

[2024] FWC 1149

The attached document replaces the document previously issued with the above code on 3 May 2024.

In Footnote 19 Document Refencing has now been updated to read PR774463.

Liam Butterworth
Associate to Deputy President Anderson

Dated 6 May 2024



DECISION

Fair Work Act 2009

s.365 - Application to deal with contraventions involving dismissal

Margarida Azevedo

v

The Trustee For The Harley Family Trust

(C2024/1283)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 3 MAY 2024

Application to deal with contraventions involving dismissal – jurisdiction – whether dismissed – altercation with small business owner – scheduled disciplinary meeting – return of company property – re-advertising of role – cessation on payroll – conduct of parties – no express communication of dismissal or resignation – employment ended on initiative of employer – dismissal – jurisdictional objection dismissed

[1] On 28 February 2024 Margarida Azevedo (Ms Azevedo or the applicant) made a general protections application to the Commission under s 365 of the *Fair Work Act 2009* (Cth) (FW Act) alleging contraventions associated with an alleged dismissal.

[2] Ms Azevedo’s application is against The Trustee for the Harley Family Trust (Adelaide Blinds).

[3] Adelaide Blinds oppose the application. It filed a response on 8 March 2024 raising a jurisdictional issue.

[4] The jurisdictional issue is that Ms Azevedo was not dismissed within the meaning of the FW Act. Adelaide Blinds contend that Ms Azevedo’s employment ended either by resignation or abandonment.

[5] The decision of the Full Court of the Federal Court of Australia in *Coles Supply Chain Pty Ltd v Milford*¹ requires the Commission to determine a dispute about the fact of a dismissal from employment under s 365 of the FW Act before the Commission can exercise powers conferred by s 368. It is thus necessary to determine the jurisdictional issue if Ms Azevedo’s application is to proceed.

[6] I issued directions on 28 March 2024 and heard the matter in person on 12 April 2024. Ms Azevedo was self-represented. Adelaide Blinds was represented by its owner Mr Harley and a Store Manager Ms Jessen, who is Mr Harley’s daughter.

[7] I received evidence and submissions, including oral evidence from five persons:

Called by applicant

- Ms Margarida Azevedo (applicant);

Called by respondent

- Mr Mark Golding, Factory Team Leader;
- Ms Jemma Miller, Office Manager;
- Ms Stephanie Jessen, Store Manager; and
- Mr Mark Harley, Owner.

[8] Some (but not all) facts relevant to the jurisdictional issue are in dispute. To the extent necessary, I deal with these issues in the body of this decision.

[9] This decision deals solely with the jurisdictional issue; not whether adverse action was taken for an unlawful reason.

Facts

[10] The Trustee for the Harley Family Trust, through trustee companies, is a blind retailer which trades in South Australia as Adelaide Blinds and Security, Mr Blinds and Total Blinds Wholesalers (Adelaide Blinds). In practice, the Mr Blinds business is generally conducted in the geographical north of Adelaide while the Adelaide Blinds and Security business is conducted in the geographical south.

[11] All are owned by Mr Harley.

[12] Ms Azevedo commenced work with the employer on 5 October 2023, as a full time sales consultant. She would attend to customer needs, inform customers of products, obtain quotes and place orders. She would do so by phone, email and in person, from the business office and also through customer home and vehicle visits.

[13] The employment relationship lasted only four months.

[14] In this period Ms Azevedo was absent for a handful of days due to sickness (for which she provided a certificate). Ms Azevedo's evidence was that on the days she was absent unwell, she would endeavour to check or respond to customer communication if possible.

[15] Ms Azevedo commonly would not work every second Monday.

[16] Ms Azevedo commenced working in the Mr Blinds part of the business. It was agreed between her and Mr Harley that early in the 2024 year she would transition to the Adelaide Blinds and Security part of the business. This had been intended when she was first employed. The transition commenced during the final week of January 2024 but had not been completed or formalised by the date of alleged dismissal..

