



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Peter Wetzler

v

Australian Taxation Office

(U2023/12120)

DEPUTY PRESIDENT ROBERTS

SYDNEY, 17 JULY 2024

Application for an unfair dismissal remedy

[1] This decision concerns an objection that has been taken by the Commonwealth represented by the Australian Taxation Office (respondent) to an application for an unfair dismissal remedy brought by a former employee of the respondent, Mr. Peter Wetzler (applicant). The objection is that the applicant was not dismissed from his employment within the meaning of s.386 of the *Fair Work Act 2009* (Act) but rather voluntarily resigned from his position in September 2023 and that as a consequence, no remedy for unfair dismissal is available to the applicant.

[2] In an earlier decision¹ (first decision) I dealt with an initial objection by the respondent that the application had been made outside the prescribed limitation period and that there were no exceptional circumstances warranting an extension of time. That objection was decided in the applicant's favour. Following that decision, the parties agreed, and it was accepted, that the appropriate course was to determine the current objection separately and in advance of any determination of the merits of the application itself.

[3] The factual background and chronology of events are summarised² in the first decision and are largely uncontroversial. For present purposes it is necessary to note that at the time of the alleged dismissal, the applicant had been charged with a serious offence and was in custody in Victoria. He had at that time also been suspended from his employment with the respondent, without pay, effective from 6 September 2023 and was, amongst other things, facing the prospect of an investigation by his employer into a possible breach of the Australian Public Service (APS) Code of Conduct (Code) arising out of the criminal charges that had been brought against him and the media reporting of those charges.

[4] The applicant was in custody in Victoria from 15 September until 18 October 2023 when he was released on bail by order of the Supreme Court of Victoria.

[5] The charges against the applicant had been discontinued by the time of the hearing of this matter.

[6] The applicant’s employment came to an end on 19 September 2023 when his wife, Ms. Allen Wetzler, who held a power of attorney to act on behalf of the applicant, sent an email titled “Peter Wetzler’s Resignation” (resignation email) to the respondent in the following terms:

Dear Jade,

As per our conversation this morning, Peter would like to hand in his resignation.

Regards Sandra Allen-Wetzler.

[7] The events both preceding and following the sending of the email were the subject of detailed evidence, discussed below.

[8] Section 386 of the Act relevantly 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.*

[9] The applicant contends that the evidence shows that the cessation of his employment occurred on the respondent’s initiative because there was a resignation which was expressed in the “heat of the moment” and/or in circumstances where the applicant’s wife was experiencing significant emotional distress and/or mental confusion. Further and in the alternative, the applicant says he was forced to resign within the meaning of s386(1)(b).³

[10] The respondent submits that neither limb of s.386(1) applies and that the applicant voluntarily resigned from his position on 19 September 2023.

The Evidence

[11] The critical exchanges leading up to the resignation email occurred between Ms. Allen Wetzler and Ms. Jade Hamilton. Ms. Hamilton is employed by the respondent in the role of Director, Conduct, Performance and Reviews within the Working Well team. Both Ms. Hamilton and Ms. Allen Wetzler gave evidence and were cross-examined at length.

Ms. Hamilton

[12] Ms. Hamilton gave evidence that she had the delegated authority from the Commissioner of Taxation to act as a “Suspension Delegate”. This means she has the authority to suspend employees of the respondent who are suspected of breaching the Code. Ms.

Hamilton said in that role she does not undertake investigations into potential Code breaches and was not the ultimate decision-maker in relation to any findings of breaches of the Code. She was however the person who determined that the applicant's employment with the respondent should be suspended effective from 6 September 2023.

[13] Ms. Hamilton gave detailed evidence about her contact with the applicant and Ms. Allen Wetzler from 8 September 2023. Ms. Hamilton said that on 8 September she spoke with Ms. Allen Wetzler and advised her that a letter had been sent to the applicant. According to a contemporaneous note made by Ms. Hamilton, there was a discussion about the need for the applicant to provide authorisation to Ms. Allen Wetzler or the applicant's lawyers to speak to the respondent about the applicant's employment situation. The note also made reference to the availability of an employee assistance programme. According to Ms. Hamilton's note, Ms. Allen Wetzler queried whether the applicant's employment would be ending. Ms. Hamilton denied that she suggested that the applicant resign his employment⁴ but accepted that she told Ms. Allen Wetzler on 8 September that resignation was an option that was open to the applicant. Email correspondence from Ms. Hamilton to Ms. Allen Wetzler on that date was also in evidence.

[14] Ms. Hamilton also deposed to the details of a telephone conversation she had with the applicant and Ms. Allen Wetzler on 11 September 2023. She said the applicant was given further information about the Code investigation process and made a request to have access to his annual leave entitlements, given his suspension without pay. A file note of the conversation records that the applicant gave a verbal authorisation for Ms. Allen Wetzler and his lawyer, Mr. Conditis, to be his contacts in relation communications from the respondent. Ms. Hamilton's email account of the conversation includes a reference to Ms. Allen Wetzler being "quite distressed" but "understanding of our processes". An email was sent to Ms. Allen Wetzler by Ms. Hamilton shortly after the telephone call which attached a copy of the Code and information about misconduct action and the procedures that would be followed by the respondent in dealing with the matter.

