DECISION

Fair Work Act 2009
s.604—Appeal of decision

David Gourlay
v
Sydney International Container Terminals Pty Limited Trading AS Hutchison Ports Sydney
(C2025/3138)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT WRIGHT
DEPUTY PRESIDENT ROBERTS

BRISBANE, 18 DECEMBER 2025

Appeal against decision [2025] FWC 888 of Commissioner Sloan at Sydney on 31 March 2025 in matter number U2024/12357

Introduction

[1] Mr David Gourlay has lodged an appeal pursuant to s.604 of the *Fair Work Act* 2009 (Cth) (FW Act) for which permission to appeal is required against a decision[1] (**Decision**) of Commissioner Sloan issued on 31 March 2025. The Decision dealt with an application made by Mr Gourlay against Sydney International Container Terminals Pty Limited trading as Hutchison Ports Sydney (**Hutchison**) pursuant to s.394 of the FW Act for an unfair dismissal remedy.

[2] The application arose from Mr Gourlay submitting his resignation at a time that he claimed he was suffering from paranoid delusions. Mr Gourlay claims that he did not intend to resign and unsuccessfully asked Hutchison Ports to disregard it. Mr Gourlay submitted that as Hutchison Ports treated the resignation as terminating the employment rather than clarifying with Mr Gourlay that he genuinely intended to resign, this amounted to termination at the initiative of the employer. Hutchison Ports raised a jurisdictional objection to the application and contended that Mr Gourlay was not dismissed. The Commissioner upheld the objection raised by Hutchison Ports and dismissed the application

[3] For the reasons that follow, we have decided to grant permission to appeal, uphold the appeal, quash the decision and refer the matter to Commissioner Sloan for re-hearing as to whether Mr Gourlay was dismissed by Hutchison Ports within the meaning of s.386(1)(a) of the FW Act.

The Commissioner's Decision

[4] The background facts and the evidence accepted by the Commissioner can be summarised as follows. Mr Gourlay was employed as a stevedore for Sydney International Container Terminals Pty Ltd, which trades as Hutchison Ports at its Port Botany terminal.[2]

[5] During his employment, Mr Gourlay was subject to six absence management plans which are plans implemented by Hutchison Ports once an employee exceeds their annual entitlement to personal leave, under which the employee is generally required to provide medical evidence for any absence.[3]

[6] On 25 September 2024, Mr Gourlay returned to work after approximately 10 weeks leave. 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.[4]

[7] 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.[5] In the early hours of 26 September 2024, at 4:31am, he sent an email to a generic email address for the Human Resources department of Hutchison Ports stating that he resigned that day, then fell asleep. The email was in the following terms:

> 'To whom may concern.
>
> I, David Gourlay resignation as of today.'

[8] The Commissioner found that Hutchison Ports accepted the resignation that morning. In a footnote to paragraph [1] of the Decision, the Commissioner stated that while he accepted that resignation is a unilateral act and not dependent on acceptance by the employer, his use of the term 'accepted' referred to the resignation being actioned and processed by the employer. In relation to the acceptance of the resignation, the Commissioner noted that at 11:02am on 26 September 2024, an email was sent to Mr Gourlay by Mr Aaron Stockdale, Manager IR & HR at Hutchison Ports, which confirmed receipt of his resignation and advised that this would be Mr Gourlay's last day of employment.[6]

[9] The Commissioner noted Mr Gourlay's evidence was that when woke up, he saw the email that he had sent at 4.31am, which he claimed to have no recollection of sending. He also saw the email from Hutchison accepting his resignation. At about 11.24am Mr Gourlay sent the following email to Human Resources:

> 'Sorry disregard my previous email. I wasn't thinking straight due to stress. i'll be in tonight for a night shift.'[7]

[10] At 6:09pm that day, Mr Stockdale sent the following email to Mr Gourlay:

> 'Dear David,
> Your resignation has already been accepted and it has been processed through our payroll for payment.'[8]

[11] Also on 26 September 2024, two of Mr Gourlay's co-workers, Mr Barry McGrath and Mr Dan Hanford, became aware of his resignation and in separate conversations expressed concerns to Mr Geoff Hughes, the Manager Terminal Operations of the Port Botany terminal, regarding Mr Gourlay's mental health. They informed Mr Hughes that they did not consider that Mr Gourlay was in the right frame of mind to make a rational decision to resign from his employment and that they believed that Mr Gourlay required medical help.[9]

[12] After these conversations, Mr Hughes called Mr Gourlay at about 6.24pm and had a short conversation with him. 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'.[10] Mr Hughes disputed that Mr Gourlay made these claims during their conversation and said that Mr Gourlay seemed completely lucid and that he understood Mr Gourlay to be saying only that he had changed his mind.

