



DECISION

Fair Work Act 2009
s.365—General protections

Scott Egginton

v

Focus (NSW) Pty Limited
(C2024/2196)

DEPUTY PRESIDENT EASTON

SYDNEY, 17 JULY 2024

Application to deal with contraventions involving dismissal – jurisdictional objection – is the applicant a person who has been dismissed – employee gave notice to resign – during the notice period the employee and the employer “agreed” that the employment would finish immediately – termination at the initiative of the employer.

[1] On 20 March 2024 Mr Egginton resigned his employment with Focus (NSW) Pty Limited. Mr Egginton gave one month’s notice, indicating that his employment would finish on 19 April 2024. Mr Egginton claims that he was dismissed on 28 March 2024 in a conversation with the owner/director of Focus (NSW) Pty Limited.

[2] On 5 April 2024 Mr Egginton made an application to the Fair Work Commission under s.365 of the *Fair Work Act 2009* (Cth). Mr Egginton claims that he was dismissed from his employment with Focus (NSW) Pty Limited (**Focus NSW**) and that the dismissal contravened the general protection provisions of the Act.

[3] Focus NSW maintains that Mr Egginton resigned his employment and was not dismissed.

The Commission’s Jurisdiction

[4] The Fair Work Commission can deal with applications under s.365 of the Act by way of conciliation or mediation under s.368. If the Commission is satisfied that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful it can issue a certificate under s.368(3). Section 370 imposes a substantial restriction upon applicants by preventing a general protections court application being made unless the FWC has issued a certificate under s.368(3)(a) in relation to the dispute.

[5] The Full Court in *Coles Supply Chain v Milford* [2020] FCAFC 152 at [51], (2020) 300 IR 146 found that the FWC’s power to deal with a dispute under s.368 is only enlivened if an application is properly made under s.365. When a jurisdictional objection is raised the FWC must determine whether the application was properly made, which might include determining whether an applicant was dismissed from their employment.

The evidence

[6] Four witness statements were filed before the hearing. Mr Egginton filed a statement on his own behalf and chose not to file a witness statement in reply to Focus NSW's witness statements. Focus NSW filed statements by Mr Mitch Doble (Director/Owner of Focus NSW), Ms Claudia Foini (NSW State Manager and Mr Egginton's direct manager) and Ms Janine Sergi (a co-worker).

[7] In the following paragraphs I will describe in sequence the relevant events by reference to the evidence from each witness.

[8] Mr Egginton commenced employment with Wispro (now known as Focus NSW) on 26 June 2023. Focus NSW is a transport company and Mr Egginton was employed as the PM Manager.

[9] Mr Egginton signed a written contract of employment. The relevant terms of the contract were:

- (a) Mr Egginton was required to give one full weeks' notice to resign his employment;
- (b) in the first year of employment Focus NSW could terminate Mr Egginton's employment by giving one weeks' written notice;
- (c) the employer had a discretion to make payment to Mr Egginton in lieu of all or part of the notice period; and
- (d) during the notice period Focus NSW was not obliged to assign Mr Egginton duties or functions and was entitled to direct Mr Egginton not to attend work.

[10] Mr Egginton was not happy in his employment. In his evidence he criticised the employer in several ways and was particularly critical of his direct manager, Ms Claudia Foini.

[11] Focus NSW's witnesses were similarly unflattering about Mr Egginton. It is not necessary to record the specific criticisms each witness levelled at other.

[12] On 20 March 2024 Mr Egginton gave notice that his employment would end by way of resignation one month later on 19 April 2024. Mr Egginton said he gave one month' notice because he thought he had to. Mr Egginton's evidence about his resignation included the following:

“On 20 March 2024 I resigned my position with FOCUS (NSW) PTY LIMITED. I gave a months' notice with a finish date of 19 April 2024. My resignation and the terms were accepted by Mitch Doble. Mitch Doble told me that Claudia Fioni would liaise with me to facilitate my exiting the business.

My reasons for resigning include, Claudia Foini excluding me from the Management Team, the Day Shift Allocator was told not to provide me any information about the happenings on Day Shift, work colleagues told me Claudia Foini was trying to push me out, and I was not provided equipment to do my job effectively or efficiently.”

