DECISION

Fair Work Act 2009
s.365—General protections

Gaye Walker
v
Australian Capital Territory as represented by Chief Minister Treasury and Economic Development Directorate
(C2023/6686)

DEPUTY PRESIDENT EASTON SYDNEY, 30 JULY 2024

Application to deal with contraventions involving dismissal – jurisdictional objection – not an employee who has been dismissed – employer claimed that the employment ended by operation of the Public Sector Management Act 1994 (ACT) – employment terminated at the initiative of the employer – jurisdictional objection dismissed – application to proceed.

[1] On 30 October 2023 Ms Gaye Walker made an application to the Fair Work Commission under s.365 of the *Fair Work Act 2009* (Cth). Ms Walker claims that she was dismissed from her employment with the Australian Capital Territory as represented by Chief Minister Treasury and Economic Development Directorate ("**the Directorate**"), and that the dismissal contravened the general protection provisions of the FW Act.

[2] The Directorate denies that Ms Walker was dismissed from her employment. The Directorate argued that the employment ended by operation of law, specifically the forfeiture of office provisions of the *Public Sector Management Act 1994* (ACT) (**PSM Act)**.

[3] Ms Walker commenced employment with the Directorate in May 2021 during the COVID-19 pandemic. Between August and September 2021 Ms Walker received two doses of a COVID-19 vaccine. Ms Walker did not ever return to work after being vaccinated.

[4] Ms Walker said she felt pressured by her workplace to be vaccinated against COVID-19. After receiving the second dose Ms Walker said she experienced a brief loss of vision in her left eye, continued blurred vision, headaches, pyrexia and left-sided facial paralysis. Ms Walker said she also suffered various ongoing and debilitating symptoms caused by the vaccine that meant that she has not been able to work at all.

[5] Medical practitioners disagree about Ms Walker's capacity to do any work, and about the claimed causal link between the vaccine and Ms Walker's various conditions. I do not need to resolve these questions because they are not relevant to the matter that I must decide.

[6] There was correspondence during the employment about Ms Walker's absence and her capacity to perform work, which culminated in the Directorate commencing what it calls a "forfeiture of office" process on 22 August 2023. This process concluded on 19 October 2023.

[7] In the 29 months Ms Walker was employed she worked the first four months and then was away for more than two years.

[8] By the terms of s.127 of the *Public Sector Management Act 1994* (ACT) (**PSM Act)** an officer who has been absent from work without permission for a continuous period of four weeks or more is taken to have retired in certain circumstances.

[9] The Directorate argued that the terms of s.127 were satisfied, Ms Walker's employment ceased by operation of s.127 and therefore Ms Walker was not dismissed for the purposes of the FW Act.

[10] For the reasons that follow I am satisfied that Ms Walker was dismissed from her employment in 2023.

The Commission's Jurisdiction

[11] The Fair Work Commission can deal with applications under s.365 of the FW 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 the making of a general protections court application unless the FWC has issued a certificate under s 368(3)(a) in relation to the dispute.

[12] 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 Commission must determine whether the application was properly made, and may need to determine whether an applicant was actually dismissed from their employment.

"A person who has been dismissed"

[13] Ms Walker only has standing to make a general protections claim if she is "a person who has been dismissed" (per s.365(a)). "Dismissed" is defined in s.12 of the FW Act by reference to s.386. Section 386 is in the following terms:

> **"386 Meaning of dismissed**
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> (1) A person has been dismissed if:
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> > (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) …"

[14] 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:
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> (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.
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> (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.
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> [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."