[13] At about 6.32pm on 26 September 2024, Mr Hughes had a conversation with Mr 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 said that Mr Gourlay could not have resigned voluntarily 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. Mr Hughes also said that Mr Gourlay had not been a reliable employee over the years, which had been a challenge for the business, and with the current economic conditions, he would not agree to reinstate him.[11]

[14] The Commissioner noted that 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[12] and referred to the Full Bench decision in *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli* (*Tavassoli*).[13]

[15] Having regard to *Tavassoli*, the Commissioner formulated the test that he was required to apply as follows:

> …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.[14]

[16] Although finding that there was little independent evidence to support Mr Gourlay's claims, and the evidence of his witnesses as to the severity of Mr Gourlay's condition, particularly on the morning of 26 September 2024, the Commissioner was satisfied that Mr Gourlay suffers from stress, anxiety and paranoia[15] and that the resignation was submitted when Mr Gourlay was in a state of 'mental confusion.'[16] However, the Commissioner was not persuaded that this was a matter of which Hutchison Ports was, or ought to have been, aware at the time it received and processed the resignation and 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.[17]

[17] The Commissioner accepted Mr Hughes' evidence that it is not uncommon for him to receive an email from an employee advising of an immediate resignation and also for employees to 'run out' all of their entitlements and then resign at the end of that period.[18] The Commissioner noted Mr Hughes' evidence that immediately prior to his resignation, Mr Gourlay had exhausted all of his leave entitlements, including long service leave. The Commissioner observed that in Mr Gourlay's circumstances, the fact that his resignation 'came out of the blue' would not necessarily have put Hutchison Ports on notice that it was unintended and that further enquiries ought to be made.[19]

[18] The Commissioner rejected the submission made on behalf of Mr Gourlay that an employee unilaterally resigning by email without any further communications with the employer, amounts to special circumstances.[20] The Commissioner also rejected a submission made on behalf of Mr Gourlay that other factors that should have put Hutchison Ports on notice to make enquiries included errors in Mr Gourlay's resignation email which suggested that it was hastily written and that the email was sent at 4:31am.[21] The Commissioner said that he was 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 intended. The Commissioner found that Mr Gourlay had not demonstrated that it was unusual that a stevedore submitted a resignation at 4.31am, given that the Terminal operates on a 24/7 basis and that Mr Gourlay is rostered across the three shifts that operate on the site.[22]

[19] The Commissioner was satisfied that Mr Gourlay's email of 4.31am contained unambiguous words of resignation, that at the time it was sent, Mr Gourlay was in a state of 'mental confusion' and that this was a special circumstance. The Commissioner was not persuaded that the other grounds that Mr Gourlay advanced demonstrated special circumstances. The Commissioner was also 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.[23]

[20] Further, the Commissioner was not satisfied that Hutchinson acted with undue haste in processing the resignation. In any event, the Commissioner found that the appearance of haste is not of itself sufficient to ground an inference of ulterior motives.[24]

[21] The Commissioner noted that a large focus of Mr Gourlay's case was that Mr Hughes did not allow Mr Gourlay to retract his resignation. The Commissioner said that Mr Hughes regarded Mr Gourlay as unreliable and that there was a 'clear flavour of opportunism' in his decision not to allow Mr Gourlay to retract his resignation.[25] However, Hutchison Ports accepted the resignation before 11.02am on 26 September 2024 and Mr Hughes became involved some hours later. The Commissioner found that 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, in that the information available to Mr Hughes at the time of his decision, was imputed to Hutchison Ports at the time the resignation was accepted.[26] The Commissioner concluded that at the time Hutchison Ports accepted Mr Gourlay's 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.[27] Based on the authorities the Commissioner considered that he must find that Mr Gourlay's employment with Hutchison Ports came to an end as a result of his

resignation and that the termination of the employment was not on the initiative of Hutchison Ports.[28]

Principles - Permission to Appeal

[22] An appeal under s.604 of the FW Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[29] There is no right to appeal, and an appeal may only be made with the permission of the Commission.

[23] This appeal is one to which s.400 of the FW Act applies. Section 400 provides:

> (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
>
> (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

[24] In the decision of the Full Court of the Federal Court in *Coal & Allied Mining Services Pty Ltd v Lawler and others*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s.400 as 'a stringent one'.[30] The task of assessing whether the public interest test is met is discretionary and involves a broad value judgment.[31] In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest as follows:

> ... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[32]

[25] It will rarely be appropriate to grant permission to appeal unless an arguable case of appealable error is demonstrated. This is so because an appeal cannot succeed in the absence of an appealable error.[33] However, the fact that the Member at first instance made an error is not necessarily a sufficient basis for the grant of permission to appeal.[34]

[26] Having regard to these factors, we are persuaded to grant permission to appeal in this case on the basis that the appeal raises an important question of general application, concerning the proper application of s.386 to cases where an applicant has, *prima facie*, resigned. For the reasons which follow, we consider that the Commissioner's conclusion on this point was attended by appealable error.

Grounds of Appeal

[27] Mr Gourlay raised the following two grounds of appeal:

1. The Commissioner misapplied Full Bench precedent by concluding that, although Mr Gourlay was in a state of 'mental confusion' when he sent an email to his

employer purporting to resign, and that his state of mental confusion 'was a special circumstance', Hutchison Ports was entitled to accept the resignation because it was not fully aware of that special circumstance.

2. The Commissioner made significant factual errors, such that he mistook the facts in the *House v The King* sense in concluding at [63] that he was not persuaded that Hutchison Ports was, or ought to have been, aware that "special circumstances" surrounding Mr Gourlay's ostensible resignation.

Mr Gourlay's submissions

Ground 1

[28] Mr Gourlay submitted that the Commissioner expressly found that Mr Gourlay was in a state of mental confusion when he sent an email to his employer purporting to resign his employment. Had the Commissioner followed the Full Bench decision in *Tavassoli*, his determination that Mr Gourlay was in a state of mental confusion when he ostensibly resigned should have resulted in a conclusion that the resignation was not legally effective.

