



DECISION

Fair Work Act 2009

s.365 - Application to deal with contraventions involving dismissal

Tomaz Zibert

v

SA Steel Works Pty Ltd

(C2024/4291)

DEPUTY PRESIDENT ANDERSON

ADELAIDE, 2 SEPTEMBER 2024

Application to deal with contraventions involving dismissal – jurisdiction – whether dismissed – whether at initiative of employer – whether forced resignation – ambiguous conduct – failure by employer to clarify or confirm – dismissal at initiative of employer – jurisdictional objection dismissed

[1] On 24 June 2024 Tomaz Zibert (Mr Zibert or the applicant) made a general protections application under s 365 of the *Fair Work Act 2009* (Cth) (FW Act) alleging contraventions associated with an alleged dismissal.

[2] Mr Zibert's application is against SA Steel Works Pty Ltd (SA Steel, the employer or the respondent). He claims to have been dismissed because he made a complaint of assault by a fellow worker.

[3] SA Steel oppose the application. It filed a response on 4 July 2024 raising a jurisdictional issue (no dismissal). SA Steel say that Mr Zibert resigned in the wake of an altercation with a fellow employee. In response, Mr Zibert says that the employer brought his employment to an end. In the alternative, he says that he was forced to resign by the employer's conduct.

[4] The decision of the Full Court of the Federal Court of Australia in *Coles Supply Chain Pty Ltd v Milford*¹ requires the Commission to determine a dispute about the fact of a dismissal under s 365 of the FW Act before the Commission can exercise conciliation powers conferred by s 368. It is thus necessary to determine the jurisdictional issue if Mr Zibert's application is to proceed.

[5] I issued directions on 19 July 2024 and heard the matter in person on 20 August 2024.

[6] Mr Zibert was represented by an Industrial Officer of the CFMEU, Mr Elliot Womersley. SA Steel was represented by its Business Manager, Ms Lena Allouche.

[7] I received evidence and submissions, including oral evidence, from four persons:

- Mr Tomaz Zibert (applicant);

- Mr Mohammad Allouche (owner);
- Mr Sinan Durmaz (leading hand); and
- Ms Lena Allouche (Business Manager).

[8] Significant factual differences exist. Some disputed facts are not relevant to the jurisdictional issue, but many are.

[9] I make some general observations about the evidence.

[10] In this matter, the general absence of corroborating documentary or oral evidence presents added difficulty to fact-finding. To a greater or lesser degree, each witness tended to embellish or understate certain events to suit their narrative. Given this, I treat all evidence with some degree of caution.

[11] Parts of Mr Zibert's evidence were clear and consistent, whilst other significant elements were inconsistent, implausible and exaggerated.

[12] Mr Durmaz appeared defensive but held firm in his evidence about the altercation with Mr Zibert. However, he was less forthcoming about his subsequent discussions with Mr Allouche.

[13] Mr Allouche was forthright though, as a busy business owner, had some difficulty with precise recall of the sequence of conversations and matters of detail. He gave the impression of somewhat downplaying the importance of the Hansen Yuncken shopping centre contract to his business to convey the impression that an employee making a complaint to the builder was not a significant concern.

[14] Ms Allouche was a conscientious witness yet, somewhat understandably given that she was also the respondent's advocate, tended to cross the line between stating a narrative of events on the one hand and matters of argument on the other.

[15] Consequently, I do not necessarily prefer the evidence of one witness over the other on all issues. I resolve the factual disputes I need to determine on an issue-by-issue basis in the body of these reasons.

[16] As is apparent from these reasons, I have not made a finding on several contested issues, including whether Mr Durmaz assaulted Mr Zibert on 4 June and whether Mr Allouche offered money to Mr Zibert to withdraw a complaint to the builder. It is not necessary to do so as this is a jurisdictional not merit hearing (though I have expressed a provisional view on the latter).