[15] Ms. Hamilton's evidence was that there was a further telephone conversation between herself and Ms. Allen Wetzler on 18 September 2023. According to Ms. Hamilton, Ms. Allen Wetzler contacted her, provided an update of the applicant's situation and made a request for the cashing out of some of his long service leave entitlements. She said they also discussed the Code investigation process. Ms. Hamilton provided a copy of an email from herself to senior personnel within the respondent on the following day describing the details of the conversation. Those details were also recorded in a file note which Ms. Hamilton accepted was also prepared on 19 September using the email to refresh her memory.

[16] Ms. Hamilton said Ms. Allen Wetzler asked her during the conversation on 18 September what the Code investigation process involved. According to Ms. Hamilton she then explained, amongst other things, the following points to Ms. Allen Wetzler:

- (i) The applicant would be provided with a written explanation of the suspected breach and would be given an opportunity to respond.
- (ii) There would be a determination as to whether a breach had been established.
- (iii) If there was a conclusion that no breach had occurred, the matter would be closed.

- (iv) If a breach was found, the matter would be referred to determine what sanction would be imposed. Sanctions could range from reprimand to termination of employment.
- (v) Termination of employment, if it did eventuate, would be placed on the staff member's employment record and that they would need to declare the termination of their employment if they apply for a job in another Commonwealth agency.

[17] Ms. Hamilton said that after the discussion referred to above, Ms. Allen Wetzler asked her if the applicant could resign. Ms Hamilton said that she informed Ms. Allen Wetzler that resignation was an option open to the applicant. According to Ms. Hamilton, Ms. Allen Wetzler said that the applicant was very proud of his work with the Respondent and that he would likely resign from his position, but that this was something that she would discuss with him.

[18] Ms. Hamilton sent an email to Ms. Allen Wetzler after the conversation which included the following:

As I mentioned during our call, the Code of Conduct investigation process can take anywhere up to 8 weeks. If a breach of the Code is found, it may be that a sanction delegate will consider termination of employment. You mentioned that Peter is aware that this may be the outcome. We also discussed resignation, and you said that this is something you will speak with Peter about, and you commented that Peter is very proud of his achievements at work.⁵

[19] Ms. Hamilton gave evidence that she received a telephone call from Ms. Allen Wetzler on the morning of 19 September 2023. According to a note that Ms. Hamilton made of the call, Ms. Allen Wetzler asked her how the applicant could resign and Ms. Hamilton responded by saying this could be done by email. The resignation email followed at 11.55am that day. At 12.23pm, Ms. Hamilton emailed Ms. Allen Wetzler acknowledging receipt of the resignation email and at 12.38pm Ms. Hamilton rang Ms. Allen Wetzler and asked if Ms. Allen Wetzler agreed to allow the respondent to notify others in the applicant's team that the applicant had resigned. According to Ms. Hamilton's file note, Ms. Allen Wetzler confirmed that this could be done. Later on the same day, Ms. Hamilton sent a request to the payroll office asking that the request for the cashing out of long service leave be cancelled because the applicant had resigned effective from that day.

[20] Ms. Hamilton's evidence was that on 20 September she sent Ms. Allen Wetzler an email recognising the applicant's service with the respondent and on 21 September she sent her a further email containing the final payment details for the applicant. Ms. Hamilton said there was no response to either email and there was no further contact from the applicant or Ms. Allen Wetzler seeking to withdraw the resignation, or otherwise.

[21] On 23 October 2023 the applicant's lawyers wrote to the respondent referring to the "constructive dismissal" of the applicant and seeking his reinstatement. The respondent replied by email on 6 November 2023 rejecting the claim of constructive dismissal and refusing to reinstate the applicant.

Ms. Allen Wetzler

[22] Ms. Allen Wetzler deposed to the circumstances surrounding the cessation of the applicant's employment in an affidavit dated 9 October 2023 (prepared for the purpose of the applicant's bail application) and a witness statement dated 21 May 2024. She said that at the time of making the affidavit and on 18 and 19 September 2023 she was in a highly distressed state and "barely holding (herself) together". She gave evidence about her family circumstances. She said the applicant was in custody charged with a serious offence and awaiting a bail application. She said if the application was not successful, the applicant faced an extended period of imprisonment until the matter was heard. She said she was in the process of selling the family home to pay for legal expenses.

[23] Ms. Allen Wetzler said that as at 18 and 19 September 2023 she was not in daily contact with the applicant. She said that prior to the telephone call with Ms. Hamilton on 18 September she did not want the applicant to resign and had no intention of tendering a resignation on his behalf.