[29] Mr Gourlay submitted that instead of focusing solely on Mr Gourlay's mental state when he resigned, the Commissioner erroneously determined that, unless an employer is aware of the existence of special circumstances when an employee expresses an intention to resign, it is entitled to accept the resignation and treat the employment as having come to an end.

[30] Mr Gourlay submitted that the Full Bench in *Tavassoli* did not hold that, if an employer is ignorant of the fact that an employee who signals an intention to resign has done so while in a state of emotional stress or mental confusion, the employer is entitled to treat the resignation as if it were given by an employee who had clearly and lucidly decided to quit his job.

[31] Mr Gourlay submitted that one of the objects of the FW Act is to ensure that a 'fair go all round' is accorded to both the employer and employee concerned. It would hardly be fair to an employee if his employer was entitled to treat his purported resignation as genuine and lawful even though the employee's mental state precluded him from making a reasoned decision to resign.

Ground 2

[32] Mr Gourlay submitted that the Commissioner made significant factual errors in concluding that he was not persuaded that Hutchison Ports was, or ought to have been, aware that 'special circumstances' surrounded Mr Gourlay's ostensible resignation. Mr Gourlay submitted that the uncontroverted evidence established that, even before Mr Hughes learned that Mr Gourlay was in the midst of a mental health crisis when he sent the email purporting to resign, Mr Hughes was aware of the following:

- Mr Gourlay suffers from depression;

- Mr Gourlay takes prescribed medications to treat his mental health issues;

- Mr Gourlay had an abundance of absences resulting from his mental health issues and had been placed on absence management plans six times in eight years of employment;

- Mr Gourlay had exhausted all of his leave entitlements, including by finishing approximately seven weeks of long service leave just two days before sending the resignation email;

- Mr Gourlay had not indicated dissatisfaction with his job and had not indicated to anyone that he had any intention to resign in the foreseeable future;

- The resignation email was sent 'out of the blue' and during non-work time in the 'wee hours' of the morning (4:31am); and

- The resignation email is ambiguous as it includes an incorrect verb tense (I, David Gourlay resignation as of today).

[33] Mr Gourlay submitted that despite Mr Hughes' awareness of each of those facts at the time Mr Gourlay purportedly resigned, the Commissioner found that these factors did not lead to a conclusion that an objectively reasonable employer would have followed up with Mr Gourlay to discern whether it was truly his intention to resign and whether the resignation was freely given. Mr Gourlay submitted that this factual determination was wrong.

[34] Mr Gourlay submitted that when an employee who is known to suffer from mental health issues, has expressed no intention resign, has not expressed dissatisfaction with his job, has exhausted his leave entitlements, and has an abundance of absences due to health issues, sends a cryptic and poorly written email at 4:31 am purporting to resign, at the very least the employer ought to have been aware that 'special circumstances' may have surrounded the employee's ostensible resignation.

[35] Mr Gourlay submitted that the uncontroverted evidence established that, within hours of Mr Gourlay sending the email, Mr Hughes was made aware by three people with firsthand knowledge that at the time he sent the email, Mr Gourlay was in a paranoid and delusional state.

[36] Mr Gourlay submitted that at that point, even if Hutchison Ports chose not to accept the conclusions reported to Mr Hughes by Mr Hanford, Mr McGrath, and Mr Keating as to Mr Gourlay's capacity to voluntarily resign, their reports should have triggered further inquiries as to whether Mr Gourlay was capable of freely resigning.

[37] Mr Gourlay submitted that rather than making further inquiries, Hutchison Ports' position was that, provided it rushed to accept the resignation before learning that it was not, and could not, be freely given, anything that it learned subsequent to the acceptance is irrelevant.

[38] Mr Gourlay submitted that if this was the case, an employer would be entitled to accept a resignation provided it was unaware when it was received that the employee who sent it did so only because he or she did so under threat of violence. By the reasoning of Hutchison Ports,

if it accepted the resignation before managers learned of the coercion, the company could rely on the unambiguous language contained in the email and accept the resignation as voluntary.

[39] Mr Gourlay submitted that Hutchison Ports should have known that he was in a state of emotional stress or mental confusion such that he could not reasonably be understood to be conveying a real intention to resign when he sent the email. As such, the purported resignation must be characterised as a termination of the employment at the initiative of the employer.

Submissions of Hutchison Ports

Ground 1

[40] Hutchison Ports submitted that the Full Bench in *Tavassoli* when referring to what an employee could be 'reasonably understood' to be conveying plainly imports considerations of what a reasonable person in the position of the counterparty (in this case, Hutchison Ports) would have understood or at least ought to have understood.

[41] Hutchison Ports submitted that the Full Bench in *Tavassoli* noted what it perceived to be a potential tension between the decisions in *Koutalis v Pollett* (*Koutalis*)[35]and *Gunnedah Shire Council v Grout*.[36] That tension was expressed by the Full Bench to be between the 'objective' approach endorsed in *Koutalis*, and what the Full Bench described as the 'arguably subjective' enquiry seemingly called for in *Gunnedah Shire Council v Grout*.

[42] Hutchison Ports submitted that:

- it is clear from the extract of *Gunnedah Shire Council v Grout* set out in *Tavassoli* that the 'arguably subjective' enquiry undertaken by the Industrial Relations Court in *Grout* was not an enquiry into the subjective state of mind of the employee, but rather into the subjective state of mind of the employer. The Industrial Relations Court in *Grout* was entertaining considerations of what the employer actually knew, rather than what a 'reasonable person' in the employer's position ought to have known.