[13] Mr Doble gave evidence of a lengthy impromptu meeting one or two days before Mr Egginton resigned. The meeting started with Mr Egginton barging into Mr Doble's office and saying "I need to work out if I am leaving this minute or at the end of the shift". In this meeting Mr Egginton raised various concerns. Mr Doble and Ms Foini spent considerable time with Mr Egginton attempting to deal with his concerns.

[14] Mr Doble's evidence included the following description of what happened after Mr Egginton gave notice to resign:

"Scott's resignation came either the next day or the day after. It came as a surprise, and I was quite frustrated given the amount of my own personal time I had spent in meetings with Scott. Hindsight, looking back at his trend of erratic behaviour, it should not have been a surprise. It came back to me from the floor staff that Scott wanted 'management' to offer him more money to stay and to promote him to 'depot manager'. Scott had not long prior received a pay increase, his method of obtaining this was to threaten to leave when he knew we were very thin on operational staff. This aside we were happy to give Scott the opportunity to prove himself only disappointed to learn that he was bragging to other managers about his salary increase, stating the business couldn't operate without him. This obviously put us in a compromising position with other managers.

It was agreed between Claudia and I that we would accept the resignation and work with Scott on an exit plan."

[15] Mr Doble and Mr Egginton have very different views about the work Mr Egginton performed in the days after his given notice of his resignation. Mr Egginton's evidence was:

"The week after resigning, the Night Shift Data Entry Clerk was on annual leave. The backup Data Entry Clerk was on sick leave. I backfilled the Data Entry Clerk position as well as covering my own workload. I was always onsite early so I could find out what was happening to effectively do my job. I stayed onsite till all the trucks were loaded and was the last employee to leave site. I also made sure the site was secure when I left once this had become the new process. The Google tracking from my mobile phone shows there was not a day that I was onsite for only 7 hours as stated by Claudia Foini ... In fact, I was regularly onsite in excess of 12 hours a day throughout my employment. I would receive phone calls while at home throughout all hours of the night from drivers and the Control Tower (who were meant to resolve issues after hours) for breakdowns and other operational functions.

Claudia Foini instructed me to stop doing so many hours, but there was no one else to do the work. Claudia Foini would generally only work a 6 hour day and only be onsite 3 or 4 days a week. Neither Mitch Doble nor Claudia Foini were regularly contactable by phone. Since submitting my resignation on 20 March 2024 I would arrive at work by 1pm as instructed by Claudia Foini and on no occasion during this time I left work before 8pm."

[16] Mr Doble's evidence was:

“As soon as his resignation was submitted, he failed to fulfil his role as PM manager.

- He stopped attending meetings.
- He missed deadlines.
- He stopped participating in key projects that he was part way through.
- He took it upon himself to reduce his hours.
- He ignored his managers emails.
- He ignored my emails.
- He acted and spoke unprofessionally to the Sydney team and customers.
- He broke site safety rules.
- He injured one of the PM team, which he failed to report and attempted to cover up.
- He failed to conduct mandatory safety toolboxes.
- He failed to comply with onboarding contractors correctly.
- He failed to raise incident reports when required.
- He failed to secure the Sydney site.
- He failed provide key access information to contractors disrupting service to customers.
- He attempted to coerce other team members into resigning.
- He failed to complete payroll correctly resulting in overpay[ment]s to employees.”

[17] Mr Egginton talked to other employees about finishing employment before the end of the notice period. Ms Foini's evidence was:

“A couple of days after Scott had tendered his resignation he arrived into the office. Scott walked into the operations office and before he sat down, he turns around and looks at me and said. “So are you going to finish me up early or what”.

My only response to Scott was “You have given 4 weeks' notice and we are yet to replace [you] and so the answer is no”.

Scott's demeanour certainly continued to downward spiral.”

[18] Mr Egginton's version of this same conversation was:

“I had previously asked Claudia Foini if she was going to finish me up early, she advised me that there was no replacement for my position, that I had given 1 months noticed and that she required me to continue working and finish out the notice period.”

[19] Ms Janine Sergi said she had a similar conversation with Mr Egginton:

“Following Scott's resignation Scott had a conversation with myself one day where he stated in words to the effect of “he was going to do a Jenny, and that he had raised a grievance with the company in the hopes that he would not have to work out his notice. Just like Jenny didn't.”