[17] This decision deals solely with the jurisdictional issue; not whether adverse action was taken for an unlawful reason.

Facts

[18] I make the following findings.

[19] SA Steel is a South Australian company which fabricates and installs steel for the construction and civil construction industries. It is owned by Mohammed Allouche. Lena Allouche, his sister, is business manager. As business manager, she is responsible (amongst other matters) for human resources and for regulatory and contractual oversight (including work health and safety compliance).

[20] The respondent employs approximately thirty persons. It is not a small business as defined by the FW Act.

[21] The business office is located at Athol Park in suburban Adelaide where it conducts fabrication operations from an adjoining workshop.

[22] Mr Zibert commenced employment as a full-time installer (rigger/dogman) in November 2023. He was a leading hand. He also had some prior experience working as a boilermaker though appears to not have been formally qualified as such.

[23] At the time of relevant events, Mr Zibert was working at a shopping centre construction site at Burnside, Adelaide. The site builder was Hansen Yuncken. SA Steel was contracted to the builder to supply and install steel on site.

[24] Mr Zibert was provided a company vehicle in which his tools of trade (including company tools valued at about \$50,000) are located. The vehicle was driven by Mr Zibert to and from work each day. During a workday, the vehicle was parked on-site, and tools required for the job were taken to the work location.

[25] Security of vehicles and the tools therein is important to SA Steel. It and other contractors have experienced financial losses from tools being stolen from vehicles and work sites, including at the Burnside project.

Site incident on Tuesday 4 June

[26] On Tuesday 4 June, Mr Zibert was working at the Zara construction site alongside another leading hand Mr Durmaz, who had come onto the site to assist Mr Zibert with the job and to help maintain the confidence of the builder in the works. Mr Durmaz had a longer period of service with SA Steel than Mr Zibert (over four years compared to eight months).

[27] That morning, Mr Zibert and Mr Durmaz were asked by a Hansen Yuncken site manager (Mr Douglas) if they knew why certain toilets were left dirty. Each indicated that they knew nothing about it. Mr Durmaz believed that Mr Zibert had mimicked his response and embarrassed him in front of the builder.

[28] Mr Zibert asked Mr Durmaz if he could leave the site to collect a tool from his car that he had forgotten to bring onto site. Somewhat exasperatedly, Mr Durmaz gave permission.

[29] Upon returning, an argument arose between Mr Durmaz and Mr Zibert. Mr Durmaz accused Mr Zibert of mimicking and embarrassing him.

[30] There is a factual dispute as to what followed.

[31] According to Mr Zibert, Mr Durmaz took off his vest and asked him if he wanted to fight, to which Mr Zibert declined. Mr Zibert then says that he felt something hit the left side of his head and believed that he had been headbutted by Mr Durmaz. He says he asked Mr Durmaz what that was all about. Mr Durmaz replied again ‘do you want to fight’, and he again stated ‘no’. Mr Zibert then says that he asked Mr Durmaz if he wanted to go outside to have a smoke to calm down.

[32] According to Mr Durmaz, after speaking to Mr Zibert about allegedly mimicking him in front of the builder, Mr Zibert stated that they should go outside, have a smoke and sort out the problem. Mr Durmaz denies the headbutting allegation and any discussion about it.

[33] I need not decide whether the headbutting incident occurred. It is sufficient for current purposes to find that:

- both men went outside to sort out their differences. I need not decide who first asked the other outside or how many times they went outside. They were outside for about thirty minutes. Whilst outside;
- Mr Zibert stated that he wanted to report their conflict to the builder;
- Mr Durmaz bluntly told Mr Zibert that he needed to show more respect to other workers and that his conduct caused them to avoid and disrespect him;
- Mr Durmaz apologised. I need not decide whether Mr Durmaz apologised for headbutting Mr Zibert (as Mr Zibert claims) or because Mr Durmaz had been direct and blunt in telling Mr Zibert what others thought of him (as Mr Durmaz claims); and
- as they talked it out, the tension between Mr Zibert and Mr Durmaz abated but Mr Zibert remained upset.