[17] Ms Azevedo initiated a conversation with Mr Harley on 30 January 2024 when she queried why she was still receiving calendar appointments in the Mr Blinds part of the business. Ms Azevedo had also experienced some problems with a quotation software system used by the business, 'Quote-rite'.

[18] Events relevant to the alleged dismissal concern the week of 5 to 12 February 2024.

[19] Ms Azevedo attended work on Monday 5 and Tuesday 6 February.

[20] She was absent due to sickness on Wednesday 7, Thursday 8 and Friday 9 February.

[21] Ms Azevedo was not scheduled to work on Monday 12 February 2024 and did not do so that day or on any days that followed.

Tuesday 6 February

[22] Whilst at work on Tuesday 6 February 2024 a lengthy discussion, which can readily be characterised in part as an argument, ensued between Ms Azevedo and Mr Harley. The discussion occupied around three quarters of an hour. It occurred in the office and in the presence and earshot of other persons, particularly the office manager Ms Miller. When after about ten minutes it became apparent to Ms Miller that the discussion had become heated and turned into an argument, Ms Miller felt uncomfortable and left the immediate office environment.

[23] The discussion and argument concerned, amongst other matters, criticism by Mr Harley of aspects of Ms Azevedo's work performance including quotes, sales, conversion rates, responsiveness and follow-up. Ms Azevedo complained about commissions, a written employment contract sent late and which had differed from terms on which Ms Azevedo believed she had accepted the job, and an unauthorised reduction of her annual leave balance over Christmas.

[24] Mr Harley remained calm but firm during the argument. Ms Azevedo became defensive to the criticism and at times raised her voice towards the owner. Mr Harley told Ms Azevedo that she was rude and unprofessional. Ms Azevedo retorted, demanding examples.

[25] These findings are largely uncontested and made having particular regard to the evidence of Ms Miller, which was clear and unembellished.

[26] Relevantly, during the course of the argument words to the following effect were twice exchanged at the initiative of Ms Azevedo:²

“Ms Azevedo: well do you want me to resign then?”

Mr Harley: no, but I want you to do your job properly.”

[27] The criticism and altercation upset Ms Azevedo and caused her to feel stressed and anxious. She attended afternoon appointments but felt unwell. Her evidence was that she had a panic attack on the way home.

Wednesday 7 February

[28] The following day (Wednesday 7 February) Ms Azevedo rang in sick and made an appointment to see her general practitioner, which was scheduled for that afternoon. Apart from going to the doctor, she remained at home.

[29] Text messages were sent by Ms Azevedo to Mr Harley at 8.46am that morning:³

Ms Azevedo

“Hi Mark, I’m not mentally fit for work today or the rest of the week. After the constant bombardment of accusations that I endured yesterday and in front of not only a co-worker but also a friend, I was gobsmacked. I had major anxiety during my last appointment and on the way home. I have an appointment today to see my doctor who will refer me for further treatment. I have advised my customer at Reynella already. Please get Jemma to reschedule the other appointments. Margarida.”

Ms Azevedo

“I will finish any other outstanding quotes and follow up on those I need to.”

[30] Ms Azevedo received no response from Mr Harley or any person on his behalf on 7 February 2024.

[31] Ms Azevedo obtained a medical certificate certifying her unwell up to and including the remainder of the working week (7 to 9 February inclusive). She provided this certificate to the employer at its request the following day.

Thursday 8 February

[32] On Thursday 8 February 2024 Ms Azevedo again remained home unwell. As had been advised by text to Mr Harley the day prior and consistent with her practice of checking customer orders or quotes on-line even when at home sick, during the morning (prior to 9:00am) she tried to log into Quote-rite. She discovered that she could not do so, receiving messages that her user name and password were invalid.

[33] I find that, unknown to Ms Azevedo, upon Mr Harley being informed on Wednesday 7 February that Ms Azevedo would not be at work on 7, 8 or 9 February, the employer disabled her access to the Quote-rite system. I discuss later why the employer did this.

