



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Mariette Lansdell
v
Gladstone Ports Corporation
(U2024/689)

DEPUTY PRESIDENT DOBSON

BRISBANE, 23 APRIL 2024

Application for unfair dismissal remedy – s.394 – Jurisdictional objection – Applicant on a fixed term contract – Substantive position relinquished – Termination at the initiative of the employer – Jurisdictional Objection dismissed

[1] On 20 January 2024, Mariette Lansdell (**Applicant**) made an application to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (**Cth**) (the **Act**) for a remedy, alleging that she had been unfairly dismissed from her employment with Gladstone Ports Corporation Limited (**Respondent**). The Applicant seeks reinstatement, compensation for lost wages and damages.

When can the Commission order a remedy for unfair dismissal?

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

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

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

When is a person protected from unfair dismissal?

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

- (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) one or more of the following apply:

- (i) a modern award covers the person;
- (ii) an enterprise agreement applies to the person in relation to the employment;
- (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high-income threshold.

When has a person been unfairly dismissed?

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

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

[6] The Respondent objected to the Application on the basis that the Applicant was not dismissed on the initiative of the Respondent, and rather that the employment came to an end at the period specified in a maximum term contract.

Background

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

- The Applicant commenced employment as a Company Secretary¹ with the Respondent on 9 September 2013 pursuant to a letter of offer dated 27 August 2013 (**2013 Offer**)² and a contract of employment dated 5 September 2013 (**September Contract**). It is unclear as to how the Applicant came to later be a Deputy Company Secretary.
- From 5 October 2021, the Applicant's employment was covered by the *Gladstone Ports Corporation Enterprise Agreement 2020 (2020 EA)*.
- As at 5 December 2022, the Applicant's substantive role was that of Deputy Company Secretary. The Applicant was also discharging the role of Company Secretary on an interim basis, holding a temporary appointment as Acting Company Secretary.³
- Following the raising of concerns from the Applicant regarding her workload, the Respondent wrote to the Applicant providing two alternatives on 7 December 2022 (**the December offer**).⁴ In the December Offer the two options were:
 1. "Relinquish your substantive role, leaving GPC free to advertise the Deputy Company Secretary (**DCoSec**) role on a permanent basis. This will leave you without a permanent substantive role and only a temporary/fixed role as Acting Company

Secretary (**ACoSec**). The ACoSec role would then be advertised early 2023, which you are welcome to apply for;

2. Alternatively, cease your ACoSec secondment, maintain your current permanent substantive role and GPC permanently recruit for the CoSec role. This option provides you certainty of a permanent substantive role but allows you the opportunity to apply for the CoSec role when advertised.”⁵

- The Applicant advised her acceptance of the first alternative, relinquishing her substantive role and instead taking on a temporary role.
- On 6 March 2023, the Respondent offered the Applicant the temporary role of Senior Corporate Advisor to the Board, which the Applicant accepted (**SCA Offer**).⁶ This offer said that the role would involve an extension to 31 December 2023. In describing the duties of the role it called it a “temporary role”⁷ and noted that all other terms and conditions of employment remained unchanged.⁸
- On 15 December 2023, the Respondent wrote to the Applicant confirming that her employment would come to an end on 31 December 2023⁹ and encouraging the Applicant “to apply for roles that are advertised within the business,”¹⁰ thanking the Applicant for her contributions and wishing her well for the future.¹¹

[8] The Applicant’s position is that the letter of 6 March 2023 did not indicate that there was an expiration date to the Applicant’s employment with the Respondent.¹² The Respondent’s position was that the Applicant’s employment was ended by operation of law at the end of the period specified in a maximum term contract.¹³

The hearing

[9] After taking into account the views of the Applicant and the Respondent and whether a hearing would be the most effective and efficient way to resolve the matter, I considered it appropriate to hold a hearing for the matter.¹⁴

Permission to appear

[10] Both the Applicant and the Respondent sought to be represented before the Commission by a lawyer.

[11] Relevantly, section 596(1) of the FW Act provides that a party may be represented in a matter before the Commission by a lawyer or paid agent only with the permission of the Commission.

[12] Section 596(2) provides that the Commission may grant permission for a person to be represented by a lawyer or paid agent in a matter before the Commission only if:

- (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
- (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
- (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

[13] The decision to grant permission is not merely a procedural step but one which requires consideration in accordance with s.596 of the FW Act.¹⁵ The decision to grant permission is a two-step process. First it must be determined if one of the requirements in s.596(2) have been met. Secondly, if the requirement has been met, it is a discretionary decision as to whether permission is granted.¹⁶

[14] On the question of representation, the Applicant submitted that:

- The matter would proceed more efficiently pursuant to s 596(2)(a) given the complexity of the matter; and
- There is a capacity and resourcing imbalance between the Applicant and the Respondent as a large corporation with significant operations and support staff, and the Applicant would be unable to effectively represent herself, pursuant to s 596(2)(b); and
- The Respondent having sought permission, and if granted, it would be unfair not to allow the Applicant to be represented, pursuant to s 596(2)(c).

