



# DECISION

*Fair Work Act 2009*  
s.365—General protections

**Anthony Vassallo**

v

**Lutheran Church Of Australia Queensland District T/A Redeemer Lutheran College, Denis Mercier-Lee, Richard Cornish, Brenton Altmann, Nick Verreyne, Tanya Crooks, Darryl Muller, Mark Vainikka, Lutheran Church Of Australia Queensland District T/A Lutheran Education Queensland**

(C2023/6939)

DEPUTY PRESIDENT LAKE

BRISBANE, 4 JULY 2024

*Application to deal with contraventions involving dismissal – forced resignation – jurisdictional objection– no dismissal – jurisdictional objection upheld – application dismissed.*

[1] Mr Anthony Vassallo (the **Applicant**) lodged a general protections application involving dismissal with the Fair Work Commission (the **Commission**) on 8 November 2023. The Applicant claims that adverse action was taken against him by the Lutheran Church of Australia Queensland District T/A Redeemer Lutheran College (the **Respondent**) along with seven other named Respondents under ss.340, 343 and 351 of the *Fair Work Act 2009* (Cth) (the **Act**).

[2] The Applicant named the following Respondents:

1. Lutheran Church of Australia Queensland District T/A Redeemer Lutheran College
2. Denis Mercier-Lee
3. Richard Cornish
4. Brenton Altmann
5. Nick Verreyne
6. Tanya Crooks
7. Darryl Muller
8. Mark Vainikka

[3] The Respondent raised a jurisdictional objection that the Applicant was not dismissed under s.386 of the Act as the Applicant resigned from his employment on 18 October 2022. The Applicant contests the objection on the basis that he was constructively dismissed and forced to resign under s.386(1)(b) of the Act. As Redeemer Lutheran College was the employer of the Applicant, they will be considered as the Respondent for the purposes of this decision.

[4] Directions were issued and the matter was listed for hearing on 11 March 2024 and 27 March 2024. The Applicant was represented by O’Callaghan Workplace Law, and the Respondent was represented by Clayton Utz.

[5] There was no objection raised by either party regarding representation at the Hearing. I granted permission for both the Applicant and the Respondent to be represented by Counsel under s.596 of the Act. Mr Jim Murdoch KC appeared as Counsel for the Applicant, and Mr Charles Martin appeared as Counsel for the Respondent. Representation was granted on the basis that the matter would run efficiently given the complexity of the matter, and there would be no unfairness between the parties.

## Background

[6] The Applicant commenced full-time employment with the Respondent as a Business Manager on 1 January 2015.<sup>1</sup>

[7] The substance of the issues of this matter arising from 28 October 2022. Mr Denis Mercier-Lee placed a document titled ‘*Re: Official Complaint against Michael Kleidon, Principal Redeemer Lutheran College, Hunter Walkenhorst, Chair, College Council, and Anthony Vassallo, Business Manager*’ on a online cloud storage system which was accessible by 9 other staff (**Dropbox incident**). Mr Mercier-Lee is a Deputy Principal of the Respondent.<sup>2</sup>

[8] Mr Mercier-Lee details in the document a complaint about the former principal of RLC, Mr Michael Kleidon. The complaint about Mr Kleidon is 5 pages in length raising past conduct and business decisions that were targeting Mr Mercier-Lee to be made redundant.<sup>3</sup> He also wrote a document making a complaint about Mr Hunter Walkenhorst and the Applicant.

[9] The complaint document about Mr Vassallo consists of 2 paragraphs which state the following:

*“Since my tenure began at Redeemer Lutheran College, Anthony Vassallo has treated me with contempt. Our very first interaction occurred when Anastasia Strong and I met with him to discuss how flexible we would be in applying the leave entitlements allowed in the enterprise agreement. Anthony became frustrated that we were suggesting the College be more flexible than just following the letter of the law. He accused me of being a Union sympathiser and refused to listen to our presentation.*

*Since then, even though there is a thin dividing wall between our office, Anthony has not chosen to speak with me but to communicate with me through the medium of email. I have made every attempt possible to open the door between our offices to have a conversation. I have also attempted to make small talk, but he has not reciprocated. I have several examples where Anthony’s tone in his emails have been accusatory and disrespectful. I believe that this is bullying behaviour as it is repeated and excluding in nature. Anthony has no trouble speaking with Richard Cornish or Anastasia Strong face to face but chooses not to speak with me face to face. I believe that Anthony has great difficulty with my sexuality. As a conservative Roman Catholic, he would believe that I am a sinner and that my sexuality is an abomination. The Code of Canon Law describes the practice of*

*homosexuality as intrinsically disordered, and as a faithful Roman Catholic, he would find me, being a Deputy Principal in a Christian School, incongruous with his Christian understanding.”<sup>4</sup>*

[10] The Applicant was not aware of the document until 11 November 2022 as he was not one of the nine staff members with access to the Dropbox.<sup>5</sup> Upon receiving the complaint, the Applicant raised this issue verbally with Mr Richard Cornish, who was the Acting Principal.<sup>6</sup> The Applicant also sent a copy of the complaint document to the Redeemer Lutheran College Council (**College Council**) stating that the complaint was available to RLC staff.<sup>7</sup>

[11] On 12 November 2022, Mr Michael Mayer wrote an email on behalf of the College Council to the Applicant. Mr Mayer wrote that the Applicant’s concerns would be actioned and informed him of the next steps that the Respondent would take.<sup>8</sup> The Applicant raised concerns of the Dropbox incident and requested a formal investigation in an email titled ‘*Action over complaint*’.<sup>9</sup> He requested a meeting with the Council to discuss writing a letter to Mr Mercier-Lee about further action if further statements were made with the assistance of a solicitor. The Applicant asked the Council to provide a written direction to Mr Mercier-Lee about his ‘defamatory conduct’.<sup>10</sup>

