# DECISION

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

**Elizabeth Sowden**
**v**
**Design True Pty Ltd**
(C2024/2542)

COMMISSIONER CRAWFORD SYDNEY, 2 AUGUST 2024

*General protections dismissal dispute – jurisdictional objection alleging no dismissal – employee commenced other employment without notifying employer – repudiation by employee – repudiation accepted by employer – employer argument inconsistent with FW Act – termination at the employer's initiative – jurisdictional objection dismissed.*

## BACKGROUND

**[1]** Elizabeth Sowden has made an application to the Fair Work Commission (**Commission**) under s.365 of the *Fair Work Act 2009* (Cth) (**FW Act**) for the Commission to deal with a dispute arising out of Ms Sowden's allegations that she was dismissed from her employment with Design True Pty Ltd (**Design True**) in contravention of Part 3-1 of the FW Act.

**[2]** Ms Sowden commenced employment with Design True on 15 March 2022 as a Senior Designer.

**[3]** Ms Sowden's general protections application identifies a dismissal date of 4 April 2024 and it was filed on 18 April 2024.

**[4]** On 17 May 2024, Design True filed a Form F8A response. The Form F8 identified a jurisdictional objection to Ms Sowden's application. Design True objected to the application on the basis that Ms Sowden was not "dismissed" within the meaning of s.386 of the FW Act. Design True argued Ms Sowden had repudiated her employment contract and that Design True accepted the repudiation and ended the employment at Ms Sowden's initiative on 4 April 2024.

**[5]** Design True's jurisdictional objection must be resolved before the Commission's conciliation powers under s.368 of the FW Act are exercised.[1]

**[6]** I issued directions for the filing of material and listed a hearing regarding Design True's jurisdictional objection for 17 July 2024 via video.

**[7]** Both parties filed an application to for the other party to produce documents ahead of the hearing. I partially granted Design True's application and dismissed an application by Ms

Sowden. I dismissed Ms Sowden's application because I was not satisfied the documents sought were sufficiently relevant to the issues I needed to determine.

**[8]** I granted both parties permission to be represented at the hearing on 17 July 2024 because I was satisfied this would enable the matter to be dealt with more efficiently. Ms Sowden was represented by Salim Milinkic from Northern Coast Solicitors. Design True was represented by Roland Hassall from Sparke Helmore Lawyers.

## MATERIAL FILED

### *Design True*

**[9]** Design True relied on a witness statement from Kane Godfrey (Director) in support of its jurisdictional objection. Mr Godfrey's statement had the following documents attached:

- KG-1: A copy of Ms Sowden's employment contract with Design True signed by Ms Sowden on 9 February 2022.
- KG-2 to KG-5: Emails exchanged between Jenny Oxley (Design Lead) and Ms Sowden in June 2023.
- KG-6: A worker's injury claim form signed by Ms Sowden on 5 July 2023 and accompanying documentation.
- KG-7: An email from Ms Sowden to Mr Godfrey dated 29 January 2024 with a medical certificate attached.
- KG-8: An email from Mr Godfrey to Ms Sowden's workers' compensation case manager, EML, dated 6 February 2024.
- KG-9: An email from Mr Godfrey to Ms Sowden dated 23 February 2024. Mr Godfrey was attempting to arrange a call with Ms Sowden to discuss her situation.
- KG-10 and KG-11: An email from Mr Godfrey to EML dated 23 February 2024 where Mr Godfrey seeks an update about Ms Sowden's claim. EML sends a holding email back indicating a response will be provided shortly.
- KG-12: A further email from Mr Godfrey to Ms Sowden dated 4 March 2024 seeking a response to his previous request for a meeting.
- KG-13: A follow-up email from Mr Godfrey to EML dated 5 March 2024.
- KG-14 to KG-16: Emails exchanged between Mr Godfrey and EML on 5 March 2024 regarding a meeting to discuss Ms Sowden's claim.
- KG-17: An email from Mr Godfrey to EML dated 12 March 2024. The email is a follow-up summary email about an earlier phone call. The email refers to Ms Sowden commencing employment elsewhere and not agreeing to return company property.

- KG-18: An email from EML to Mr Godfrey dated 15 March 2024. The email confirms Ms Sowden has commenced working elsewhere and is still undergoing treatment.