[34] Text messages were exchanged on Thursday 8 February between Ms Azevedo and Mr Harley:⁴

Mr Harley (8.29am)

“Margarida I have checked your Personal Leave and you only have 9.13 hrs left, so that’s all I can pay you. Also I need a doctors certificate. I will see you next Monday for a meeting at 10am please bring all company property for that meeting, I will have my HR lady there, you can bring an advocate if you like.”

Ms Azevedo

“Hi Mark, sorry but I can’t make it Monday, I need my car to be seen as I previously told you. I don’t need an advocate either. We can make it another day. Not Thursday or Friday because I am going in for scans. Cheers.”

Ms Azevedo

“Oh and here’s your Doctors Certificate (Because I know you never believed me) Cheers.” (*screen shot of medical certificate attached*)

Mr Harley (12.38pm)

“Margarida as an Employer that’s what I request for every employee every time and I am well within my rights to do so and unless you are hiding something you shouldn’t have a problem with that.”

Ms Azevedo (12.57pm)

“Hiding something? Really Mark? Tell you what, I can drop everything off on Saturday morning at Mr Blinds location. It’s on the way to my mum’s. There’s no need to prolong this any further. Let me know if this works. See you then. Regards Margarida”

[35] Ms Azevedo received no response from Mr Harley or any person on his behalf to her request that the Monday (12 February) proposed meeting be moved to a later date.

[36] Mr Harley interpreted the final (12.57pm) text message sent on 8 February by Ms Azevedo as an apparent resignation. He asked Ms Jessen to communicate with Ms Azevedo to confirm her resignation and report back to him.

[37] On the afternoon of Thursday 8 February 2024 (3.57pm) Ms Azevedo sent a personal text to Mr Harley’s wife. It relevantly stated:⁵

“Hey Lynne...In other matters which I’m sure you know about, I just wanted to express my deepest thanks to you for your continued support, your show of respect and kindness towards me always. You have always treated me with utmost respect and I have appreciated this always. I wish you all the best for the future. Take care. Margarida”

Friday 9 February

[38] On Friday 9 February 2024 Ms Azevedo remained home unwell. At 8.18am Ms Azevedo received the following text message from Ms Jessen (the store manager and her immediate report):

“Hi Margarida we have had many customers querying where their quotes are and why they haven’t had responses. We have just today been informed by staff members you have resigned please hand in your letter of resignation and all company property including phone, laptop, all samples and fuel card as soon as possible. Thank you.”

[39] Later that morning (9.43am) Ms Azevedo telephoned an employee with whom she worked and had good relations, Mr Golding. It was very brief. There is a factual dispute. According to Mr Golding, the call went as follows:⁶

“Ms Azevedo: thank you for being professional and helpful

Mr Golding no worries; are you leaving?

Ms Azevedo: yes, I’m under stress

Mr Golding: oh not good. Do you have something else lined up?

Ms Azevedo: yes I have something in the works.

Mr Golding: well good luck then. I wish you well.”

[40] Ms Azevedo’s evidence was that she did not say “yes, I’m under stress” or “ yes I have something in the works”.

[41] I prefer Mr Golding’s evidence. He was clear in recall. He had not been associated with the dispute between Ms Azevedo and Mr Harley. Whilst taking into account that he is a continuing employee and that his version is more favourable to the employer’s case than Ms Azevedo’s, he gave his evidence freely. Given the stress and anxiety being experienced by Ms Azevedo on 9 February 2024, and the fact that Ms Azevedo initiated the call to thank Mr Golding for past help, Mr Golding’s evidence is plausible and preferred.

[42] During Friday 9 February 2024 Ms Jessen reported to Mr Harley that Ms Azevedo had informed other staff that she had resigned and that she (Ms Jessen) had sought confirmation of this in writing.

[43] Earlier on Friday 9 February 2024 (6.42am) Ms Azevedo noticed on the web site seek.com that an advertisement had been placed by Adelaide Blinds and Security for recruitment of a “Sales Consultant (Mr Blinds)”. The advertisement, appearing on 9 February 2024, stated that it had been placed “1d ago”.

