DECISION

Fair Work Act 2009
s.394 – Unfair Dismissal

Joao Dos Santos
v
Fafelu Constructions Group Pty Limited
(U2023/5770)

DEPUTY PRESIDENT BOYCE SYDNEY, 23 APRIL 2024

Application for an unfair dismissal remedy - whether unfair dismissal application has been filed out of time – jurisdictional objection as to whether there was a "dismissal" within the meaning of s.386 of the Fair Work Act 2009 — whether there was an 'agreement' to take unpaid leave for an indefinite period of time – whether the employment contract was repudiated – whether the repudiation was accepted - what was 'date' of dismissal.

Introduction

[1] Mr Joao Dos Santos (**Applicant**) has filed an unfair dismissal application (**Application**) under s.394 of the *Fair Work Act 2009* (**Act**) with the Fair Work Commission (**Commission**). The Respondent employer to the Application is Fafelu Constructions Group Pty Limited (**Respondent**).

[2] The Respondent raises an objection that the Application has been filed out of time, and opposes any extension of time to file the Application. The Respondent also raises a jurisdictional objection to the Application, namely, that the Applicant was not "dismissed" by the Respondent within the meaning of s.386 of the *Fair Work Act 2009* (**Act**). This decision concerns the out of time objection, and the no-dismissal jurisdictional objection.

[3] At the hearing, Mr *Philip Boncardo*, of Counsel, instructed by Ms *Penelope Parker*, Senior Associate, Maurice Blackburn Lawyers, appeared with permission on behalf of the Applicant,[1] and Mr *Hamish Harrington*, Senior Industrial Officers, Master Builders Association, appeared for the Respondent.[2]

Overview

[4] The Respondent is a small business employer of less than 10 employees, undertaking a form-working, concreting and steel-fixing business, including via subcontracting arrangements to builders. Prior to the cessation of his employment with the Respondent, the Applicant was a full time employee of the Respondent, undertaking formwork and carpentry on residential and commercial building sites.

[5] There is no written employment contract between the parties.

[6] The Respondent says that in circumstances where it experiences a shortage or lack of work, it has a regular practice of requesting employees to take 'leave', with employees either utilising their annual leave entitlements to take paid leave and/or taking periods of unpaid leave. These 'agreements' to take leave are not documented in writing,[3] however, the Respondent asserts that it always obtains the oral agreement of a relevant employee to take such leave.

[7] As a result of a downturn in available work, the Respondent contends that it entered into an agreement with the Applicant for him to take (relevantly) a period of unpaid leave from 27 April 2023 until such time as work became available. The Applicant denies that any such agreement was made, and that he never agreed to take unpaid leave (or unpaid time off) until further notice (i.e. for an undefined or indefinite period of time).

[8] The Applicant further says that the Respondent's failure to pay him for the period to which he was advised by the Respondent not to come to work constitutes a serious breach of his employment contract with the Respondent, being a breach that the Applicant brought to the Respondent's attention for rectification via back payment (for the period of time he was told to not come into work). When the Respondent refused to rectify its breach (i.e. refused to pay the Applicant his wages for the period that he was told not to attend work), the Applicant elected to bring the employment contract between the parties to an end. In other words, the Respondent's breach was a repudiation of the employment contract between the parties, that the Applicant was entitled to accept, and did accept, bringing the employment contract to an end, and giving rise to a "dismissal" within the meaning of s.386(1)(a) or (1)(b) of the Act.

[9] The Respondent says that even if there was a dismissal within the meaning of s.386 of the Act, any such dismissal occurred well before (or more than 21 days before) the Application was filed, and that there are no exceptional circumstances enlivening the Commission's discretion to extend time to file the Application.[4]

Legislation

[10] Section 386(1) of the Act reads:

> "**386 Meaning of *dismissed***
>
> (1) A person has been ***dismissed*** if:
>
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
>
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."

Case law – s.386(1)(a) and (b) of the Act

[11] The phrase "terminated on the employer's initiative" under s.386(1)(a) of the Act is treated as a termination in which the action of the employer is the principal contributing factor (directly or consequentially) that leads to (or has the objective probable result of leading to) the termination of the employment contract and/or the employment relationship.[5] That is, had the employer not taken the action that it did, the employee would have remained employed.[6]

[12] Under s.386(1)(b) of the Act, a forced resignation occurs where an employee has no other choice but to resign. The onus is upon an employee to prove that their resignation was forced by their employer.[7] In other words, an employee must be able to prove on the balance of probabilities that his or her employer took relevant action/s with the intent, or objectively probable result, of bringing the employment relationship to an end.[8] The fact that a resignation may have been foreseeable, or a reasonable response to the actions of an employer, is not the test. Rather, the focus is upon whether the employee's resignation was the objective probable result of his or her employer's action/s having regard to, or in light of, other avenues or options equally open or available to the employee.

Case law – repudiation

[13] There is no dispute between the parties as to the law of repudiation. In short, if one party to a contract (such as an employment contract), considers that the other party has engaged in a fundamental breach of that contract, the party not in breach has the choice (or may elect) to continue with the Contract (under the new terms set by the breaching party), or accept the repudiation (breach) and elect to terminate the Contract. The repudiation (or breach) itself does not automatically terminate the contract, rather, the choice or election by the non-breaching party to bring the contract to an end, terminates the contract.[9] The test is objective, and is a question of fact not law, having regard to all of the relevant circumstances of the case.[10] Mere silence (by a wronged party) in respect of a breach will not amount to acceptance of the breach, nor will continued performance of contractual obligations (on its own) amount to acceptance of a breach (or an election to continue the contract on the newly varied terms). Each case is to be judged or determined based upon its own particular facts and circumstances.

[14] The acceptance, by an employee, of a repudiatory breach by an employer, will amount to a termination at the initiative of the employer for the purposes of s.386(1)(a) of the Act.[11]

Respondent's Evidence in Chief

[15] The Respondent first employed the Applicant on 22 July 2009. The Applicant left the Respondent's employ in November 2011 to work for another company. He was then reemployed by the Respondent on 27 February 2013 as a full time carpenter.[12] The *Building and Construction General On-Site Award 2020* covers and applies to the Applicant's employment with the Respondent.

[16] During his employment with the Respondent, the Applicant reported to Mr Fernando Brazete (**FB**), Managing Director of the Respondent, and Mr Alex Brazete (**AB**), Construction Manager. AB works closely with FB, however, AB ultimately reports to FB. AB is the son of FB. The Respondent also employs FB's daughter, Ms Natalie Brazete (**NB**),[13] in the role of office administrator.