[24] Ms. Allen Wetzler said that during the telephone conversation with Ms. Hamilton on 8 September 2023, resignation was discussed and she indicated that the applicant "would not be resigning any time soon." Ms. Allen Wetzler accepted that Ms. Hamilton's file notes of their conversation on 11 September were consistent with what was discussed. She accepted that she received Ms. Hamilton's email of 11 September 2023 enclosing details of the Code process but said she did not read the attachments because she was in a state of extreme distress.

[25] Ms. Allen Wetzler said that in the conversation with Ms. Hamilton on 18 September 2023, she did not recall Ms. Hamilton outlining the Code process to her.⁶ In cross-examination said she believed there was no discussion about the Code process.⁷ Ms. Allen Wetzler denied asking Ms. Hamilton on 18 September if the applicant could resign,⁸ although in cross-examination accepted that she had asked that question.⁹ She said that the relevant part of the conversation started with Ms. Hamilton saying words to the effect "Has (the applicant) considered resigning?" She said resignation was offered to her.

[26] According to Ms. Allen Wetzler, Ms. Hamilton also said words to the following effect:

- (i) The criminal charges and the fact that the applicant was employed by the respondent had been reported in the newspapers and "the likelihood is that (the applicant) will be terminated"¹⁰ and "it was a foregone conclusion that (the applicant) would lose his job."¹¹
- (ii) It would be better for the applicant to resign.¹²
- (iii) If the internal review goes through and the applicant gets charged, he will have to declare that in any application for work.¹³
- (iv) Unless (the applicant) resigns (the respondent) will conduct an internal review, but the fact the matter has already been in the papers means that (the applicant) has already brought (the respondent) into disrepute and if (the respondent) terminated (the applicant's) employment he would have to declare that when applying for another job and that would make it worse.¹⁴
- (v) The respondent will also talk to the police.¹⁵

[27] Ms. Allen Wetzler said she told Ms. Hamilton that the applicant was proud of his work with the respondent. She said in her statement that she also said to Ms. Hamilton that it was likely that the applicant would resign¹⁶ but later said she could not recall whether she made those comments.¹⁷ Ms. Allen Wetzler said that during the conversation with Ms. Hamilton on 18 September the applicant's sister was with her and that after the call the two discussed what should be done. The applicant's sister did not give evidence.

[28] In her evidence in chief Ms. Allen Wetzler said that she was unable to confirm that she said to Ms. Hamilton that she was in daily contact with the applicant.¹⁸ In cross-examination she accepted that she did say that she was in daily contact but pointed out that this contact did not happen in practice.¹⁹

[29] Ms. Allen Wetzler said she may have spoken to the applicant on 19 September and that if she did, she would have told him that she had resigned on his behalf.²⁰ The following evidence was given by Ms. Allen Wetzler in cross-examination:

...And you gave some evidence that on 19th, your best recollection is that you did speak to – or you think that you spoke to Peter on the 19th. That was that lengthy phone call from the prison?---Yes.

And you said to me earlier that if you did speak to him on the 19th, you would have told him that you had resigned that day, tendered his resignation?---Possibly, yes.

And so you recall having a discussion with him shortly thereafter, after tendering the resignation?---Yes. I didn't realise it was the same day. I thought it was a couple of days later.

All right. But you recall telling him, shortly after the resignation, that you had tendered it?---Yes.

And I take it that he was supportive of that decision?---Yes.²¹

[30] Ms. Allen Wetzler said that when she forwarded the resignation email on 19 September she did so “believing, as (the applicant) did, that we didn't have a reasonable alternative.”²²

Ms. Hamilton – Evidence in Reply

[31] Ms. Hamilton denied saying on 18 September that unless the applicant resigned, the respondent would conduct an internal review. She denied saying that the applicant had brought the respondent into disrepute. She denied that she said the respondent would talk to the police and said she regarded it to be inappropriate for the respondent to make contact with the police during a criminal investigation. Ms. Hamilton denied suggesting or implying that it would be best for the applicant to resign and denied she said or implied that the applicant had no other option but to resign.

[32] Ms. Hamilton said during her conversations with Ms. Allen Wetzler she did not have concerns that Ms. Allen Wetzler was too distressed to make decisions about the applicant's

employment. Ms Hamilton said she was never made aware that Ms. Allen Wetzler was having to sell the family home to fund legal costs.

[33] According to Ms. Hamilton, Ms. Allen Wetzler said she would be speaking with the applicant on the evening of 18 September and that she would discuss the prospect of the applicant resigning with the applicant then.²³

[34] Ms. Hamilton denied making any reference to disclosures about termination beyond the APS. She also denied saying it was a “foregone conclusion” that the applicant would lose his job because of media coverage. Ms. Hamilton denied that she suggested to Ms. Allen Wetzler that the applicant resign and said that it was Ms. Allen Wetzler who raised the issue of resignation with her. She denied suggesting or implying that the respondent would terminate the applicant’s employment unless he resigned.