[34] Mr Durmaz then left the construction site to attend to another job in the city.

Reporting the incident

[35] Mr Zibert, who remained upset, tried to call Mr Allouche but could not get through. After speaking to his domestic partner, he decided to report the altercation with Mr Durmaz to the builder.

[36] He went to the Hansen Yuncken site office. He spoke to Mr Douglas and then a site safety officer, Mr McNally. Mr Zibert made a written report of the incident.² Whilst doing so, Mr Allouche called Mr Zibert back twice. Mr McNally told Mr Zibert to finish making the report and only then return the calls. Mr Zibert did so. The report was made before Mr Allouche had the chance to talk to Mr Zibert and vice versa.

[37] Mr Zibert then immediately returned Mr Allouche’s call . Mr Allouche asked Mr Zibert what had happened. Mr Zibert told him.

[38] There is a factual dispute over what was then said.

[39] Mr Zibert alleges that Mr Allouche stated, “we will lose all work if a complaint is made” and offered money to him to withdraw the report. Mr Allouche refutes this and any suggestion that he offered to bribe Mr Zibert to drop the matter.

[40] Though I do not need to make a formal finding on this serious allegation, in view of its severity and scandalous nature, it is appropriate to observe that I found Mr Zibert’s evidence of this conversation to be particularly unimpressive. Relevantly, when giving oral evidence Mr Zibert almost casually doubled the value of the alleged bribe, claiming in the witness box that “between \$100,000 to \$200,000” was offered whereas his signed witness statement simply referred to a figure of \$100,000. On such a serious matter, this level of casual imprecision reflected poorly on Mr Zibert’s credit and smacked of self-serving embellishment and unreliable evidence.

[41] What is not in dispute is that during this telephone conversation, or one shortly thereafter between the two, Mr Zibert told Mr Allouche that he was upset, indicated that he had made a report to the builder and stated words to the effect of “I can’t do this anymore.” Mr Allouche acknowledged the upset and asked Mr Zibert to come to the SA Steel office in suburban Athol Park after work to discuss the issue with him.

[42] At around this time another installer could not locate Mr Zibert at the construction site and noticed Mr Zibert’s vehicle open with tools exposed. Nor could Mr Durmaz (who had returned to the site). Mr Allouche was contacted. He was concerned about Mr Zibert’s whereabouts and for the security of company property. Unable to reach Mr Zibert by phone, Mr Allouche sent him the following text message:³

“Hey mate I need the key for the ute”.

[43] Mr Zibert replied:⁴

“No worries. I’m driving to the workshop”.

Discussion at workshop

[44] Mr Zibert travelled to the Athol Park office with the company vehicle. Mr Zibert spoke to Mr Allouche, preferring to do so privately outside rather than in the office.

[45] Mr Allouche and Mr Zibert discussed what had happened that morning. Whilst doing so, Mr Zibert repeated words to the effect “I can’t do this anymore” and added “I don’t want to be here anymore”. To the extent Mr Zibert denied saying that he said this, I prefer the evidence of Mr Allouche on this point.

[46] Mr Allouche stated that he couldn't make a judgement about the alleged assault because it was one person’s word against the other but indicated that if Mr Zibert wished to make a report to the police, then he should do so. I do not find that Mr Allouche raised specific performance concerns with Mr Zibert (as suggested in a subsequent email by SA Steel of 13 June).

[47] It was apparent to Mr Allouche that Mr Zibert was not happy. For his part, Mr Zibert felt it wrong that Mr Allouche was treating the alleged assault as a police matter rather than a workplace issue.

[48] Mr Allouche interpreted what Mr Zibert had said and his unhappiness as indicating that he was resigning. Mr Allouche decided to not attempt to dissuade Mr Zibert from that course.

