, the evening shift at 2.00pm and the night shift at 10.00pm. Mr Hughes gave evidence that Hutchison Ports employs 190 stevedores at the terminal. With that number of employees working on rosters operating 24/7, Mr Gourlay has not demonstrated that it would necessarily have been remarkable that a stevedore submitted a resignation at 4.31am.

Conclusions as to special circumstances

[81] Notwithstanding its grammatical errors, Mr Gourlay's email of 4.31am contained unambiguous words of resignation. I am satisfied that at the time it was sent, Mr Gourlay was in a state of "mental confusion". This was a special circumstance.

[82] I am not persuaded that the other grounds that Mr Gourlay advanced demonstrate special circumstances.

[83] However, I am not satisfied that at the time that it received and acted on the resignation, Hutchison Ports was aware of circumstances that would have caused a reasonable person in its position to question whether Mr Gourlay truly intended to resign. Based on the authorities to which I have referred, it was entitled to act on that resignation.

The haste with which Hutchison Ports acted

[84] Mr Gourlay took issue with the apparent haste with which Hutchison Ports acted to action his dismissal and process his termination payment. In broad terms, he submitted that the fact that the resignation was accepted without question and processed as quickly as it was suggested that Hutchison Ports was acting consciously to take advantage of the opportunity to rid itself of a troublesome employee.

[85] Mr Hughes gave evidence that it had been necessary to process Mr Gourlay's resignation quickly as "payroll was processing employee pays that day".⁵⁵ The accuracy of this evidence was called into question under cross-examination. Yet Mr Hughes also stated that Mr Gourlay's resignation "was processed as it normally would be"⁵⁶ and that "when somebody sends a resignation it is not uncommon for that resignation to be accepted and processed on the day".⁵⁷

[86] Mr Gourlay has not convinced me that there was undue haste in Hutchison Ports acting on and processing his resignation. On the evidence, the company moves quickly on resignations. However, even were I to find that Hutchison Ports had acted uncommonly quickly (which the evidence does not suggest), it would not greatly advance Mr Gourlay's case. The appearance of haste is not of itself sufficient to ground an inference of ulterior motives.

Mr Hughes's decision not to allow Mr Gourlay to retract his resignation

[87] The question which next arises is: what is the significance of Mr Hughes's decision not to allow Mr Gourlay to retract his resignation? This was a large focus of Mr Gourlay's case.

[88] I have already referred to the evidence of Mr Hughes's conversations with Mr Gourlay and others in the late afternoon and early evening of 26 September 2024. Mr Hughes was cross-examined at some length on what was said in those conversations, what he drew from them as to Mr Gourlay's mental state, and otherwise on the reasons for his decision.

[89] Mr Hughes accepted that he could have allowed Mr Gourlay to retract his resignation and continue to work. Arrangements could have been made to reverse or reconcile the payment to Mr Gourlay that had been processed. But, as I have earlier noted, he decided against "reinstating" Mr Gourlay on the basis that he "had not been a reliable employee over the

years”.⁵⁸ Mr Hughes denied under cross-examination that he saw the situation as an opportunity to get rid of an employee who had excessive absences due to his mental health problems, or that he acted opportunistically.

[90] The evidence does not demonstrate that Mr Hughes had knowledge that Mr Gourlay’s many absences from work were due to “mental health problems”. However, he regarded Mr Gourlay as unreliable. There is a clear flavour of opportunism in his decision not to allow Mr Gourlay to retract his resignation. That is, Mr Hughes was not going to let slip the opportunity for Hutchison Ports to be rid of an unreliable employee.

[91] But what is the significance of that? Hutchison Ports accepted the resignation before 11.02am on 26 September 2024. Mr Hughes became involved some hours later. How can information provided to Mr Hughes, whatever the extent to which he accepted it, have had a bearing on the company’s decision to accept the resignation?