Submissions

[35] The applicant argued that Ms. Allen Wetzler was in a distressed state during her dealings with Ms. Hamilton. He said this was understandable given his own circumstances and the situation his family was in. The applicant said this would have been clear to the respondent and that Ms. Hamilton’s own evidence recognised that Ms. Allen Wetzler was distressed.

[36] The applicant said that there was a change in Ms. Allen Wetzler’s position between the 8 September conversation, where Ms. Allen Wetzler said the applicant would not be resigning, and 18 September when she indicated that he would likely resign. The applicant submitted that Ms. Allen Wetzler reacted to what she was told by Ms. Hamilton on 18 September and that rather than confirm that the decision to resign was not merely a reaction to the stress of the surrounding circumstances and the content of the telephone call on 18 September, the respondent “opportunistically” accepted the resignation without question. The applicant argued that the circumstances fell within the first limb of s.386(1) and that his employment had been terminated on the respondent’s initiative.

[37] Alternatively, the applicant argued that the respondent engaged in a course of conduct with the intention of bringing the employment to an end or that the resignation was the probable result of the respondent’s conduct such that the applicant had no effective or real choice but to resign. The applicant said he had been suspended without pay without the respondent having any direct knowledge of the strength of the charges that had been brought against him. He said the respondent was aware of the media interest in the criminal allegations from an early stage and this was a key issue in the Code investigation process. The applicant said that Ms. Hamilton established a relationship of trust and confidence in the telephone calls with Ms. Allen Wetzler and that the former, knowing that the latter was vulnerable and the applicant was in prison, convinced Ms. Allen Wetzler that the applicant’s best option was to resign.

[38] The applicant said that the steps taken by the respondent vis-à-vis the applicant were taken to meet the respondent’s objective of avoiding adverse media coverage for themselves arising from the arrest of the applicant. He pointed out that the respondent had themselves rated

the potential risk of such coverage as severe and that it was conceded that the concern about adverse publicity led directly to the applicant's suspension without pay.

[39] The applicant submitted that the decision to suspend without pay was made beyond power because clause 11 of the Code, relied on by the respondent for the suspension, did not apply to conduct prior to the commencement of the employment relationship. He said there was no basis for a belief that there were reasonable grounds to say that the applicant had breached the Code and that such a belief was necessary for a power to suspend to be validly exercised. The applicant said that the *Public Service Regulations* provided that a person could only be suspended without pay for more than 30 days in exceptional circumstances and that media attention relating to the charge could not constitute such circumstances. In the result, the applicant maintained that the suspension decision was defective and unnecessary and placed additional psychological and financial pressure on the applicant and his wife.

[40] The respondent submitted that there was no "heat of the moment" resignation. Rather, they said the resignation was communicated via email a day after the conversation between Ms. Allen Wetzler and Ms. Hamilton on 18 September and after Ms. Allen Wetzler had discussed the matter with the applicant's sister who was present during the telephone call. They said in the circumstances it was entirely reasonable for the respondent to accept the resignation.

[41] The respondent pointed out that after the resignation had been received, Ms. Hamilton contacted Ms. Allen Wetzler on four occasions regarding the resignation and there was no indication that the resignation was not a true resignation or had been made in the heat of the moment. Nor did the applicant attempt to retract the resignation that had been given. Instead, the respondent said, there was silence and a complete acceptance of the situation for some five weeks.

[42] The respondent submitted that the interactions between Ms. Hamilton and Ms. Allen Wetzler were entirely appropriate and typical in the circumstances. They said that rather than showing that there had been any breach of trust or manipulation of Ms. Allen Wetzler's circumstances, the evidence showed that Ms. Hamilton had taken steps to help the applicant and his wife, including by processing leave applications, answering questions about the Code process and seeking confirmation about communication of the applicant's resignation to his team. The respondent said the resignation was clear, direct and unambiguous. They said the resignation was not solicited or suggested by the respondent, let alone forced.

Consideration

[43] The legal principles governing the application of s 386(1) of the Act in the context of cases of an ostensible resignation are well established and widely known. They were set out by a Full Bench of this Commission in *Bupa Aged Care Australia Pty Ltd v Tavassoli*²⁴ (Bupa) at [47] as follows:

- (1) *There may be a dismissal within the first limb of the definition in section 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 section 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 probably (sic) 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.*

[44] In *Khayam v Navitas English Pty Ltd t/a Navitas English*²⁵ (Khayam) a majority of a differently constituted Full Bench said in relation to the application and interpretation of s.386(1)(a):

As stated in Mohazab, the expression “termination at the initiative of the employer” is a reference to a termination that is brought about by an employer and which is not agreed to by the employee. In circumstances where the employment relationship is not left voluntarily by the employee, the focus of the inquiry is whether an action on the part of the employer was the principal contributing factor which results, directly or consequentially, in the termination of the employment.²⁶

[45] The question of whether or not the termination of the applicant’s employment was a termination on the initiative of the employer turns in large measure on the view that is taken of the evidence relating to the conversation on 18 September. However, the circumstances and discussions preceding this conversation are also relevant to the context in which the conversation occurred and must be taken into account.