[49] Mr Zibert gave Mr Allouche the keys to the vehicle.

[50] Though the evidence on this point is somewhat uncertain, it is more probable than not that at some stage in the discussion Mr Allouche asked Mr Zibert whether he wished to work as a boilermaker in the fabrication side of the business, and Mr Zibert declined.

[51] Thinking that Mr Zibert was resigning, Mr Allouche arranged for the vehicle to remain in the yard and asked Mr Zibert if he wanted an uber home. Mr Zibert declined, indicating he would be collected by his partner.

[52] Whilst waiting for his partner, Mr Zibert removed some of his personal tools from the ute.

[53] Mr Zibert's evidence was that, whilst waiting, Mr Allouche asked Mr Zibert to set up a time the following day to return to the office to discuss with Mr Allouche the events of the day. Mr Zibert claims that he agreed to do so and further agreed to wait for a phone call from Mr Allouche confirming a time. Mr Allouche denies making such a suggestion. On this, I prefer Mr Allouche's evidence. Mr Zibert's evidence was inconsistent on the detail of what was allegedly promised (on the one hand he claimed it was a promise to return to the workshop to discuss the matter the next day, on the other he said it was a promise to be told the next day which construction site to attend for work). I do not find that Mr Allouche promised to make a telephone call the next day.

[54] Mr Zibert's partner then collected Mr Zibert.

Report to police

[55] That evening (4 June), on the encouragement of his partner, Mr Zibert went to the local police station and filed a report alleging that he had been assaulted by Mr Durmaz that day at work.⁵

[56] After investigating the matter, the police subsequently advised Mr Zibert (some weeks later) that they would not press the report further given the disputed versions of events.

Events 5 June

[57] Mr Zibert remained at home on 5 June.

[58] According to Mr Zibert's evidence, he was home waiting for a call from Mr Allouche (I have found that no promise of a call had been made).

[59] No call was received.

[60] At 12 noon Mr Zibert received an email from Ms Allouche which stated:⁶

“Hi Tommy,

I hope this email finds you well.

We received your resignation yesterday and have taken position (*sic*) of the vehicle you returned to the office thank you. Can you please advise if you have anything further that belongs to SA STEELWORKS?

There are a few items that look personal to me in the truck, but I am unsure – can you please advise if you have anything that you require, and we will be organised for it to be dropped off.

Thank you
Kind regards

Lena Allouche
Business Manager”

[61] Mr Zibert did not immediately respond.

[62] At 3.57pm Mr Zibert received an email from a Ms Santos of SA Steelworks asking for his boilermaker certificate. Mr Zibert immediately responded (4.03pm) that he was employed as a “rigger, dogman” and not a boilermaker.

[63] Ten minutes later (4.13pm) Ms Santos replied asking him to disregard her earlier email.

[64] I accept Ms Allouche’s evidence that this contact by Ms Santos was unrelated to the resignation issue or Mr Zibert’s discussion the previous day with Mr Allouche. For quite separate business reasons, SA Steel was administratively following-up qualification records of persons (including Mr Zibert) it had employed on a particular past job.

[65] At 5.38pm Mr Zibert responded to Ms Allouche’s earlier email:⁷

“Can you please clarify how you came to the conclusion that I resigned as I never submitted any form of verbal or written resignation.”

[66] At 5.43pm Ms Allouche replied:⁸

“Hi Tommy

You dropped off your tools and car and from your meeting yesterday and your discussion with moh you were not happy.

Plus you did not attend work today.

Lena Allouche
Business Manager”

[67] Final pay was made up for Mr Zibert. He did not attend, nor was he contacted or rostered for work after the communication on 5 June.

Events of 13 June

[68] After having been certified as suffering stress by his general practitioner, Mr Zibert sent medical certificates to SA Steel and lodged a workers compensation stress claim.