[92] To a large extent, Mr Gourlay’s case conflated the action of Hutchison Ports in accepting the resignation with the decision of Mr Hughes not to allow Mr Gourlay to retract it. Looked at from a different angle, the information available to Mr Hughes at the time of his decision was imputed to Hutchison Ports at that time the resignation was accepted.

[93] This is seen in Mr Gourlay’s oral submissions at the hearing:⁵⁹

“It is clear that the company knew that David Gourlay was not in the right frame of mind when he sent the email. We had long term employees, good employees, reliable employees who had expressed concern to Mr Hughes; so much concern that it caused him to call him. We had Mr Keating who said he talked to him, was concerned about him. They all described Dave Gourlay as being in the midst of a mental health crisis. Mr Hughes accepted that. He even said in his text message to Mr McGrath that he doesn’t sound good at all. ‘I think he genuinely needs some help.’ *And yet they accepted the resignation.*” (Emphasis added)

And further:⁶⁰

“Certainly the law can’t be the case that an employer can say, ‘All right, Dave sent in his resignation, we accept. The employment relationship is over.’ They have to consider *the entirety of the communications between the parties on that day*, and the entirety of the communication points to a conclusion that he didn’t intend to resign.” (Emphasis added)

[94] As the authorities to which I have referred make clear, the relevant point in time for present purposes is that at which Hutchison Ports accepted the resignation. Based on my earlier findings, the employment came to an end prior to 11.02am on 26 September 2024. Mr Gourlay’s submissions are tantamount to arguing that, in his circumstances, he was entitled to withdraw his resignation. He had no such entitlement: the unilateral withdrawal of a notice of termination of a contract of employment is not possible.⁶¹

[95] Mr Hughes’s decision was a tough call, if not a harsh one. On all of the evidence, I consider that it was an unfortunate position for Mr Hughes to have taken. To the extent that

Mr Gourlay was seen as an unreliable employee, there were other ways in which that may have been addressed. This is particularly the case given that Mr Hughes gave evidence that there had been an improvement in Mr Gourlay's attendance.

[96] But the fairness or otherwise of Mr Hughes's decision is not the subject of these proceedings. By the time he made that decision, the employment had come to an end.

In conclusion

[97] I have a lot of sympathy for Mr Gourlay and the position in which he finds himself. But at the time Hutchison Ports accepted his resignation, there were no circumstances of which it was, or ought to have been, aware that would have caused a reasonable person in its position to question whether the email conveyed a real intention to resign. Based on the authorities to which I have referred, I consider that I must find that Mr Gourlay's employment with Hutchison Ports came to an end as a result of his resignation. The termination of the employment was not on the initiative of Hutchison Ports. Mr Gourlay was not dismissed

[98] For these reasons, Mr Gourlay cannot be found to have been unfairly dismissed. The only appropriate order is that the proceedings be dismissed.

Order

[99] I order that the proceedings be dismissed.



COMMISSIONER

Appearances:

Kirk S Bond of Maritime Union of Australia for the Applicant.

Brendan Milne, for the Respondent.

Hearing details:

2025

Sydney (by video)