- KG-19: An email from Ms Sowden to Mr Godfrey dated 25 March 2024. Ms Sowden requests to take annual leave from 8 to 12 April 2024.

- KG-20: A letter from Mr Godfrey to Ms Sowden dated 4 April 2024. The letter states Ms Sowden has repudiated her employment contract by commencing work with another company. The letter indicates Ms Sowden's employment terminated effective 5 February 2024 when she commenced employment with another company.

- KG-21: An advertisement for a Client Design Leader position with Geyer Services Pty Ltd (**Geyer**) dated 25 January 2024. This was a document produced by Ms Sowden in response to a production order.

- KG-22: An email from Geyer offering Ms Sowden fixed-term employment. The email is dated 29 January 2024. This was a document produced by Ms Sowden in response to a production order.

- KG-23 and KG-24: Emails from Ms Sowden regarding her acceptance of employment with Geyer. These documents were produced by Ms Sowden in response to a production order.

- KG-25: A copy of Ms Sowden's contract of employment with Geyer dated 29 January 2024 and signed by Ms Sowden on 31 January 2024. This was a document produced by Ms Sowden in response to a production order.

- KG-26: A copy of payslips arising from Ms Sowden's employment with Geyer during February, March and April 2024. These documents were produced by Ms Sowden in response to a production order.

**[10]** Mr Godfrey was cross-examined on his evidence during the hearing.

**[11]** Design True relied on an outline of submissions dated 14 June 2024 and an outline of reply submissions dated 12 July 2024. Mr Hassall also made oral submissions at the end of the hearing.

***Ms Sowden***

**[12]** Ms Sowden provided a witness statement dated 4 July 2024. Ms Sowden's statement had the following documents attached:

- ES-1: An email from Ms Sowden to Mr Godfrey and others dated 27 June 2023. The email relates to a motor vehicle accident Ms Sowden was involved in as a passenger and raises concerns with Ms Oxley's handling of an insurance claim on behalf of Ms Sowden. The email also raises broader concerns about Ms Oxley's behaviour towards Ms Sowden.

- ES-2: An email from Ms Oxley to Ms Sowden dated 26 June 2023 containing notes about a meeting regarding Ms Sowden's project commitments.

- ES-3: An email from Ms Sowden to Ms Oxley dated 26 June 2023 which raises concerns about Ms Oxley's behaviour.

- ES-4: Emails exchanged between Ms Sowden and Alex Waley (Team Lead – New Business) about the timing of a pitch for a new project.

- ES-5: A further copy of Ms Sowden's email to Mr Godfrey and others on 27 June 2023, raising concerns about Ms Oxley's behaviour.

- ES-6: An email from Milan Kovacevic (Head of Projects) to Ms Sowden and others on 28 June 2023 regarding suppliers.

- ES-7: An email from Mr Kovacevic to Ms Sowden dated 28 June 2023. Mr Kovacevic apologies for the tone of his previous email.

- ES-8: A letter from Mr Godfrey to Ms Sowden dated 7 July 2023. The letter is headed unauthorised absence and indicates Ms Sowden may be treated as having abandoned her employment if she does not make contact to explain her ongoing absence.
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- ES-9: An email from Ms Sowden to Mr Godfrey dated 7 July 2023. Ms Sowden explains she is absent due to being unfit for work and that she has submitted a workers' compensation claim. Ms Sowden complains about being repeatedly contacted by Mr Godfrey during a time when she is unfit for work.

- ES-10: An email from Mr Godfrey to Ms Sowden dated 11 July 2023. Mr Godfrey apologises for any miscommunication and indicates he has been concerned about Ms Sowden's welfare.

- ES-11: Emails between Ms Sowden and a lawyer on 16 February 2024 where Ms Sowden is advised she does not have to attend the meeting requested by Mr Godfrey and that she does not need to provide an update.

- ES-12: A certificate of capacity dated 1 February 2024 from Dr Ben Dickson. Dr Dickson certifies that Ms Sowden has capacity for some work from 1 February 2024 to 14 March 2024. The other work being "trial of interior design with alternate employer."

- ES-13: Emails exchanged between Ms Sowden and Better Recovery Group on 5 and 6 March 2024 regarding how Ms Sowden's attempt at alternative employment is progressing.