[46] There is sufficient evidence, much of it uncontested, to comfortably say that Ms. Allen Wetzler was confronting difficult circumstances when she engaged in the conversation with Ms. Hamilton on 18 September 2023 and when she ultimately tendered her husband’s resignation the following day. The applicant had been charged with a serious offence. He was in prison interstate awaiting a bail application and faced the prospect of an extended period there awaiting trial if his bail application did not succeed. Mr. Wetzler had been suspended from work without pay. The family had mounting legal bills and faced the prospect of selling the family home to defend the charges. A separate workplace process was in the offing to determine whether a breach of the Code had occurred and if so, what if any sanction might be imposed.

[47] It was not in issue that the question of resignation was first discussed between Ms. Hamilton and Ms. Allen Wetzler during the first telephone conversation on 8 September. The former’s note of that call says that Ms. Allen Wetzler asked if the applicant’s employment

would be ending and Ms. Hamilton responded by saying that resignation was an option open to the applicant. Ms. Hamilton accepted that she said to Ms. Allen Wetzler that resignation was an option open to the applicant and that the response that the applicant would not be resigning any time soon was directly responsive to Ms. Hamilton's statement.²⁷

[48] Ms. Allen Wetzler contacted Ms. Hamilton by telephone on 18 September. The call was a reasonably lengthy one, lasting approximately nine and a half minutes. Ms. Hamilton created a contemporaneous note of the call. That was the email that was sent to Ms. Allen Wetzler shortly after the call concluded. Ms. Allen Wetzler did not respond to the email either to dispute its contents or otherwise. Ms. Hamilton's evidence about the call was consistent with the content of the email. I am satisfied that Ms. Hamilton discussed the Code process with Ms. Allen Wetzler even though Ms. Allen Wetzler said she was unable to recall whether that process was discussed. The length of the call is consistent with a reasonably detailed conversation occurring about what the Code process might involve.

[49] I am also satisfied that the version of the conversation about the Code process provided by Ms. Hamilton is the more accurate one. Ms. Hamilton was the suspension delegate but was not responsible for investigating or making findings in relation to alleged Code breaches. She was however familiar with the Code processes and had provided Ms. Allen Wetzler with documents which outlined those processes in advance of the discussion.²⁸ Those documents outlined the processes and the range of possible outcomes in relatively straightforward terms. Ms. Allen Wetzler's version of what Ms. Hamilton said does not align with the content of those documents. I think it unlikely that a senior person in Ms. Hamilton's position would be making statements about outcomes of a process in which she was not directly involved, or which were inconsistent with documents that had been provided. I do not think that she did make such statements.

[50] There are other aspects of Ms. Allen Wetzler's evidence about the conversation on 18 September which are troubling. First, there were different versions of important aspects of the conversation. In her affidavit of 9 October 2023, she said that Ms. Hamilton's words were "*unless (the Applicant) resigns the ATO will conduct a review*" then "*if the ATO terminated (the Applicant's) employment he would have to declare that...*" (emphasis added) and then later "*it would be best for (the Applicant) to resign rather than the ATO terminate his employment.*"²⁹ In her statement prepared for these proceedings, Ms. Allen Wetzler said the words were "*if the internal review goes through and (the Applicant) gets charged, (the Applicant) will have to declare that*" and "*since it was already in the paper it was a foregone conclusion that (the Applicant) will lose his job.*" She also said that Ms. Hamilton used words to the effect that "*the likelihood is that (the Applicant) will be terminated*" and "*it would be better for (the Applicant) to resign.*"³⁰

[51] In cross-examination Ms. Allen Wetzler ultimately accepted that Ms. Hamilton did not say that termination was a "foregone" conclusion.³¹ It was also put to her that there was nothing in her affidavit of 9 October 2023 - a document that was affirmed much closer to the date the conversation took place - to the effect that Ms. Hamilton said that termination was the only likely outcome or a "foregone conclusion". However, Ms. Allen Wetzler defended her later account as the more reliable version.

[52] Contrary to the position maintained by Ms. Allen Wetzler I do not think that Ms. Hamilton was suggesting that the outcome of the Code process would be the applicant's termination, or that she recommended to her that the applicant resign. In cross-examination Ms. Allen Wetzler accepted that Ms. Hamilton did not say the applicant's best option was to resign but rather asked whether resignation had been considered.³² I also do not think that Ms. Hamilton referred to the Code process as an "internal review" or said words to the effect of "if (the applicant) is charged..." since Ms Hamilton knew he had already been charged at the time of the conversation.

[53] I also conclude that during the telephone call on 18 September, Ms. Allen Wetzler said to Ms. Hamilton that it was likely that the applicant would resign³³ and that Ms. Allen Wetzler would speak with her husband about resignation that evening³⁴. Ms. Allen Wetzler accepted that she told Ms. Hamilton that she was in daily contact with the applicant³⁵.