[12] On 14 November 2022, Mr Cornish informed Mr Mercier-Lee that the confidentiality of his complaint letter had been compromised and set out options to address the situation. The options were that Mr Mercier-Lee would work onsite subject to certain undertakings, work remotely or be stood down on pay until 2 December 2022.<sup>11</sup> Mr Mercier-Lee elected to work onsite subject to undertakings.<sup>12</sup> An email was sent from Mr Vassallo to Mr Cornish titled ‘*defamation issue*.’ The Applicant accepted the interim decision made regarding Mr Mercier-Lee and was ‘more than willing to work on site’.<sup>13</sup>

[13] On the same day, the Respondent engaged BDO to undertake an investigation of the Dropbox incident. The Respondent sought to investigate the following:

- a) How did two confidential documents end up on Mr Vassallo’s desk on 11 November 2022 through digital and data analysis?
- b) Who had access to the complaint?
- c) Where were the documents stored in electronic form?
- d) Who had access to the location of the documents on RLC servers?
- e) Who accessed the document on RLC servers?
- f) Who received the document via email?
- g) Who printed the documents based on evidence on RLC servers?<sup>14</sup>

[14] On 25 November 2022, the Applicant sent a written complaint to the College Council. He alleged that Pastor Altmann had made derogatory remarks about the Applicant, engaged in rumourmongering, breached confidence, and was involved with the Dropbox investigation where he should not have been due to his close friendship with Mr Mercier-Lee.<sup>15</sup>

[15] On 28 November 2022, Mr Mercier-Lee was stood down on full pay from RLC.<sup>16</sup> The Applicant was informed that the Respondent was progressing his complaint.<sup>17</sup>

[16] On 7 December 2022, BDO had completed their investigation and a report was provided which uncovered the following (**BDO Report**):

- Mr Mercier-Lee uploaded the document titled complaint to an incorrect folder within the Dropbox.
- The particular Dropbox folder was accessible by 9 staff members of the Respondent.
- Ms Maddi Jones, one of the 9 staff members with access to the folder, received notification that a new document had been uploaded. She opened the document and was not sure whether the document was meant to be seen by the other staff members. She called 3CX Phone System to speak with another staff member where no one answered.
- Ms Jones then contacted Ms Robinson directly. Ms Robinson contacted Mr Mercier-Lee regarding the complaint.
- Mr Jones forwarded Mr Mercier-Lee an email she received from Dropbox about changes that Mr Mercier-Lee made in the Dropbox.
- Multiple users' access was removed although it was unknown which user removed access.
- Mr Mercier-Lee deleted the complaint from the Dropbox.
- Ms Jones had access of the complaint on her phone and took a screenshot of the complaint.
- Ms Robinson texted Mr Kleidon regarding a situation that personal information had been shared.
- Ms Jones had shared the screenshot of the complaint with Mr Kemp on 11 November 2022 which was 11 days after Ms Jones was aware of the complaint. Mr Kemp had told the Applicant of the complaint and sent him a copy.
- The Applicant asked for the original complaint from Ms Jones. The Applicant printed three copies of the complaint from his work laptop.<sup>18</sup>

[17] There is a large gap which occurs from 28 November 2022 to 9 August 2023. No incident was raised by the Applicant or Respondent for a period of 245 days. Mr Mercier-Lee was stood down during this period.

[18] On 9 August 2023, Mr Mercier-Lee and Mr Verreyne met at the request of Mr Cornish about Mr Mercier-Lee's return to work and the professional expectations that were required of him.<sup>19</sup>

[19] On 11 August 2023, Mr Cornish met with the Applicant at 12:30pm. In this meeting, they discussed the Respondent seeking for Mr Mercier-Lee to return given his career goals and his age at the end of the term. The Applicant raised concerns that his complaint was outstanding for a long period of time, and the Respondent was requesting him to attend a meeting with the Respondent and Mr Mercier Lee in bad faith.<sup>20</sup>

[20] Later that day, Mr Cornish and the Applicant's wife Mrs Sharon Vassallo have a telephone call.<sup>21</sup> One of the main events that the Applicant relies on in establishing his constructive dismissal was this incident.

[21] The Applicant submits that Mr Cornish implied that the Applicant would be stood down if he elected not to attend a meeting with Mr Verreynne and Mr Mercier-Lee and his phone call with Mrs Vassallo would be the only opportunity to speak about the matter.<sup>22</sup> The Applicant stated that Mr Cornish asked the Applicant to consider resignation or he would be required to attend meetings with Mr Verreynne or Mr Mercier-Lee.

[22] Mr Cornish did acknowledge that he told the Applicant that he could be stood down, but he did not want the Applicant to be stood down. Mr Cornish disputes that he told the Applicant that he should resign from his employment or "go quietly", or that the hurdle of seeking a fair resolution of his complaint resulted from the Respondent's interference with the investigation.<sup>23</sup>

[23] On 13 August 2023, the Applicant emailed Mr Cornish titled '*Seeking justice*' which states:

*"Dear Richard,*

*Following the events of Friday, I have considered what legal remedy may be most suitable to seek the justice so far denied to me by the College, College Council, LEQ, CLEQ, and/or DCB, in regard to the extended and debilitating matters outstanding. I am writing to inform that a claim to Fair Work, on the grounds of Adverse-action, Coercion, and Misrepresentation, would appear to be the most compelling course of action.*