[20] The day after Mr Egginton gave notice of his resignation (21 March 2024) he made a complaint to Ms Nicole Campbell, who is a Human Resources Co-ordinator, of bullying. His email raising his complaint included:

“I am not sure if you are aware or not but I have tendered my resignation mainly due to psychosocial hazards in my work place. I spoke to Claudia [Foini] 3 weeks ago regarding this and to Mitch [Doble] a week ago the issues have not improved if anything have got worse. I have been through a lot in my time with DXT that was not been protected by the company there have been so many fictitious complaints which I even brought to your attention at one point only to be told you were disappointed in me asking for an investigation and something to be brought against the perpetrator...”

[21] On 26 March 2024 Mr Egginton completed a “Grievance Report Form”, purporting to raise a grievance about “Psychosocial Hazard (bullying), Constructive dismissal. Lack of support from the company to the ongoing treatment I have received at [Focus NSW].”

[22] The interactions between Mr Egginton and Ms Foini seem to have become even more problematic after Mr Egginton gave notice to resign and raised a complaint. Mr Doble’s evidence was that:

“I spoke with Claudia, who at this stage did not feel safe being around Scott, and it was discussed if Scott should report to me directly whilst he worked out his notice period. I was not prepared to possibly endanger Claudia by having her interact any further with Scott on a one-on-one basis. At was at this time that I advised Claudia that I would speak with Scott.”

[23] The Grievance Report Form was sent by email on 26 March 2024 to Ms Campbell. On 28 March 2024 Ms Campbell and Mr Egginton had the following exchange by email:

Ms Campbell at 9:36AM:

“Thanks Scott,

When you are next in work we will make a time for a meeting together to go through the allegations and the factual aspects of the investigation. Please let me know when you return.”

Mr Egginton at 9:39AM:

“Hi Nicole

I am in today but i think they will be finishing me up today you would have mire insight into this then I do. Claudia does not even liase with me or pass on any information since I resigned.” [sic]

[24] Mr Egginton’s prediction that his employment was about to end was prophetically accurate. Mr Egginton’s employment in fact finished within the next few hours.

[25] Mr Doble said that he decided to speak to Mr Egginton about “letting him go if he wished to do so.” He said his reasoning was as follows:

“I consulted with Nicole (HR), so I knew where we stood in relation to letting Scott leave on his own accord vs terminating him on the spot. We agreed that we would let him go if he wished to do so but that would mean that he would not be paid out the remainder of his notice period. I advised Nicole that if Scott did not want to leave on his own accord, that I would have him report directly to myself whilst he worked out the remainder of his notice period.”

[26] Mr Doble was not on site on 28 March 2024 and so he spoke to Mr Egginton by telephone. There are two similar but different versions of the conversation that ensued. Mr Egginton said:

“... I phoned Mitch Doble and he said, “things are not working out. You don’t want to be here so you can finish up now. Give your work phone and fuel card to Claudia and leave.” I told Mitch Doble the phone was actually mine, so I would return the sim card. I also asked about the outstanding superannuation he hadn’t paid which equated to almost \$8000. He said they would be paying it through to ATO. That was the extent of the conversation.

I then walked to the Operations Office gave Claudia Foini the sim and fuel card as instructed and cleared my personal belongings out of the desk. As I was leaving, I shook hands with the Allocator and the Fleet Manager. When I walked past Claudia Foini I said to her, “I can’t say it has been a pleasure as you are probably the worst boss I’ve had”. I then said, “you talk about how bad Sean Perkis is, but you are worse”, and I left. There was no verbal aggression as alleged by Claudia Foini. I did not yell, the comments made were delivered in a very matter of fact way.”

[27] At the hearing Mr Egginton also explained his view at the time he spoke with Mr Doble:

“I wanted to get out of there as soon as I could .. that’s why I resigned ... I spoke to [Ms Sergi] and I told her I wanted to finish up .. I did want to go and in a meeting that I said that to [Ms Foini] ... There's no denying from myself that I want[ed] it to be out. I wasn't happy there. That's why I resigned.

... I was happy to go early, but if I had to work it out I was working it out ... I did want to go early, I didn't want to be there.”