[17] The Respondent's employees generally take around 4 weeks paid leave over the Christmas / New Year period each year, with other leave also taken (including on an unpaid basis) during the year.[14]

[18] In late December 2022 and early January 2023, the Respondent identified that it would struggle to provide sufficient work for its employees.[15]

[19] FB states that he contacted the Applicant (who was coming to the end of his leave over the Christmas / New Year period) on 25 January 2023, to see if he would agree to extend his leave (but on an unpaid basis) "for a couple of weeks" until the Respondent was in a position to provide him with work (i.e. when new jobs became ready for the Applicant to be provided work on).[16] FB's evidence is that the Applicant agreed to "wait [on unpaid leave] until new jobs were ready before returning to work" (**the February Arrangement**). I observe that the February Arrangement was made orally, and is otherwise undocumented (beyond time sheet record entries made by the Respondent).[17] The February Arrangement ended up lasting for a period of about three and a half weeks.

[20] FB states that he called the Applicant in early February 2023 to see if he was still happy with the February Arrangement, and that the Applicant advised FB that he was "happy to wait until new jobs were ready for him to return to work".[18]

[21] The February Arrangement ended on 21 February 2023, when the Applicant returned to paid work for the Respondent. FB states that the Applicant did not raise any issues or concerns with him about the February Arrangement upon his return to work.[19]

[22] FB's evidence is that when the Applicant returned to work on 21 February 2023, work availability continued to be a problem for the Respondent.[20] FB says that it became apparent to the Respondent in late April 2023, that there was insufficient work to provide to employees in the foreseeable future, and that the type of work employees had been given to perform in March and April 2023 had not been very productive.

[23] FB states that he spoke to the Applicant on 26 April 2023,[21] and advised him that:

a) the Respondent had no work to provide to the Applicant;

b) it may be necessary to consider redundancies, including in respect of the Applicant's role; and

c) an alternative to redundancy would be for the Applicant to wait until the Respondent could find work for the Applicant. During this time, FB told the Applicant that he was free to go and find paid work with another employer somewhere else, and if he ended up staying at that other employer, his remaining entitlements would be paid out to him at that time.[22]

[24] FB states that the Applicant agreed (during the phone call on 26 April 2023) to take a further period of leave (implicitly on an unpaid basis), commencing on 27 April 2023,[23] for an on-going and indefinite basis, albeit until such time as the Respondent could find work for him again (**the April Arrangement**). I observe that the April Arrangement was made orally, and is

otherwise undocumented (beyond time sheet record entries made by the Respondent).[24] The April Arrangement lasted for a period of around six weeks.

[25] FB's evidence is that he personally:

a) called the Applicant two to three times (between April and June 2023), and each time the Applicant reconfirmed his continued agreement to the April Arrangement.[25]

b) received calls from the Applicant one or two times (between April and June 2023) asking when work would resume, and each time the Applicant reconfirmed his continued agreement to the April Arrangement.[26]

[26] In addition to the calls identified in the foregoing paragraph, FB states that he received a call from the Applicant in the first week of June 2023 inquiring about his return to work, and FB advised him that "work should be available in the next week".

[27] AB's evidence is that he called the Applicant in about the second week of May 2023, expressed his "regret for the situation", and asked the Applicant if he would like to explore redundancy as an option. He also spoke to the Applicant on a further two occasions (between mid-May 2023 and 8 June 2023), updating the Applicant on the lack of available work (and operational challenges), and asking the Applicant how he was doing. In all of these calls AB states that the Applicant reaffirmed that he wished to continue on unpaid leave until work became available, did not express any concern with not being paid (or being on unpaid leave), and did not wish to pursue a redundancy option.[27]

[28] FB says that he personally called the Applicant on 7 June 2023 twice, in order to tell the Applicant that he could return to work, but the Applicant did not answer the phone.[28] There are no telephone records in respect of these two calls, or their diversion to voicemail.[29]

[29] On 8 June 2023, the Respondent received a letter (by post) from the Applicant dated 5 June 2023 (**5 June Letter**), which reads:

> "Dear Fernando Brazete,
>
> I am a full-time employee of your business and have not been given any work since the 29th of April 2023 and have not received any pay since the 28th of April 2023.
>
> I have tried to call Alex Brazete and yourself on numerous occasions and at times have not heard back or received minimal information with no return to work date.
>
> I am a Full-time employee and am ready and able to work, I am entitled to be paid for the hours that I am contracted to work as a full-time employee.
>
> I have checked the Fair Work Ombudsman's website and my job is covered by the Building and Construct on General On-site award 2020.
> Below is a link for this award:
> https://library.fairwork.gov.au/award/?krn=MA000020#

I ask that you please inform me of the current situation and back-pay the amount owed as soon as practicable.

I am also entitled to 4 weeks' pay from the 22 January until the 23 of February, for the period that I was told to stay home as there was not enough work also.

I am happy to discuss this further with you or you can respond by email at [email redacted].

Kind regards

Joao Dos Santos"[30]

[30] As a result of the 5 June Letter, AB called the Applicant and requested he attend a meeting with FB and himself on 15 June 2023 (**15 June Meeting**).[31]

[31] FB's evidence of the discussion that occurred at the 15 June Meeting is as follows:

"On 15 June 2023, myself, Alex and my daughter Natalie met with Joao in the office. In that meeting we confirmed with Joao that his job is open for his return. Joao's initial response was that he would not come back unless he was paid for relevant periods he spent on unpaid leave this year. Joao mentioned in that meeting that he understood that he had agreed to take those periods as unpaid leave but nevertheless now expected payment. We responded by referring to our agreement that Joao take unpaid leave and asked him to 'have a think about it'. Alex then invited Joao to come back to work on the following Monday. Joao suggested that he come back on the following Wednesday instead.

My understanding was that the outcome of the meeting on 15 June 2023 was that Joao would come back to work for us on Wednesday, 21st June 2023. On 19th June 2023, Alex told me that he received a call from Joao. Alex told me that Joao had said he would not come back to work for us until he was paid for time he spent off in January/February and April - June this year. I was shocked to hear this as I understood from the discussion on 15 June 2023 that the matter was effectively over."[32]

[32] AB's evidence of the discussion that occurred at the 15 June Meeting is as follows:

"On 15 June 2023, Joao came to the office for a meeting. In addition to Joao and myself, my father and sister were there.

At the meeting, I said to Joao that workflow had once again improved and we had work for him to perform. In response, Joao said he would only come back to work if he was paid for relevant periods in January/February and April-June when he had been on unpaid leave.

In that meeting, we asked why Joao was now seeking payment when he had agreed to take relevant times as unpaid leave.