- there is no suggestion in either *Koutalis* or *Grout* that the relevant enquiry is limited to whether the employee subjectively intended to convey an intention to resign, and so the statement of principle set out by the Full Bench in *Bupa* cannot be sensibly read as suggesting that an employee's subjective intention is determinative.

- Hutchison Ports submitted that when the statement of principle distilled by the Full Bench in *Tavassoli* is properly understood, the approach adopted by the Commissioner in considering whether a reasonable person in the position of the employer knew, or ought to have known, about the relevant special circumstance (being in this case, Mr Gourlay's state of 'mental confusion') is entirely orthodox and consistent with established Full Bench authority.

Ground 2

[43] Hutchison Ports submitted that it appears that Ground 2 is concerned with the Commissioner's finding that he was not persuaded that Hutchison Ports was aware of, or ought to have been aware of, Mr Gourlay's state of 'mental confusion' at the time it accepted Mr Gourlay's resignation.

[44] Hutchison Ports submitted that as to the first of these matters, Mr Hughes accepted that while he was aware Mr Gourlay may have been taking medication for depression in mid-2023, his evidence was that he had no knowledge that Mr Gourlay was, at the time of the resignation, experiencing any mental health issue that would have impaired his ability to make rational decisions. It was also submitted that none of the evidence that Mr Gourlay referred to in his submissions provides a basis for a conclusion, that Hutchison Ports ought to have been aware that Mr Gourlay was experiencing a state of mental confusion at the time he resent the resignation email. Accordingly, there was no error of fact and Ground 2 is not made out.

Consideration

[45] The first ground of appeal concerns whether the Commissioner correctly applied the principles set down in *Tavassoli* to the circumstances of Mr Gourlay's case. In *Tavassoli* the Full Bench examined in detail cases concerning 'dismissal' and identified what it described as a 'bifurcation' in the definition of dismissal established in s. 386(1) of the FW Act. The second limb of the definition identified by the Full Bench involves a resignation 'forced' by the conduct of the employer and is not relevant in the present case. In relation to the first limb of the definition, the Full Bench said:

> 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.[37]

[46] The Full Bench then analysed the line of cases concerning circumstances where an ostensible resignation may or may not be considered voluntary, and distilled the following principles:

> '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.[38]'

[47] The matters identified in the extract set out above, were described by the Full Bench in *Tavassoli* as 'special circumstances'. The question of whether an ostensible resignation is ineffective, arises only where there are special circumstances in connection with the resignation

that the employer should reasonably have apprehended. The central question in this appeal is whether special circumstances apprehended by the employer after a resignation has been accepted, are relevant to whether the resignation is capable of acceptance and effective. The question arises because the Commissioner accepted that there were special circumstances attending Mr Gourlay's resignation but adopted an approach to the effect that the special circumstances were irrelevant to whether the resignation was ineffective, because Hutchison Ports was not aware of them, before the resignation was 'accepted'. In our opinion, the Commissioner's approach in relation to when special circumstances are relevant, is erroneous. Our reasons for this conclusion follow.

[48] The relevant points that can be derived from *Tavassoli* and the cases referred to by the Full Bench may be summarised as follows:

- An important feature of termination at the initiative of the employer 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.[39]
- If words of resignation are unambiguous, an employer is entitled to treat them as such.
- Notwithstanding that words of resignation are unambiguous; there may exist 'special circumstances' which objectively viewed, put the employer on notice that the employee's intention should be clarified before the purported resignation is accepted, because the employee could not reasonably be understood to be conveying a real intention to resign.[40]
- These 'special circumstances' may include:
    - something in the context or surrounding circumstances of the exchange between the employer and the employee;[41]
    - the circumstances of the employee;[42]
    - whether words were spoken or actions taken in temper, in the heat of the moment or when the employee was under pressure (either personal or work-related;[43]
    - whether the employee was suffering from emotional stress or mental confusion;[44]
    - the 'intellectual make-up' of the employee; [45]
    - whether there was 'jostling' although this may 'shade into' forced dismissal;[46] or
    - an attempt by the employee to withdraw the resignation within a reasonable time after it is given.
- Because voluntariness is critical, where an employee who has ostensibly resigned asserts that the resignation was the result of stress or confusion, it is important to carefully consider evidence about the mental condition of the employee.[47]
- Consideration of an employee's mental condition may include medical history, conduct at work, the coherence and rationality with which the employee discusses or conveys the resignation, whether there is evidence that the employee's mind was so affected by a medical/mental health condition that the employee is not capable of acting rationally, whether the employee intended to resign and the extent of the employee's emotional state noting that a state of despair or that an employee is not

in a state of emotional equilibrium may not be sufficient to ground a finding that a resignation was ineffective because it was not voluntary.[48]

- Where a resignation is a 'considered and deliberate step' rather than an action 'in the heat of the moment' subsequent reconsideration of the step does not approximate to the action of a person who, realising that he or she, in a state of anger or high emotions, has said something unintended, immediately makes amends.[49]
- If special circumstances exist and the employer simply treats the ostensible resignation as terminating the employment, including by accepting the resignation 'forthwith' 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 employment at the initiative of the employer.
- Where an employer disregards special circumstances that were known or should reasonably have been known, the employer runs a risk of a finding being made that on an objective consideration of the facts, the employee did not have a real intention of resigning.[50]
- All of the cases cited in *Tavassoli* proceed on the basis that reasonableness with respect to the question of whether a resignation is effective, is assessed by reference to the facts objectively understood, the objective position, or what a reasonable person in the position of the parties would have understood.