- ES-14: An email from Ms Sowden to EML dated 6 April 2024. Ms Sowden requests the recommencement of weekly payments because her last date of employment with Geyer is 9 April 2024.

**[13]** Ms Sowden was cross-examined on her evidence during the hearing.

**[14]** Ms Sowden relied on an outline of submissions dated 5 July 2024. Mr Milinkic also made oral submissions at the end of the hearing.

**FINDINGS – EVIDENCE**

**[15]** There is no dispute about what I consider to be the key evidentiary issues for the purposes of Design True's jurisdictional objection.

**[16]** I find that:

i. Ms Sowden's full-time employment with Design True was regulated by an employment contract that she signed on 9 February 2022.

ii. Ms Sowden's contract with Design True expressly states in clause 20.3 that she must not "without the prior consent of the Company, engage in any other business activity or employment."

iii. Ms Sowden was absent from her employment with Design True from 28 June 2023 due to a medical condition.

iv. Ms Sowden submitted a workers' compensation claim in relation to her medical condition and liability for the claim was accepted by Design True's insurer.

v. Ms Sowden commenced employment with Geyer on 5 February 2024 as a Client Design Leader.

vi. Ms Sowden did not seek permission from Design True prior to accepting employment with Geyer.

vii. Ms Sowden gave notice of her resignation from employment with Geyer on 2 April 2024 with the effective date being 9 April 2024.

viii. Mr Godfrey wrote to Ms Sowden on 4 April 2024 to confirm Design True considered Ms Sowden had repudiated her employment with Design True and that Design True was accepting the repudiation.

**[17]** I have taken account of all the evidence relied upon by both parties. However, much of the evidence related to Ms Sowden's substantive application rather the confined legal issue of whether Ms Sowden's employment was terminated at the initiative of Design True.

**STATUTORY PROVISIONS**

**[18]** Section 365(1) of the FW Act states:

If:

(a) a person has been dismissed; and

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

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

**[19]** The dictionary in s.12 of the FW Act defines "dismissal" by calling up the definition in s.386 of the FW Act. The definition in s.386 states:

**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.

**[20]** Although Mr Milinkic referred to "constructive dismissal" briefly in closing submissions, that argument was not further developed or clarified. I do not consider there is any evidence that demonstrates Ms Sowden resigned from her employment with Design True. I do not consider s.386(1)(b) of the FW Act to be relevant to this case.

**[21]** Neither party argued any of the exclusions from the meaning of "dismissal" in s.386(2) of the FW Act are relevant to this case. I agree with that position.

**[22]** As a result, Design True's jurisdictional objection turns on whether Ms Sowden was terminated at the initiative of Design True within the meaning of s.386(1)(a) of the FW Act.

## AUTHORITIES

**[23]** A majority of the Full Bench in *Khayam*[2] identified a series of principles concerning the interpretation of s.386(1)(a) of the FW Act. Given that case was directed at a series of time-limited contracts, several of the principles do not have relevance to Design True's jurisdictional objection. The principles that have broad relevance to the interpretation of s.386(1)(a) appear to be:

> "(1) The analysis of whether there has been a termination at the initiative of the employer for the purpose of s 386(1)(a) is to be conducted by reference to termination of the employment *relationship*, not by reference to the termination of the contract of employment operative immediately before the cessation of the employment. This distinction is important in the case of an employment relationship made up of a sequence of time-limited contracts of employment, where the termination has occurred at the end of the term of the last of those contracts. In that situation, the analysis may, depending on the facts, require consideration of the circumstances of the entire employment relationship, not merely the terms of the final employment contract.
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> (2) 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.
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> (3) In *Mahony v White* the Full Court stated that a termination of employment may be done *at the initiative of* the employer even though it was not done *by* the employer. In circumstances where the parties to a time-limited contract have agreed that their contract will expire on a specified date but have not agreed on the termination of their employment relationship, it may be the case that the termination of employment is effected by the expiry of the contract, but that does not exclude the possibility that the termination of employment relationship occurred at the initiative of the employer - that

is, as a result of some decision or act on the part of the employer that brought about that outcome…"