[15] On the question of representation, the Respondent submitted that:

- The matter would proceed more efficiently pursuant to s 596(2)(a) given the complexity of the matter; and
- The Applicant having sought permission, and if granted, it would be unfair not to allow the Respondent to be represented, pursuant to s 596(2)(c).

[16] Having considered those matters, I determined that:

- allowing the parties to be represented by a lawyer would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter;
- it would not be unfair not to allow the Applicant to be represented because the Applicant is unable to represent herself effectively;
- it would be unfair not to allow the Applicant to be represented taking into account fairness between the Applicant and other persons in this matter.
- allowing the Respondent to be represented by a lawyer would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter.

[17] I have therefore decided to exercise my discretion to grant permission for the parties to be represented.

[18] Accordingly, at the hearing on 5 April 2024, the Applicant was represented by Mr Jamie Wells and Mr Bradley Ellacott of Mills Oakley and the Respondent was represented by Mr James McLean of counsel, instructed by Mr Crispin Scott of Herbert Smith Freehills.

Witnesses

[19] The Applicant gave evidence on her own behalf.

[20] The following witness gave evidence on behalf of the Respondent:

- Mr Craig Haymes – Chief Executive Officer

Submissions

[21] The Respondent filed submissions in the Commission on 19 March 2023, and reply submissions on 2 April 2024. The Applicant filed submissions in the Commission on 26 March 2024.

[22] On 2 April 2024, the Applicant's representative contacted chambers and objected to the Respondent's reply submissions and the second statement from Mr Haymes, proposing that they served to bring up new issues rather than responding to the Applicant's material. On 3 April 2024, I invited the Applicant to provide any material in reply to the Respondent's material that they say agitates new issues. I note the Applicant filed a second witness statement from the Applicant dated 4 April 2024.

Has the Applicant been dismissed?

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

[24] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

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

[25] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed:

(2) However, a person has not been *dismissed* if:

(a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or

(b) the person was an employee:

- (i) to whom a training arrangement applied; and
- (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

and the employment has terminated at the end of the training arrangement;
or

(c) the person was demoted in employment but:

- (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
- (ii) he or she remains employed with the employer that effected the demotion.

(3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

[26] The parties are in dispute about whether the employment of the Applicant was terminated at the initiative of the employer or whether the employment relationship came to an end as a result of the exhaustion of a time limited contract pursuant to s386(2)(a). The objection

having been made, the Commission is required to determine whether the Applicant was dismissed.

Contract ceased at the expiry of the Term

[27] The Respondent submitted that the contract under which the Applicant was employed at the time of dismissal was for a temporary role. Further, the parties had agreed that the Applicant's role as Senior Corporate Advisor would come to an end by 31 December 2023, unless the Applicant was notified otherwise. The Time Limited Contract (TLC) was not varied or abandoned, and the Respondent had acted passively in allowing it to expire, as was its prerogative.

[28] The Respondent further submitted that the Applicant held no substantive ongoing role with the Respondent. The Respondent submitted that the Applicant had elected to forego and did not hold a permanent position and had further been advised that her appointment as Acting Company Secretary was coming to an end. On 7 December 2022, following an offer put by the Respondent, the Applicant chose to relinquish her substantive role, and the only role that the Applicant had with the Respondent was a temporary one. On 6 March 2023, the Respondent confirmed an offer of a temporary appointment to the role of "Senior Corporate Advisor" to the Board, the SCA Offer.¹⁷ The SCA Offer referred to the Applicant's responsibilities as "in this temporary role..." (emphasis added).

[29] The Respondent submitted further that on 8 March 2023, the Applicant confirmed acceptance of the offer, which the Respondent submitted, gave rise to a time limited appointment of the Applicant to the role of Senior Corporate Advisor with an end date of 31 December 2023 (**Time Limited Contract**). On 20 March 2023, the Applicant's appointment to the role of Senior Corporate Advisor to the Board commenced and her temporary acting arrangements as Acting Company Secretary ended.