> Joao responded that he knew he had agreed to take unpaid leave and understood the arrangement that was reached however he said that he now believed himself entitled to payment for all that time off. Joao reiterated that he would not return to work unless he was paid for all times he had agreed to take as unpaid leave.
>
> I referred again to the agreement that had been reached and suggested to Joao that he should have a think about his position but that work was available for him to do and his job remains open to him for him to return on Monday, 19th June 2023. Joao responded that he would come back to work on Wednesday, 21st June 2023 instead. I responded that we would be happy for him to come back on Wednesday, 21st June 2023.
>
> I came out of the meeting assuming that common sense had prevailed and that he had agreed to return to work."[33]

[33] On 19 June 2023, AB received a telephone call from the Applicant, who advised AB that he would not be returning to work unless he is paid for the two unpaid leave periods (in January/February 2023 and April to June 2023).[34] AB rejected (on behalf of the Respondent) this request. AB has not had any further communication directly with the Applicant since this phone call.

Applicant's evidence in Chief

[34] The Applicant says that he did not agree to the February Arrangement. Rather, his evidence is that he considered that he had no choice but to wait until he was provided with work again. His evidence in relation to the February Arrangement is as follows:

> "On or around 22 December 2022, I received a telephone call from Fernando Brazete who said words to the following effect:
>
> > *"your current job at Bellevue Hill will finish today and we will reopen on 12 January 2023. We will be open if anyone wants to come back earlier but if you want your four weeks off then come back on 22 January 2023. Alex or I will give you a call to tell you which job site you will go to".*
>
> I agreed to take four weeks of annual leave over the Christmas period.
>
> …
>
> On or around 21 January 2023 I made a telephone call to Fernando and we had a conversation to the following effect:
>
> > *Me: Where should I go tomorrow?*
> >
> > *Fernando: There are no jobs are now, you will need to wait a week. I will call you next week and if you want to get work elsewhere then you can.*
>
> I made telephone calls to Alex or Fernando at least once a week for the following few weeks. On some occasions Alex or Fernando would answer my calls and say words to

the effect "you need to wait another week". Other times, they would ignore my calls and not call me back.

Neither Alex nor Fernando called me to check in until late February when they told me I could return to work.

I did not agree to this arrangement. I had no choice but to wait until I was provided work.

I did not receive any wages between 21 January 2023 and late February 2023. I received a payslip on 15 March 2023. …"[35]

[35] In relation to the April Arrangement, the Applicant gives the following evidence:

"I went to work on 26 April 2023. When I got home, I received a phone call from Fernando Brazete and we had a conversation to the following effect:

> Fernando: *there is no work, work has stopped for now, you will have to stay home for a week, and you will take it in turns with the other workers staying home for a week. You can use your annual leave if you want.*
>
> ***Me:*** *Okay, if there is no work I will have to take one week of annual leave.*
>
> Fernando: *Okay, we will pay you for the one week of annual leave.*

At no point during the conversation on 26 April 2023 did Fernando mention termination or redundancy.

I was never paid for the hours worked on 26 April 2023 or for the week of annual leave which I agreed to.

I did not agree to take a period of unpaid leave until further notice.

From around 30 April 2023 to 15 June 2023, I made several phone calls to Fernando and Alex. During these calls Fernando said words to the effect "there is still no work available for you". I would say words to the effect "if you are going to fire me, let me know" and Fernando would reply with words to the effect "we don't want to have to do that, you can find work elsewhere if you want".

I refer to paragraphs 22 and 23 of the FB Statement. I deny that Fernando called me 2 to 3 times during this period. He called me once a month. I made calls to Fernando or Alex at least once a week. Alex did not call me during this period. I do not agree that Fernando said words to the effect that work would be available in early June 2023.

I did not receive any wages from 26 April 2023.

In response to paragraphs 27 of the AB Statement, I deny that Alex called me in or around early May 2023 nor did we have a conversation in which he mentioned redundancy or offered me an apology.

In response to paragraphs 28 and 29 of the AB Statement, I say as follows:

(a) I did not agree to be on a period of unpaid leave. I had no choice.

(b) I was told to stay at home, and I felt helpless. I deny that Alex made any enquiries into my financial situation, nor did I say words to the effect that I am financially okay."[36]

[36] The Applicant also denies that he received a call from FB in early June 2023 telling him he could return to work from unpaid leave (i.e. he denies that he received any calls from FB in June 2023, or that he himself called FB in June 2023). The Applicant's evidence is that he only received a call from AB on 12 June 2023 (post the Respondent receiving the 5 June Letter) asking him to attend the 15 June Meeting.[37]

[37] In relation to the 15 June Meeting, the Applicant gives the following evidence:

"On 15 June 2023 I attended a meeting in Fafelu's office in Brookvale with Fernando Brazete, Alex Brazete and Natalie Brazete.

During the meeting we had a conversation to the following effect:

Me: *You cannot stand down an employee because there isn't enough work.*

Alex: *We aren't going to pay you anything.*

Fernando: *We will give you 4 or 5 weeks pay and that will be the end of it.*

Alex: *No we don't want to pay you*

Fernando: *You can return to work when you want*

Me: *What about the money you owe me?*

Alex: *No we won't pay you anything*

Me: *I will come back to work on Wednesday if you pay me what I am entitled to.*

I left the meeting feeling very upset. I did not understand why I had been treated that way when I had done nothing wrong.

In response to paragraph 27 of the FB Statement, I deny that I said words to the effect that I understood that I had agreed to take unpaid leave but now expected payment.

In response to paragraph 35 of the AB Statement, I deny saying that I was on unpaid leave. I said that I wanted to be paid for those periods.

In response to paragraph 36 and 37 of the AB Statement, I deny that that was the effect of the conversation as I did not agree to take a period of unpaid leave."[38]

[38] In relation to his conversation with AB on 19 June 2023, the Applicant gives the following evidence:

"On 19 June 2023 I made a phone call to Alex, and we had a conversation to the following effect:

Me: *If you pay me for six weeks, I will come back to work, and we can move on.*

Alex: *No, that is too much money, we aren't giving you any money.*

Me: *I have rights, this is what you owe me, it will cost you money.*

Alex: *You can get a lawyer and I will get mine. I will sell my house if I have to.*

Alex threatened me and spoke to me in an aggressive and intimidating tone. I deny that I was aggressive, I always respected my boss', I just said what I had to say. After this conversation it was clear to me that Fafelu had refused to pay me my wages to which I was entitled. I was very upset.

In response to paragraph 42 of the AB Statement, I deny that I was aggressive.

In response to paragraph 43 of the AB Statement, I deny that Alex said words to that effect.

When Alex said he wasn't going to pay me, I didn't go back to work. I didn't have any trust in them that they wouldn't just decide not to pay me again or give me any work.

I disagree with paragraph 26 of the NB statement which says I agreed to take unpaid leave in January/February and from April to June 2023. I didn't agree to take unpaid leave, I was not provided with any work, and was not paid any wages. I had no choice in the matter.