[54] Ms. Hamilton said that the respondent's guide for handling misconduct matters stated that they should check with police before a misconduct investigation starts. She said there was no contact with police before the applicant was suspended. She also maintained that she did not refer to contacting the police during her conversation with Ms. Allen Wetzler on 18 September. I accept her evidence on that point.

[55] I am not satisfied that Ms. Hamilton said anything that pre-empted a conclusion that media reporting of the applicant's case meant that the applicant had already brought the respondent into disrepute or breached the Code. These were matters for a separate established process and a different decision-maker.

[56] Overall, Ms. Hamilton was a forthright and credible witness. Her version of the conversation is amply supported by contemporaneous notes and emails. I conclude that Ms. Hamilton's version of the conversation is the more reliable one. The substance of what was said about the Code process and the applicant's employment was that termination was a *possible* outcome *if* the breaches were established. This was what was put in the email from Ms Hamilton shortly after the call and *before* the resignation was given. I also accept that resignation was discussed, but that Ms. Hamilton, consistently with what she had said on 8 September, confirmed that resignation was an option open to Mr. Wetzler.

Section 386(1)(a)

[57] The applicant said that each of the elements of dismissal constituted by the first limb of s.386(1) had been made out, including that the respondent had taken no steps to confirm that the applicant had intended to resign after the resignation was given. Ms. Allen Wetzler confirmed in cross-examination that although she was in a state of high emotion and stress, she had no difficulty in dealing with Ms. Hamilton about the applicant's leave balances or dealing with the applicant's lawyers, including providing instructions, making decisions about the criminal proceedings and making arrangements for the applicant's affairs in the Victorian prison system.³⁶ She accepted without hesitation that Ms. Hamilton was at all times professional, calm and courteous and that she wanted to assist and provide information.

[58] The ATO's investigation was in its early stages when the conversation of 18 September occurred. Although the applicant had been suspended without pay, the respondent had

facilitated the payment of accrued annual leave entitlements through Ms. Allen Wetzler that would have seen the applicant be paid until November.³⁷ The telephone call on 18 September was initiated by Ms. Allen Wetzler. Ms. Hamilton told Ms. Allen Wetzler in an email shortly after the call on the same day that the Code investigation process could take anywhere up to 8 weeks.³⁸ In my view there was nothing in any of what Ms. Hamilton said to Ms. Allen Wetzler to suggest that there was any urgency attached to making a decision about resignation.

[59] I also note that Ms. Allen Wetzler was not alone³⁹ when the decision was made to tender the resignation. She said:

I certainly got off the phone and spoke to (the applicant's) sister who was with me, because I - yes, I was in a flux because I wouldn't know what would be the right thing to do for Peter, and we came to the conclusion that he resign would be appropriate, because Peter was so proud of the work he'd done for the ATO.⁴⁰

[60] It was uncontroversial that following the resignation email on 19 September 2023, Ms. Hamilton contacted Ms. Allen Wetzler on four separate occasions, once by telephone and 3 times by email. At no stage in the 5 weeks following the resignation did the applicant or Ms. Allen Wetzler indicate that the resignation was not freely given or that they wished to withdraw the resignation. The applicant became aware of the resignation on 19 (or 20) September and was supportive of the decision to resign.⁴¹ The resignation was not contested until 23 October 2023 after the applicant's lawyer first became aware of it.⁴²

[61] Having regard to all the circumstances, I am of the view that although Ms. Allen Wetzler was dealing with a stressful situation, she maintained a level of mental fortitude that permitted rational decision-making. She was not in such a state of heightened stress or mental confusion that she could not reasonably be understood to be conveying a real intention to resign. Nor was the resignation tendered in the "heat of the moment". It was tendered the day after the critical conversation with Ms. Hamilton and after Ms. Allen Wetzler and the applicant's sister had weighed up the options.

[62] The resignation was in clear terms which, given the events which preceded it, could only have been understood as evincing a real intention to resign. Having regard to my conclusions as to the substance of the conversations between Ms. Allen Wetzler and Ms. Hamilton, I do not think that the circumstances were such that it was unreasonable for the respondent to treat the resignation as being genuinely given and having immediate effect. Consequently, the respondent could not have been on notice that further clarification was required.⁴³ In any event, whilst the communications from the respondent that followed the resignation were not in the nature of a positive inquiry about the resignation, they followed on from the resignation and there was an opportunity for the applicant to say that the resignation was not intentional or voluntary. This did not happen in my view because everyone, including the applicant, thought that resignation was the appropriate course of action.

[63] I conclude that the applicant's employment was not terminated on the employer's initiative within the meaning of s.386(1)(a).

Section 386(1)(b)

[64] The applicant submitted that various factual elements had been established which were sufficient to allow the Commission to conclude that the second limb of s.386(1) had been satisfied.⁴⁴ Included amongst these was a challenge to the validity and reasonableness of the respondent's decision to suspend the applicant without pay on 6 September 2023. The applicant said this decision placed the applicant and his wife under additional financial stress and made them reliant on paid leave being granted.