[69] On 13 June 2024, Mr Zibert received a further email from SA Steel Works. It read:⁹

“Hi Tomaz,

As per our previous correspondence we accepted your resignation on the 03/06/2024 - after your meeting with mohammed regarding the following incidents.

- Workplace bullying with several employees – most recently with an employee at a burnside project – 03/06
- Incident at Parafield Swimming Centre – 28/05/2024 - smoking while welding
- Incident at Parafield Swimming Centre – 02/06/2024 - reported to SA WORK SA – working on a ladder in an unsafe manner
- Stolen tools in your toolbox from the site at Cullinan

We cannot accept your stress leave claim as you did not indicate to us at any time that you were under any stress – while working with us and have only sent this after we accepted your resignation.

SA STEELWORKS will not lodge a work cover claim on your behalf.

We wish you the best in your endeavours.

Thank you
Kind regards

Lena Allouche
Business Manager”

[70] On 24 June 2024 Mr Zibert, via the CFMEU, lodged this application.

Submissions

Mr Zibert

[71] Mr Zibert submits that his employment was terminated at the initiative of the employer within the meaning of s 386(1)(a) of the FW Act. He says that the employer’s conduct was the “principal contributing factor” which resulted in the termination of his employment.

[72] In support of this submission Mr Zibert submits that:

- he told the employer on 5 June that he had not resigned;
- he did not resign orally or in writing;
- he returned keys to the vehicle on 4 June because he was directed to do so;

- he attended the workshop on 4 June because he was told to do so;
- when telling the employer that he “could not do this anymore”, he was upset because he believed that he had been the victim of a workplace assault. Those were not words of resignation nor could be safely relied upon by the employer as a resignation;
- the vehicle he was entitled to use to travel to and from work was repossessed by the employer; and
- the employer did not contact him on 5 June to discuss his situation, nor did it confirm or clarify his employment status.

[73] In the alternative, Mr Zibert submits that if he is found to have resigned, then he was forced to resign due to the conduct or course of conduct by the employer. He relies on the same aforementioned conduct.

[74] As such, Mr Zibert submits that he was dismissed within the meaning of the FW Act and therefore his application is within jurisdiction.

SA Steel

[75] SA Steel submit that it neither dismissed nor intended to dismiss Mr Zibert. It submits that doing so would have been contrary to its best interests because it is difficult to find steel installers, and losing Mr Zibert from the job at the Burnside shopping centre impacted the job and exposed the business to liquidated damages if it did not meet its contractual obligations to the builder.

[76] SA Steel submits that Mr Zibert resigned, that reliance on his resignation was not unreasonable, and that it did not force Mr Zibert to resign.

[77] SA Steel submit that Mr Zibert resigned when he orally, and then a few hours later in person, told the business owner Mr Allouche that he could no longer do the job and didn't want to do it anymore. He handed in the keys to the company ute, left it in the yard, removed his tools and had his partner pick him up and take him home.

[78] SA Steel submit that the resignation was not in the heat of the moment because Mr Zibert had hours to cool down after the alleged incident and before he repeated that he could not do the job anymore.

[79] SA Steel submit that in the construction industry it is not uncommon for an employee to leave without formality and that it is unrealistic to expect the employment of construction workers who no longer want to do the job and who do not turn up the next day to be kept on as employees.

[80] As there was no dismissal, the application is outside the Commission's jurisdiction and should be dismissed.

Consideration

[81] Section 365 of the FW Act provides:

“365 Application for the FWC to deal with a dismissal dispute

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.”

[82] Section 365 requires a dismissal to have occurred as a jurisdictional fact. “Dismissal” for these purposes (and other purposes of the FW Act) is defined in s 386(1). It 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.”

[83] Determining whether, on the facts, a person has been dismissed is an objective exercise. That a person believes they have been dismissed or another believes or believed the contrary does not make it so.

[84] A finding whether there has been a dismissal is based on a consideration of the evidence as a whole, including inferences reasonably drawn from the conduct of the parties.