*Specifically:*

- *My Formal Complaint to the College Council, against the derogatory and intimidating "complaint"/written opinions and actions of Denis Mercier-Lee made to the Executive Director of LEQ against me in November 2022 and the publicising of these opinions withing (sic) the College community.*
- *In fact, you have told me that LEQ had instructed you and College Council not to progress my Complaint.*
- *I have never received any communication from LEQ about My Complaint.*
- *My right to defend myself was denied as I was never told by LEQ there was a Complaint by Denis against me yet you told me on Friday that LEQ may now begin to investigate the Complaint.*
- *The further Complaint that I made against the defamatory and mischievous statements made by Pastor Brenton Altmann against me to another staff member*

*in November 2022 has not been resolved or even progressed although I had been informed by College Council that both LEQ and the Bishop had been made aware of this complaint many months ago.*

- *The information you provided to me on Friday afternoon following the meeting that you had with Nick Verreyne of LEQ last Wednesday, 09 August 2023, that LEQ:*
  - *wants Denis to return to duty at the College before the end of this term.*
  - *that I would be stepped down from my job if I refused to meet with LEQ and*
  - *then with Denis, as,*
  - *LEQ wants Denis re-instated at Redeemer as they seemed to be “scared of Denis”.*
- *Additionally, the telephone call you made to my wife, Sharon, on Friday afternoon, made without my knowledge, was deeply unwelcome, debilitating, and shocking, given you repeated to her that it was likely that I would be stepped down from my role at Redeemer this coming week!!*
- *This call had the result (possibly the result that LEQ wants) of intimidating me and distressing Sharon so much that she is now asking me to resign my position at the College, fearful of what unwarranted disciplinary actions LEQ might take against me. (I do accept, however, that you may have been in the unenviable role of messenger.)*

*NB. On the basis of what you told Sharon, i.e. that you may not be able to speak to either of us in the near future, I took the heart-breaking precaution of removing my personal belongings from my office at Redeemer last night.*

*As we had previously agreed, I will be working on the College’s 2024 recurrent budget from home on Monday. Please let me know if I am able to attend work on Tuesday or if I should continue to work from home for a period of time.”<sup>24</sup>*

[24] On 15 August 2023, the Applicant emailed Ms Tanya Crooks writing:

*“Dear Tanya,*

*Last Friday afternoon, Richard told me that he had been informed by LEQ that I would be required to attend a meeting at LEQ and that if I refused, no matter how unsafe I felt, I would be stood-down from my position as Business Manager of Redeemer Lutheran College.*

*Richard then, unbeknownst to me, called my wife, Sharon, and told her the same thing. This has caused a considerable amount of distress to my family.*

*What is going on?*

*Yours sincerely,  
Anthony Vassallo”<sup>25</sup>*

[25] On 18 August 2023, Mr Verreyne sent the below email to the Applicant:

*“Dear Anthony,*

*Tanya has passed on your email to me and asked me to respond.*

*Apologies for the delayed response, but I have been trying to contact Richard to clarify with him the approach he has taken in your meeting.*

*I was not party to your discussion with Richard and as he is currently on personal leave, I have not been able to discuss this with him.*

*Given I have not been able to discuss the matter with Richard, I recommend we wait till Richard is back at work and then the three of us can meet to discuss and understand what has occurred. If you have any other matters or concerns you wish to raise with me in the interim, please feel free to do so (emphasis added).*

*If you feel you or your family would benefit from additional support, I remind you that pastoral support as well as the Employee Assistance Program are available. You can access EAP directly at any time, 24 hours a day and this service is confidential and independent.*

*Regards*

*Nick<sup>26</sup>*

[26] Later the same day, the Applicant sent a reply stating the following:

*“Dear Nick,*

*Thank you for replying on behalf of Tanya, albeit, as you say, delayed and late on a Friday afternoon.*

*In case you are uninformed, I understand Richard will be away from the College for at least two weeks. This is what the College staff were told yesterday.*

*As you say you have not been able to talk to Richard, please read the e-mail at the bottom of this thread. It explains Richard’s conversation with me last Friday and his shocking telephone call to my wife. He told me that what he said to me and my wife was based on information that you provided to him at your meeting last Wednesday.*

*With regards to my concerns, I would like to start by asking why LEQ (I assume this means you and/or Tanya) have instructed Richard and the Redeemer College Council to shelve my complaints (about Denis and Brenton) for such a long time. This seems very inappropriate behaviour, certainly uncaring, and, possibly, illegal. (This is why I have been advised to take these matters to Fair Work as detailed below).*

*Regarding a meeting with you, I would feel very unsafe based on what I have heard of your approach to meeting with Redeemer staff members in the past and, if such a meeting were to take place, I would insist on legal representation.*

*Thanks & regards,  
Anthony Vassallo*<sup>27</sup>

[27] On 1 September 2023, Bishop Vainikka and Ms Margit Hubbers from the College Council met to discuss a series of issues arising from the Applicant's complaints.<sup>28</sup> The Applicant emailed Ms Crooks, copying Mr Verreynne, Bishop Vainikka, Dr Muller and Ms Hubbers, stating:

*“Dear Tanya,*

*It has been two weeks since my e-mail responding to Nick's offer to respond to my concerns and he is yet to respond.*

*Then, yesterday, I heard that Nick had asked Anastasia for copies of information about my current WorkCover claim, which I understand is a breach of my privacy. I also understand that Nick was particularly interested to know whether Anastasia had signed off on my claim.*

*What is going on?*

*Thanks & regards,  
Anthony Vassallo*<sup>29</sup>

[28] Later the same day, Mr Verreynne replied to the Applicant:

*“Dear Anthony*

*Thank you for your email which Tanya has passed on to me to respond. I had not come back to your earlier email as I was advised that you were on personal leave, and I did not want to disturb you while you are off work. However, since you have reached out again, please see my response to the matters you have raised below.*