[28] Mr Doble said of the same conversation:

“Scott did call and the discussion was about the option of him working out his notice or leaving on his own accord. Whilst Scott did most of the talking, I raised concerns about him not fulfilling his role. He’s answer to that was ‘that he was no longer interested and just wanted to leave’. Scott agreed that the situation was deteriorating and he was happy to move on, on his own accord. Whilst we had no body to cover his role, which again he agreed to, I was happy for him to move on. This was without pay, at no stage was it

agreed to that his notice would be paid out. To me this was very clear in the context of the conversation, the only question that Scott had was around his super entitlements. He initially advised he had never been paid super but then conceded that he had been paid super weekly. It was agreed that any remaining super and/or leave entitlements would be paid out, again it was not agreed, nor did I advise that the notice period would be paid out. I wished him well and that concluded the conversation.”

[29] At 1:15PM on Ms Foini sent an email to Ms Campbell and Mr Doble in the following terms:

“Hi Nicole,

Confirming Scott is now gone.

He did manage to let me know I am the worst boss he has ever had whilst walking out.

I have the sim card and the fuel card returned to me.

Thank you”

[30] At 1:21PM Mr Doble replied:

“Hi Nicole.

Confirming the conversation with Scott.

He agreed and advised that he does not want to be with the company any longer. I advised him that he does not have to work out his notice period and if he wants to leave now, he can choose to do so.

There was no discussion on paying out his leave. I simply approved him leaving straight away due to the fact that the situation is deteriorating.

He advised he hadn’t been paid super, I had ask[ed] several times for him to confirm. He eventually acknowledged that he receives super weekly.

[H]e wanted to discuss the fact that he is being ignored within the business. I didn’t go there as I don’t agree with him and it was not the forum to resolve.

Thx.”

Observations about the evidence

[31] Neither party was legally represented at the hearing. Like many cases, the evidence was not perfect from either side nor was much of the evidence rigorously tested. In his witness statement Mr Doble included a list of problems he said occurred with Mr Egginton’s work after his given notice of his resignation. Mr Egginton had the opportunity to file a statement in reply to Mr Doble’s statement but chose not to do so. Mr Egginton was adamant at the hearing that Mr Doble’s assertions were wrong.

[32] Mr Doble was not available for cross-examination because he was flying overseas in the afternoon that the hearing took place. I reluctantly received Mr Doble's witness statement into evidence. As a matter of fairness I cannot place significant weight on his witness statement because Mr Egginton did not have the opportunity to test Mr Doble's evidence by way of cross-examination.

[33] The most important event in this case is the conversation between Mr Egginton and Mr Doble. Fortunately there is not much difference between Mr Egginton's account of the conversation and Mr Doble's account. Both statements agree that there was no discussion about whether Mr Egginton would be paid the balance of the notice period.

[34] At the hearing Mr Egginton asserted that Mr Doble deliberately chose not to address payment for the balance of the notice period and he further suggested that Mr Doble was deceptive in deliberately not raising this matter with Mr Egginton.

[35] Mr Egginton wanted to cross-examine Mr Doble about whether he deliberately chose not to address payment in this very important phone call. Ultimately the case does not turn on whether Mr Doble *deliberately* chose not to talk about payment for the balance of the notice period because his subjective intentions are not particularly relevant. What is more relevant is the words used by the employer and the employee and what a reasonable person would understand those words to mean about the end of the employment.

“A person who has been dismissed”

[36] Mr Egginton only has capacity to make a claim if he is “a person who has been dismissed” (per s.365(a)). “Dismissed” is defined in s.12 of the Act by reference to s.386. Section 386 is in the following terms:

“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.

(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.

[37] In *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941 at [47]-[48], (2017) 271 IR 245 at 268-9 (**Tavassoli**), the Full Bench summarised the relevant tests under s.386 as follows:

“[47] Having regard to the above authorities and the bifurcation in the definition of “dismissal” established in s.386(1) of the FW Act, we consider that the position under the FW Act may be summarised as follows:

(1) There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the “heat of the moment” or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although “jostling” by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.

(2) A resignation that is “forced” by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element.