[44] Ms Azevedo was upset to see this advertisement and considered that the business was advertising for a replacement for her job.

Saturday 10 February

[45] On the morning of Saturday 10 February 2024 Ms Azevedo sent Ms Jessen the following text message:⁷

“Good morning Stef I have not had a response from your father Mark in regards to returning the work property back to the Mr Blinds location today. I am surprised that you are not aware of the circumstances that took place last Tuesday. I want to respectively return the property as soon as possible so will anyone be there today to do this? Or will next week be better for you. Tuesday or Wednesday? Regards Margarida

[46] Ms Jessen replied:

“I am aware of the conversation that have been had Margarida. Yes the office is open today until 1. Please return everything. Thank you.”

[47] Later that morning (Saturday 10 February) Ms Azevedo drove to the Mr Blinds location and returned company property including the company supplied laptop and staff building pass. She forgot to return two other items.

Final payments

[48] Mrs Azevedo did not attend for work on Monday 12 February or in the week that followed. Mr Harley did not expect her to do so.

[49] Ms Azevedo briefly attended the workplace on Tuesday 13 February and returned the remaining two items she had forgotten to return the previous Saturday. No discussion was held with any person about her employment.

[50] Ms Azevedo was not paid salary or commission after 7 February 2024. Her weekly payslip for the period 1 February 2024 to 7 February 2024 shows that a payment of wages for that week was made on 8 February 2024. Her weekly payslip for the following week (period 8 February to 14 February) shows only a payment for 3.156 hours of personal leave which was paid in the regular pay run on 15 February. An amount of 2.923 days of annual leave accrual is recorded but there is no record of this having been paid, something acknowledged by Mr Harley as error on his part.

[51] Ms Azevedo commenced these proceedings two weeks later, on 28 February.

Submissions

Ms Azevedo

[52] Ms Azevedo submits that she was dismissed on the initiative of her employer.

[53] She submits that she did not resign nor intend to resign.

[54] Ms Azevedo points to the following which, in combination, she contends point to a finding that she was dismissed at the initiative of the employer:

- She was absent from work for lawful reasons on 7, 8 and 9 February (personal leave), had a scheduled day off on 12 February and would have worked on 13 February had her employment not ceased by then;
- Whilst absent on personal leave the employer disengaged her access to the Quote-rite system, in all probability on 7 February but certainly by the early morning on 8 February;
- On 8 February she asked the employer to reschedule a disciplinary meeting it had unilaterally proposed for Monday 12 February (her day off) and she had suggested Tuesday 13 or Wednesday 14 February as alternatives, but received no reply;
- On 9 February she was asked by the employer to return company property as soon as possible;
- On 9 February the employer placed a job recruitment advertisement for her position, with the advertisement in all probability first placed the day prior; and
- The employer made final payments to her via the payroll system on 15 February.

[55] Ms Azevedo submits that she did not abandon her employment as she was ready, willing and able to work when well enough and scheduled to do so on 13 February 2024, but her employment had concluded by then.

[56] Ms Azevedo submits that she did not resign. In particular she submits that:

- she returned company property on 10 and 13 February only because she was asked to do so;
- she contacted other staff (including Mr Golding on 9 February) and the owners wife (on 8 February) out of politeness and to maintain good relations, not because she was or had resigned; and
- she refrained from resigning or confirming to Ms Jessen that she had resigned.

[57] Ms Azevedo submits that her conduct relied upon by Adelaide Blinds has been taken out of context in that:

- She only proposed to return property on an earlier date in response to the employer's request to return property, and did so, in the terms of her email, only "if this works";
- She spoke to Mr Harley's wife in a personal capacity and for reasons unrelated to her employment;
- She spoke to Mr Golding out of decency and respect, and because by then she had believed she had been constructively dismissed and was being pushed out; and

- Even if she had told Mr Golding she was leaving, this did not mean that she had resigned. She was leaving because by then she had been forced out by the employer.