*LEQ has at no time instructed Richard Cornish or Redeemer Lutheran College Council to “shelve” any complaints from you. As outlined in my email of 18 August 2023, as I have not been able to discuss your concerns with Richard and I was not a party to your discussion with Richard and do not know what Richard said to you, I propose we wait until Richard is back so we can discuss the matter. I understand that Richard will be on leave until the end of this term. At this stage, I also do not know when you will be back at work.*

*Your email outlines that you would feel “unsafe” meeting with me based on what you have heard of my approach to meeting with Redeemer Lutheran College staff in the past. I deny ever engaging with staff at Redeemer Lutheran College in a way that would be unsafe and am concerned to hear you feel this way. However, given the serious*



*nature of this claim it is important that these concerns are properly particularised so they can be addressed. I would be happy to discuss them further with you when you are well enough to do so.*

*In any event, when you are well enough to do so, these are not reasons to not meet with me, noting that I have already proposed that the meeting is to include Richard. It is a matter for you if you wish to bring a support person to the meeting, and it is also a matter for you if your support person is a lawyer. Once you and Richard are both back at work, we can schedule a meeting to discuss these matters further (emphasis added).*

*Lastly, your email to Tanya also notes that I have requested a copy of your WorkCover claim - that is correct. I did so in my role as Deputy Executive Director, People & Business Services. The Lutheran Church of Australia Queensland District is your employer and Lutheran Education Queensland is a department within the Lutheran Church of Australia Queensland District. Employers are entitled to respond to workers' compensation claims and there is no prohibition within Queensland workers' compensation legislation on providing a copy of a claim in an organisation to appropriate persons within an organisation. Given this, it is appropriate that I be provided with a copy of the claim.*

*Regards  
Nick<sup>30</sup>*

[29] The Applicant replied to Mr Verreyne with the following:

*“Dear Nick,*

*Thank you for your prompt reply to my e-mail to Tanya.*

*Your concern about me being on leave is touching but I submitted my WorkCover claim a full week after writing to you.*

*To address your other points:*

*1. It is my understanding that on 2 December 2022 Darryl Muller, Chair of CLEQ, wrote to Julie Truss, then Chair of RLCC, directing her that:*

*RLCC hand over all material relating to the investigation into Mr Vassallo's complaints to Mr Verreyne and that RLCC acknowledge CLEQ's authority to conduct, continue or discontinue these investigations as it deems fit.*

*Given that December 2022 was many months ago and you have never once addressed my complaints with me, I assume that you decided to discontinue these investigations. Hence, Richard's comments.*

*2. With regards to WorkCover, when have you ever required information on WorkCover claims related to Redeemer staff in the past? It has been suggested to me that your interest in whether Anastasia had already signed my WorkCover claim was because you*

*were trying to stop it from being processed. Also, my WorkCover claim was submitted after Richard went on his latest period of leave and, as you say below, you have not been able to talk to him, so I am not sure of the veracity of your statement to Anastasia about you “helping Richard with my claim”.*

*3. And, with regards to meeting with you, I am aware of at least one occasion when Richard had a week of stress leave after meeting with you. At least, that is the reason he gave me and others at Redeemer.*

*If you want to have an open and honest conversation about the problems your actions have caused for me and for my Colleagues at Redeemer, I am happy to do so. If, however, I am just going to be “white-washed”, please don’t waste my time.*

*Yours sincerely,  
Anthony Vassallo”<sup>31</sup>*

**[30]** On 4 September 2023, Mr Verreyne emailed the Applicant stating:

*“Dear Anthony,*

*I refer to your email on Friday and I note from your out of office message that you are back at work today.*

*While you are entitled to raise your concerns with LEQ, the sarcasm is not necessary. You are a senior managerial employee of the Lutheran Church of Australia Queensland District at Redeemer Lutheran College and as such, like all employees, are expected to communicate courteously and professionally.*

*In relation to your workers’ compensation claim, I am not seeking to stop it from being processed. You are entitled to make an application for workers’ compensation and the assessment of the claim is by WorkCover Queensland, not LEQ (or LCAQD). Based on your comment in your email that you attribute to Anastasia Strong, I understand that Anastasia informed you about my request. However, I did not say that the purpose of my request was to help Richard with your claim.*

*You contacted LEQ on 15 August 2023 raising concerns about communications you had from Richard. Your request was allocated to me, and I responded to propose we meet to discuss your concerns when Richard had returned from leave. Following my response, you have been emailing me, and expanding the number of recipients to your emails to now include the Chair of Redeemer Lutheran College Council as well as Bishop Mark Vainikka, to make disparaging comments and a number of assertions that appear to be based on hearsay about myself and LEQ, when all we are seeking to do is understand and resolve your concerns.*

*Given the concerns you had raised regarding Richard’s communications and the matters I am assisting Richard with, there is a need for visibility regarding your claim due to the potential impact on these matters (which given your role, you are not across). Accordingly, as LCAQD is your employer and I am the Deputy Executive Director -*

*People & Business Services for LEQ, it is appropriate that I am provided with a copy of your claim.*

*I am happy to continue to work with you to address your concerns, however, as I understand your key concern is what you outlined in your email of 15 August 2023, I suggest we wait until Richard has returned from leave so the three of us can discuss the matter together.*

*Regards  
Nick<sup>32</sup>*

**[31]** The Applicant replied with the following:

*“Dear Nick,*

*As usual, your response does not address any of my concerns. If truly you “are seeking to do is understand and resolve your concerns”, please address the following:*