**[24]** Design True argues Ms Sowden repudiated her employment contract when she commenced working for Geyer without the permission of Design True and it accepted the repudiation and brought the contract to an end on 4 April 2024. That which will constitute repudiation was considered by the High Court of Australia in *Koompahtoo*[3] in which Gleeson CJ, Gummow, Heydon and Crennan JJ said as follows:

"In its letter of termination, Koompahtoo claimed that the conduct of Sanpine amounted to repudiatory breach of contract. The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it. (In this case, we are not concerned with the issues that arise where the alleged repudiation takes the form of asserting an erroneous interpretation of the contract. Nor are we concerned with questions of inability as distinct from unwillingness.) Secondly, it may refer to any breach of contract which justifies termination by the other party. It will be necessary to return to the matter of classifying such breaches. Campbell J said this was the sense in which he would use the word "repudiation" in his reasons. There may be cases where a failure to perform, even if not a breach of an essential term (as to which more will be said), manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words…"

**[25]** The question whether there has been a repudiation of the contract of employment is determined objectively, it is unnecessary to show a subjective intention to repudiate[4] and is a question of fact not law.[5] Repudiation of a contract is a serious matter and is not to be lightly found or inferred.[6]

**[26]** It is more common in the Commission for repudiation arguments to arise in the context of alleged repudiatory conduct by an employer. For example, a Full Bench in *City of Sydney RSL*[7] provided the following examples:

"Relevantly, for present purposes, repudiation may exist where an employer reduces the wages of an employee without the employee's consent[8] or where there is a serious non-consensual intrusion on the nature of the employee's status and responsibilities in a way which is not permitted by the contract.[9] Similarly, if an employer seeks to bring about a change in the employee's duties or place of work which is not within the scope of the express or implied terms of the contract of employment, the conduct may evince an intention to no longer be bound by those terms. Therefore, in these circumstances if an

employee does not agree to the change, which if agreed would amount to a variation of the contract, the employee may claim to have been constructively dismissed."

**[27]** The Full Bench in *City of Sydney RSL* also identified that repudiatory conduct does not of itself end the employment contract, acceptance of the repudiation is required:

> "Conduct of an employer which repudiates the contract of employment does not by that act alone bring the contract of employment to an end. A repudiation of the contract by the employer gives the employee who is not in breach the option to decide whether to continue, that is to affirm the contract, or to treat the contract as at an end by accepting the repudiation.[10]"

**[28]** Design True submitted with reference to High Court authority that:

> "It is well-established that where a party engages in repudiatory conduct, it is the conduct of the party responsible for the repudiatory breach which causes the employment relationship to end and not the party accepting the repudiation."[11]

**[29]** However, an issue that I consider to be far less clear is whether an employer can identify repudiatory conduct by an employee, accept the repudiation, and then argue that the termination is not at the employer's initiative for the purposes of s.386(1)(a) of the FW Act.

**[30]** Design True's position is potentially supported by the Full Bench decision in *Abandonment of Employment*[12] where the Full Bench stated:

> "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.[13] 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.[14]"

**[31]** However, the decision of Deputy President Bell in *Fonterra*[15] indicates a distinction may be capable of being drawn between abandonment of employment cases and other instances of renunciation for the purposes of the statutory definition of "dismissal". The Deputy President was taken to the High Court judgments in *Visscher* and *Koompahtoo* which were cited by the Full Bench in the *Abandonment of Employment* decision. The Deputy President stated:

> "However, it is the combination of those statements that I consider Fonterra has misconstrued. I do not consider that any fair reading of those two sentences, or paragraphs [21] – [22] in *Abandonment of Employment*, supports the wide proposition that appears to be advanced by Fonterra that where conduct of an employee constitutes renunciation, that conduct will necessarily result in a termination at the initiative of the

employee. The Full Bench was dealing with a factual scenario of 'abandonment'. Necessarily, that is conduct that will be at the initiative of an employee.

Fonterra submitted that a 'refusal to perform work' or to 'comply with a reasonable and lawful direction' have been found to constitute a repudiatory breach of the employment contract, justifying summary dismissal. So much might be accepted. Such circumstances of dismissal might provide a very sound reason to underpin a 'valid reason' for a dismissal (where this is an unfair dismissal case) but the cases I was referred to undermine Fonterra's antecedent proposition that there is no statutory "dismissal" at all."