24 January

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- ¹ I am mindful that a resignation is a unilateral act, the exercise of which does not depend on it being accepted by the employer: *Birrell v Australian National Airlines Commission* (1984) 9 IR 101 at 109. I use the term “accepted” in part for consistency with other decisions of the Commission and in part for convenience. When I refer in this decision to a resignation being “accepted”, I am referring to it being actioned or processed by the employer.
- ² Unless otherwise stated, all references to legislative provisions in this decision are to provisions of the *Fair Work Act 2009*.
- ³ This was in accordance with the “Adverse Conditions” provision of the Hutchison Ports Australia (HPA) and Maritime Union of Australia (MUA) Enterprise Agreement 2021
- ⁴ He may have been mistaken in this regard. The evidence suggests that his income would have been maintained, at least for a period. However, for present purposes all that is relevant is Mr Gourlay’s understanding.
- ⁵ *Saeid Khayam v Navitas English Pty Ltd* [2017] FWCFCB 5162 at [75], citing *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200
- ⁶ (2017) 271 IR 245; [2017] FWCFCB 3941
- ⁷ (2017) 271 IR 245; [2017] FWCFCB 3941 at [35]-[46]
- ⁸ See *Koutalis v Pollett* [2015] FCA 1165 at [43]-[44]
- ⁹ *Kane Davy v O’Connor Engine Services Pty Ltd* [2021] FWC 6697 at [29]
- ¹⁰ Transcript 24 January 2025, PN 274
- ¹¹ Outline of Submissions of the Applicant, 23 December 2024, par 9
- ¹² Outline of Submissions of the Applicant, 23 December 2024, par 14
- ¹³ Statement of David Gourlay, par 9
- ¹⁴ Statement of David Gourlay, par 14
- ¹⁵ Statement of David Gourlay, par 11
- ¹⁶ Statement of Dan Hanford, par 4
- ¹⁷ Statement of Dan Hanford, par 5
- ¹⁸ Statement of Dan Hanford, par 6
- ¹⁹ Statement of Dan Hanford, par 8
- ²⁰ Statement of Barry McGrath, par 9
- ²¹ Statement of Barry McGrath, par 10
- ²² Statement of Paul Keating, par 8
- ²³ Statement of Paul Keating, par 9
- ²⁴ Statement of Paul Keating, par 10
- ²⁵ Statement of David Gourlay, par 22
- ²⁶ Statement of Barry McGrath, par 15 and Annexure BM1
- ²⁷ I have determined to accept these documents into evidence, subject to weight, over the objection of Hutchison Ports.
- ²⁸ Reply Witness Statement of Paul Keating, par 1 and Attachment PK-1
- ²⁹ Statement of David Gourlay, par 26 and Attachment DG7
- ³⁰ Statement of Geoff Hughes, par 27
- ³¹ Statement of Geoff Hughes, par 27
- ³² Statement of Geoff Hughes, par 20
- ³³ Transcript, 24 January 2025, PN229
- ³⁴ Outline of Submissions of the Applicant, par 6
- ³⁵ Outline of Submissions of the Applicant, par 14
- ³⁶ Reply Outline of Submissions of the Applicant, par 14. See also Transcript, 24 January 2025, PN275, PN278, PN347,
- ³⁷ Transcript, 24 January 2025, PN275

³⁸ Statement of Geoff Hughes, par 29(b) and Attachment GH-5

³⁹ Reply Witness Statement of Dan Hanford, par 6 and Attachment DH-1

⁴⁰ Transcript, 24 January 2025, PN108

⁴¹ Transcript, 24 January 2025, PN117

⁴² Transcript, 24 January 2025, PN116

⁴³ Transcript, 24 January 2025, PN215

⁴⁴ Under the enterprise agreement applying to Mr Gourlay, employees may access long service leave after seven years of service.

⁴⁵ Statement of Geoff Hughes, 13 January 2025, par 29

⁴⁶ Transcript, 24 January 2025, PN259

⁴⁷ Transcript, 24 January 2025, PN348

⁴⁸ Transcript, 24 January 2025, PN358-PN361

⁴⁹ [\[2019\] FWC 3546](#) at [30]

⁵⁰ Outline of Submissions of the Applicant, par 13

⁵¹ Outline of Submissions of the Applicant, par 6

⁵² Transcript, 24 January 2025, PN132

⁵³ Transcript, 24 January 2025, PN124

⁵⁴ Transcript, 24 January 2025, PN252

⁵⁵ Statement of Geoff Hughes, par 12

⁵⁶ Transcript PN178

⁵⁷ Transcript PN215

⁵⁸ Statement of Geoff Hughes, par 22

⁵⁹ Transcript PN280

⁶⁰ Transcript PN351

⁶¹ *Ngo v Link Printing Pty Limited* (1999) 94 IR 375 at [16]