[65] The respondent said that the challenge to the suspension decision was raised for the first time in closing submissions and that the propositions relied on to make good the argument were not squarely or sufficiently put to Ms. Hamilton in cross-examination. Further, the respondent pointed out, correctly, that the decision to suspend was not challenged by the applicant at the time it was made even though the applicant had been released from custody well in advance of the expiration of the time period to challenge the decision. The respondent also said that the applicant's incarceration meant that he was unable to work in the periods 6 to 11 September⁴⁵ and 15 September and 18 October. It was said that the suspension notice therefore had no practical consequence as the applicant would have been reliant on paid leave as a source of income in any event.

[66] The argument about the validity of the suspension decision was not the central issue for determination in this case. Nor was it put that a definitive finding as to the lawfulness and reasonableness of the suspension decision would be sufficient to determine whether there had been a 'forced resignation' under s386(1)(b). The applicant relied on a course of conduct including the suspension, not this singular event that occurred at the outset of the process. Ordinarily, the commencement of an investigation and a proposed suspension would not provide the basis for a constructive dismissal claim. In *Davidson v. Commonwealth* the Full Bench said:

*The conclusions reached by the Commissioner are consistent with the authorities and the common understanding that the institution of an investigation and the proposed taking of action to suspend an employee during such investigation would not normally provide a basis for a claim of constructive dismissal. Such processes, provided they are accompanied by appropriate protections for the rights of the employee concerned, allow allegations of concern to an employer to be properly examined and tested.*⁴⁶

[67] A finding in the applicant's favour on the suspension question may sound in an entitlement to remuneration lost, if any, as a result of the suspension, but in my view does not necessarily resolve the question of whether the applicant had been forced to resign. I think the proper approach here is to consider the suspension as one of a sequence of events to determine whether the overall circumstances constituted a course of conduct engaged in by the respondent with the intention of eliciting a resignation and thereby involuntarily bringing the applicant's employment to an end. In that respect it is noteworthy that the applicant was given a reasonable period to respond to the suspension and advised that the suspension decision itself was reviewable, but elected not to challenge the decision at the time it was made. He was also told that the decision to suspend had to be reviewed at regular intervals. The suspension decision was made at the very outset of the events which ultimately unfolded. It was separate from the Code investigation process which would ultimately determine whether a sanction would apply and if so, the form of such sanction. This was made clear by the respondent.

[68] I also note that the suspension removed any right the applicant may have otherwise had to the payment of ordinary remuneration. That is a significant right. After the suspension, Ms. Hamilton facilitated the payment of accrued annual leave, suggested that the applicant might seek access to long service leave entitlements,⁴⁷ offered access to the employee assistance programme and generally offered to provide further information or assistance that might be required. I do not think that the suspension decision was engaged in with the intention of bringing the employment to an end or that termination of the employment was the probable result. Even if the applicant's arguments about the suspension decision are correct, I do not consider that this alters the conclusion I have reached about the overall effect of the course of conduct of the respondent and the voluntariness of the applicant's resignation.

[69] I do not consider that the respondent's contact with Ms. Allen Wetzler rather than the applicant's lawyer bespeaks an intention to circumvent Mr. Conditis and thereby make it easier to secure the applicant's resignation. The applicant authorised both his wife and his lawyer to act on his behalf in relation to his employment. Ms. Hamilton provided her contact details to Ms. Allen Wetzler and told her that she was more than happy for Mr. Conditis to contact her if that was her preference.⁴⁸ She also indicated that the person responsible for the Code investigation would be in contact with her, the applicant or the applicant's lawyer in due course.⁴⁹ Ms. Allen Wetzler was fully authorised to act on the applicant's behalf, as was Mr. Conditis. She did not request that Ms. Hamilton speak with Mr. Conditis instead and there was no evidence that Mr. Conditis had any contact with the respondent prior to the resignation letter.

[70] Although I accept that the respondent was concerned about the media coverage that the applicant's charges had attracted, and his connection with the ATO, I do not consider that the interactions between Ms. Hamilton and Ms. Allen Wetzler demonstrate that the former was attempting to manoeuvre the latter into a position where a resignation would follow. Nor do I think that Ms. Hamilton intended to mislead or create a false impression as to the processes or likely outcome. My conclusions on the critical telephone conversation do not support such a finding and nor do the documents and emails that were sent to Ms. Allen Wetzler by the respondent.

[71] As I have concluded above, there can be little doubt that Ms. Allen Wetzler was stressed and upset at the events that surrounded her. I am also satisfied that Ms. Hamilton was conscious of the stress that Ms. Allen Wetzler faced. However, I do not accept that the combined effect of the respondent's conduct deprived Ms. Allen Wetzler of options or negated any real choice that she may have had in the matter.