Adelaide Blinds

[58] Adelaide Blinds submit that Ms Azevedo, by her conduct, left her employment on her own account by either resignation or abandonment. In particular, Adelaide Blinds relies on the following:

- Ms Azevedo was twice expressly told by the owner on 6 February that he did not want her to resign but wanted her to improve her performance;
- Ms Azevedo resigned on 8 February immediately following being directed to attend a disciplinary meeting scheduled for the following week. She did so in writing by telling the owner “I can drop everything off on Saturday morning at Mr Blinds location... There’s no need to prolong this any further.” Ms Azevedo did so because she did not wish to have her performance further debated, following the argument she had with Mr Harley on 6 February during which she had been defensive and insubordinate;
- Ms Azevedo confirmed the fact of resignation by returning company property on 10 February, which was a date she had nominated;
- Ms Azevedo confirmed the fact of resignation by telephoning the owners wife on the afternoon of 8 February and thanking her for past support; and
- Ms Azevedo confirmed the fact of resignation by telephoning a co-worker; Mr Golding, on the morning of 9 February expressly saying she was leaving and thanking him for past support.

[59] Adelaide Blinds submit that its conduct relied upon by Ms Azevedo has been taken out of context in that:

- Ms Azevedo was disengaged from Quote-rite as she was absent from work for a three day period and follow-up on her quotes needed to be undertaken by others;
- The advertisement for a Sales Consultant was not specific to Ms Azevedo’s role. The business has an ongoing responsibility to recruit sales consultants;
- The request to return company property was for a future date aligning to a future disciplinary meeting that did not occur because Ms Azevedo resigned to pre-empt that meeting; and
- Ms Azevedo did receive a text from Mr Harley after she sought an alternate meeting date. Following that text, she resigned.

Consideration

[60] Section 365 of the FW Act provides:

“365 Application for the FWC to deal with a dismissal dispute

If:

- (a) a person has been dismissed; and
- (b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.”

[61] Section 365 requires a dismissal to have occurred as a jurisdictional fact. “Dismissal” for these purposes (and other purposes of the FW Act) is defined in s 386(1). It provides:

“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.”

[62] Determining whether, on the facts, a person has been dismissed is an objective exercise. That a person believes they have been dismissed or another believes or believed the contrary does not make it so.

[63] A finding as to whether there has been a dismissal is based on a consideration of the evidence as a whole, including inferences reasonably drawn from the conduct of the parties.

[64] In this matter it is clear that no evidence exists of an expressly made decision to dismiss or notification of dismissal. Equally there is no evidence of an expressly made resignation or communication of resignation.

[65] Yet, it is equally clear that both Ms Azevedo and Adelaide Blinds agree that an employment relationship which had existed on 6 February had, at least by Tuesday 13 February, ended.

[66] That there is no express evidence of a dismissal or resignation is a consequence of the conduct of both parties. What is readily apparent is that the employment relationship had fallen into serious disrepair after the argument in the office between Ms Azevedo and Mr Harley on 6 February. In the days that followed, each danced around the other, with both (for different reasons) wanting the relationship to end but neither (again for different reasons) wanting to deliver the final blow.

[67] Ms Azevedo wanted the relationship to end because she had lost respect for Mr Harley (evident by her insubordinate attitude on 6 February), was by the time of these events looking for another job,⁸ and was offended by being directed on 8 February to attend (what her experience of having previously worked with a union told her⁹) was a disciplinary meeting the following week where she felt it was likely she would be fired. Yet Ms Azevedo did not want to cast the final blow because she felt it was her employer who had to take responsibility for the relationship ending in this way.

[68] On the other hand, Adelaide Blinds wanted the relationship to end because Mr Harley had lost trust and confidence in Ms Azevedo, regarding her as insubordinate and failing on performance grounds. Yet he preferred to somewhat opportunistically allow her to end things, even if he saw benefit in her departure.

[69] This matter is not however determined by reference to these subjective desires or preferences. It is decided by reference to conduct, objectively assessed.

[70] I do not find that Ms Azevedo abandoned her employment. If well enough, she would have attended for work on her next scheduled working day (13 February) if she was still in employment.