The *Public Sector Management Act 1994* (ACT)

[15] Section 127 of the PSEM is central to the Directorate's argument:

> **"127 Forfeiture of office**
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> (1) This section applies if an officer is absent from work without permission for a continuous period of 4 weeks or more.
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> (2) The head of service may give the officer a written notice telling the officer that the officer will be taken to have retired from the service 2 weeks from the day the notice was sent unless, within the 2-week period, the officer—
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> (a) returns to work; or
>
> (b) explains the absence and asks the head of service for any further period of absence that may be necessary having regard to that explanation.
>
> (3) The officer is taken to have retired from the service on the day after the end of the 2-week period unless the officer—
>
> (a) returns to work; or
>
> (b) explains the absence.
>
> (4) If the officer explains the absence and asks the head of service for a further period of absence, the head of service must—
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> (a) as soon as practicable, consider the matter; and
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> (b) tell the officer, in writing, that the officer—
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> (i) is given leave for the period, including any conditions on the leave; or
>
> (ii) must return to work within a stated period (of at least 2 weeks) or the officer will be taken to have retired from the service at the end of the stated period.
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> (5) If an officer is required to return to work within a period stated under subsection (4) (b) (ii) and the officer does not return to work in the period, the officer is taken to have retired from the service on the day after the end of the period."

[16] The events leading to the end of Ms Walker's employment can be described in reasonably neutral terms. On 9 August 2021 Ms Walker took leave from the Directorate because of claimed adverse side effects of the COVID-19 vaccine. In April 2023 and independent medical examiner found that Ms Walker was fit to work from home two hours per day for three days a week. On 20 June 2023 the Directorate wrote to Ms Walker asking her to attend a return-to-work meeting on 24 July 2023. On 10 July 2023 the Directorate formally directed Ms Walker to return to work on 24 July 2023, in accordance with the independent medical examination report - two hours per day for three days a week, from home.

[17] On 23 July 2023 Ms Walker provided a medical certificate indicating that she was unfit for duty due to a "medical condition" from 19 July 2023 to 22 September 2023. This medical assessment was contested by the Directorate.

[18] The Directorate wrote to Ms Walker on 22 August 2023 advising that a 'forfeiture of office' process had commenced in accordance with s.127 of the PSM Act. The letter stated that Ms Walker would be taken to be retired from the ACT Public Service by 7 September 2023 unless, within two weeks from the date of the notice, she returned to work or provided an explanation of her absence in writing and sought permission for any further period of absence.

[19] Ms Walker's lawyer wrote to the Directorate on 5 September 2023, submitting that Ms Walker's absence from work was "explained" and that it was not appropriate practice for the Directorate to question Ms Walker's medical certificate. The letter invited the Directorate to consider alternative dispute resolution options. Ms Walker provided a further medical certificate on 25 September 2023 advising that she was unfit for her normal work or study from 20 September 2023 to 22 December 2023. Ms Walker sought a further absence until 22 December 2023.

[20] On 4 October 2023 the Directorate advised Ms Walker by letter that her explanation for her absence was rejected, that her application for a further absence was declined and directed Ms Walker to return to work in accordance with the independent medical examination assessment.

[21] On 19 October 2023 the Directorate notified Ms Walker that she was taken to have retired from the ACT Public Service as of 19 October 2023 pursuant to s.127(5) of the PSM Act.

The Directorate's submissions

[22] The Directorate relied on the decisions in *Susanne Kelly v Melba Support Services* [2021] FWC 3233, *Quirk v Construction, Forestry, Maritime, Mining and Energy Union* [2021] FCA 1587, (2021) 312 IR 359 and *Mylan v Health Services Union NSW* [2013] FCA 190 to support the proposition that where a person's employment is terminated by operation of law there will be no termination at the employer's initiative and hence no dismissal for the purpose of s.386 of the FW Act.

[23] The Directorate said the decision of Deputy President Young in *Applicant v Secretary to the Department of Education and Training* [2022] FWC 1994 was "instructive". In that matter a teacher's registration was suspended for longer than 12 months because of alleged misconduct. Section 2.4.59(5) of the *Education and Training Reform Act 2006* (Vic) provides that a teacher's employment "ceases, by virtue of this subsection" in such circumstances. Deputy President Young found that the teacher was not dismissed at the employer's initiative because no further actions were necessary or required by the employer to bring about the cessation of the employment.