[30] The Applicant's position is that the SCA Offer does not purport to do what the Respondent submitted. The Applicant submitted that the SCA Offer in referring to the role of Senior Corporate Advisor provided an expiry date to higher duty allowances and provides for unilateral variation at the Respondent's election. The Applicant provided that only the role rather than the Applicant's employment, in the strictest sense, would expire on 31 December 2023. The Applicant proposed that when the Respondent chose not to extend the Applicant's appointment, the Applicant was required to be redeployed.

[31] The Applicant submitted that none of the numerous temporary appointments that she held, save the SCA Offer, were time limited. It was the Applicant's position that her underlying employment continued and had always held a right to reversion to her substantive role. The Applicant maintained that the surrendering of such a role in December 2022, did not convert her employment to a term status. The Applicant drew a line between her role and her employment, by submitting that her employment remained pursuant to the September Contract, regardless of any letters regarding her role. The Applicant posited that there was no rationale to treat temporary appointments that occurred during an employee's employment, as being interchangeable with term employment and to do so would conflate temporary appointments with term employment, which in their view are two different things.¹⁸

[32] In their closing submissions, the Respondent submitted that they were not relying on section 386(2)(a) of the Act. Instead, the Respondent submitted that this matter involved a time limited contract rather than employment being for a specified period and relied on the full bench authorities in *Khayam*¹⁹ and *Alouani-Roby*²⁰. I do not agree with the Respondent's submission that s.386(2)(a) is not relevant in this matter for the reasons that follow.

[33] The Respondent submitted that simply because termination can be other than at the initiative of the employer, such as the termination by the effluxion of time or some decision by the Applicant to end, this does not preclude that the contract came to an end. The Respondent contended that the Applicant was presented with a choice in December 2022, which had two alternatives and the consequences of each were clear. The first option resulted in her role being relinquished, leaving her without a permanent role. The second option alternatively would have been to stay in the permanent position. The Respondent highlighted that the Applicant acknowledged that at 2 March 2023, that she did not hold a permanent position²¹ and that at 9 February 2023 her current role would be fulfilled by someone else and that she was no longer required to discharge the functions of that role.

[34] In the Applicant's closing submissions, the Applicant submitted that she did not accept that she was on a time limited contract which expired on 31 December 2023, and that the various letters provided to the Applicant in the course of her employment provided for temporary placements. The Applicant submitted that her employment was subject to an ongoing contract, that being the September Contract, and that none of the variations that had been provided to the Applicant had the effect of establishing a term limited contract.

[35] The Applicant sought to make the distinction between 'role' and 'employment', and that none of the correspondence between the parties could be interpreted as conflating a role of higher duties to her on-going employment with the Respondent.

Evidence

Mr Craig Haymes

[36] Mr Haymes, Chief Executive Officer of the Respondent, gave a witness statement for the Respondent. Mr Haymes has been employed in his current position since 1 May 2022 and stated that at that time, the Applicant's substantive position was as Deputy Company Secretary (DCoSec) and was acting up in the position of Acting Company Secretary (ACoSec) on an interim basis.

[37] Mr Haymes provided that on 7 December 2022, after the Applicant had raised concerns with him regarding her workload, he sent the letter providing the Applicant with two options as follows:

“1. Relinquish your substantive role, leaving the GPC free to advertise the DCoSec role on a permanent basis. This will leave you without a permanent substantive role and only a temporary / fixed role as ACoSec” (the first option)

Or

“2. Alternatively, cease your ACoSec secondment, maintain your current permanent substantive role and GPC permanently recruit for the CoSec role. This option provides you with certainty of a permanent substantive role but allows you the opportunity to apply for the CoSec role when advertised.” (the second option).

(collectively, the options)

[38] The position of Deputy Company Secretary was subsequently advertised and filled.

[39] Mr Haymes gave evidence that on 9 February 2023, Mr Haymes met with the Applicant to discuss with the Applicant her options in circumstances where her higher duties as acting Company Secretary was due to come to an end on 31 March 2023 and a candidate had been identified to take over the Acting Company Secretary role.

[40] Mr Haymes submitted that he was predisposed to give the Applicant a “soft landing”²² and after discussions with the Board, identified a further temporary opportunity as a Senior Corporate Advisor.²³ Mr Haymes claims he met with the Applicant on 9 February 2023³² to explain this and point out that the position was intended only to temporarily extend her employment with the Respondent and that there was an end date on that Temporary Senior Corporate Advisor role being 31 December 2023.²⁴

[41] Mr Haymes subsequently issued the letter of offer to the Applicant on 6 March 2023 (SCA Offer). Mr Haymes gave evidence that the temporary position as Senior Corporate Advisor had a range of duties that he considered would be more achievable for the Applicant and would assist, to a degree, the new Acting Company Secretary into that role. It would also allow the Applicant to maintain her remuneration level and other conditions for the remainder of the year.