I caused the unfair dismissal application to be filed on 26 June 2023."[39]

Summary of evidence in Chief

[39] The Respondent's evidence is that the February and April Arrangements arose from a bona fide (oral) agreement with the Applicant to take unpaid leave until such time as the Respondent was in a position to provide the Applicant with work (or meaningful and productive work). In others words, the agreement between the parties as to the February and April Arrangements represented an agreed variation (or agreed suspension) of some of the terms of the contract of employment between the parties (as to the provision of work and/or payment),

and therefore was not a breach of contract. On the Respondent's case, it was doing the Applicant a favour, because the February and April Arrangements avoided the Applicant being made redundant.

[40] The Applicant's evidence is that he did not 'agree' to the February and April Arrangements, but considered he had no choice but to go along with (or not openly object to) such arrangements. In other words, on the Applicant's case, the February and April Arrangements did not represent a bona fide agreement between the parties, but a breach of the express and implied terms of the Applicant's contract of employment with the Respondent to provide him with work on full time basis, to which he was to receive payment for. The refusal or the failure of the Respondent do comply with the terms of the Applicant's contract of employment in this regard represented a serious breach (repudiation) of the contract between the parties, that the Applicant was entitled to accept, and when he did so accept, it brought the contract of employment between the parties to an end, and gave rise to the Applicant's "dismissal" within the meaning of s.386 of the Act.

Resolution of facts in dispute – approach

[41] Whilst there are various facts not in dispute, making findings on the ultimate issues in these proceedings requires the resolution of various disputed facts. Given that my findings on the ultimate issues in this case primarily concern disputed accounts as to what occurred in respect of the April Arrangement, it is necessary for me to assess the credibility of the evidence of both the Applicant and the Respondent's witnesses. In undertaking this task, I adopt the general approach in respect of credibility set out by Manousaridis J in *O'Kane v Freelancer International Pty Ltd & Anor*[40]:

> "[19] Credibility may be defined as "*the quality or power of inspiring belief*". When applied to testimony, credibility refers to the capacity of the testimony to inspire belief in the existence or non-existence of the fact asserted by the witness to exist or not exist. A finding by a court in a civil proceeding, therefore, that testimony is not credible is usually taken to be a finding that the testimony does not have the capacity to satisfy the court, at least on the balance of probabilities, of the existence or non-existence of the fact asserted by the testimony to exist or not exist. But "*credibility*" has a broader meaning. It may be taken to refer to testimony that is capable of satisfying a fact finder that the fact asserted by the testimony to exist or not exist does exist or does not exist, but which, in the particular circumstances of the case, the fact finder is not so satisfied. I propose to use "*credibility*" in both senses.
>
> [20] Whether or not any given testimony will inspire satisfaction in the existence or non-existence of the fact the witness asserts exists or does not exist will depend on the fact-finder's assessment of the witness's "*powers of perception, memory and narration . . . and of his* [or her] *opportunity and desire to exercise them honestly and efficiently in the situation under examination*". That means that assessing the credibility of testimony "*involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be*". Assessing evidence "*apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other*

> *evidence*". It has also been said that credible evidence is "*that which meets the test of plausibility*".[41]
>
> (footnotes omitted)

[42] Both parties have urged me to make credibility findings about individual witnesses, including as to the manner in which evidence has been prepared prior to filing. In this decision, I do not consider that it has been necessary to make credibility findings directly about individual witnesses. Rather, my approach has been to make findings and conclusions based upon an objective consideration and comparison of the evidence before me.

[43] Further, in limiting my findings in this matter to the evidence and submissions of the parties that are necessarily relevant to the determination of the jurisdictional objection raised by the Respondent (i.e. whether or not the Applicant has been "dismissed"), I have adopted the general proposition or approach of 'confinement' stated by Callinan J in the High Court case of *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd*[42]:

> "But as a general proposition, all civil courts, including intermediate appellate courts, should confine themselves to the issues which are necessary for the disposition of the case."[43]

Consideration and findings

[44] Other than for context purposes, whether or not the February Arrangement represented an agreement between the parties, or a repudiatory breach by the Respondent, is not a matter for resolution in these proceedings (i.e. in the context of a determination under s.386 of the Act concerning the April Arrangement). This is especially so in circumstances where the Applicant returned to work as normal (or the employment relationship continued) when the February Arrangement came to an end. For completeness, I reject the proposition that the February Arrangement gives (for want of a better term) 'credibility' to the Respondent's claims in respect of the April Arrangement, or otherwise reflects some form of tendency or knowledge to be attributed to, and then weighed against, the Applicant's other evidence in these proceedings.

[45] I have already set out the evidence in Chief advanced by each of the parties in this decision. The testing of that evidence during cross-examination leads me to make the findings that follow in relation to the real terms of the April Arrangement.

[46] The first finding that I make is that the terms of the April Arrangement were made orally during a phone call between FB and the Applicant on 26 April 2023 at 5:03pm (a conversation of 1 minute and 53 seconds based upon FB's mobile telephone records) (**April Phone Call**);[44] The April Arrangement was initiated by FB (on behalf of the Respondent), i.e. the April Arrangement does not concern a proposal made by the Applicant to the Respondent.

[47] FB's evidence (under cross-examination) is that during the April Phone Call:

a) FB (relevantly) told the Applicant that the Respondent had no work for him, and asked the Applicant "if he was prepared to wait another week or two until there was work".[45]

b) there was no discussion about paid or unpaid leave between FB and the Applicant: "We never talked about money because with [the Applicant] and with all workers, we are all friends".[46]

c) in the context of (a) above, the Applicant stated that he was happy to wait until he was called, and told work was available.[47]

[48] The foregoing evidence of FB (during cross-examination) is inconsistent with FB's evidence in Chief (summarised and referenced at paragraphs [23] to [24] of this decision) in two important respects:

a) *firstly*, FB's evidence in Chief refers to his conversation with the Applicant during the April Phone Call as involving a reference to "redundancy" (or the option of same). But in his reply evidence, and during his cross-examination, FB makes no reference at all to his conversation with the Applicant (in the April Phone Call) containing a reference to "redundancy" (or a like concept/option/alternative);[48] and

b) *secondly*, FB's evidence in Chief refers to his conversation with the Applicant during the April Phone Call as involving words to the effect that the Applicant was happy to wait (indefinitely) to return to work (i.e. to return to work at some unknown date into the future when work becomes available).[49] But in his reply evidence, and during his cross-examination, FB states that in his conversation with the Applicant (during the April Phone Call) he only referred to the Applicant having to wait a week or two until there was work.[50]

[49] The Applicant's evidence as to the April Phone Call is that during this call:

a) no mention of redundancy (or alike) was discussed;

b) FB asked the Applicant to stay at home for a week as there was no work available, and then take further weeks off in turn with other workers. This time off could be paid as annual leave (inherently, if accruals were available);

c) the Applicant requested that he be paid a week's annual leave for that one week, and FB agreed that the Respondent would pay him for that week, one week's annual leave (but the Applicant was never paid this one week's annual leave); and

d) the Applicant did not agree to take unpaid leave "until further notice".[51]

[50] The Applicant was not specifically cross-examined as to whether redundancy was raised or otherwise mentioned during the April Phone Call.