[71] Leaving aside the separate question as to whether a resignation (if any) was forced within the meaning of s 386(1)(b), I turn to what inferences and conclusions can be reasonably drawn from the conduct of the parties in the period 6 to 10 February so as to determine whether the employment relationship ended at the hand of Ms Azevedo (resignation) or at the initiative of the business (dismissal).

[72] Having regard to the evidence, it is readily apparent that no single act is conclusive one way or the other in deciding this question. Rather, the conduct of each party must be viewed in context. In this matter an important contextual consideration is that conduct in this period occurred as part of a continuum concerning a relationship that had come under severe strain. Aspects of the conduct of each party in the period 6 to 10 February inclusive point both in favour of and against the finding they seek; other conduct is ambiguous.

[73] The employer places heavy weight on the collective force of three aspects of Ms Azevedo's conduct: her final text message to Mr Harley on 8 February; her telephone calls to Mr Harley's wife and Mr Golding on 8 and 9 February; and her return of company property on 10 February.

[74] For reasons of context, I do not consider these actions as decisive as the employer suggests.

[75] The final text message to Mr Harley on 8 February was a response text. It was a response to Mr Harley implying in an accusatory manner that Ms Azevedo was not being full and frank about her desire to change the date of the disciplinary meeting ("hiding something"), a meeting where she had (moments earlier) been instructed "to bring all company property". It was in this context that Ms Azevedo then responded:

“Hiding something? Really Mark? Tell you what, I can drop everything off on Saturday morning at Mr Blinds location. It’s on the way to my mum’s. There’s no need to prolong this any further. Let me know if this works. See you then. Regards Margarida”

[76] This response, whilst clearly written by Ms Azevedo in frustration, points somewhat in the direction of Ms Azevedo ending her employment but falls short of a statement of resignation. I accept that Ms Azevedo foresaw the likely demise of her employment by dismissal and, in the moment of writing that further text, sought not to prolong the unpalatable dance of termination. But given that she knew that she had already been removed from the Quote-rite system and had already been instructed to bring company property with her to the disciplinary meeting, she need not have been a prophet to see what was likely coming her way. I accept Ms Azevedo’s evidence that she “felt defeated”¹⁰ and wrote this text because she “did not want to feel further baited”¹¹ In the words of her evidentiary statement “I had had enough by now”¹².

[77] For the same reasons, Ms Azevedo’s telephone calls to Mr Harley’s wife and to Mr Golding that afternoon and the following morning do not constitute statements of resignation. Neither Mr Harley’s wife nor Mr Golding had the authority of the employer to receive a resignation. Nor were either of these conversations a confirmation of resignation. The conversations were equally consistent with what Ms Azevedo believed to be a constructive dismissal. She was indeed saying thank you and goodbye. Whilst I found Ms Azevedo’s evidence that she only made these calls for personal reasons and out of politeness to be somewhat self-serving, by the time she did so Ms Azevedo had good reason to believe that she had been constructively dismissed. I have found that she had already been taken off the Quote-rite system, had been told to return company property the following Monday, and (by the time of speaking to Mr Golding) had seen a job comparable to hers advertised publicly by her employer.

[78] The return of company property on 10 February cannot therefore be divorced from the instruction first made by Mr Harley two days earlier that company property had to be returned on 12 February. Ms Azevedo was simply bringing that process forward. She did so after hearing nothing more from Mr Harley, and after Ms Jessen repeated (on 9 February) that she should do so. Whilst I accept Ms Jessen’s evidence that she did so in good faith believing that Ms Azevedo had told staff she had resigned, and this was not expressly refuted to her by Ms Azevedo, it is noteworthy that Ms Jessen’s 8.18am email predated the discussion between Ms Azevedo and Mr Golding.