[85] These principles were summarised in the Federal Court judgement of Rares J in *Koutalis v Pollett*.¹⁰

“...it depends upon what a reasonable person in the position of the parties would have understood was the objective position...based on what each party...had said or done, in light of the surrounding circumstances”.

[86] This approach was subsequently applied in the leading decision of a Full Bench of the Commission in *Bupa Aged Care Australia Pty Ltd v Tavassoli*¹¹ (considered below).

[87] Further, a finding that a person did not voluntarily resign does not, of itself, equate to a finding that the person was dismissed.¹² There must be a properly made finding of dismissal within the meaning of the FW Act for the application to be within jurisdiction.

Dismissed on initiative of employer

[88] Termination of an employment relationship will be “at the initiative of the employer” if the action of the employer is the “principal contributing factor” which leads to the termination of the employment relationship such that, had the employer not taken the action it did, the employee would have remained in the employment relationship.¹³ Where termination is agreed by an employee, it will not be “at the initiative of the employer” within the meaning of s 386(1)(a).

[89] In this matter, it is readily apparent that there is no express statement, written or oral, of dismissal nor express statement of resignation.

[90] The finding that I comfortably make having regard to what each party said and did is that the conduct of both was ambiguous.

[91] Further, each somewhat opportunistically danced around the other; Mr Allouche willing to let Mr Zibert go because, if he had to make a choice in the wake of the altercation, he preferred to retain his longer serving leading hand Mr Durmaz; Mr Zibert because he had had enough once Mr Durmaz bluntly told him that morning how others felt about working alongside him and once he felt that Mr Allouche was treating the assault allegation as a police rather than workplace matter.

[92] As there was no express dismissal nor express intention to dismiss, it is inferences from facts, properly found, that determines this matter.

[93] Objectively considered, there is conduct by the employer which points both in favour of and against a finding that it terminated the employment relationship at its initiative.

[94] In favour of such a finding is that:

- On 4 June, the employer asked Mr Zibert to return the keys to the company vehicle he was using and, having done so, re-took possession of the vehicle and required Mr Zibert to travel home without the company car. Until then and by agreement, this car had been his regular and permitted mode of transport to and from work. Whilst the employer’s lunchtime request to return the keys of itself is a neutral factor because of the then surrounding circumstances (the employer acted reasonably in needing to secure its vehicle as it could not locate Mr Zibert), when coupled with the employer’s subsequent action in retaking possession, this weighs somewhat in favour;
- On the morning of 5 June Mr Allouche, once he was informed that Mr Zibert had not turned up for work, unilaterally advised office staff that Mr Zibert was no longer employed, and then directed Ms Allouche to send Mr Zibert an email stating that he had resigned. From the time Mr Allouche issued that instruction, the employer no longer regarded an employment relationship to exist between it and Mr Zibert. This consideration weighs clearly in favour;
- The employer made up final entitlements after 5 June despite Mr Zibert having advised in writing at 5.38pm that day that he “had never submitted any form of verbal or written resignation”;

- The employer made no contact with Mr Zibert after he left the business premises on 4 June and particularly did not do so after Mr Zibert's email of 5 June; and
- The employer proceeded, after 5 June, to find another installer to replace Mr Zibert without any further representation to Mr Zibert.

[95] These considerations collectively weigh materially in favour of a finding that the employer's conduct was the principal contributing factor which led to the employment relationship ending.

[96] I have regard to the fact that Mr Allouche, in taking these steps, genuinely believed that Mr Zibert had resigned because he had stated that he no longer wanted to "be here anymore". I also take into account that SA Steel, and Mr Allouche in particular, did not intend to dismiss Mr Zibert. Whilst Mr Allouche acted somewhat opportunistically (discussed below), he also knew that losing an installer in a tight labour market would, in the short term at least, cause complication with the job he was contractually required to complete for the builder, under threat of liquidated damages.