*Regarding point number 1 in my e-mail below (1 September 2023), I do not believe that you need to wait for Richard to return to explain why you have not progressed my complaints for almost a year. The letter from the Chair of CLEQ on 2 December 2022 made it clear that matters were taken out of Richard and RLCC’s hands and that you are responsible for dealing with my complaints. You have not done so in almost a year. Please explain why?*

*Similarly, you do not need to wait for Richard to return in order to explain why you told Richard that if I refused to meet with you and then Denis, I would be stepped down. Why did you say this? Or, if you did not say this to Richard, please let me know. Richard has told several people at Redeemer about your meeting with him and I am sure we would all like to know if what he was saying was untrue.*

*Regarding the most despicable behaviour of Richard calling and attempting to blackmail/coerce and deeply distressing my wife, yes, he will have to answer for this unless, of course, he was directed in his behaviour by someone else.*

*Regarding my point number 2 (1 September 2023), as you say “the assessment of the claim is by WorkCover Queensland, not LEQ (or LCAQD).” Why then, do you need to see my claim?*

*NB. I have included the Bishop as he has recently informed me that he does not have visibility of these issues. As the “person conducting a business or undertaking (PCBU)” as defined in the Work Health and Safety Act 2011, I think it is only fair that he should be aware of what is happening in his business. I have included Tanya as I believe that, as the Executive Director of LEQ and former Principal of Redeemer, she may have an interest in what has been happening at the College. I would also remind you that I addressed my concerns to Tanya, not to you. Based on the information that I have received (and provided in my e-mails) you may, personally, be responsible for several*

*of my concerns and so I am very uncomfortable with my concerns being “allocated” to you.*

*Thanks & regards,”*<sup>33</sup>

[32] This was the last correspondence sent from the Applicant before his resignation. Mr Verreyne stated that he did not respond to this email as the Applicant went on further personal leave and that further emails would make the Applicant more combative. In his evidence, he considered that he had addressed everything they could at the time on the information he had and wanted to speak with Mr Cornish before replying to the Applicant.<sup>34</sup>

[33] On 22 September 2023, the Applicant’s WorkCover claim was accepted.

[34] On 5 October 2023, the Applicant sent a medical certificate to the Respondent stating that *“his ability to make decisions about his employment is not impeded yet any confrontation or attending meetings with his current employer would be detrimental to his health and gaining certainty over his employment dispute would assist in his recovery.”*<sup>35</sup>

[35] On 18 October 2023, the Applicant attended another appointment with his General Practitioner who stated that he was unable to return to the Respondent under any circumstances and encouraged him to seek alternative employment.<sup>36</sup> The same day, the Applicant sent a resignation letter to the Respondent. The letter states the following:

*“Dear Richard,*

***Resignation***

*Regrettably, I hereby give notice of my resignation from my position as Business Manager of Redeemer Lutheran College.*

*The last twelve months have been difficult for me at the College, during which time I have been publicly defamed, secretly lied about, threatened, had my privacy breached, and without my knowledge, my wife was contacted and distressed.*

*The detrimental treatment has its genesis in Denis Mercier-Lee discriminating against me on the grounds of my relief beliefs when on Friday 28 October 2023 he posted a formal letter of grievance on a Dropbox accessible to RLC staff that contained insulting, offensive and hurtful allegations in respect of my Roman Catholic faith. Without any evidential or factual foundation, he falsely imputed to me adverse views on homosexuality that I do not hold and have never ventilated to anyone.*

*I am at pains to understand why rather than dealing with my complaint about Mr Mercier-Lee (and subsequent complaints about other members of the College leadership) and then taking appropriate action, RLC (and others) instead chose to pressure me to withdraw and/or not pursue my complaint against him. This action effectively imposed on me a requirement to work in an environment where I must tolerate being publicly discriminated against because of my Roman Catholic faith and*

*work in an environment where my employer fetters my right to make a complaint in relation to my employment.*

*RLC also breached its duty of care to me and breached the implied contractual duty to provide a safe working environment, as evidenced by WorkCover Queensland accepting my injury claim.*

*I have reached out to you Richard, the College Council, the LEQ Executive Director, and even the Bishop, yet my complaints have been ignored and/or remain unresolved. I therefore have no choice but to resign and issue legal proceedings against the entities and individuals responsible. I also intend to make a common law claim (in negligence and/or contract) for the injury I have suffered at RLC.*

*As you know, during my time at RLC I have gone above and beyond what would normally be expected from a Business Manager, including providing the best support I could to you personally at a very difficult time for you and for the College. I am aware that this has been a difficult time for many in our community and the entire College community continue to be in my prayers.*

*I feel, however, for my own safety and for the safety of my family, I am left with no option but to resign from what has become an unsafe workplace for me. My resignation should not be taken to amount to a waiver or affirmation of RLC's behaviour and breaches of contract.*

*Please confirm receipt of this letter.*

*Yours sincerely  
Anthony Vassallo<sup>37</sup>*

**[36]** The Applicant lodged his general protections application involving dismissal on 8 November 2023 within the 21-day statutory timeframe.

**[37]** On 18 November 2023, the Applicant obtained a medical report regarding his psychological condition. It noted that the Applicant's workplace did not present as a psychologically safe workplace and encouraged him to seek alternate employment. The Applicant was reported to be distressed because he was wanting to be released from his current contract to commence his new employment.

**[38]** The Applicant's submissions focus on the Respondent's higher standard of conduct in an employment contract given its religious nature, denial of procedural fairness, incremental deterioration of the Applicant given his successful workers' compensation claim, and the Respondent shifting the decision making of Mr Cornish in its responsibility in addressing the issue raised by the Applicant. The Respondent's submissions focus on a series of facts demonstrating that the Applicant was not forced to resign as the conduct or course of conduct was not clearly identified, and that the conduct alleged was not sufficient to establish a forced resignation. I have considered all the material presented to me and I provide my consideration below.