[51] Given the conflicting witness testimony as to what was said during the April Phone Call, it is difficult to discern from the evidence exactly what was said or agreed between FB and the Applicant. That said, the evidence in my view does give rise to some important findings. In this regard, in respect of the April Phone Call, I find that:

a) due to a downturn in available work for the Respondent's business, and an inability to provide the Applicant with meaningful and productive work, FB requested the Applicant to take a week or two off on an unpaid basis. As FB himself stated during his evidence:

> "It was not exactly as leave. It was that there was no work and he agreed that if there is no work, he couldn't work."[52]

b) the Applicant yielded to FB's request for him to take a week or two off on an unpaid basis; and

c) there was no mention of redundancy as an alternative option to the taking of unpaid time off.

[52] The foregoing findings are made noting that:

a) the Applicant and FB were the only two individuals involved in the April Phone Call (i.e. whatever AB says that FB told him about the April Phone Call is hearsay);

b) FB departed from his evidence in Chief (written witness statement) during cross-examination, giving rise to significant differences between FB's evidence in Chief, and his evidence given during cross-examination; and

c) FB's evidence during cross-examination is more closely aligned with that of the Applicant, especially to the extent that both FB and the Applicant 'essentially' agree that FB requested the Applicant to take a week or two off on an unpaid basis during the April Phone Call.[53]

[53] It is trite that for an agreement at law to come into (or have) effect, an offer, and its acceptance, must precisely correspond. The short point is that, on the basis of my findings in this decision, the request (or offer) by FB (to the Applicant) during the April Phone Call was for the Applicant to take a week or two off on an unpaid basis. This was (for want of a better term) the precise 'offer' that the Applicant yielded to (or 'accepted') (**Unpaid Time Off Agreement**). It follows that I equally find that:

a) FB's evidence as to the terms of the April Arrangement (beyond my findings in paragraph [51] of this decision) must be rejected;

b) more specifically, there was no 'offer' from FB to the Applicant to take unpaid leave until further notice during the April Phone Call (as asserted by FB in his evidence in Chief);

c) the contention (explicit or implicit) that the Applicant agreed to enter into the Unpaid Time Off Agreement on the basis that keeping his job (and avoiding redundancy) was some form of 'consideration' (or forbearance) does not arise on the evidence.

[54] It is appropriate to note that whilst I proceed on the basis that the Applicant agreed to enter into the Unpaid Time Off Agreement, I consider that the better description of the Applicant's conduct in this regard to be that of 'acquiescence' (i.e. abstaining from complaining, interfering with or objecting to a violation of one's legal rights).[54] Terms such as 'consent', 'agreement', and acquiescence are all capable at law (depending upon the circumstances) of giving rise to a contention or defence that a particular arrangement was made, that certain rights were waived, or that particular relief be denied (e.g. due to election, laches, or estoppel). But each of the terms consent, agreement, and acquiescence have different meanings, even if they might have the same ultimate effect upon legal findings or outcomes.

[55] It is equally appropriate to reject the claims in the Respondent's evidence that the Applicant was somehow satisfied or "happy" to be placed upon unpaid leave until further notice on the basis that he was so committed and/or loyal to the Respondent that he had no interest in receiving an income from his full time role with the Respondent. There is no evidence that the Applicant was satisfied or happy with the Unpaid Time Off Agreement, or that the Applicant is some type of independently wealthy, or high net worth, individual, who is able to pick and choose when and where he works.

[56] Having regard to my findings as to the April Arrangement and the Unpaid Time Off Agreement, the Respondent's case essentially becomes one of 'Where to from here?' in that its whole case is predicated (post 26 April 2023) upon a finding that the April Arrangement reflected the agreement between the Applicant and FB (the latter on behalf of the Respondent) moving forward.[55] In other words:

a) the Respondent's case is advanced (by way of evidence and submissions) on the basis that the April Arrangement reflected offer and acceptance between FB and the Applicant during the April Phone Call, which was thereafter repeatedly reconfirmed pursuant subsequent telephone conversations between the Applicant and FB and/or AB, and reaffirmed by the Applicant's own conduct (in making no objection to the April Arrangement prior to sending the 5 June Letter (received in the postal mail by the Respondent on 8 June 2023));[56] and

b) the Respondent's case has not been advanced (nor does it pivot) on the basis that the Unpaid Time Off Agreement was recast, renewed or extended via a series of phone calls during May and early June 2023 between FB and/or AB, and the Applicant.

[57] The Respondent has put into evidence FB's mobile telephone records for the months of January, February, March, April, and May 2023. There are no mobile telephone records put into evidence by the Respondent at all for AB, or for FB for June 2023. Relevantly, FB's mobile telephone records for May 2023 indicate that he spoke to the Applicant on 3 May 2023 for 7 minutes and five seconds, and attempted to call the Applicant on 13 May 2023.[57]

[58] The Respondent has provided no explanation for failing to put into evidence any of AB's mobile telephone records,[58] and for failing to put into evidence any of FB's mobile telephone records for June 2023. Given the nature of some of the disputed issues of fact in the months of May and June 2023, as to whether phone calls were made and what conversations occurred, I work on the basis that the Respondent's failure to put such mobile telephone records into evidence has occurred because such evidence would not have assisted the Respondent's case in

these proceedings. This is especially so in circumstances where the Respondent has had no difficulty in putting into evidence the mobile telephone records that it has.

[59] The Applicant's mobile telephone records for May and June 2023, identify that he:

a) attempted to call AB in May 2023 on the following dates: 9, 14, 16 (twice) and 22;

b) spoke to AB on 9 May 2023 for 3 minutes and fifteen seconds, on 22 May 2023 for 4 minutes and 46 seconds, and on 14 June 2023 (twice) for 1 minute and 1 second, and for 18 minutes and 55 seconds;

c) attempted to call FB in May 2023 on the following dates: 8, 9 (twice), 16 (four times) and 22.

d) spoke to FB on 13 May 2023 for 11 minutes and forty-seven seconds.[59]

[60] The summary from the mobile telephone evidence is that the Applicant had telephone conversations with:

a) AB on 9 and 22 May 2023, and 14 June 2023;[60] and

b) FB on 3 and 13 May 2023.