[24] The Directorate submitted:

(a) the critical action that ended the employment relationship was Ms Walker's refusal to return to work. If an employee fails to return to work within the relevant time then no further action is required by the employer to terminate the employment because the employment ends by operation of the PSM Act;

(b) the precise means of the employment relationship coming to an end is not of concern, but instead the relevant concern is "at whose initiative this has occurred" (relying on *Quirk* at [223]);

(c) the decision of Moore J in *Australian Liquor Hospitality and Miscellaneous Workers' Union* (1994) 55 IR 18 is instructive. Moore J held that section 76v of the *Public Service Act 1922* (Cth), which provided that "[s]ubject to subsection (2), an officer shall, by force of this subsection, be retired from the Service upon attaining the maximum retiring age" did not bring to a person's employment to an end at the initiative of the employer. Instead, the termination was one "resulting from the operation of an act of Parliament";

(d) the Commission's inquiry should be to determine the critical action or actions that effectively terminated the employment. In this case the critical actions were those of Ms Walker failing to return to work by 18 October 2023 and failing to engage with the process contained in s.127 of the PSM Act;

(e) once a notice is issued under s.127(2) there is no certainty that an officer will be retired. At least four possible scenarios could follow the issue of a notice, depending on the officer's response and conduct. In *Bienias v Iplex Pipelines Australia Pty Limited* [2017] FWCFB 38, 266 IR 1 at [41] the Full Bench reasoned that even if the employee was deemed to have abandoned their employment, in order for the employment to end the employer was required to take the additional step of terminating the employment (cited by the Full Bench in *4 Yearly Review Of Modern Awards – Abandonment of Employment* [2018] FWCFB 139 at [13]);

(f) the commencement of the process does not directly or consequentially lead to the termination of the officer's employment;

(g) the ending of the employment occurred as a result of the decisions that were made by Ms Walker not to engage with the process;

(h) the notification to Ms Walker of the forfeiture of office process did not intend to bring the employment relationship to an end or have the probable result of bringing the employment relationship to an end. To the contrary, each of the Directorate's letters to Ms Walker directed her to return to work within her medical restrictions;

(i) Ms Walker was not unfit for duty. There was no request for an extension of Ms Walker's leave – only a tender of a medical certificate that was not accepted by the Directorate;

(j) Ms Walker's correspondence did not engage at all with the dissonance between the opinion of the independent medical expert and the medical certificate provided by Ms Walker, despite the Directorate's specific requests that she do so;

(k) the beneficial effect of s.127 of the PSM Act is that it provides reasonable opportunities for officers to return to duty or explain their absence before action is taken. The absence from work is dealt with either by a return to work, a request and approval for additional leave or by forfeiture of office;

(l) if Ms Walker had returned to work to test out her ability to work in the way that was described in the independent medical assessment, that would have brought the whole forfeiture of office process to a grinding halt;

(m) if the relevant provisions within s.127 the PSM Act are met, and if an officer does not return to work as directed, the head of service has no discretion to not retire the officer. The Directorate was not required to dismiss Ms Walker because of a separate legislative, contractual or other obligation. Once Ms Walker did not return to work under subsections 127(5) of the PSM Act, Ms Walker was deemed to have been retired; and

(n) there was no action by the employer that was intended to bring the employment to an end. There was no active decision to end Ms Walker's employment.

[25] The Directorate argued in the alternate that Ms Walker repudiated her contract of employment by failing to return to work. The Directorate submitted:

> "The Applicant's actions were, to any reasonable person, fundamentally inconsistent with a public servant seeking to return to their office, or to clarify their physical or mental capacity to exercise their functions in order to enable the Respondent to assist them to return to work."

Ms Walker's submissions

[26] Ms Walker submitted that s.127 of the PSM Act is not an automatic or self-executing application of some other law. The finalisation of the employment required various decisions or evaluative judgements to be made by the Directorate and required a series of actions by way of various notices. For example, it was always open to the Directorate to accept the medical certificates and not issue the forfeiture of office notices.