[79] I do not accept the employer’s evidence¹³ that because property in Ms Azevedo’s possession included product samples it was operationally necessary to ask for those samples to be returned, and that the direction to do so was unrelated to Ms Azevedo’s employment security. Firstly, I prefer Ms Azevedo’s evidence that the stores had additional samples to cover a salespersons absence. Secondly, the text instruction to return property was incorporated into the same instruction to attend the disciplinary meeting on 12 February. As such, there was clearly a connection between the two. Thirdly, Ms Azevedo was not certified to be absent on personal leave beyond 9 February. She was scheduled to next work on 13 February. An instruction to return property on 12 February when it is expected the employee will work and use that property the following day is not reasonably explained on operational grounds.

[80] I also take into account that an employee ending their employment is a significant act, one that commonly (and in the case of Ms Azevedo who had no other job lined up despite what she told Mr Golding) places financial pressure on them. For these reasons, the fact of resignation needs to be clearly established on the balance of probabilities. In this matter, that finding is not reasonably open.

[81] Even if Ms Azevedo's final text to Mr Harley on 8 February 2024 and conduct in the two days that followed (the phone calls and return of property) could be construed as a resignation, the overall context would lead me to conclude that it was unreasonable for the employer to rely on it as such. This context includes that Ms Azevedo was at the time unwell on personal leave, her text of 8 February was clearly written in frustration, and was responsive to a directive which barely concealed a disposition by the employer that her employment end one way or the other and an unreasonable suggestion of bad faith on her part.

[82] In contrast, the conduct of Adelaide Blinds more clearly supports a finding that Ms Azevedo's employment was terminated at its initiative despite there being no singular act of dismissal.

[83] Firstly, whilst Ms Azevedo was absent on personal leave, the employer disengaged her access to the Quote-rite system, in all probability on 7 February but certainly by the early morning of 8 February. The effect of this was that Ms Azevedo could not do her job. Further, and importantly, Ms Azevedo had expressly informed Mr Harley by text on the morning of 7 February that even though she was unwell, she would check on quotes during her days of sickness.¹⁴

“I will finish any other outstanding quotes and follow up on those I need to.”

[84] Mr Harley's evidence was that Ms Azevedo was disengaged from the Quote-rite system because “the previously booked appointments had to be rescheduled and quotes had to be sent...so another user could use the licence as we only have a licence for 5 users at a time”.¹⁵ There are a number of difficulties with this explanation. Firstly, no evidence was led as to the holders of the five licences and whether the number of licensees could be adjusted or was within the employers control to adjust. Secondly, no evidence was led as to why disengagement from the Quote-rite system was the only reasonably available option. Rather, the evidence is that no notice was given to Ms Azevedo of the unilateral decision to withdraw her access and, if indeed only she was licensed to access her quotes, no thought was given to asking her to enter the system and provide quotation details back to the office rather than disengage her access. Thirdly, whilst taking into account that a three day absence is likely to be more disruptive to a business than a single day, Ms Azevedo's access to Quote-rite had not been disengaged on previous occasions when she had taken personal leave.

[85] In short, despite knowing that Ms Azevedo intended to follow up her quotes whilst on personal leave, and despite Ms Azevedo having done so on prior occasions,¹⁶ her access to the quotation system was unilaterally disengaged.

[86] In so doing, Adelaide Blinds may have been acting in the best interests of its clients. However, the employer's explanation does not reasonably explain its conduct as being in the ordinary course of business and unrelated to its desire to conclude Ms Azevedo's employment.

[87] Secondly, Ms Azevedo was unilaterally told on 8 February to attend a meeting on 12 February. The purpose of the meeting was not expressly disclosed but what was disclosed clearly inferred it was of a disciplinary character. Ms Azevedo was told that it would be with the owner, that Mr Harley “will have my HR lady there”, that she could “bring an advocate” and that she should “bring all company property for that meeting”. These facts support an inference that Mr Harley, despite telling Ms Azevedo two days earlier that he did not want her to resign but to do her job better, had by then formed the view that he wanted the employment relationship to end by at least the scheduled meeting (whether by resignation, agreed parting, or dismissal).