[42] In his second statement, Mr Haymes states that he would not have mentioned the issues of redundancies in his discussions with the Applicant in the lead up to 7 December 2022 as redundancies were not relevant to the discussions that he was having and that neither of the two options that were offered to the Applicant involved redundancies. Mr Haymes stated that the options were to either continue in her permanent substantive position of DCoSec *or* choose to instead forgo her permanent role and accept an offer of temporary employment as Company Secretary on an acting and term limited basis causing her employment to end at the end of the term.

[43] Mr Haymes denied ever advising the Applicant that she could convert back to a permanent position and never suggested that in choosing the first option, that she could continue to be employed by the Respondent on a permanent basis or be able to return to permanent employment at the end of her tenure in the temporary position of Acting CoSec. Mr Haymes did recall telling the Applicant that as the Respondent was a large organisation, that there would be plenty of positions that she could apply for down the track, but stressed that if she chose the first option, she would need to apply for any future roles through the formal and open recruitment process as any applicant would.

[44] Mr Haymes explained that whether an employee is engaged on a temporary or permanent basis can be of particular significance for employees of government or government-

owned entities and this was part of the reason he felt it was important to emphasise to the Applicant the consequences for her employment in choosing the first option.

[45] During cross examination, Mr Haymes expressed that a role and a position are mutually exclusive and hypothesised that if the Applicant had maintained her substantive position, then she would have retained her certainty of a permanent substantive role. When taken to the December Offer, Mr Haymes stated that it clearly provided that the option would “leave [the Applicant] without a permanent substantive role and only a temporary fixed role”.

[46] It was put to Mr Haymes that he referred in his first statement to a term limited basis, rather than fixed term and Mr Haymes expressed that it was the same thing.

[47] Mr Haymes was asked to demonstrate where in the correspondence he had issued to the Applicant, did he reference ‘employment’ rather than ‘role’. Mr Haymes stated that the role was in an acting capacity, and that role and employment were mutually exclusive, and that it should have been clear in the correspondence that the temporary fixed role of acting CoSec is mutually exclusive to being a term employee. Mr Haymes stated that an employee can be a permanent employee and put into an acting role, as can a temporary employee be put into an acting role. Mr Haymes stated that the letter which provided the options made it clear that the temporary nature of the Applicant’s employment resulted from the relinquishment of the Applicant’s substantive role, and that the higher duties of acting Company Secretary was a temporary role performed by the Applicant.

Ms Mariette Lansdell

[48] Ms Lansdell provided two statements in relation to the Jurisdictional objection in this matter. The first provided to attest to the background of the matter, as explained above, and to provide the 12 July 2022 letter which extended her temporary appointment to the CoSec role.

[49] In her second statement, Ms Lansdell addressed Mr Haymes’ second statement. The Applicant maintained that Mr Haymes had told her there would be no redundancies, which had been a concern of hers in choosing between returning to her substantive role and risking a redundancy at the conclusion of her Acting role. The Applicant denied that during her discussions with Mr Haymes, that she had been told that in surrendering her substantive role and accepting the temporary ‘employment’ that her employment would come to an end at the conclusion of the term.

[50] Ms Lansdell provided context to the events which triggered the Respondent providing her with the options. Ms Lansdell had approached Mr Haymes to seek greater support. It was her view that the CoSec role had a high workload which required approximately three full-time people to manage and that it was solely being managed by her. The Applicant stated that the Respondent told her they would recruit for a Deputy CoSec to support her in the Acting CoSec role.

[51] On 6 December 2022, the Applicant states she was advised that the Respondent couldn’t advertise for the Deputy CoSec role as it belonged to the Applicant as her substantive role. The Applicant stated this meant she had been told that the only way she was to receive a support resource was to relinquish her substantive role.

[52] The Applicant maintained that she had been assured about the availability of permanent roles and denied that there was any discussion about her needing to apply for a role which was available, and for which she would be suitable, when the higher duties came to an end.²⁵ This evidence is at odds with the email from the Applicant to the Respondent on 2 March 2023 at 4.56pm in which the Applicant states that the circumstances at that time were not how she ‘envisaged an exit from’²⁶ the Respondent. This is demonstrative that the Applicant was aware that her ongoing employment was not guaranteed.