[27] Ms Walker argued that s.127 of the PSM Act is not a self-executing provision:

(a) section 127(2) gives the Head of Service a discretion to issue a notice;

(b) the exercise of that discretion "is the product of a deliberation by a human mind ... so there is both an application of attention and intentionality"; and

(c) there is a second conscious and objective step that the head of service might have to take: they must engage with any explanation for the absence provided by an officer and/or consider approving a further period of leave.

[28] Ms Walker argued:

(a) the head of service is not required to issue a notice under s.127(2) when the conditions under s.127(1) are satisfied. For example, Ms Walker argued, the Head of Service could have accepted Ms Walker's medical certificate and not commenced the forfeiture of office process at all;

(b) when she sent a medical certificate covering the period from September to December 2023 Ms Walker, for the purposes of s.127, explained the absence and asked for a further period of absence per s.129(2);

(c) because of certain medical evidence the Directorate committed an "error of law" by relying upon an independent medical examination report;

(d) for various reasons that are not presently relevant, Ms Walker argued that she was in fact on authorised leave which meant that s.127 of the PSM Act had no application to her employment; and

(e) the employer's intention in initiating the forfeiture process is irrelevant. The whole purposes of the notice was to set in train a statutory process, one result of which is termination of the employment by forfeiture of office. The Directorate is taken at law to intend the natural and foreseeable consequences of their action.

[29] Ms Walker submitted that the Full Court's reasoning in *Australian Postal Corporation v Forgie* (2003) 130 FCR 279 at [40] is analogous:

> "The way in which s 37(7) [of the *Safety, Rehabilitation and Compensation Act 1988* (Cth)] must operate also suggests that a 'determination' is required. The inclusion of the words 'without reasonable excuse' introduces a distinctive requirement for some deliberative human action. An assessment needs to be made at some point – by a person – as to a refusal or failure to undertake a rehabilitation program, and to the reasonableness or unreasonableness of that refusal or failure. Such a process requires that the person at least consider the circumstances surrounding the employee's failure or refusal to undertake a rehabilitation program and to evaluate what is reasonable in the circumstances. This intellectual process involves matters of judgment and degree. The suspension of rights under s 39(7) can only occur by force of law once some such assessment has been made. The process cannot be conducted in a manner analogous to the mechanistic operations of a sorting machine. The process that is required would seem unequivocally to fall, at least, within the s 3(3)(g) AAT Act hence within the definition of 'determination' under the definition of 'decision' as 'doing or refusing to do any other act or thing' and SRC Act."

Consideration: the PSM Act

[30] It is helpful to make some general observations about the terms of the PSM Act:

(a) the objects of the PSM Act include "establish and maintain a public service that assists the Executive to meet the needs of the community and serves the community on behalf of the Executive" (s.5(b));

(b) officers are appointed to an office on a permanent basis (s.24);

(c) Part 6 of the PSM Act regulates the "redeployment, underperformance and end of employment of officers" (ss.120-127);

(d) section 125 empowers the Head of Service to take certain action, including termination of employment, in cases of underperformance by officers, by reference to procedures prescribed by an industrial instrument;

(e) section 126 empowers the Head of Service to end the employment of a public servant (including an officer) if the public servant has engaged in misconduct; and

(f) section 127 empowers the Head of Service, in specified circumstances, to give an officer notice telling the officer that the officer will be taken to have retired from the service two weeks from the day the notice was sent unless specific conditions apply (s.127(2)).

[31] Reading s.126 and s.127 of the PSM Act together it is reasonably clear that any "retirement" effective under s.127 can only occur if the employer/Head of Service takes action. If, by contrast, s.127 simply said that any officer who is absent from work without permission for a continuous period of four weeks is taken to have retired from the service, then it would be readily acceptable that the retirement of the officer occurs by force of the legislative provision rather than by any conduct by the employer.

[32] Sections 125 and 126 incorporate elaborate procedures for disciplinary action, investigations and the like that apply to underperformance and misconduct. There are significant procedural safeguards in the PSM Act that apply to the potential cessation of the employment of an officer.

[33] By contrast the procedure within s.127 is simple and, in public service terms, swift. It is possible, for example, that the employment of an officer ceases two weeks after a Head of Service issues a notice.