[48] It is necessary for an applicant for an unfair dismissal remedy whose employment has terminated because the employer has acted on a communication of resignation on the part of the employee to articulate whether they contend they were dismissed in the first or the second scenario above (although it may be possible for both scenarios to arise in a particular factual situation). Where the applicant is self-represented or inadequately represented, it may be necessary for the member of the Commission hearing the matter to clarify with the applicant the precise basis upon which it is contended that the applicant was dismissed. If this is not done, it may lead to the wrong test being applied to the matter.”

Consideration – General

[38] By the terms of Mr Egginton’s contract of employment he could have resigned by giving one weeks’ notice. Mr Egginton gave one month’ notice because, he said, he thought he was required to do so. Mr Egginton’s stated understanding was not tested in cross-examination.

[39] Under the same contract Focus NSW could have dismissed Mr Egginton with one weeks’ notice at any time during the notice period, or it could have paid Mr Egginton in lieu of notice, or it could have directed him to stay away from the business, on pay, for the balance of the notice period. If Mr Egginton engaged in some kind of misconduct during the notice period, Focus NSW could have dismissed him immediately without any notice at all. In most but not all these scenarios the employment would be terminated on Focus NSW’s initiative even though Mr Egginton had given notice to resign.

[40] Disputes often arise when employers and employees “agree” to end the employment early after the employee has given notice to resign. Such “agreements” often fall apart when the final pay is drawn because of misunderstandings about what was agreed.

[41] The most decisive factor to be considered when a supposed agreement is made to end the employment earlier than the date notified by the employee, is whether the employee has a real or effective choice to work out the balance of the notice period with pay. Generally:

- (a) if the employee has the choice to work the full notice period with pay after giving notice of resignation, but freely agrees to end the employment earlier, the employee is not dismissed. The employment does not end at the initiative of the employer nor does it end because of a resignation that was forced by the employer. The employee has freely elected to bring forward the date on which their resignation takes effect; however
- (b) if the employer’s conduct leaves the employee with no real choice but to end the employment earlier than the notified date (without payment for the balance of the notice period), the employee is dismissed – either at the initiative of the employer or by way of a forced resignation under the second limb described in *Tavassoli* at [47(2)].

[42] The payment of the balance of the notice period and the ending of the employment by resignation are not the same thing, but a clear understanding between the parties about the first provides a strong indicator about the second. If an employee has freely elected to leave their employment earlier than previously notified, with a clear understanding of the consequences for the payment of the balance of the notice period, the Commission can more readily be satisfied that the employee in fact resigned their employment.

[43] It is distinctly possible that Mr Egginton was doing “a Jenny” (see [19] above), meaning he was taking action that he knew the employer would not like “in the hope that he would not have to work out the notice period.” In other words, it is distinctly possible that Mr Doble’s decision to initiate a discussion on 28 March 2024 was precisely what Mr Egginton was hoping for.

[44] Mr Doble initiated the conversation at a time when, at least in his mind, Mr Egginton was not properly performing his work and Ms Foini had expressed concerns about her safety working with Mr Egginton. Mr Egginton’s animus towards Ms Foini was obvious. She was the target of his formal complaint lodged on the same day that he resigned. In his complaint Mr Egginton said that the action he would like taken about his complaint was “I would like people held to account and for the company to actually practise what it is preaching.” In other words, after resigning Mr Egginton lodged a grievance to punish Ms Foini. Whatever the nature of the grudge that Mr Egginton held towards Ms Foini, he had not learned to fake it and just smile along. Indeed, once he resigned, he did not hold back in his attacks towards Ms Foini, telling her “I can’t say it has been a pleasure as you are probably the worst boss I’ve had.” He said he wasn’t aggressive in his tone when he said these words, but the words were so offensive that the tone was irrelevant.

[45] In the context of this history and animosity, and Mr Egginton’s desire to leave his job as soon as he could, the conversation between Mr Egginton and Mr Doble was crucial.

[46] It seems reasonably clear that in the conversation Mr Egginton and Mr Doble initially talked about Mr Egginton’s unhappiness. Mr Doble said “whilst Scott did most of the talking, I raised concerned about him not fulfilling his role.”