[53] The Applicant rejected Mr Haymes’ version of events in regard to the meeting of 9 February 2023. The Applicant states that following the advertising of her former substantive role of DCoSec, that she had been asked to be on the interview panel for the candidates for the role and it appeared to her that the 9 February meeting was to discuss the proposed candidates. Under cross examination it was put to the Applicant that the meeting was not to discuss the proposed candidates but rather to discuss that the position had been filled and to explore other options for her ongoing engagement with the Respondent. The Applicant acknowledged that the first part of the meeting did deal with the proposed candidates, however, the Applicant was then informed that the candidate would be appointed to the Acting CoSec role that the Applicant was performing at that time. The Applicant submitted that in the second part of that meeting, she was told that she was to be assigned to the new role of Senior Corporate Advisor. The Applicant stated that she had been told that this role was established so that she could focus on her personal circumstances and return when she was ready. The Applicant went on to state that she had been told that when she was ready to return, that the CoSec role would be advertised, and she would be given it.²⁷

[54] Ms Lansdell denied that she had ever discussed the extension of her employment or that she would be required to apply for roles through a ‘market recruitment process’ and she also denied ever being told that there was an end date. She claimed that when she was told in December 2023, that this had “completely blindsided” her.²⁸ This statement is at odds with the SCA Offer²⁹ that the Applicant acknowledges receiving on 6 March 2023 and which was filed as annexure D to the Applicant’s unfair dismissal application.³⁰ The SCA Offer in its first paragraph says that the role will continue “until 31 December 2023 or as notified”³¹ and also describes the role as ‘temporary’.³²

[55] During cross examination, Ms Lansdell confirmed she had extensive experience in positions which required the preparation of employment contracts but said she was only part of the process, not the deciding person. Ms Lansdell stated that she was not aware of the differences between permanent employment and temporary employment in the context of government-owned corporations and further was not aware that permanent employment is a different form of employment to temporary employment. Ms Lansdell claimed that she had never come across any other person who held temporary employment in her career with the Respondent.

[56] I enquired as to whether Ms Lansdell was aware of any employees in the organisation that she was involved in employing or working with, who were not permanent, and Ms Lansdell stated that she was aware of people employed through recruitment agencies, contractors, volunteers etc. but to her knowledge, wages and salary employees are all permanent employees, and only contractors were brought on for short term contracts. When asked about how

apprentices were employed, the Applicant stated that she did not know. Mr Haymes later gave evidence that there were a number of people employed by the Respondent in temporary roles. I find it unlikely that in the Applicant's career at the Respondent she would not be aware of the difference between temporary and permanent roles, and I also found it unlikely that she was not aware there were other temporary employees at the Respondent. It was my observation that the Applicant seemed to be concerned that if she acknowledged this it might harm her case. Consequently, I preferred the evidence of Mr Haymes.

[57] The Applicant confirmed that when she was in the Acting CoSec role, she understood that it was a temporary opportunity that she had been offered. I found this to be at odds with Ms Lansdell's evidence about temporary employment at the Respondent. The December Offer, in my view, had clearly spelled out that one of the two alternatives that the Applicant was offered, involved the relinquishing of the Applicant's substantive role and that as a result she would lose her permanency and become a temporary employee. As the hearing progressed, the Applicant appeared to explain this away with a belief, that was unsupported by the evidence, that Mr Haymes would make sure that she would win the Company Secretary role on a permanent basis. The Applicant's claim in this respect is at odds with the evidence before the Commission, that in the December Offer, she was advised in writing that the Company Secretary role would be advertised and that the Applicant would be welcome to apply for the role if she wanted to.³³ The Applicant signed her understanding of that correspondence and indicated her selection of one of the two options offered to her on 8 December 2023.³⁴ There is no suggestion the role would be given to the Applicant and I don't accept that any promise was made.

[58] The Applicant stated that she understood the options that were presented to her in the letter of 7 December 2022 to mean that choosing option 1 would leave her without a substantive role. The Applicant stated, however, that during a phone conversation with the CEO the day prior, that she would relinquish her substantive role if that was the only way she could get assistance in her Acting CoSec role. The Applicant further agreed that if she had chosen option 2, that she would retain her current, permanent substantive role and that she had elected not to proceed with that option.

Consideration

[59] Firstly, I will deal with the Applicant's contention that the Applicant would not agree to forego generous redundancy entitlements in the event that she could no longer be employed in the business and that such a conclusion should be resisted.³⁵ There is no evidence before the Commission to support a any suggestion that a redundancy would be on offer. Neither the Company Secretary nor the Deputy Company Secretary role were no longer required to be performed. On that basis there was no grounds for a redundancy.

The Relinquishing of the Applicant's Substantive Role

[60] I conclude that the Applicant approached the Respondent as she was struggling to perform both her substantive role of Deputy Company Secretary and the acting role of Company Secretary. I further conclude that it was a busy role, and it is apparent that two people were required to perform the duties those roles entailed. That much is clear by the fact the Respondent had two positions, a Company Secretary and a Deputy Company Secretary. It seems that the

Applicant was doing an extraordinary job getting through what was required whilst dealing with some difficult challenges in her personal life.