[34] I accept the Directorate's submission that s.127 of the PSM Act provides a reasonable opportunity for officers to return to duty or explain an unauthorised absence before action is taken. If the absent officer returns to work, even without explanation, the forfeiture of office process stops. It seems open for the employer to take separate disciplinary action in relation to the unauthorised absence, subject to the procedural requirements of s.125 or s.126.

Consideration – was Ms Walker dismissed?

[35] By its terms, s.127 has no effect on the employment of an officer who is absent from work without permission for a continuous period of four weeks *unless and until* the Head of Service takes the step specified in s.127(2) of giving the officer a written notice. The word "may" in s.127(2) establishes beyond doubt that the issuing of a notice is entirely discretionary. Similarly, the time period referred to in s.127(1) of "4 weeks *or more"* is consistent with a Head of Service choosing not to issue a written notice immediately after an officer has been absent for a continuous period of four weeks.

[36] The circumstances are analogous to abandonment of employment. In *4 Yearly Review Of Modern Awards – Abandonment of Employment* [2018] FWCFB 139 at [21]-[22] (the **4 Yearly Review** case) the Full Bench provided the following summary of the common meaning and effect of the expression "abandonment of employment":

> "[21] "Abandonment of employment" is an expression sometimes used to describe a situation where an employee ceases to attend his or her place of employment without proper excuse or explanation and thereby evinces an unwillingness or inability to substantially perform his or her obligations under the employment contract. This may be termed a renunciation of the employment contract. The test is whether the employee's conduct is such as to convey to a reasonable person in the situation of the employer a renunciation of the employment contract as a whole or the employee's fundamental obligations under it. Renunciation is a species of repudiation which entitles the employer to terminate the employment contract. Although it is the action of the employer in that situation which terminates the employment contract, the employment relationship is ended by the employee's renunciation of the employment obligations.
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> [22] Where this occurs, it may have various consequences in terms of the application of provisions of the FW Act. To give three examples, first, because the employer has not terminated the employee's employment, the NES requirement in s 117 for the provision of notice by the employer, or payment in lieu of notice, will not be applicable. Second, if a modern award or enterprise agreement provision made pursuant to s 118 requiring an employee to give notice of the termination of his or her employment applies, a question may arise about compliance with such a provision. Third, if the employee lodges an unfair dismissal application, then the application is liable to be struck out on the ground that there was no termination of the employment relationship at the initiative of the employer and thus no dismissal within the meaning of s 386(1)(a) (unless there is some distinguishing factual circumstance in the matter or the employee can argue that there was a forced resignation under s 386(1)(b))."
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> [Footnotes omitted]

[37] The Full Bench impliedly assumed that the termination of the employment relationship by the employer is a dismissal, and the termination of only the employment contract by the employer is not a dismissal. This assumption might need to be revisited in light of the majority's decision in *NSW Trains v James* [2022] FWCFB 55 at [45], 316 IR 1 at 20 (**NSW Trains v James**). In that matter the majority found that the expression "employment … has been

terminated" in s.386(1)(a) means termination of the employment relationship and/or termination of the contract of employment."

[38] An employee who abandons their employment as described by the Full Bench in the *4 Yearly Review case* is absent from work without approval, seemingly with the intention of abandoning their obligation to perform work, but has not resigned. If the employer takes steps to end the employment it is the employer who terminates the employment contract even though the employment relationship ends by the employee's renunciation of their employment obligations.

[39] Section 127 readily accommodates abandonment of employment by an officer engaged under the PSM Act. An officer who has abandoned their employment, and who has disengaged with their employment and their employer, by definition cannot be on authorised leave. If nothing else happens the officer's employment under the PSM Act continues despite their abandonment. However a notice under s.127(2) will cause the employment to end by way of a deemed retirement if the notice is ignored by the disengaged officer. In a straightforward case of abandonment of employment, applying the reasoning from the *4 Yearly Review* case, the action of the employer giving notice under s.127(2) initiates the termination of the employment contract.