[49] These points are illustrated in the cases discussed by the Full Bench in *Tavassoli.* For example, in *Gunnedah Shire Council v Grout*,[51] Mr Grout was employed by the Council. His doctor certified that he had been suffering from severe work-related stress, causing severe depression and the deterioration of his general health and recommended that Mr Grout take early retirement effective immediately. Mr Grout was referred to a psychiatrist in Sydney. Mr Grout then went to work on 18 May 1994 and provided a written letter of resignation to the Council advising that the resignation would take effect on 23 May 1994. That evening, the Council met and resolved to accept Mr Grout's resignation. On 20 May 1994, Mr Grout travelled to Sydney to see the psychiatrist who admitted Mr Grout to a psychiatric hospital and suggested he get legal advice. On 23 May 1994, lawyers acting for Mr Grout corresponded with the Council purporting to withdraw Mr Grout's letter of resignation and advised that Mr Grout would be taking sick leave for the remainder of the week. The following day, the Council advised Mr Grout's lawyers that it had accepted Mr Grout's resignation and that it would not agree to its withdrawal.

[50] The court identified that the central issue was whether Mr Grout's employment was terminated by the Council or alternatively by his acceptance of the Council's repudiation of his employment contract, or whether Mr Grout brought his employment to an end by resigning.[52] An important point identified by the Court was whether the Council knew, or should have known, that Mr Grout was suffering such a degree of confusion or pressure that his act of resignation was not a considered and voluntary one.[53] The Court said that because voluntariness is critical, it was important to carefully consider the evidence concerning Mr Grout's mental condition at the time he submitted his resignation letter. The Court found that the evidence built up an impression of a man under severe pressure but did not provide a basis for a finding that Mr Grout's action in writing the letter was a product of confusion or was involuntary for the following reasons:

- he coherently and rationally discussed his situation and announced an intention consistent with what he stated in his letter to his manager;
- he was twice given the opportunity to consider his position and chose not to; and
- it was reasonable for the Council to accept the resignation promptly because Mr Grout occupied an important position and urgent substitute arrangements would be necessary given that the resignation was to take effect within five days.[54]

[51] The Court concluded that the Council was entitled to deal with Mr Grout's letter on the basis that, although he was stressed, Mr Grout knew what he was doing and wanted to resign, and as such his employment was not terminated at the initiative of the Council.

[52] The decision in *Minato v Palmer Corporation Ltd* (*Minato*)[55] was discussed by a Full Bench of the AIRC in *Canh K. Ngo v Link Printing Pty Ltd* (*Ngo*).[56] The Full Bench in *Tavassoli* said that this discussion concerned the possibility that an employer might have an obligation to obtain confirmation of a dismissal, but only a dismissal in equivocal terms. *Ngo* concerned an appeal against a decision by the Commission that Mr Ngo had resigned his employment. The facts set out by the Full Bench in the appeal can be summarised as follows. After some issues were raised about Mr Ngo's work performance by his manager, Mr Ngo expressed disappointment that his employer did not trust the quality of his work anymore and said that he would resign. Mr Ngo's manager told him that he was required to provide the resignation in writing 'tomorrow'. The Full Bench noted Mr Ngo's evidence confirmed that he said: 'I resign. Is two weeks' notice okay?'

[53] The Full Bench also noted that the next day, Mr Ngo attended work and was advised by a manager that he was not required to be at work because the company had accepted his resignation the previous day. It was significant that Mr Ngo did not immediately on attending work, state that he did not intend to resign, and made this statement after he was questioned as to why he had attended work. It was in response to this question that Mr Ngo said he was not resigning. At first instance the AIRC found that Mr Ngo had resigned and that it was not satisfied that action by his employer directly or consequentially resulted in the termination of employment. On appeal the Full Bench considered decisions that assert the existence, in certain circumstances, of a duty to clarify a resignation and referred in particular to *Minato*. The Full Bench said:

> We are prepared to assume, without so deciding, that it was incumbent on Link, following Mr Ngo's statement that he resigned, to allow a reasonable period of time to elapse to ascertain whether circumstances arose during the period that put Link on notice that further enquiry was necessary to see whether Mr Ngo's resignation was really intended. Mr Ngo spoke his words of resignation on the afternoon of 8 June 1998. He then resumed work for the balance of the shift, went home, resumed work the next day and, when approached by Mr Corrigan, said that he was not resigning. In our view, any reasonable period of time had elapsed well before Mr Ngo said this.[57]

[54] The Full Bench went on to consider whether Mr Ngo was entitled to withdraw his resignation and referred to the decision of Gray J in *Birrell v Australian National Airlines Commission* (*Birrell*)[58] in the context of its statement that a unilateral withdrawal of a notice of termination of a contract of employment is not possible. The Full Bench said that to the extent that some authorities had found that words spoken in the heat of the moment were ineffective if withdrawn immediately, in Mr Ngo's case, the 'heat had died down', and assuming in his

favour that his resignation was given in the heat of the moment, it was not retracted swiftly. The Full Bench concluded that Mr Ngo was not entitled to withdraw his resignation. In our opinion, the fact that 'the heat had died down' is a significant point in *Ngo* and it is apparent this finding is based on the fact that Mr Ngo resumed work after resigning and worked for the remainder of his shift and reported for work the next day and commenced working, without seeking to withdraw his resignation. The Full Bench also noted Mr Ngo's evidence that in the interview during which he resigned, Mr Ngo had asked if two weeks' notice was 'okay'. It was in the context of those facts that the Full Bench decided that the resignation was effective and could not be withdrawn.