[61] When the Applicant asked the Respondent for assistance, the Respondent gave the Applicant two options. One was to give up her substantive role as Deputy Company Secretary which would be advertised and filled while she continued acting as the Company Secretary with a view to the Applicant applying for the Company Secretary role when it was advertised. I am satisfied that she was not promised the role. In that respect I found that the Applicant's evidence was at odds with the letters in evidence³⁶ and with the Respondent's witness Mr Haymes³⁷ and in the letters³⁸ and Mr Haymes evidence³⁹ that I prefer on this point, in considering all of the evidence before the Commission.

[62] I conclude that the two options put by the Respondent were problematic. The Respondent gave the Applicant two options that both had a degree of distastefulness to them.

[63] One option was for the Applicant to give up the higher duties she was performing and return to her substantive role in the more junior Deputy position. This would require the Applicant to forgo the higher duties payment and perform a more junior role. The Applicant was told she could apply for the Company Secretary role when it was advertised. I can understand it would be difficult, perhaps even embarrassing, to be moved to a more junior position, after having worked for the organisation since 9 September 2013.

[64] I note that the Applicant was engaged as the Company Secretary,⁴⁰ just over 9 years earlier at the time she was given the two options in the December offer, and that there was no evidence before the Commission as to the Applicant ever moving into a Deputy Company Secretary role. In terms of the evidence before the Commission, there was actually none to suggest that the Applicant was not the Company Secretary per her initial Employment Contract.⁴¹

[65] The second option was for the Applicant to relinquish her substantive role and hence her permanency with the Respondent. She could then apply for the more senior of the two roles that she was acting in. Taking this option the Applicant would remain in the more senior of the two roles, she could apply for the role when it was advertised. I conclude that the Applicant chose this option, because she had extensive knowledge and experience over the prior 9-10 years, and she had confidence in her ability to perform the role and hence her prospects of winning the permanent role. Despite my finding that the Applicant had not been promised the promotion, I would think most people in her position would come to the same conclusion.

[66] This two-option dilemma created by the Respondent in respect to the Applicant's request for help, is in my mind inherently unreasonable. It makes no sense why an employee with around 10 years of service as a permanent employee, would be forced to relinquish her substantive role in these circumstances.

[67] There were a number of other options the Respondent could have taken. There is no cogent reason why the Applicant could not have retained her substantive role and applied for the more senior vacancy when it was advertised. There is no plausible reason why the Company Secretary role could not be advertised while the Applicant acted in it. There was no explanation as to why the Applicant's substantive role needed to be vacant in order to advertise it.

[68] It is an odd approach that the Respondent could not just advertise the Deputy Company Secretary role as a temporary role while the Applicant was temporarily performing the Company Secretary role or why the Respondent could not advertise the permanent Company Secretary role and when it was filled, return the Applicant to her substantive Deputy Company Secretary role.

[69] In giving these two options, it is my view that the Respondent created a dilemma where the Applicant had no choice but to give up her substantive role in circumstances where there was no reason put before the Commission, for her to do so. I can only speculate that the Applicant may have felt she had more chance of having help to perform her role more quickly and/or more chance of being promoted to the Company Secretary role if she chose to relinquish her substantive role. The alternative, it seems, was to step back to the more junior of the two roles and reduce her prospects of being appointed to the more senior role permanently.

The SCA Offer

[70] At a meeting between the Applicant and the Respondent on 9 February 2023,⁴² the Applicant was advised that a candidate had been identified to take over the Acting Company Secretary role when the Applicant's higher duties in that role came to an end on 31 March 2023.⁴³ In that meeting, the Respondent had some discussions with the Applicant about her future.⁴⁴ She was offered the temporary role of Senior Corporate Advisor (the SCA Offer).⁴⁵

[71] It is uncontested that as a result of the recruitment process for the Deputy Company Secretary, a new candidate had been recruited. At the meeting on 9 February 2023,⁴⁶ the Applicant was advised that this candidate would be appointed to the Acting Company Secretary role when the Applicant's higher duties in that role would come to an end on 31 March 2023.⁴⁷

[72] The SCA Offer was subsequently put in writing on 10 February 2024 by the Respondent.⁴⁸ The offer on its face elucidated a temporary position that would come to an end on 31 December 2023.⁴⁹ I note the duties that are set out to be performed in the Senior Corporate Advisor role in the SCA Offer, have a material overlap with the duties that might be expected of a Company and/or Deputy Company Secretary role.⁵⁰

Vitiating Factors of the SCA Offer

[73] Where one of the relevant factors that may vitiate an otherwise validly formed contract exists, as set out in *Khayam*,⁵¹ such as misrepresentation, unconscionable dealing, duress, undue influence, and their statutory equivalents (such as the prohibitions on misleading and deceptive conduct and unconscionable conduct), then the contract may not be considered to have been voluntarily and genuinely made and, therefore, it may not be valid and enforceable.