**[32]** There is also potentially a broader issue concerning whether traditional common law principles regarding the effect of an employer accepting repudiatory conduct by an employee have been overtaken by statutory dismissal protections. For example, the Industrial Relations Commission of New South Wales in Court Session has previously questioned whether the common law doctrine of frustration has a role in the modern employment environment, aside from where the relevant employee has died. In *Pasovska*,[16] the Court stated:

"On the other hand, the reliance by the courts on the doctrine of frustration in the area of employment law has been the subject of some criticism by academic commentators (for example, *Collins*, *Ewing* and *McColgan*, Labour Law: Text and Materials (Hart Publishing, 2001) pp 535-540). As Bristow J, sitting in the Employment Appeal Tribunal, said in a case cited in that volume, *Harman v Flexible Lamps Ltd* [1980] IRLR 418 at 419:

"In the employment field the concept of discharge by operation of law, that is frustration, is normally only in play where the contract of employment is for a long term which cannot be determined by notice. Where the contract is terminable by notice, there is really no need to consider the question of frustration and if it were the law that, in circumstances such as are before us in this case, an employer was in a position to say 'this contract has been frustrated', then that would be a very convenient way in which to avoid the provisions of the Employment Protection (Consolidation) Act. In our judgment, that is not the law in these sort of circumstances…

This is a further circumstance which tells against the role of the doctrine of frustration in modern industrial or award regulated employment, except in the case of the death of the employee. So much was recognised as to long service leave etc by Wootten J in *Finch v Sayers* at 547 when his Honour, in a passage cited earlier, referred to benefits such as long service leave "commonly [depending] on, or [being] proportioned to, continuity of service". However, his Honour may not have been alive to the other reason noted above; not only that the doctrine of frustration could have an unforeseen and arbitrary effect on accruing rights (presumably what his Honour was referring to was the cessation of the accrual of such rights) but also that the availability of the doctrine could destroy the rights altogether in some cases."

**[33]** Further, in *Annetta*,[17] a Full Bench of the Australian Industrial Relations Commission was required to assess whether a test amounting to repudiation was required to be applied to

determine whether there was a "valid reason" for a summary dismissal. The Full Bench rejected this argument and stated:

> "It was submitted on behalf of the appellant that in cases of summary dismissal there can be no valid reason for the termination within the terms of s.170CG(3)(a) unless the employee is guilty of conduct justifying summary dismissal at common law. In this respect it was further submitted that the common law requirement goes beyond wilful disobedience in that the conduct must amount to a refusal to be bound by the terms of the contract: *Adami v Maison de Luxe Limited* (1924) 35 CLR 143. Mr Langmead submitted that the appellant's conduct on 17 February, 1998 could not be so regarded because there was no instruction given to the appellant, only a request, and the appellant provided an adequate explanation for not doing the work he was asked to do.
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> We think there are a number of answers to this submission. It is generally accepted that the term "valid reason" should be construed to mean *"sound, defensible or well-founded"*: *Selvachandran v Peterson Plastics Pty Ltd (1995)* 62 IR 371 at 373. Although that case concerned legislation which has now been repealed it is still regarded as authoritative. To limit the meaning of the term *"valid reason"* by importing a test amounting to repudiation of the contract at common law is unwarranted and impermissible. Secondly 170CG(3)(a) focuses on the reason for termination. The appellant's construction would result in an arbitrary application of the section in some circumstances. Take a case where an employee is guilty of conduct which does not amount to misconduct justifying summary termination. If the employer terminates the employment on notice there would be a valid reason for doing so. If the employer terminates the employment summarily there would not be a valid reason for doing so. The validity of the reason cannot be made to depend on whether or not the termination was on notice. Thirdly, however, we are not convinced that if the common law test were applied it would make any difference in this case. The Senior Deputy President found that the appellant had refused to do the duties he was requested to do and that the explanation he gave for the refusals was unreasonable. We think these findings were clearly open to her. The appellant did not say during the enquiry into his conduct that he was not given a direction. Furthermore he continued to maintain his right to refuse to do work which was not his and to refuse to rectify work which somebody else had performed unsatisfactorily. The appellant took this position in an interview more than a week after the day of the refusals. This amounts to the unilateral inclusion of a new term in the employment contract and by necessity amounts to a refusal to observe the fundamental requirement of any contract of service - to be ready, willing and available to carry out the lawful directions of the employer. In the circumstances we reject the submission that the Senior Deputy President should have found that there was no valid reason for the termination of the appellant's employment."