[61] AB's evidence as to his telephone conversations with the Applicant in May 2023 are relevantly to the effect that:

a) the Applicant understood that the April Arrangement would continue and that he (AB) became self-assured as a result of these conversations that the Applicant was "okay with the agreement [April Arrangement] we [FB on behalf of the Respondent] had reached that he [the Applicant] remain on unpaid leave for a temporary [undefined] period";

b) AB asked the Applicant if he wanted to "explore redundancy as an option", but that the Applicant said in response that he "did not wish to pursue that [redundancy] as an option and said he [the Applicant] was happy to wait to resume work at the [Respondent]"; and

c) when AB asked how the Applicant was doing, the Applicant responses "never raised any concerns about lack of payment or issues with money".[61]

[62] FB's evidence as to his telephone conversations with the Applicant in May 2023 are relevantly to the effect that the April Arrangement was repeatedly reconfirmed, with the Applicant only asking FB as to when he would be able to return to work.[62]

[63] The Applicant's evidence as to his (separate) telephone conversations with each of AB and FB during May 2023 is as follows:

> "From around 30 April 2023 to 15 June 2023, I made several phone calls to Fernando and Alex. During these calls Fernando said words to the effect "there is still no work available for you". I would say words to the effect "if you are going to fire me, let me know" and Fernando would reply with words to the effect "we don't want to have to do that, you can find work elsewhere if you want"."[63]

[64] On the back of my findings as to the non-existence of the April Arrangement, and the entering into of the Unpaid Time Off Agreement, I accept the Applicant's evidence as to the telephone conversations he says he had with each of AB and FB during May 2023. In short, I find that these conversations did not concern reconfirmation of the April Arrangement, but concerned the Applicant asking when he would be returning to paid work because the Unpaid Time Off Agreement was about to, or had, expired (i.e. noting that the Unpaid Time Off Agreement was only agreed to by the Applicant on the basis that it was for a period of only one or two weeks (from 27 April 2023 to about 12 May 2023)).

[65] In its evidence and submissions, the Respondent asserts that:

a) the Applicant unilaterally determined to depart from the April Arrangement on 5 June 2023 (when he sent the 5 June Letter); and

b) that such departure occurred because the Applicant was asked to come back to work (i.e. the Applicant strategically determined to depart from the April Arrangement only when he was told that he could return to work, meaning he was content with the April Arrangement and sought to take advantage of his pending return to work by asking for money that he knew he was not entitled to receive).

[66] There are two difficulties with the foregoing assertions by the Respondent:

a) *firstly*, my finding that the April Arrangement was never entered into by the Applicant (i.e. there could be no departure from the April Agreement if it never came into existence because it was never agreed to); and

b) *secondly*, there is no evidence that the Applicant was advised by either FB or AB that he would be able to return to work prior to him sending the 5 June Letter. AB's evidence on the issue is hearsay,[64] whilst FB's evidence is that he spoke to the Applicant (after receiving a call from the Applicant) sometime in early June 2023 (prior to 8 June 2023) and advised him that work should be available next week.[65]

[67] I reject FB's evidence that he spoke to the Applicant sometime in early June 2023 (prior to 8 June 2023), and advised the Applicant that work should be available next week. In this regard, FB's evidence on this issue is:

a) wholly unsupported by any mobile telephone records,[66] or other documentary evidence;

b) denied by the Applicant;[67]

c) contrary to FB's evidence during cross-examination;[68] and

d) absent relevant context and evidentiary foundation in respect of FB's claim that the Respondent suddenly had work become available for the Applicant to perform in the first week of June 2023 (e.g. What work? and What was the pipeline of this work to bring it to availability in early June 2023?).

[68] The parties had an in-person meeting on Thursday, 15 June 2023 (being the 15 June Meeting), to discuss the 5 June Letter. Present at this meeting were FB, AB and NB, and the Applicant.

[69] The Respondent's evidence in relation to the 15 June Meeting is that:

a) the Applicant advised that he would not be returning to work unless he was paid for the periods of unpaid time he had taken (or been subject to) in January, February, April, May and June 2023;

b) the Applicant understood and accepted when he was told by FB and/or AB that the times he had taken off on an unpaid basis were essentially unpaid periods of leave because he [the Applicant] had agreed to this under the February and April Arrangements;

c) despite (b), the Applicant advised that he had now changed his mind and wanted to be paid;

d) the Applicant was advised (by FB and/or AB) to "have a think about it", i.e. to reconsider if he really wanted to now assert that he should be paid; and

e) the Applicant was told that he could come back to work the following Monday (19/6/23), but the Applicant advised that he would prefer to come back to work the following Wednesday (21/6/23), which the Respondent agreed to. The meeting ended in good spirits on the basis that the Applicant would be coming back to work the following week.[69]

[70] The Applicant's evidence in relation to the 15 June Meeting is that:

a) he never said any words to the effect of understanding and/or accepting that he had agreed to take unpaid time off or unpaid leave at any time (in 2023);[70] and

b) words to the following effect were said:

"During the meeting we had a conversation to the following effect:

Me: You cannot stand down an employee because there isn't enough work.

Alex: We aren't going to pay you anything.

Fernando: We will give you 4 or 5 weeks pay and that will be the end of it.

Alex: No we don't want to pay you

Fernando: You can return to work when you want

Me: What about the money you owe me?

Alex: No we won't pay you anything

Me: I will come back to work on Wednesday if you pay me what I am entitled to."[71]

[71] Contrary to his evidence in Chief,[72] AB's evidence during cross-examination,[73] as to the discussion that occurred at the 15 June Meeting included statements such as:

"There was never anything about we're not going to pay you."[74]

"There was nothing ever about not paying, because if there was anything about not paying in that conversation it wouldn't have been a very nice conversation."[75]

"So there was no - nothing about not being, not paying him, nothing about money whatsoever."[76]

[72] AB's evidence during cross-examination as to the discussion that occurred at the 15 June Meeting is also contrary to the evidence in Chief of FB,[77] and the evidence given by FB during cross-examination.[78]

[73] Given the conflicting witness testimony as to what was said during the 15 June Meeting, it is difficult to discern from the evidence exactly what was said. That said, in my view, the evidence before me supports the following findings:

a) the purpose of the 15 June Meeting was to discuss the contents of the 5 June Letter;

b) the contents of the 5 June Letter concern the Applicant:

- making the Respondent aware of his displeasure, dissatisfaction, and objection to not receiving work (as a permanent full time employee) and not being paid for various weeks in the first half of 2023 (a situation that remains on-going as at 5 June 2023 (when the 5 June Letter was sent), and on-going as at the 15 June Meeting); and