[74] The Applicant challenged the course taken by the Respondent and it was inherently reasonable that she did so.⁵² The Applicant put her concerns in writing to the Respondent in her email dated 2 March 2023.⁵³ In that correspondence the Applicant raises concerns about the legitimacy of the temporary SCA role, sought to understand why the Respondent was taking the approach it was and proposed a number of alternatives open to the Respondent in respect to her employment.⁵⁴

[75] It is my view that the Respondent engaged in conduct leading to the SCA Offer, that create vitiating factors in the SCA offer. That conduct begins with the December Offer which it relies on to say that the Applicant had given up her permanency and hence warranting the need for the SCA Offer to create a ‘soft landing’⁵⁵ for the Applicant. It is not contested that the December Offer was made in response to the Applicant asking for help as she was overwhelmed by the work in her role (which subsequently became 2 roles) and a period of time when she was dealing with some personal difficulties.

[76] It is my view that the two options presented to the Applicant were both unnecessarily detrimental to the Applicant. There was no cogent explanation for the Applicant to give up her substantive role in order to have assistance. The Applicant was told the position could not be advertised unless she did so.⁵⁶ There is no reason why the Applicant’s substantive position could not be advertised as a Temporary role. The Respondent gave evidence, which I accept, that the organisation routinely had engaged employees in temporary roles to accommodate its needs. It is my view that it was unconscionable to require an employee with almost 10 years of services to give up her substantive role in order to get assistance to deal with a heavy workload in circumstances where an employee is dealing with a temporary period of difficulties outside of work.⁵⁷

[77] Further, it was and is misleading to required that employee to do so when there were other options open to the Respondent (i.e. to fill the substantive role of the Applicant on a temporary basis). I further find that the Applicant made the decision under duress that was exacerbated by the heavy workload, the personal difficulties and the suggestion by her employer that the only way she could be supported in her busy role, was for her to give up her substantive role.

[78] Further, the Respondent gave evidence, which I accept, that the Applicant was told “there would likely be plenty of positions she would be able to apply for down the track”⁵⁸ even with the qualification that it would be up the Applicant to apply for such roles and be assessed on a merit basis. The Applicant performed a specialist role on a significant salary. The Applicant had performed this role for a considerable time. I don’t imagine too many roles in an organisation at that level with a similar skill set being required. Critically, there was no evidence put before the Commission of a single vacancy that demonstrated the Respondent’s suggestion to the Applicant was accurate. It was open for the Respondent to do so but it did not. I find the Respondent, in suggesting that there would be *inter alia*, ‘plenty of positions’ painted a picture that was erroneous. It carried a message that downplayed the significant risk of the Applicant giving up her substantive role, on her job security and consequently amounted to a misrepresentation that misled the Applicant to agree to relinquish her substantive position.

[79] Further, the Respondent advised the Applicant in both of the options suggested, that she would be welcome to apply for the Company Secretary role and would be considered on a merit basis.⁵⁹ I note however that the Respondent provided no explanation as to why the Applicant could be appointed to the Senior Corporate Advisor role, without any merit based process nor how the new candidate was appointed to the acting Company Secretary role without having had an open merit-based selection process which had the effect of excluding any assessment of the Applicant for that role, in circumstances where the Applicant was told she could apply for it and had been performing the role for some time. It may well be that a different process applies

for temporary roles but that does not explain the filling of the acting Company Secretary role with a new candidate having excluded the Applicant from continuing in or even being considered for, that role. I note the Applicant raised similar concerns with the Respondent in her email of 2 March 2023.⁶⁰

[80] Furthermore, the material overlaps in the duties to be performed in the Senior Corporate Advisor role that is the focus of the SCA Offer,⁶¹ with the duties of a Company Secretary/Deputy Company Secretary are of further concern in respect of failing to demonstrate the genuine difference between the SCA Role and the work performed by the Applicant over the preceding some 10 years. This contributes to the strength of the vitiating factors present in the December Offer and the SCA Offer and arising in all the circumstances.