[47] It is also reasonably clear that Mr Doble initiated discussion about Mr Egginton finishing employment early. Considering Mr Egginton’s earlier conversations with Ms Sergi and Ms Foini, Mr Doble was pushing against an open door when he raised the topic, but nonetheless it was Mr Doble who sent the conversation down that particular path.

[48] Mr Egginton said that Mr Doble told him “things are not working out. You don’t want to be here so you can finish up now.” Mr Doble said “Scott did call and the discussion was about the option of him working out his notice or leaving on his own accord ... Scott agreed that the situation was deteriorating was happy to move on, on his own accord.”

[49] On either account there was no specific discussion about whether Mr Egginton would be paid for the balance of the notice period. Mr Egginton said that if it had been made clear to him that he would not be paid for the balance of the notice period he would not have agreed to finish immediately. This assertion can be tested against the surrounding circumstances. Focus NSW said that Mr Egginton stopped doing his job properly after he gave notice. Mr Egginton said that he might do a “Jenny” so that he would not have to work out his notice period. At the hearing Mr Egginton said he thought that Jenny was paid out the balance of her notice period, but he denied raising a grievance in the hope that Focus NSW would finish his employment early. The conversation between Mr Egginton and Mr Doble was on Easter Thursday, obviously just before the Easter public holidays. Unsurprisingly, Mr Egginton did not want to lose the benefit of being paid for the Easter public holidays. It was clear at that point that Mr Egginton

wanted to go early - however it was not clear whether he wanted to go early if it meant he would not be paid for the notice period.

[50] It is significant that the conversation between Mr Egginton and Mr Doble did not include any discussion about payment for the balance of the notice period. The legal effect of the conversation would have been much clearer if there had been a full and frank discussion about payment for the balance of the notice period. For example, if Mr Doble had told Mr Egginton that he could work out the notice period, or he could agree to leave immediately without payment for the balance of the notice period, and Mr Egginton elected to leave immediately, then the employment would have concluded by way of Mr Egginton's resignation.

[51] On the evidence available I cannot be satisfied that Mr Egginton's employment ended by way of his resignation. Because there was no discussion at all about working the balance of the notice period for pay, or paying the balance of the notice period, or not paying the balance of the notice period, it cannot be said that Mr Egginton freely agreed to make his resignation effective immediately. It is possible that he did freely agree to make his resignation effective immediately without expectation of payment of the balance of the notice period, however there was no evidence that was consistent with this possibility.

[52] To be clear: Mr Egginton's and Mr Doble's subjective intentions, assumptions or understandings when they spoke and made their agreement (the agreement that Mr Egginton leave employment early) are not particularly relevant. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe (see *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52 at [40], (2004) 219 CLR 165 (**Alphapharm**)).

[53] Neither party spoke about payment for the balance of the notice period. It does not matter whether one or both deliberately avoided the subject, or whether neither knew nor thought to raise it. Because it wasn't spoken about at all there is no basis to objectively find that Mr Egginton freely agreed to forego the opportunity to work out the balance of the notice period for payment. That is, there is no evidentiary basis to find that Mr Egginton freely agreed to end the employment by way of resignation on a date earlier than the expiry of the notice he had already given. For completeness, the surrounding circumstances known to the parties and the purpose and object of the agreement made (see *Alphapharm* at [40]) do not provide any further illumination.

[54] I am satisfied that the employment ended at the initiative of the employer when Mr Doble initiated discussion with Mr Egginton about finishing his employment earlier than the date specified in the resignation notice. On the evidence I am not satisfied that Mr Egginton freely chose to bring forward the effective date of his resignation. I am satisfied that the employment relationship ended at the initiative of the employer, or alternatively by way of a forced early resignation.

[55] I am satisfied that Mr Egginton's application was properly made insofar as he is "an employee who was dismissed" for the purposes of s.365(a) of the FW Act. Focus NSW's jurisdictional objection is therefore dismissed.

[56] A conference will shortly be convened under s.368 of the FW Act to deal with Mr Egginton's claim against Focus NSW.



DEPUTY PRESIDENT

Appearances:

S Egginton, Applicant
N Campbell, for the Respondent

Hearing details:

2024.
Sydney (By Video using Microsoft Teams)
June 14.

Printed by authority of the Commonwealth Government Printer

<PR777093>