- requesting he receive back-payment for wages not paid to him during the weeks (and days) he was told to stay home because there was not enough work available;

c) the Applicant requested (at the 15 June Meeting) that he be paid the wages not paid to him during the weeks (and days) he was told to stay home to date (per the 5 June Letter, and the unpaid periods in April, May and June 2023);

d) the Respondent rejected the Applicant's request for payment, and told the Applicant that he should have a further think about this request, and perhaps just return to work (as work was now available) next week;

e) the Applicant tentatively agreed to return to work on Wednesday, 21 June 2023, but with the caveat that he would come back to FB and/or AB with his final position. I note that AB's evidence is that the 15 June Meeting ended on the basis of the Applicant stating (words to the effect of): "Look, I'll go home and I'll ring you back";[79] and

f) The issue of the Applicant's request for wages not paid to him during the weeks (and days) he was told to stay home to date was unresolved at the conclusion of the 15 June Meeting, as was the Applicant's return to work. Both of these matters would be subject to subsequent further communication and/or agreement.

[74] It is common ground between the parties that the Applicant telephoned AB on 19 June 2023 and advised him that he would not be returning to work for the Respondent unless he was paid for the weeks (and days) he did not work in 2023 (but was told to stay home because there was no work). It is equally common ground between the parties that AB advised the Applicant that the Respondent would not be paying him (at all) during his periods of (unpaid) time off work in 2023. The Applicant's evidence, which I accept, is that he:

a) determined to end his employment with the Respondent (on 19 June 2023);

b) communicated same to the Respondent (i.e. via or to AB), on 19 June 2023; and

c) his decision to end his employment with the Respondent was not only because he had not been paid, but because he had no faith that the Respondent would not do the same again to him moving forward.

[75] Having regard to the evidence and submissions of the parties, and the findings I have already made (as set out in this decision from paragraph [46] onwards), I make the following ultimate findings in disposal of these proceedings:

a) the Unpaid Time Off Agreement, to the extent that it can be said to be an agreement, was for a maximum period of one to two weeks post 27 April 2023 (i.e. up to 12 May 2023);

b) there was no agreement between the parties for the Unpaid Time Off Agreement to be extended beyond 12 May 2023;

c) the Applicant was a full time employee of the Respondent. A term of the Applicant's employment contract with the Respondent was that he be paid his full time wage each pay period;

d) post the cessation of the Unpaid Time Off Agreement (i.e. post 12 May 2023), the Applicant was entitled to be paid his full time wage;

e) the failure by the Respondent to pay the Applicant his full time wage post the cessation of the Unpaid Time Off Agreement was a sufficiently serious (and on-going) breach by the Respondent of the contract of employment between the parties, such that it gave the Applicant a right to terminate the contract of employment. At no time did the Applicant, by his words or conduct, accept this breach;

f) the Applicant's demands of the Respondent for rectification (made in the 5 June Letter, at the 15 June Meeting, and during his conversation with AB on 19 June 2023) were rejected by the Respondent;[80]

g) on 19 June 2023, in his conversation with AB, the Applicant made his election to bring the contract of employment to an end, thereby giving rise to a "dismissal" of the Applicant by the Respondent within the meaning of s.386(1)(a) of the Act on that date;

h) in view of (g), the Applicant's date of dismissal by the Respondent was 19 June 2023, meaning that the Unfair Dismissal Application filed by the Applicant on 28 June 2023 in these proceedings has not been filed out of time (and no issue of exceptional circumstances or extension of time arises); and

i) this is not a matter to which any issues as to genuine redundancy, Small Business Fair Dismissal Code, minimum employment period, or absence of award coverage, arise.

[76] I dismiss the Respondent's objection that the Application has been filed out of time, and I dismiss the Respondent's jurisdictional objection that the Applicant was not dismissed by it within the meaning of s.386 of the Act. Orders to this effect will be published contemporaneously with this decision.

DEPUTY PRESIDENT

Appearances:

Mr *Philip Boncardo*, of Counsel, instructed by Ms *Penelope Parker*, Senior Associate, Maurice Blackburn Lawyers, appeared with permission on behalf of the Applicant.

Mr *Hamish Harrington*, Senior Industrial Officers, Master Builders Association, appeared for the Respondent.

Printed by authority of the Commonwealth Government Printer

<PR773798>

[1] Transcript, PN68.
[2] The Respondent is a member of the Master Builders Association (cf. s.596(4) of the *Fair Work Act 2009*).
[3] Transcript, PN831 and PN914.
[4] See s.394(2) and (3) of the *Fair Work Act 2009* (Act). Note the requirement to consider an out of time objection prior to other objections: *Coles Supply Chain v Milford* [2020] FCAFC 152. However, in this case, not only is the "dismissal" of the Applicant in contention, but the date of dismissal. The latter must be determined prior to being in a position to determine the out of time objection.
[5] *NSW Trains v James* [2022] FWCFB 55; (2022) 316 IR 1, at [45].
[6] *Mohazab v Dick Smith Electronics* (2005) 62 IR 200, at 205 to 206. See also: *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 496, at [19] to [23]; *Mahony v White* [2016] FCAFC 160, at [23]; *Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162, at [75]; *Rheinberger v Huxley Marketing Pty Ltd* (1996) 67 IR 154, at 160.
[7] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941. See also *Bruce v Fingal Glen Pty Ltd (in Liq)* [2013] FWCFB 5279 and *Australian Hearing v Perry* (2009) 185 IR 359, at 367-368; [209] AIRCFB 680.
[8] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941, at [47].
[9] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115, at [43]-[56]; *Visscher v Giudice* [2009] HCA 34; (2009) 239 CLR 361.
[10] *Simon v NGS Group Pty Ltd ATF NGS Discretionary Unit Trust* [2019] FWC 3442.
[11] *Visscher v Giudice* [2009] HCA 34; (2009) 239 CLR 361; *Michael White v Superior Facilities Pty Ltd* [2020] FWC 3035.
[12] Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [8]-[10].
[13] Compare Respondent's Closing Submissions, 15 December 2023, at [59], with Transcript, PN1438-PN1444.
[14] Exhibit R4, Alex Brazete Statement, 11 September 2023, at [16]; Exhibit R6, Natalie Brazete Statement, 11 September 2023, at [10]-11].
[15] Ibid, at [13].
[16] Ibid, at [14]-[15]. See also Exhibit R4, Alex Brazete Statement, 11 September 2023, at [18] and [20].
[17] Note, Exhibit R6, Natalie Brazete Statement, 11 September 2023, at [8]-[9], and [13]-[14]. Transcript, PN831 and PN914.
[18] Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [14]-[17].
[19] Ibid, at [17]. See also Exhibit R4, Alex Brazete Statement, 11 September 2023, at [22].
[20] Exhibit R4, Alex Brazete Statement, 11 September 2023, at [23]-[24].
[21] Whether the conversation was 25, or 26, April 2023 is not significant.
[22] Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [19]-[20]. Note Exhibit R2, Fernando Brazete Reply Statement, 4 October 2023, at [8] and [10], regarding "other options" not needing to be explored. See also Exhibit R4, Alex Brazete Statement, 11 September 2023, at [25].
[23] Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [21].
[24] Note, Exhibit R6, Natalie Brazete Statement, 11 September 2023, at [8]-[9], and [13]-[14]. Transcript, PN831 and PN914.
[25] Exhibit R2, Fernando Brazete Reply Statement, 4 October 2023, at Annexure FB-1 (CB, pp. 190-192). Not counting the day of 26 April 2023, Mr Fernando Brazete's phone records identify that he called the Applicant (between 27 April 2023 and 8 June 2023) on 3 May 2023 twice (call durations were 7 minutes and 5 seconds, and 4 minutes and 19 seconds), and 13 May 2023 once (call duration 12 seconds).
[26] Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [22]-[23].
[27] Exhibit R4, Alex Brazete Statement, 11 September 2023, at [27]-[29].
[28] Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [24].
[29] The evidence of Alex Brazete (Exhibit R4, Alex Brazete Statement, 11 September 2023, at [30]) is hearsay, and I do not rely upon it for the purposes of making any findings in this decision.
[30] Exhibit A1, Joao Dos Santos Statement, 26 September 2023, at Annexure JD-3.
[31] Exhibit R4, Alex Brazete Statement, 11 September 2023, at [33].
[32] Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [27]-[28].
[33] Exhibit R4, Alex Brazete Statement, 11 September 2023, at [34]-[39]. Note also Exhibit R6, Natalie Brazete Statement, 11 September 2023, at [25]–[26], and Exhibit R7, Natalie Brazete Reply Statement, 4 October 2023, at [4]-[6].
[34] Exhibit R4, Alex Brazete Statement, 11 September 2023, at [40]-[43].
[35] Exhibit A1, Joao Dos Santos Statement, 26 September 2023, at [14]-[21].
[36] Ibid, at [25]-[33].