[81] Although I consider it is unnecessary to do so, for completeness I did turn my mind to the exception in respect of the Anti-avoidance provisions of the Act.⁶² It is unfortunately a view by some, that having difficult conversations are too hard, as are responding to unfair dismissal applications and that the path of least resistance is more attractive. It is not possible for me to understand the motivations in this matter however it is my view that the December Offer and the subsequent SCA Offer, in all the circumstances, had the substantial purpose of avoiding the Respondent's obligations in respect of the Applicant's permanency and hence unfair dismissal rights.

[82] I find that the Applicant relinquished her substantive role (and hence her permanency) as a consequence of the December Offer and the SCA Offer, being infected with misrepresentation, misleading conduct and duress. I find that there are vitiating factors as identified by the Full Bench in *Khayam*⁶³ applicable to the Applicant's circumstances. It is my view that the Respondent's actions and conduct render the SCA Offer void *ab initio*. Consequently, the Applicant's employment was not subject to an end date that brought about the end of her employment. It is my view that it was the Employer's actions that brought the Applicant's employment to an end and therefore that the Applicant's employment came to an end at the initiative of the employer.

Conclusion

[83] I therefore find that the Applicant's employment was terminated at the initiative of the Respondent and the jurisdictional objection is dismissed.

[84] Directions have been issued to deal with the merits of the matter.



DEPUTY PRESIDENT

Appearances:

Bradley Ellacott of Mills Oakley for the Applicant.
Mr James McLean of counsel, instructed by Mr Crispin Scott of Herbert Smith Freehills for the Respondent.

Hearing details:

5 April 2024
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¹ Digital Court Book p.12.

² Digital Court Book p.12-17.

³ Digital Court Book p.18

⁴ Digital Court Book p.9

⁵ Digital Court Book p.19.

⁶ Digital Court Book p.20-21.

⁷ Digital Court Book p.20.

⁸ Digital Court Book p.21.

⁹ Digital Court Book p.22-23.

¹⁰ Digital Court Book p.23.

¹¹ Ibid.

¹² Digital Court Book p.25 [7]-[8].

¹³ Digital Court Book p.51 [2].

¹⁴ *Fair Work Act 2009* (Cth) s.399.

¹⁵ *Warrell v Fair Work Australia* [2013] FCA 291.

¹⁶ Ibid.

¹⁷ Digital Court Book p.20.

¹⁸ Digital Court Book p.27 [22].

¹⁹ *Khayam v Navitas English Pty Ltd*, [\[2017\] FWCFB 5162](#).

²⁰ *Alouani-Roby v National Rugby League Ltd* (2022) 318 IR 389.

²¹ Digital Court Book p.69-70.

²² Digital Court Book p. 67 [11].

²³ Ibid [12].

²⁴ Ibid [13].

²⁵ Digital Court Book p.34 [9].

²⁶ Digital Court Book p.70; Second Statement of Mr Craig Hames dated 2 April 2024, Annexure CH4.

²⁷ Digital Court Book p.34

²⁸ Ibid.

²⁹ Digital Court Book p.20-21.

³⁰ Digital Court Book p.3-11 and 20-21.

³¹ Digital Court Book p.20.

³² Ibid.

³³ Digital Court Book p.19.

³⁴ Ibid.

³⁵ Digital Court Book p.28 [25].

³⁶ Digital Court Book p.19.

³⁷ Digital Court Book p.66-67.

³⁸ Digital Court Book p.19.

³⁹ Digital Court Book p.66-67.

⁴⁰ Digital Court Book p.12.

⁴¹ Ibid.

⁴² Digital Court Book p.67 [13]-[14].

⁴³ Digital Court Book p.67.

⁴⁴ Digital Court Book p.67 [10].

⁴⁵ Digital Court Book p.67 [11]-[13].

⁴⁶ Digital Court Book p.67 [13]-[14].

⁴⁷ Digital Court Book p.67 [10].

⁴⁸ Digital Court Book p.67 [14].

⁴⁹ Digital Court Book p.34.

⁵⁰ Digital Court Book p.20.

⁵¹ *Khayam v Navitas English Pty Ltd T/A Navitas English* 92017) 273 IR 44 [75].

⁵² Digital Court Book p.69-70; Second Statement of Mr Haymes of 2 April 2024, Attachment CH4.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Digital Court Book p.67 [11].

⁵⁶ Digital Court Book p.33 [6]-[8].

⁵⁷ Ibid.

⁵⁸ Digital Court Book p.67 [8] and p.34 [9].

⁵⁹ Digital Court Book p.19.

⁶⁰ Digital Court Book p. 69.

⁶¹ Digital Court Book p.20.

⁶² *Fair Work Act 2009* (Cth) s.386(3).

⁶³ *Khayam v Navitas English Pty Ltd T/A Navitas English* 92017) 273 IR 44.