[55] *Ngo*, and the cases where it is found that a resignation cannot be unilaterally withdrawn, deal with resignations that are effective, rather than those that are ineffective by virtue of being attended by special circumstances. Those cases do not stand as authority for the proposition that an ineffective resignation cannot be withdrawn, albeit they do support the proposition that the withdrawal of an ineffective resignation must be within a reasonable timeframe having regard to the facts of the case.

[56] The Full Bench in *Tavassoli* also cited the decision of the Federal Court in *Koutalis v Pollett* (*Koutalis*)[59] observing that this case endorsed the approach taken in the UK decisions it had earlier discussed. *Koutalis* concerned an appeal from a finding in the Chief Industrial Magistrates Court that Mr Pollett had been constructively dismissed from his employment. Mr Pollett was employed as a motor mechanic for 8.5 years. He was required to take annual leave by his employer so he could regain focus and enthusiasm for his work as his employer was concerned about Mr Pollett's performance. Upon returning to work after taking annual leave, Mr Pollett advised his employer that he was unhappy and wanted to leave. Later that day Mr Pollett, who had left the workplace, telephoned his employer and said, 'I've made a hasty decision and don't want to resign. I'll be back at work tomorrow.' Mr Pollett's employer said, 'I'm sorry, Adam, I've accepted your verbal resignation.' Mr Pollett disputed his employer's version of events and claimed that when he returned to work following his annual leave, he was pressured to resign by his employer and that he decided to leave the workplace for the rest of the day so that he could seek advice.

[57] The Federal Court accepted the employer's version of events as it was corroborated by the owner of a nearby smash repair business (Mr Malovini) who claimed that after Mr Pollett left the workplace following his conversation with his employer, Mr Pollett informed Mr Malovini that he had left his employment and was planning to open his own mobile mechanic business. Based on this evidence, the Federal Court was satisfied that Mr Pollett had decided over the previous two weeks of his leave to start up his own business and that he had had enough of dealing with his employer. Justice Rares confirmed that the approach to the question of whether a resignation is effective, involves an objective assessment of the facts, stating that:

> The question whether a resignation did or did not occur does not depend upon the parties' subjective intentions or understandings. Rather, it depends upon what a reasonable person in the position of the parties would have understood was the objective position immediately after Mr Pollett left the Koutalis' business' premises on the morning of 5 May 2014, based on what each party to the conversation had said or done, in light of the surrounding circumstances.[60]

[58] As we have noted above, the Commissioner formulated the test he was required to apply to Mr Gourlay's case as requiring that first, 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, the employer was or ought to have been aware of those circumstances. In relation to the first requirement, the Commissioner found that the resignation was submitted when Mr Gourlay was in a state of mental confusion and that this was a 'special circumstance'. We understand, based on this finding, that the Commissioner was satisfied that Mr Gourlay met the first requirement of the test he formulated.

[59] The first ground of appeal suggests that having found that a 'special circumstance' applied to Mr Gourlay's resignation, the Commissioner should have found that Hutchison Ports' actions in acting on the resignation without making further inquiries amounted to a dismissal. In formulating the question for determination, the Commissioner referred to the Full Bench's phrase in *Tavassoli*, 'could not reasonably be understood to be conveying a real intention to resign' and said that this raises the question, 'understood by whom?' The Commissioner said that he believed that the answer to that question is, 'a reasonable person in the position of the parties and as such the test 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?'[61] We believe that the Commissioner was correct in formulating the question for determination in this way.

[60] However, the Commissioner went further and determined the question on the facts and circumstances at the point in time that Hutchison received and processed the resignation.[62] As a result of taking this approach, the Commissioner did not consider evidence of the facts that were known, or those a reasonable person in the position of the parties would have understood, in deciding whether the Mr Gourlay's ostensible resignation was effective. Contrary to the approach adopted by the Commissioner, the cases referred to in *Tavassoli* do not establish that consideration of whether an ostensible resignation is attended by special circumstances, is limited to facts that were known, or would reasonably have been known by the employer, before the resignation was accepted. Those cases indicate that courts and tribunals have not confined their analysis of 'the objective position'[63] to the precise time that a resignation takes effect and there is no requirement that the question is approached on this basis. For example, in *Grout*, the Full Court relied upon events which occurred after Mr Grout tendered his resignation to conclude that the resignation was freely given although the 'evidence built up an impression of a man under severe pressure'. These events included that Mr Grout coherently and rationally discussed his situation with his employer after submitting the written resignation and that he was twice given the opportunity to consider his position and chose not to do so. There is no reason why events occurring after an ostensible resignation cannot be relied upon to establish that a resignation was not voluntary because it was attended by special circumstances. An employer put on notice of the existence of special circumstances after accepting an ostensible resignation shortly after the resignation is given, is not immune from those circumstances being found to objectively establish that the resignation was not effective.