[97] However, as noted, a subjective belief (even one genuinely held) is not the basis on which to determine whether there was a dismissal.

[98] That said, against a finding that SA Steel terminated the employment relationship at its initiative are the following facts:

- On 4 June Mr Zibert told Mr Allouche on more than one occasion (both by phone and then in person) that he "can't do this anymore" and "I don't want to be here anymore";
- To the extent Mr Zibert stated by telephone in the heat of the moment following the altercation on 4 June that he had had enough, more than three hours passed before he repeated this view to Mr Allouche in person at the business premises;
- On 4 June Mr Zibert did not protest at having the company vehicle repossessed and returning home by calling for a lift from his partner;
- Mr Zibert removed personal tools from the ute before leaving the workshop and going home;
- On the morning of 5 June Mr Zibert made no contact with the employer to indicate that he was ready and willing to resume work or was unwell. To the extent Mr Zibert was expecting the employer to call, when the call didn't come Mr Zibert remained passive; and
- Mr Zibert took five hours on the afternoon of 5 June before replying to SA Steel's email asserting that he had resigned.

[99] Whilst these factors collectively weigh somewhat against an objective finding of dismissal at the employer's initiative, they do so only to a limited extent.

[100] Each case turns on its own facts. In this matter, context is critical. Mr Zibert stated to the owner that he "can't do this anymore", that he had "had enough" and that he "didn't want

to be here anymore” after believing that he had been assaulted in the workplace, after having been told by a fellow-leading hand that his conduct caused other workers to disrespect him and, importantly, after the owner told him that he (the owner) could not decide who to believe or disbelieve but that he could report the matter to the police. The clear inference from Mr Allouche’s conduct was that the employer was not intending to deal further with the alleged incident by way of workplace investigation.

[101] Given this, Mr Zibert’s belief that the events of that morning required a workplace response and were not just a police matter was objectively reasonable. It was in that context that Mr Zibert made and repeated what he said to Mr Allouche.

[102] In a different context, the words used by Mr Zibert may well be sufficient to constitute a clear statement of resignation. However, in the context of the events of 4 June those words, of themselves, were insufficient to be relied upon as a resignation. As a general principle, a resignation, given its consequences, should be expressed by words or conduct that clearly discloses a considered and voluntary intention to cease employment if it is to be relied upon by an employer as ending the employment relationship without any further inquiry on its part.

[103] Whilst the evidence of Mr and Ms Allouche that in this industry it is not uncommon for some construction workers to leave or no longer turn up without the formality of written resignation is plausible, no different legal standard applies to construction workers than employees in other industries. Even having regard to the surrounding circumstances of this matter and the industry, the words used by Mr Zibert are insufficient to objectively make a finding of resignation, even though they were repeated, and Mr Allouche believed them to have had that effect.

[104] I also take into account that Mr Zibert had a approximately three hours between lunchtime and mid-afternoon on 4 June to cool down. However, the issue is not whether he had time to do so, but whether he was in a considered state when he repeated that he “could not do this anymore”, that he had “had enough” and that he “didn’t want to be here anymore” such that those were words of voluntary resignation. I do not make that finding. Whilst the heat of the altercation with Mr Durmaz had dissipated by mid-afternoon, and whilst Mr Zibert was by then less openly agitated and the workshop conversation with the owner was (to use Mr Zibert’s words) “friendly”, I accept Mr Zibert’s evidence that he remained stressed about what had occurred even though he appeared outwardly calmer.

[105] It was reasonable that Mr Zibert felt this way; he had been called to meet the owner about the altercation, was asked to return keys and, during the meeting, sensed that the owner had decided to neither believe nor disbelieve him, to regard itself as “stuck in the middle” (to use Mr Allouche’s words in evidence¹⁴) and to treat the alleged assault as a police rather than workplace matter.