**[34]** There is no suggestion in the Full Bench decision in *Anetta* that an employer is able to evade the operation of the unfair dismissal jurisdiction by accepting repudiatory conduct by an employee and arguing there was no dismissal at the initiative of the employer. The case is consistent with the proposition that repudiatory conduct by an employee is to be considered by the Commission when applying statutory dismissal provisions and does not act as a jurisdictional barrier to accessing the provisions.

**[35]** In *The Laws of Australia*,[18] Dr Victoria Lambropoulos provides the following explanation on when conduct of an employee will justify summary dismissal:

> "Whether disobedience, misconduct, or incompetence by an employee constitutes grounds for summary dismissal depends on whether, in the circumstances, such conduct amounts to a breach of an essential term of the contract of employment and/or a repudiation of the contract.[19]
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> It follows that to determine whether an employer is entitled to dismiss summarily an employee, it is necessary to determine, first, whether the employee has breached an essential term of the contract of employment, and/or whether that breach evinces an intention by the employee no longer to respect the employee's obligations under the contract. As such, this test requires the court to determine the express and implied terms of the contract of employment and to assess the seriousness of the misconduct. Importantly, the focus of the court's assessment of the seriousness of the misconduct is not the gravity of the breach per se, but whether the employee's conduct amounts to a repudiation of his or her essential obligations under the contract of employment.[20]
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> These principles were aptly condensed in the following oft-quoted passage from *Laws v London Chronicle (Indicator Newspapers)* Ltd [1959] 1 WLR 698; [1959] 2 All ER 285:
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>> To my mind, the proper conclusion to be drawn from the passages which I have cited and the cases to which we have been referred is that, since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that the question must be – if summary dismissal is claimed to be justifiable – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service … I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and … therefore … the disobedience must at least have the quality that it is "wilful"; it does (in other words) connote a deliberate flouting of the essential contractual conditions.[21]
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> The language used in the cases appears to treat the ground of breach of an essential term or condition of the contract and the ground of repudiation of the contract as one in the same. It is, however, important to note that they are two independent grounds which if established give rise to a right by the employer to terminate the employment contract without the giving of notice. Mark Freedland explained it in the following way in his work on the contract of employment:
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>> The right to rescind a contract for breach of condition arises by reason of a failure of performance which has occurred in the past, provided that the failure is of sufficient gravity or relates to a sufficiently major term of the contract. The right to rescind a contract in response to repudiation arises, not so much by reason of a failure of performance in the past, as by reason of the manifesting of an intention not to perform contractual obligations in the future.[22]

Further, in relation to the ground of repudiation, the conduct of the employee is assessed in accordance with an objective standard. That is:

> The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.[23]

At common law, where an employer has summarily dismissed an employee for misconduct, disobedience, neglect, or incompetence, the employer bears the onus of proving the facts upon which their decision to dismiss without notice can be justified.[24] In justification of such action, an employer may rely upon facts not known to the employer at the time of the summary dismissal.[25]"

**[36]** Dr Lambropoulos' analysis proceeds on the basis that a repudiatory breach by an employee gives an employer the right to summarily dismiss an employee without notice. There is no suggestion in Dr Lambropoulos' analysis that an employer can accept an employee's repudiatory breach with the result that the termination is at the employee's initiative.

**[37]** I consider it is relevant that a Full Federal Court in *Mahony*[26] concluded there would be a termination at the employer's initiative even if the employer was under a statutory obligation to dismiss the relevant employee. That case related to criminal allegations against two teachers and an alleged obligation to dismiss the teachers to comply with child protection legislation. The Court found the teachers were terminated at the employers' initiatives.

## CONSIDERATION

**[38]** After reviewing the various authorities cited above, I conclude that even if Ms Sowden did repudiate her employment contract with Design True, Design True's argument that its acceptance of the repudiation does not result in a termination at Design True's initiative to be inconsistent with the intended operation of the FW Act.