[40] To be clear, I do not think Ms Walker actually abandoned her employment – Ms Walker sought to preserve her employment by providing medical certificates regarding her capacity. Ms Walker did not cooperate well, if at all, with the Directorate's attempts to have her return to duties from home within her medical restrictions. It seems that Ms Walker did not constructively engage with the dissonance in the medical opinions about her capacity to perform work, nor did she hold realistic expectations about how long the Directorate would wait for her cooperation given that she had only worked the first 4 of her 29 months of employment.

[41] In Ms Walker's case the notice under s.127(2) was not ignored. Her case did not follow the relatively simple path described above. There is disagreement about whether Ms Walker properly responded to the notice and whether she asked for a further period of leave. For present purposes it is sufficient to recognise that Ms Walker did respond to the notice and that, to use neutral terms, her response did not stop the Directorate from continuing the forfeiture of office process.

[42] Putting aside the contest about whether Ms Walker was in fact on unauthorised leave when the Directorate initiated the forfeiture of service process, her circumstances are nonetheless analogous to an abandonment of employment because the absence per se did not terminate the employment under the PSM Act – it was the conduct in dealing with the absence that led to the termination of the employment. In these proceedings each party said it was the actions or inactions of the other party that caused the termination of the contract.

[43] I accept that once a Head of Service decides to issue a notice under s.127(2) then in some circumstances the employment will come to an end without the employer taking any further step. By the terms of s.127(3) the officer is taken to have retired from the service two weeks after the issuing of the notice unless they return to work or explain the absence. It is arguable that if the officer does not return to work or explain the absence then the officer is not dismissed at the initiative of the employer. Applying the reasoning in the *4 Yearly Review* case

the unauthorised absence ends the employment relationship because it amounts to a renunciation of the employment contract, and the employment contract is terminated by the action of the employer issuing the notice. The second of these conclusions is not a certainty in light of the Full Bench decision in *NSW Trains v James*. The Directorate's submission that if the relevant provisions within s.127 are met, and if an officer does not return to work as directed, the head of service has no discretion to not retire the officer does not take the analysis any further.

[44] However the Directorate did not and cannot rely on s.127(3). The Directorate took more steps after issuing the initial notice. Ms Walker did explain the absence within two weeks of receiving the notice (see [18]-[19] above). The Directorate did not accept the explanation and the Directorate gave Ms Walker notice in writing under s.127(4) requiring her to return to work within two weeks. The Directorate relies on Ms Walker's failure to return to work after the second notice and the operation of s.127(5).

[45] As Ms Walker submitted, the Directorate had a discretion to (1) issue the first notice or not, (2) accept the explanation and approve a further absence or not, and (3) issue the second notice.

[46] I accept that s.127 is not a self-executing provision and that the Head of Service (or their delegate) made the following decisions with using the discretion conferred upon them under s.127:

(a) the decision to issue the first notice to Ms Walker;

(b) the decision to reject Ms Walker's explanation and her application for further leave; and

(c) the decision to issue the second notice under s.127(4) requiring Ms Walker to return to work within two weeks.

[47] I also accept that these decisions were "the product of a deliberation by a human mind [applying] attention and intentionality." They each had an impact on Ms Walker's employment. If the Head of Service had deliberated differently on any of these decisions then Ms Walker might not have been dismissed at all.

[48] The Directorate submitted that the critical action that ended the employment relationship was Ms Walker's refusal to return to work. As a matter of causation this cannot be completely correct in light of the decision made by the Head of Service. Obviously the forfeiture of office process would have immediately ceased if Ms Walker had returned to work and in this regard her refusal to return to work was critical to the sequence of events. The Directorate's submission that the ending of the employment occurred as a result of the decisions made by Ms Walker is literally correct however one cannot examine Ms Walker's conduct without also examining the Directorate's conduct. It is equally correct to say that the ending of the employment occurred as a result of the decisions that were made by the Head of Service requiring Ms Walker to engage with the process.