### **Was the Applicant forced to resign under s.386(1)(b) of the Act?**

[39] Section 386(1) of the Act relevantly provides that 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.<sup>38</sup>

[40] The Applicant's main contention is that he was dismissed within the meaning of s.386(1)(b) of the Act as he was forced to resign.

[41] The Full Bench in *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli* outlined the relevant authorities with respect to what it means for an employee to be terminated at the initiative of the employer.<sup>39</sup> In short, it is not sufficient to simply demonstrate that the employee did not voluntarily leave their employment.<sup>40</sup>

[42] While it may be that some action on the part of the employer is intended to bring the employment to an end, it is not necessary to show the employer held that intention.<sup>41</sup> It is sufficient that the employer's conduct, would, on any reasonable view, be likely to bring the employment relationship to an end.<sup>42</sup>

[43] All the circumstances – including the conduct of both the employer and employee – must be examined.<sup>43</sup> In other words, it must be shown that “the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship.”<sup>44</sup>

[44] The Full Bench of this Commission in *ABB Engineering Construction Pty Limited v Doumit (ABB)* said, in relation to determining whether the ending of an employment relationship is a voluntary or forced resignation:

*“Often it will only be a narrow line that distinguishes conduct that leaves an employee no real choice but to resign employment, from conduct that cannot be held to cause a resultant resignation to be a termination at the initiative of the employer. But narrow though it be, it is important that that line be closely drawn and rigorously observed. Otherwise, the remedy against unfair termination of employment at the initiative of the employer may be too readily invoked in circumstances where it is the discretion of a resigning employee, rather than that of the employer, that gives rise to the termination.*

*The remedies provided in the Act are directed to the provision of remedies against unlawful termination of employment. Where it is the immediate action of the employee that causes the employment relationship to cease, it is necessary to ensure that the employer's conduct, said to have been the principal contributing factor in the resultant termination of employment, is weighed objectively.*

*The employer's conduct may be shown to be a sufficiently operative factor in the resignation for it to be tantamount to a reason for dismissal. In such circumstances, a resignation may fairly readily be conceived to be a termination at the initiative of the employer. The validity of any associated reason for the termination by resignation is tested. Where the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary.*"<sup>45</sup>

[45] Furthermore, in *Pawel v Australian Industrial Relations Commission*,<sup>46</sup> the Full Bench noted:

*"Mere "causation" or "motivation" will not satisfy the requirement that the termination be at the initiative of the employer."*

[46] Forced resignation has been interpreted by the Commission in the following ways:

- the actual conduct of the employer forced to do so, such that there was an element of compulsion present;<sup>47</sup>
- a 'critical action' or 'critical actions' of the employer which was intended to bring the employment relationship to an end;<sup>48</sup>
- as a result of some action on the part of the employer intended to bring the employment to an end and perhaps action which would, on any reasonable view, probably have that effect;<sup>49</sup> and
- the employer's conduct (when it is not evidenced was intended to bring about the resignation directly) must be conduct that is in some way or in some manner oppressive or repugnant in the ordinary course, and/or else so impacted on the volition of the employee such that the resignation was a reasonable response to that conduct in all the circumstances.<sup>50</sup>

[47] In considering the definition of forced resignation, I am satisfied with the evidence before me that there was no forced resignation because of conduct, or a course of conduct, engaged by the Respondent.

[48] The psychologist report dated 18 November 2023 provides assistance in understanding the Applicant's condition. Mr Vassallo was not handling the situation well because of his belief that he was discriminated arising from the situation of Mr Mercier-Lee and that he was seeking counselling. However, forced resignation does not turn on the Applicant's belief of the situation, but the objective assessment of conduct by the parties. The Respondent's conduct in dealing with the complaint can be assessed.

#### *Initial handling of Mr Vassallo's complaint*

[49] Mr Mercier-Lee's complaint was placed in a Dropbox where only two people accessed the complaint. The complaint was never submitted as a formal complaint although it was titled as an official complaint. Ms Jones took a screenshot and provided the Applicant a copy when asked when more staff had knowledge of the complaint. The Respondent did not investigate the contents of Mr Mercier-Lee's claim given that it was not pressed. It was not unreasonable for

the Respondent to consider whether the complaint was substantiated. At this stage, the Respondent could assume that complaint was unsubstantiated.

[50] When the Applicant made a formal complaint about the Dropbox incident on 11 November 2022, the Respondent interviewed Mr Mercier-Lee, provided options of how Mr Mercier-Lee was to address the situation, and engaged BDO to undertake an independent investigation of Mr Vassallo's complaint. This was done two days after Mr Vassallo lodged an official complaint.

[51] Within fourteen days of interviewing Mr Mercier-Lee and engaging BDO to undertake the investigation, the Respondent stood down Mr Mercier-Lee on full pay. The initial complaint was dealt with promptly.

[52] At this stage, the Applicant was not compelled to work with Mr Mercier-Lee for 245 days from 7 December 2022, when the BDO report was completed, to 9 August 2023, when Mr Mercier-Lee was set to return to work. It appeared that there was no issue with the Applicant having Mr Mercier-Lee stood down for this period. Mr Mercier-Lee's complaint about Mr Vassallo being 'defamatory' was not pressed. There is no evidence before me which indicates the Applicant sought a resolution or decision to be made on the matter during this period. The Respondent took the appropriate steps to address the Applicant's complaint.