[61] Cases concerning resignation 'in the heat of the moment' suggest that the inquiry about the existence of special circumstances is not limited to a consideration of the objective position at the time of the ostensible resignation but extends to a period after the resignation is communicated and accepted. As the Queensland Industrial Relations Commission observed in *Achal v Electrolux Pty Ltd*[64] (*Achal*) (cited in *Tavassoli*) with reference to *Birrell*: 'it was not necessary for his Honour to decide, and I do not understand his Honour to have decided, that an employee whose distress is real and obvious and whose employer jostles her into resigning

whilst in that state may not withdraw the resignation unilaterally on recovering her composure where the employer will not be prejudiced thereby, save to the extent that the advantage flowing from the resignation evaporates'. What constitutes a reasonable period in which a resignation may be withdrawn, depends upon circumstances of the case. As we have observed, *Ngo* was a case where the fact that Mr Ngo did not retract his resignation swiftly was a matter which the AIRC found favoured a conclusion that the resignation was given voluntarily. The facts in that case can be contrasted with those in *Minato* where the applicant attended the head office of her employer and indicated to a manger that she wished to remain employed, immediately after stating she would resign and storming out of the workplace. In such circumstances, the AIRC found that when the employer accepted the resignation in the knowledge that Ms Minato did not wish to resign, it terminated her employment. The authorities do not suggest that the approach to considering special circumstances should differ between 'heat of the moment' resignations and resignations involving a state of emotional stress or mental confusion

[62] Further we note that in the UK decision in *Kwik-Fit (G.B.) Ltd v Lineham*,[65] the Court stated:

> A reasonable period of time should be allowed to lapse and **if circumstances arise during that period which put the employer on notice that further inquiry is desirable** to see whether the resignation was really intended and can properly be assumed, then such inquiry is ignored at the employer's risk. He runs the risk that ultimately evidence may be forthcoming which indicates that in the 'special circumstances' the intention to resign was not the correct interpretation when the facts are judged objectively. [emphasis added]

[63] While there is no requirement in the Australian authorities that an employer allow a reasonable time to elapse before acting on a resignation, there is nothing in *Tavassoli* which suggests that an employer is immune from a finding that a resignation is properly characterised as a termination of employment on the initiative of the employer, simply because the employer does not become aware of circumstances that would have put a reasonable employer on notice that further inquiry as to whether the resignation was intended is desirable, until **after** the resignation is purportedly accepted, particularly when the employer is made aware of such circumstances shortly after the resignation. It is not necessary that we identify what a reasonable period is, as on any view both the seven hours between Mr Gourlay sending his resignation and then attempting to retract the resignation, and the 22-minute period between Mr Gourlay's resignation being accepted by Hutchison Ports and Mr Gourlay's communication of his desire to retract it, were short and reasonable periods. We also consider that in the present case there were circumstances that should have placed a reasonable employer on notice that there may have been special circumstances relating to the Appellant's resignation based on the following facts:

1. Mr Gourlay's 'resignation' was sent at 4.31am on 26 September 2024.
2. The resignation was 'accepted' at 11.02am 26 September 2024.
3. Mr Gourlay sought to withdraw the resignation by email at 11.24am on 26 September 2024 when he awoke after sending the resignation email.
4. Mr Gourlay's email informing the Respondent that he had resigned was following his first day back at work following a period of leave that extended over approximately 10 weeks.
5. On the day of Mr Gourlay's resignation, Mr Hughes was informed by Mr Gourlay's work colleagues that Mr Gourlay had told them that he had not been in his 'right mind'

when he made the decision to resign, culminating in a request at 6.32pm on 26 September made by MUA officials on behalf of Mr Gourlay, that he be permitted to rescind his resignation.

6. There was also evidence available to Hutchison Ports, had it considered the information it was provided by Mr Gourlay's work colleagues, that he had recently sent messages to them that indicated that he was suffering some form of mental incapacity.
7. Other than it lost the advantage of Mr Gourlay's resignation (in circumstances where the Commissioner found there was a flavour of opportunism in its acceptance of the resignation), there was no evidence of anything precluding Hutchison Ports agreeing to the resignation being withdrawn.

[64] Having regard to the authorities, we believe that the Commissioner made an appealable error when he confined the inquiry as to whether Hutchison Ports was, or ought to have been aware, of the special circumstance applying to Mr Gourlay, to the time that Hutchison received and processed the resignation, and failed to consider whether Hutchison Ports was or ought, to have been aware of special circumstances, because of events following its acceptance of the resignation. The Commissioner noted that there were conflicts in the evidence about the conversations between Mr Hughes and Mr Gourlay, Mr Hanford and Mr Keating about Mr Gourlay's mental health,[66] but that he did not need to resolve these evidentiary conflicts as whatever information was provided to Mr Hughes, and whatever the extent to which he accepted it, could have had no bearing on Hutchison Ports' action in accepting Mr Gourlay's resignation, because the resignation had already been accepted.[67] As we have stated this approach was erroneous.

[65] We uphold Ground 1 of the Appeal. Having reached this conclusion, it is not necessary for us to consider Ground 2. We consider that the appropriate course is to quash the decision and to remit the matter to the Commissioner to re-hear the question of whether Mr Gourlay was dismissed within the meaning of s.386(1)(a) having regard to our reasons for decision. The matter may be reheard on the basis of the evidence adduced to date and such further evidence as the Commissioner may determine to admit.