[49] Section 127 gave the Head of Service the ability or authority to make certain decision. The force or effect of s.127 did not, of itself, end Ms Walker's employment. The provisions of the PSM Act are readily distinguishable from the provisions of the *Education and Training Reform Act 2006* (Vic) considered in *Applicant v Secretary to the Department of Education and Training* [2022] FWC 1994.

[50] The authorities relied upon by the Directorate are clear in distinguishing between the cessation of employment by operation of law and the cessation of employment as a result of conduct by the employer. In *Mylan v Health Services Union NSW* [2013] FCA 190 (**Mylan**) the applicant's appointment to an office of a registered organisation was brought to an end by an order of the Federal Court. Justice Buchanan observed at [26] that "… any employment was at an end without any necessity for action by the [employer] union. In any event, Mr Mylan's office (and any employment) was lost by operation of law as a result of the Orders."

[51] In *Quirk v Construction, Forestry, Maritime, Mining and Energy Union* [2021] FCA 1587, (2021) 312 IR 359 Perram J endorsed the reasoning in *Mylan's case* but came to a different conclusion on the facts. The applicants in *Quirk* were removed from office purportedly by operation of the union's rules after they faced internal disciplinary charges. The employment of the applicants was said to have been terminated by operation of law. Justice Perram's reasoning included the following:

> "[225] I therefore do not accept the Respondents' submission that there can be no termination of an employment relationship purely because the contract of employment came to an end by operation of law. Nor do I accept that *Mylan* stands in the way of that conclusion … I would accept that *Mylan* is authority for the proposition that where a contract of employment ends by operation of law without any act by the employer then there will be no termination within the meaning of s 386. But I do not accept that his Honour intended to say, or did say, anything about the situation where a contract of employment ends by operation of law as a result of the actions of the employer. Facts of that kind were not before the Court in Mylan.
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> [226] I therefore accept that Mr Quirk and Mr Miller's employment by the Federal Union was terminated on the initiative of the Federal Union within the meaning of s 386. The Divisional Executive invalidly removed them from office which then led Ms Mallia to repudiate their contracts of employment on 27 April 2015. They were therefore dismissed by the Federal Union from its employment within the meaning of item 1, cl (a) of the table of adverse actions in s 342."

[52] In *Australian Liquor Hospitality and Miscellaneous Workers' Union* (1994) 55 IR 18 the applicant reached the maximum retirement age under the *Public Service Act*. Justice Moore found that "the termination of the employment of Mr Simmons was not termination at the initiative of the employer but rather, as is submitted by the respondent, termination resulting from the operation of the Act of parliament." Mr Simmons relied on the employer's discretion to extend the employment. Justice Moore found that the statute applied without qualification and that the existence of the discretion, and the employer's decision not to exercise that discretion, did not alter the ordinary operation of statutory provision.

[53] I am satisfied that Ms Walker's employment was terminated on the Directorate's initiative. The Directorate's conduct in issuing a notice to Ms Walker under s.127(2) of the PSM Act and in writing to Ms Walker under s.127(4).

Did Ms Walker repudiate her contract of employment?

[54] The Directorate argued in the alternate that Ms Walker repudiated her contract of employment because her actions were fundamentally inconsistent with a public servant seeking to return to work. For the same reasons that I do not think Ms Walker abandoned her employment, I am not able to find that Ms Walker repudiated her employment.

[55] In response to a directive that she resume duties working from home Ms Walker provided a medical certificate that indicated that she was not fit to perform any work at all for a period of time. The medical certificate is sparse and said basically nothing about her condition. The Directorate sought further information about Ms Walker's capacity to return to work, including by reference to the independent medical assessment that indicated that she was fit for some duties, but Ms Walker did not cooperate. Ms Walker's conduct may or may not have been misconduct or unsatisfactory conduct, but I cannot find that her conduct was so uncooperative that it repudiated the employment.

Conclusion

[56] I am satisfied that Ms Walker was dismissed from her employment. The Commission has jurisdiction to deal with Ms Walker's application under s.368 and the Directorate's jurisdictional objection is dismissed.

DEPUTY PRESIDENT

Hearing details:

Heard on the papers.

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