#### *Assessment of Mr Cornish's conduct*

[53] Mr Cornish made an assessment in May 2023 that the Dropbox incident was an accident, that it was not widely distributed, that the complaint was on the Dropbox for a short period of time and only two staff members saw the complaint in the Dropbox from the BDO Report. It was unfortunate that one staff member had taken a screenshot of the complaint and spread the contents of its complaints to other staff members.

[54] Upon assessing the BDO Report, Mr Cornish made a reasonable decision to stop the show cause process. It was reasonable given that Mr Vassallo's initial complaint was thoroughly investigated, and enough time had passed that the incident was not a live issue. Although the Applicant had concerns, it is for the Respondent to manage its workplace risk and hear Mr Vassallo's concerns, rather than be dictated by the Applicant's demands which it appeared to be case with the email correspondence between himself and Mr Verreyne.

[55] Mr Cornish stopped his investigation of Mr Mercier-Lee on 9 August 2023, and Mr Mercier-Lee was set to resume his duties. Mr Cornish undertook the responsibility to discuss professional expectations of Mr Mercier-Lee and his return with Mr Vassallo because of their friendship. It did not appear Mr Cornish was the person to make final decisions about Mr Vassallo's employment.

[56] The phone call from Mr Cornish to Mrs Vassallo on 11 August 2023 was poorly handled. If the evidence of Mrs Vassallo were to be accepted about Mr Cornish implying the Applicant to resign or that he would be stood down if he did not attend a meeting with Mr Verreyne, the Applicant still had the option to follow the procedure to determine whether the Respondent would address his complaint. There was no evidence demonstrating that the Applicant was forced to resign. It appeared to be speculation of potential scenarios if the



Applicant did not attend a meeting with Mr Verreynne by Mr Cornish, Mrs Vassallo and the Applicant.

[57] Mr Cornish created additional burdens on the process as it may have led Mr Vassallo to be more combative on how his complaint would be addressed by the Respondent. However, this incident is not a determinative factor of whether there is constructive dismissal when assessing the Respondent's subsequent conduct.

*Assessment of Mr Verreynne's conduct*

[58] The Applicant submitted that he was not offered procedural fairness. It is my view that this there was no issue of procedural fairness as there was no intent for the Applicant to be dismissed.

[59] Mr Verreynne's emails to Mr Vassallo were reasonable. When the Applicant sent emails about Mr Cornish's conversation on 11 August 2023, Mr Verreynne was very clear that the matter would be discussed when Mr Cornish returns from leave, and that he was open to addressing any issues or concerns from the Applicant on 18 August 2023.

[60] This was the appropriate response given that Mr Cornish was too close to the matter and was not handling the situation well. Mr Cornish subsequently went on leave after this event. Mr Verreynne appropriately addressed the matter by provide an opportunity for the Applicant to discuss his concerns through a meeting upon Mr Cornish's return. This was the consistent position held by the Respondent. It was reflective in the email by Mr Verreynne on 4 September 2023.

*“Given the concerns you had raised regarding Richard's communications and the matters I am assisting Richard with, there is a need for visibility regarding your claim due to the potential impact on these matters (which given your role, you are not across). Accordingly, as LCAQD is your employer and I am the Deputy Executive Director - People & Business Services for LEQ, it is appropriate that I am provided with a copy of your claim.*

*I am happy to continue to work with you to address your concerns, however, as I understand your key concern is what you outlined in your email of 15 August 2023, I suggest we wait until Richard has returned from leave so the three of us can discuss the matter together.”*

[61] Given that the Applicant was on WorkCover and was on leave during this time and Mr Cornish was also on leave, there was no imminent requirement for Mr Verreynne to address the situation at this stage. The Applicant was becoming more resistant to meeting with Mr Verreynne, Mr Verreynne's reason for not communicating with the Applicant was credible given the emails that were sent between the parties between 13 August 2023 and 18 August 2023. The Respondent did not put the Applicant in a position to communicate or work with Mr Mercier-Lee at this stage. Mr Vassallo did not let the Respondent undertake its procedure before he resigned.

*Assessment of Mr Vassallo's conduct*

[62] Mrs Vassallo's phone call with Ms Hubbers on 31 August 2023 did not assist in demonstrating the Respondent's conduct or course of conduct contributed to the Applicant's resignation. There was more probative evidence that was of assistance.

[63] The Applicant tendered his WorkCover claim and medical certificate from 5 October 2023. I accept that this evidence supports that the Applicant was in a distressed state. However, I did not find this to be sufficient that the employer put the Applicant in a position where he was forced to resign.

[64] The Applicant's medical certificate on 5 October 2023 stated that he was not impeded to make decisions about his employment yet could not attend a meeting with Mr Verreyne to discuss his concerns.

[65] When I asked questions surrounding the timeframe of the Applicant's resignation during the hearing, the Applicant stated that he was approached by three people for a new role around late September 2023. He wanted to be released from his employment to commence employment with his new employer. The Applicant stated he had a lot of leave remaining, and only resigned once he secured new employment.<sup>51</sup> This demonstrated that the Applicant could make well-versed decisions regarding his employment.

[66] The psychological report provided by the Applicant stated that part of the stress was due to a negotiation period for an early release as there was a three-month notice period for resignation, and there were conversations between the Applicant and Respondent regarding without prejudice discussions on handover and potential settlement of the matter.<sup>52</sup> Even though it was the psychologist's view that Mr Vassallo's current workplace did not present a psychologically safe workplace, the Respondent did not request the Applicant to work. The Respondent was seeking to have a meeting to discuss Mr Vassallo's concerns in his emails from 18 August 2023 at first instance. This further indicated that the Applicant had agency to make decisions about his employment instead of resigning.