[88] Thirdly, the employer ignored Ms Azevedo’s request that the meeting be deferred to the Tuesday or Wednesday. This request was reasonable; Monday was Ms Azevedo’s day off. Mr Harley’s response simply referenced the managerial prerogative and doubled down on his insistence that Ms Azevedo attend as she had been instructed (“I am well within my rights to do so”). Mr Harley’s evidence¹⁷ that he did not suggest an alternate date because of the text message he then received presupposes that the subsequent text message by Ms Azevedo was a clear expression of resignation. I have found that, in context, it pointed somewhat in that direction but did not of itself have that character and that reliance on it as such was unreasonable.

[89] Fourthly, by at least 9 February (and in all probability on 8 February) the employer placed a job recruitment advertisement for a position equivalent to that held by Ms Azevedo. I found Mr Harley’s evidence¹⁸ that this advertisement was simply part of an ongoing attempt to maintain labour supply in his business self-serving and unconvincing.

[90] Fifthly, despite Mr Harley asking Ms Jessen to obtain confirmation of what he believed to be Ms Azevedo’s resignation, he subsequently proceeded to arrange for final payments to be made via the payroll system despite the requested written confirmation of resignation never having been proffered. I accept that Mr Harley did so because Ms Azevedo had returned company property on 10 February. However, for reasons outlined above, that act alone, when viewed in context, was not an act of resignation.

[91] For these reasons, I conclude that Ms Azevedo’s employment ended, in reality, at the initiative of Adelaide Blinds, and not by Ms Azevedo. Although, as I have observed, each somewhat opportunistically danced around the other waiting for the other to strike the blow ending the employment relationship and Ms Azevedo foresaw what was coming, it was the employer’s conduct which more clearly initiated and then controlled the ending of the relationship.

[92] I make this finding recognising the sincerity of Mr Harley’s closing address in which he stated that as a small business person he had in good faith believed Ms Azevedo’s 8 February text message to have been a resignation and that this belief had informed the employer’s subsequent conduct. As I have indicated, subjective belief does not determine this matter as the events fall for objective assessment. A finding of dismissal in a sea of ambiguous and somewhat conflicting conduct by both parties need not result in the reputational damage opined by Mr Harley.

[93] I make no finding as to the reason or reasons why the employer did so, as such a finding is unnecessary to determine this jurisdictional issue.

[94] Whilst it is also unnecessary to consider s 386(1)(b), had I found Ms Azevedo to have resigned, it would have been clearly open to find that the resignation was the probable result of a course of conduct by the employer between 6 and 10 February 2024, and as such a dismissal by forced resignation within the meaning of the FW Act.

Conclusion

[95] As Ms Azevedo was dismissed within the meaning of the FW Act, her application is within jurisdiction. It will be listed for conference under s 368. The jurisdictional objection by Adelaide Blinds is dismissed.

[96] An order giving effect to this decision accompanies its publication.¹⁹



DEPUTY PRESIDENT

Appearances:

M. Azevedo, on her own behalf

M. Harley, with S. Jessen assisting, on behalf of The Trustee for the Harley Family Trust

Hearing details:

2024.

Adelaide:

12 April

Printed by authority of the Commonwealth Government Printer

<PR774462>

¹ [2020] FCAFC 152

² Audio transcript Ms Azevedo 1:37

³ A1 and R4

⁴ A1 and R4

⁵ R4

⁶ R1

⁷ R3

⁸ Audio transcript Ms Azevedo 1:30

⁹ Audio transcript Ms Azevedo 2:32

¹⁰ Audio transcript Ms Azevedo 1:42, 1:59 and 2:05

¹¹ Audio transcript Ms Azevedo 1:58 and 2:25

¹² A1 Statement of Margarida Azevedo page 8

¹³ R4 Statement of Mark Harley paragraph 7

¹⁴ Audio transcript Ms Azevedo 1:39

¹⁵ R4 Statement of Mark Harley paragraph 6

¹⁶ Audio transcript Ms Azevedo 2:37

¹⁷ Audio transcript Mr Harley 3:22

¹⁸ Audio transcript Mr Harley 3:15 – 3:19

¹⁹ [PR774463](#)