[66] We order as follows:

(a) Permission to appeal is granted.

(b) The first appeal ground is upheld.

(c) The Decision is quashed.

(d) The matter is referred to Commissioner Sloan for re-hearing as to whether Mr Gourlay was dismissed by Hutchison Ports within the meaning of s.386(1)(a) of the FW Act based on the evidence admitted to date and such further evidence as the Commissioner may decide to admit.

VICE PRESIDENT

Appearances:

K. Bond and A. *Swayn* of the National League of Officers for the Maritime Union of Australia for the Appellant

J. McLean, of Counsel, instructed by Kingston Reid, for the Respondent

Hearing details:

2025
Sydney
16 June.

Printed by authority of the Commonwealth Government Printer

<PR791585>

---

[1] [2025] FWC 888.
[2] Ibid, [1].
[3] Ibid, [7].
[4] Ibid, [8].
[5] Ibid, [9].
[6] Ibid, [1].
[7] Ibid, [13].
[8] Ibid, [17].
[9] Ibid, [14].
[10] Ibid, [37].
[11] Ibid, [16].
[12] Ibid, [21].
[13] (2017) 271 IR 245; [2017] FWCFB 3941.
[14] [2025] FWC 888, [24].
[15] Ibid, [57].

[16] Ibid, [62].

[17] Ibid, [63].

[18] Ibid, [69]-[70].

[19] Ibid, [71].

[20] Ibid, [73].

[21] Ibid, [76].

[22] Ibid, [80].

[23] Ibid, [83].

[24] Ibid, [86].

[25] Ibid, [90].

[26] Ibid, [92].

[27] Ibid, [97].

[28] Ibid.

[29] This is so because on appeal the Commission has power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* (2000) 203 CLR 194, [17] per Gleeson CJ, Gaudron and Hayne JJ.

[30] (2011) 192 FCR 78, [43]

[31] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398, [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78, [44] -[46]

[32] [2010] FWAFB 5343, 197 IR 266, [27]

[33] *Wan v AIRC* (2001) 116 FCR 481, [30]

[34] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343, [26]-[27], 197 IR 266; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089, [28], 202 IR 388, affirmed on judicial review in *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; *NSW Bar Association v Brett McAuliffe; Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663, [28]

[35] [2015] FCA 1165.

[36] (1995) 62 IR 150; 134 ALR 156.

[37] [2017] FWCFB 3941 at [35].

[38] (2017) 271 IR 245; [2017] FWCFB 3941, [47].

[39] *Grout v Gunnedah Shire Council* (1995) 134 ALR 156 citing *Mohazab v Dick Smith Electronics Pty Ltd*.

[40] Op. cit. at [35].

[41] *Sovereign House Security Services Ltd v Savage* [1989] IRLR 11- cited by Murphy JR in *Minato v Palmer Corporation Ltd* (1995) 63 IR 357.

[42] In *Gunnedah Shire Council v Grout* op. cit. Mr Grout's personal circumstances including his medical history were considered at length from 153 – 157; In *Tavassoli v Bupa Aged Care t/a Bupa Aged Care Mosman* Op. cit., the Full Bench considered that the applicant is a refugee from Iran, has limited English skills and was then 55 years of age;

[43] *Kwik-Fit (GB) Ltd v Lineham* [1992] ICR 183 at 188 cited by Murphy JR in *Minato v Palmer Corporation Ltd* (1995) 63 IR 357; *Erbil v Sportscraft Manufacturing* Print P8154 [1998] AIRC 85 (23 January 1998) per Williams SDP where it was concluded that the action of an employer in giving a resignation form to an employee who was angry and upset to the point where her Union representative counselled the employer against providing the form, and a request to give the employee time to calm down was rejected, was the act that directly brought about the termination of employment.

[44] *Grout v Gunnedah Shire Council* (1995) 134 ALR 156.

[45] *Kwik-Fit (GB) Ltd v Lineham* [1992] ICR 183 at 188 cited by Murphy JR in *Minato v Palmer Corporation Ltd* (1995) 63 IR 357; *Gunnedah Shirt Council v Grout* op. cit. at 166.

[46] See discussion by the Full Bench in *Tavassoli* op. cit. at [39] and cases cited therein.

[47] *Grout v Gunnedah Shire Council* (1995) 134 ALR 156.

[48] Ibid at 166.

[49] *Birrell v Australian National Airlines Commission* (1984) 9 IR 101 at 110 – 111.

[50] *Erbil v Sportscraft Manufacturing* Print P8154 [1998] AIRC 85 (23 January 1998) per Williams SDP; *Kwik-Fit (G.B.) Ltd v Lineham* [1992] ICR 183 at 191.

[51] (1995) 134 ALR 156.

[52] Ibid at 152.

[53] Ibid at 160.

[54] Ibid at 160 – 161.

[55] (1995) 63 IR 357.

[56] Print R7005, [1999] AIRC 57, (22 January 1999).

[57] Ibid at [11].

[58] (1984) 9 IR 101.

[59] [2015] FCA 1165.

[60] Ibid at [43].

[61] [2025] FWC 888, [23].

[62] Ibid, [63].

[63] *Koutalis v Pollett* [2015] FCA 1165.

[64] (1993) IR 236.

[65] [1992] ICR 183.

[66] [2025] FWC 888, [51]-[54].

[67] Ibid, [55].