## **Conclusion**

[67] Given that there was no indication that the Applicant was going to be stood down or forced to resign, it appears to be speculation from the Applicant and Mrs Vassallo that the Applicant was going to be dismissed. The Applicant was never asked to resign.<sup>53</sup> The meeting between Mr Verreyne and the Applicant was still open and no conduct or course of conduct from the Respondent was determinative of the Applicant's dismissal.

[68] The Applicant would have a more persuasive argument demonstrating a constructive dismissal if he had attended a scheduled meeting to discuss his concerns with Mr Verreyne to get a better understanding of how the Respondent was managing their workplace risk. However, the Applicant sought to have another role lined up and only resigned once this was secured. This indicated that resignation was an option for him. Otherwise, the Applicant would have remained on sick leave until he was able to follow the process offered by the Respondent.

[69] As a result, I do not find Mr Vassallo's resignation to meet the threshold of a forced resignation per s.386(1)(b) of the Act. Therefore, the Applicant is not eligible to lodge an application under s.365 of the Act. The jurisdictional objection is upheld, and the Application is dismissed.

[70] I Order accordingly.



DEPUTY PRESIDENT

*Appearances:*

J. Murdoch KC appearing as Counsel for the Applicant instructed by O'Callaghan Workplace Law

C. Martin appearing as Counsel for the Respondent instructed by Clayton Utz

*Hearing details:*

2024

Brisbane

11 March, 27 March

*Final written submissions:*

2024

23 April

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<sup>1</sup> Statement of Anthony Vassallo [1].

<sup>2</sup> Ibid [8]; Further Statement of Richard Cornish, Annexure RC-08.

<sup>3</sup> Statement of Anthony Vassallo, Annexure AV3.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid [12].

<sup>6</sup> Ibid [14].

<sup>7</sup> Applicant's Outline of Submissions [17]-[18].

<sup>8</sup> Statement of Anthony Vassallo, Annexure AV5.

<sup>9</sup> Statement of Anthony Vassallo, Annexure AV-5.

<sup>10</sup> Ibid, Annexure AV6.

<sup>11</sup> Respondent's Form F8A – Response to general protections application, Annexure 1 [3.8].

<sup>12</sup> Ibid, Annexure 1 [3.9].

<sup>13</sup> Statement of Anthony Vassallo, Annexure AV-7.

<sup>14</sup> Respondent's Form F8A – Response to general protections application, Annexure 1 [3.10].

<sup>15</sup> Statement of Anthony Vassallo, Annexure AV9; Applicant's Outline of Submissions [23].

<sup>16</sup> Statement of Anthony Vassallo, Annexure AV11; Statement of Richard Cornish [20].

<sup>17</sup> Applicant's Submissions 24.

<sup>18</sup> Respondent's Form F8A – Response to general protections application, Annexure 1 [3.18].

<sup>19</sup> Statement of Richard Cornish [30].

<sup>20</sup> Ibid [31]; Statement of Anthony Vassallo [26].

<sup>21</sup> Ibid [39].

<sup>22</sup> Statement of Anthony Vassallo [31]

<sup>23</sup> Statement of Richard Cornish at [31].

<sup>24</sup> Statement of Anthony Vassallo, Annexure AV15.

<sup>25</sup> Ibid, Annexure AV16.

<sup>26</sup> Ibid, Annexure AV17.

<sup>27</sup> Ibid, Annexure AV18.

<sup>28</sup> Respondent's Form F8A – Response to general protections application, Annexure 1 [3.33].

<sup>29</sup> Statement of Anthony Vassallo, Annexure AV20.

<sup>30</sup> Ibid, Annexure AV23.

<sup>31</sup> Ibid, Annexure AV24.

<sup>32</sup> Ibid, Annexure AV25.

<sup>33</sup> Ibid, Annexure AV26.

<sup>34</sup> Statement of Nicolaas Verreyne [33].

<sup>35</sup> Statement of Anthony Vassallo, Annexure AV-28.

<sup>36</sup> Ibid 76.

<sup>37</sup> Ibid Annexure AV30.

<sup>38</sup> *Fair Work Act 2009* (Cth) s 386(1)(b).

<sup>39</sup> *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli* [2017] FWCFB 3941.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid; see also *Rheinberger v Huxley Marketing Pty Limited* (1996) 67 IR 154, 160-161; see also *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 496 (11 August 2006); *Mohazab v Dick Smith Electronics (No 2)* (1995) 62 IR 200.

<sup>42</sup> *Rheinberger v Huxley Marketing Pty Limited* (1996) 67 IR 154, 160-161 cited in *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli* [2017] FWCFB 3941 at [31].

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<sup>43</sup> *Whirisky v DivaT Home Care* [\[2021\] FWC 650](#) at [77].

<sup>44</sup> *Mohazab v Dick Smith Electronics (No 2)* (1995) 62 IR 200 and *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli* [\[2017\] FWCFB 3941](#) at [28].

<sup>45</sup> (1996) PRN6999.

<sup>46</sup> (1999) FCA 1660 at 58 (Pawel J).

<sup>47</sup> *Megna v No 1 Riverside Quay (SEQ) Pty Ltd* PR 973462, 11 August 2006.

<sup>48</sup> *Boulic v Robot Building Supplies* [\[2010\] FWA 6905](#), [16].

<sup>49</sup> *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli* (1995) 62 IR 200, 205-206.

<sup>50</sup> *Hastie v Impress Australia Pty Ltd* [\[2008\] AIRC 102](#) at [48].

<sup>51</sup> Transcript of Hearing Day 2 PN 1750-1766

<sup>52</sup> *Ibid* PN1768 – 1733.

<sup>53</sup> *Ibid* PN1789.