**[39]** The FW Act expressly allows an eligible employee to contest an employer's determination that they have committed serious misconduct or some other serious breach of their employment contract via the unfair dismissal and general protection regimes. The definition of "dismissed" contained in s.386 of the FW Act applies to both regimes. On Design True's argument, an employer can avoid the operation of both regimes by relying on contractual arguments about repudiation and acceptance. If repudiation by the employee and acceptance by the employer is established, the Commission's functions would end there. The statutory provisions that determine whether a person has been "unfairly dismissed" or dismissed in contravention of the general protections, would not be assessed by the Commission. I do not accept that is the intended operation of the FW Act.

**[40]** Further, the FW Act provides an express exclusion from the requirement of an employer to provide notice of termination where the employee is terminated "because of serious misconduct".[27] I consider this to be a further statutory indication that the intended consequence of serious and repudiatory misconduct is summary dismissal at the employer's initiative, as

opposed to acceptance of repudiatory conduct by an employer resulting in a termination at the employee's initiative.

**[41]** I also consider Design True's position results in a level of complexity that is inconsistent with the statutory direction in s.577(1) of the FW Act for the Commission to exercise its powers and functions in a manner that is "fair and just" and in a manner that is "quick, informal and avoids unnecessary technicalities". I consider having to determine complicated contractual issues concerning repudiation and acceptance prior to considering the unfair dismissal and general protections provisions is contrary to a quick, informal and non-technical approach.

**[42]** Finally, I consider it would be an extremely odd outcome if an employer who is alleging that an employee has committed a serious and repudiatory breach of their employment contract can select whether to summarily dismiss the employee at the employer's initiative or alternatively accept repudiation and have the employment terminate at the employee's initiative. An employer in that case is effectively selecting the battleground for any challenge to their decision. The logical choice would be acceptance of repudiation because that enables the employer to initially mount a jurisdictional objection on the basis that there is no dismissal, and then if they are unsuccessful on that argument, defend whether the dismissal was an "unfair dismissal" or was in breach of a general protection. That outcome cannot be described as a simple or efficient process. I do not consider it was intended by the FW Act.

**[43]** I consider Ms Sowden's contract with Design True in this case is strikingly consistent with my conclusion above. Clause 25.1 of the contract relevantly states:

> "The Employer may terminate your employment without notice or without payment in lieu of notice for any of the following reasons, if you:
>
> (a) commit any serious or persistent breach of any of the terms of the Contract
>
> (b) are guilty of dishonesty, misconduct or neglect in the performance of your obligations under the Contract
>
> …
>
> (e) refuse to comply with any reasonable instruction or direction including any failure to comply with your obligations under any of the Employer's rules, policies and/or procedures and any directions given by management of the Employer…"

These provisions clearly contemplate that summary dismissal will be the consequence of a serious and repudiatory breach of the employment contract. There is no reference to acceptance of repudiation in this clause.

**[44]** I was also taken to clause 6 of Ms Sowden's contract during the hearing. In that clause, Ms Sowden agrees to comply with policies and procedures. Design True argued that includes an Employee Handbook, which contains further obligations regarding secondary employment. However, clause 6(c) of the contract expressly states: "failure to comply with the Employer's policies may result in disciplinary action, up to and including dismissal." The secondary

employment part of the Employee Handbook also states: “If you work without consent this could result in the termination of your employment.” I consider these provisions can only be understood as referring to termination at the employer’s initiative being the consequence of a serious and repudiatory breach of the contract.

**[45]** For these reasons, I find Design True “dismissed” Ms Sowden on 4 April 2024 when it wrote to her purporting to accept her repudiation of the employment contract. I consider this was an action on the part of Design True which was the principal contributing factor which resulted in the termination of the employment. I consider Design True summarily dismissed Ms Sowden on 4 April 2024 purportedly because she had commenced alternative employment with Geyer without its permission in breach of her employment contract. I consider this constitutes a termination at the initiative of Design True and that Ms Sowden was “dismissed” within the meaning of s.386(1)(a) of the FW Act.

**CONCLUSION**

**[46]** I find that Ms Sowden was “dismissed” by Design True effective 4 April 2024 and dismiss the jurisdictional objection raised by Design True.

**[47]** The dispute will proceed to be listed for a conference.

<u>COMMISSIONER</u>

*Appearances*:

*Mr Milinkic* from Northern Coast Solicitors representing Ms Sowden.

*Mr Hassall* from Sparke Helmore Lawyers representing Design True.