[37] Ibid, at [36]-[37].
[38] Ibid, at [39]-[44].
[39] Ibid, at [45]-[51].
[40] [2018] FCCA 933.
[41] Ibid, at [19]-[20].
[42] (2006) 229 CLR 577.
[43] Ibid, at 634, [172].
[44] Exhibit R2, Fernando Brazete Reply Statement, 4 October 2023, at Annexure FB-1 (CB, p. 192) – Phone call on 26 April 2023 at 5:03:59PM (There is also a telephone call from FB to the Applicant at 06:00:15AM, presumably about the commencement of work that day). Transcript, PN401-PN403.
[45] Transcript, PN319-PN321, and PN401-PN403.
[46] Ibid, PN330-PN331.
[47] Ibid, PN319-PN333.
[48] Ibid, PN319-PN324; Exhibit R2, Fernando Brazete Reply Statement, 4 October 2023, at [9] (compare, Exhibit A1, Joao Dos Santos Statement, 26 September 2023, at [25]-[26]).
[49] Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [19]-[20].
[50] Transcript, PN319-PN321, and PN401-PN403.
[51] Exhibit A1, Joao Dos Santos Statement, 26 September 2023, at [24]-[28].
[52] Transcript, PN457.
[53] Ibid.
[54] See, for example, Exhibit A1, Joao Dos Santos Statement, 26 September 2023, at [33].
[55] Respondent's Closing Submissions, 15 December 2023, at [3]-[4], [18], [26]-[27], [32]-34], [36], [41]-[42], [55], [59]-[63], [76], [78], [80], and [85]-[88]; Respondent's Closing Reply Submissions, 2 February 2024, at [3], [5], [12], [26], [86], [88], [97]-[98], [106], and [109].
[56] Ibid.
[57] Exhibit R2, Fernando Brazete Reply Statement, 4 October 2023, at Annexure FB-1 (CB, p. 190-191).
[58] Transcript, PN625-PN626. The Respondent submits that it did not need to put AB's phone records into evidence as it can rely upon the Applicant's phone records. This might be correct, but only up to the point that there is no dispute as to whether or not a specific phone call or conversation occurred.
[59] Exhibit A2, Joao Dos Santos Statement, 9 October 2023, at Annexure JD-6.
[60] There is no evidence before me of the 14 June 2023 conversations between AB and the Applicant.
[61] Exhibit R4, Alex Brazete Statement, 11 September 2023, at [27]-[29]; Exhibit R5, Alex Brazete Reply Statement, 4 October 2023, at [6]; Transcript, PN653.
[62] Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [22]; Exhibit R2, Fernando Brazete Reply Statement, 4 October 2023, at [10].
[63] Exhibit A1, Joao Dos Santos Statement, 26 September 2023, at [29].
[64] Exhibit R4, Alex Brazete Statement, 11 September 2023, at [30]-[29].
[65] Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [23].
[66] Note paragraph [58] of this decision. In relation to the purported telephone communications on 7 June 2023 (which are not supported by mobile telephone records), compare Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [24]; Exhibit A1, Joao Dos Santos Statement, 26 September 2023, at [36]; and Transcript, PN423-PN426, PN444 and PN446.
[67] Exhibit A1, Joao Dos Santos Statement, 26 September 2023, at [30].
[68] Transcript, PN444.
[69] Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [27]-[28]; Exhibit R4, Alex Brazete Statement, 11 September 2023, at [34]-[39]; Exhibit R6, Natalie Brazete Statement, 11 September 2023, at [26]; Transcript, PN745, PN750 to PN758.
[70] Exhibit A1, Joao Dos Santos Statement, 26 September 2023, at [42].
[71] Exhibit A1, Joao Dos Santos Statement, 26 September 2023, at [40].
[72] Exhibit R4, Alex Brazete Statement, 11 September 2023, at [34]-[39].
[73] Transcript, PN745, PN750 to PN758.
[74] Ibid, PN750.
[75] Ibid.
[76] Ibid.
[77] Exhibit R1, Fernando Brazete Statement, 11 September 2023, at [27]-[28].
[78] Transcript, PN449-PN468.

[79] Note, also, NB's evidence at Transcript, PN971.

[80] The fact that the Applicant seeks payment for his periods of unpaid time off in February, April, May and June 2023, as opposed to his periods of unpaid time off in only April, May and June 2023 (in respect of the 'April Arrangement') does not change anything in respect of the repudiation by the Respondent, and its acceptance by the Applicant.