[72] Ms. Allen Wetzler could have waited for the investigation process to develop further or even to finalise, and then challenge any adverse outcome. She could have conferred with the applicant before making a decision. She could have sought advice from Mr. Conditis or asked him to confer with the respondent. Instead, Ms. Allen Wetzler made a conscious assessment. She thought it was better to resign than have her husband go through the stress of a possible termination.⁵⁰ She thought it better to resign and move on because she and the applicant had enough things going on in their lives without the need to worry about a Code investigation.⁵¹ She discussed the matter with the applicant's sister before the resignation who agreed with the decision to resign. These were understandable decisions. Shortly after the resignation, she

conferred with the applicant about what she had done, and the applicant was supportive of the decision.⁵² It was there the matter rested until 23 October 2023.

[73] It is often said that the line between a voluntary resignation and conduct which leaves no real choice for an employee but resignation is a narrow one but one which must be “closely drawn and rigorously observed.”⁵³ Here, I do not think the employer engaged in conduct with the intention of bringing the employment to an end or that termination of the employment of the applicant was the probable result of the employer’s conduct such that the employee had no effective or real choice but to resign. I do not think the resignation was forced in the relevant sense.

[74] I conclude that the applicant was not dismissed within the meaning of s.386(1) and the Commission is therefore unable to hear the application for an unfair dismissal remedy.

[75] The application is dismissed.



DEPUTY PRESIDENT

Appearances:

Mr. Andrew Wilson, Counsel for the Applicant.
Ms. Vanja Bulut, Counsel for the Respondent.

Hearing details:

In-person at the Fair Work Commission, Sydney on Friday, 24 May 2024.

Final written submissions:

Respondent’s closing submissions filed on 19 June 2024.
Applicant’s closing submissions filed on 5 July 2024.
Respondent’s closing submissions in reply filed 12 July 2024.

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¹ [\[2024\] FWC 492](#) (23 February 2024).

² *Ibid* at [6] to [15].

³ See *Bupa Aged Care Australia Pty Ltd v. Tavassoli* [\[2017\] FWCFCB 3941](#) at [47].

⁴ Transcript PN228.

⁵ Exhibit R1 Annexure JH13.

⁶ Exhibit A3 paragraph [33].

⁷ Transcript PN 635-636.

⁸ Exhibit A3 paragraph [42].

⁹ Transcript PN 650 and see 655.

¹⁰ Exhibit A3 paragraph [34].

¹¹ *Ibid* at [13].

¹² *Ibid* at [34].

¹³ *Ibid* at [13].

¹⁴ Exhibit A2 paragraph [14].

¹⁵ *Ibid*.

¹⁶ Exhibit A3 paragraph [35].

¹⁷ *Ibid* at [42].

¹⁸ *Ibid* at [29].

¹⁹ Transcript PN741.

²⁰ Transcript PN722.

²¹ Transcript PN 852-856.

²² Exhibit A2 op cit paragraph [15].

²³ Exhibit R2 paragraph [17].

²⁴ [\[2017\] FWCFCB 3941](#).

²⁵ [\[2017\] FWCFCB 5162](#).

²⁶ *Ibid* at [50] and n2 [75]. See also *Mohazab v Dick Smith Electronics* (1995) 62 IR 200.

²⁷ Transcript PN 242.

²⁸ Exhibit R1 Annexure JH9.

²⁹ Exhibit A2 at [14].

³⁰ Exhibit A3 at [13] and [34].

³¹ Transcript PN 837-838.

³² Transcript PN 653.

³³ Exhibit R1 paragraph [31] and annexures JH14 and JH15, R2 paragraphs [17] and [39] and Exhibit A3 paragraph [35], cf paragraph [42].

³⁴ Exhibit R1 paragraph [31] and exhibit R2 paragraphs [17] and [39].

³⁵ Transcript PN 741.

³⁶ Transcript PN 865 and following.

³⁷ Transcript PN 596.

³⁸ Exhibit R1 annexure JH 13.

³⁹ Ms. Allen Wetzler did not refer to this in her evidence in chief see - Exhibit A3.

⁴⁰ Transcript PN 657.

⁴¹ Transcript PN 855-856.

⁴² Transcript PN 912.

⁴³ cf *Minato v. Palmer Corporation Ltd* (1995) 63 IR 357 at 361-2).

⁴⁴ See applicant's closing submissions paragraph [84].

⁴⁵ The applicant was released from custody in NSW on 8 September - see first decision paragraph [8].

⁴⁶ [\[2011\] FWAFB 6265](#) at [18].

⁴⁷ Exhibit R1 annexure JH 9, 10 and 12. A request for such a payment was made by Ms. Allen Wetzler on 18 September. Ms. Hamilton appeared to be of the view by 18 September at 2.04pm that the long service leave request would be declined - Exhibit A1 Court Book page 195. See also Exhibit R1 annexure JH 14.

⁴⁸ Exhibit R1 annexure JH 5.

⁴⁹ Exhibit R1 annexure JH9.

⁵⁰ PN 676-677.

⁵¹ PN 796.

⁵² PN 856.

⁵³ *Doumit v ABB Engineering Construction Pty Ltd* Print N6999