*Hearing details:*

*2024.*
*Via video.*
*17 July.*

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[1] *Coles Supply Chain Pty Ltd v Milford* [2020] FCAFC 152 and *Lipa Pharmaceuticals Ltd v Mariam Jarouche* [2023] FWCFB 101 at [23].

[2] *Saeid Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162 at [75].

[3] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115.

[4] See for example *Whittaker v Unisys Australia Pty Ltd* (2010) 192 IR 311 at [32] – [41] and *Fishlock v The Campaign Palace Pty Ltd* (2013) 234 IR 1 at [126].

[5] See *Woods v W M Car Services (Peterborough) Ltd* [1982] ICR 693 at 698,699-700, 701-702.

[6] *Shevill v Builders Licensing Board* (1982) CLR 620, 633.

[7] *City of Sydney RSL & Community Club Limited v Balgowan* [2018] FWCFB 5 at [18].

[8] See for example *Rigby v Feredo Ltd* [1988] ICR 29 and *Brockton Holdings No V Pty Ltd v Kara Kar Holding Pty Ltd (*1994) 57 IR 288.

[9] See for example *Whittaker v Unisys Australia Pty Ltd* (2010) 192 IR 311 at [41] – [46], [68] and *Fishlock v The Campaign Palace Pty Ltd* (2013) 234 IR 1 at [126].

[10] See *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435 at 450 – 453, 461 – 463, 465 – 467; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 47 – 428; *Visscher v Giudice* (2009) 239 CLR 361 at [53] – [55].

[11] Citing *Byrne v Australian Airline* [1995] HCA 24, Brennan CJ, Dawson and Toohey JJ and *Automatic Fire Sprinklers v Watson* [1966] HCA 25 per Dixon J.

[12] [2018] FWCFB 139 at [21].

[13] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61, 233 CLR 115 at [44]-[47].

[14] *Visscher v Giudice* [2009] HCA 34, 239 CLR 361 at [53].

[15] *Kiril Simonovski v Fonterra Brands (Australia) Pty Ltd* [2023] FWC 429.

[16] *Hilton Hotels of Australia Ltd v Pasovska* [2003] NSWIRComm 17 at [42] and [48].

[17] *Annetta v Ansett Australia Ltd* Print S6824 (AIRCFB, Giudice J, Williams SDP, Cribb C, 7 June 2000) at [9] and [10].

[18] Published by Thomson Reuters Australia on Westlaw.

[19] *North v Television Corp Ltd* (1976) 11 ALR 599; 177 CAR 1278 (IRCA); *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698; [1959] 2 All ER 285 (CA); *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66.

[20] *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, Dixon and McTiernan JJ at 81–82.

[21] *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698; [1959] 2 All ER 285 (CA), Lord Evershed MR at 700 (WLR), cited with approval in *North v Television Corp Ltd* (1976) 11 ALR 599; 177 CAR 1278 (IRCA), Smithers and Evatt JJ at 609 (ALR) and in *Gooley v Westpac Banking Corp* (1995) 53 IR 262; 129 ALR 628, Wilcox CJ at 270 (IR).

[22] FreedlandMR , *The Contract of Employment* (Clarendon Press, 1976) p 208; See also SappideenC , O'GradyP , RileyJ and WarburtonG with SmithB , *Macken's Law of Employment* (7th ed, Thomson Reuters (Professional) Australia, 2011) p 315.

[23] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115; 82 ALJR 345; [2007] HCA 61, Gleeson CJ, Gummow, Heydon and Crennan JJ at [44].

[24] *Clouston & Co Ltd v Corry* [1906] AC 122, Lord James for the Council at 129; *North v Television Corp Ltd* (1976) 11 ALR 599; 177 CAR 1278 (IRCA), Smithers and Evatt JJ at 602 (ALR); *Industrial Relations Bureau v Knox Auto Parts & Accessories Pty Ltd* (1982) 1 IR 314 (FCA), Keely J at 314.

[25] *Lane v Arrowcrest Group Pty Ltd (t/as ROH Alloy Wheels)* (1990) 27 FCR 427; 43 IR 210; 99 ALR 45.

[26] *Mahony v White* [2016] FCAFC 160.

[27] Section 123(1)(b) of the FW Act.