[106] Nor do I consider that Mr Zibert returning the vehicle’s keys on the afternoon of 4 June weighs against a finding of dismissal. Mr Zibert did so because he had been directed by Mr Allouche to do so. He complied with a lawful and reasonable direction. However, his removal of personal tools from the ute suggests somewhat, but not decisively, that he did not intend to return to work after that day.

[107] In *Bupa*, with respect to the meaning of s 386(1)(a), the Full Bench observed:¹⁵

...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”.

[108] I find that SA Steel had the opportunity on the morning of 5 June to contact Mr Zibert and clarify or confirm whether Mr Allouche’s belief that he had resigned was in fact correct. It did not do so. Rather, Mr Allouche unilaterally declared to the office staff, based on a genuinely made assumption (but assumption nonetheless), that Mr Zibert was no longer employed.

[109] I further find that SA Steel had had the opportunity after 5.38pm on 5 June to not give effect to the employment relationship ending once Mr Zibert had advised in writing that he had not resigned. SA Steel did not do so. Rather, SA Steel responded five minutes later telling Mr Zibert why it believed he had resigned.

[110] In an objective sense, this was unreasonable conduct by the employer. It was unreasonable because Mr Allouche knew that no express oral or written resignation had been communicated. Although he formed the belief of resignation in good faith, Mr Allouche did so by drawing inferences. He indicated as much in his evidence:¹⁶

“I told the girls Tomaz is not here anymore, he’s not going to come back...I just assumed that he is a rigger, a boilermaker, he’s a professional, from my understanding he does not need to work there, he can get a job anywhere...”

“then he goes, I can’t do this anymore and he basically implied that he’s quitting; that’s basically how I understood it...”

[111] In this respect, the conclusion reached by Mr Allouche was indifferent to whether a resignation actually occurred. He did not consider it necessary nor particularly in his interests to clarify or confirm Mr Zibert’s intention. This indifference stemmed from that fact that if Mr Allouche had to make a choice in the wake of the altercation, he preferred to retain his longer serving leading hand, Mr Durmaz. He did so despite knowing (and telling Ms Allouche) that the business would be “screwed” losing an installer.¹⁷ In his evidence Mr Allouche put it this way:¹⁸

“I had Sinan as well...I had to make a commercial decision to say if this guy is willing to go and if it would have saved my business to keep running and keep employing the guys that I’ve got, and keep them busy, well then I have to actually just keep quiet and let it happen, let, let nature take its course. I can’t control that...”

“I was under the assumption that he quit. No need to poke the bear any more than what I did.”

[112] I take into account that Mr Zibert was passive in that on 4 June he did not ask why the keys were having to be returned and why the company vehicle was being repossessed. Nor did he call on the morning of 5 June to ascertain if he still had a job. This passiveness, whilst relevant, is not decisive because in the wake of ambiguous conduct by an employee that could be interpreted as a resignation, an employer should take reasonable steps to confirm or clarify the employee’s intent before declaring the employment relationship to be over.

[113] For these reasons I find that whilst SA Steel did not intend to dismiss Mr Zibert, its conduct on 5 June 2024 in unilaterally declaring that Mr Zibert was no longer employed and in communicating that to Mr Zibert in the wake of his protest later that day was the principal contributing factor which led to the termination of the employment relationship.

[114] Accordingly, there was a dismissal within the meaning of s 386(1)(a) of the FW Act. The reason for dismissal was Mr Allouche's genuine but mistaken belief that Mr Zibert had resigned.

[115] That being so, and not having found a resignation to have occurred, I do not need to consider whether the conduct or a course of conduct of the employer forced a resignation within the meaning of s 386(1)(b).

Conclusion

[116] I have found that Mr Zibert was dismissed on the initiative of the employer within the meaning of the FW Act.

[117] Given this, the application is within jurisdiction. It will be listed for conference under s 368. The jurisdictional objection by SA Steel is dismissed.

[118] An order giving effect to this decision accompanies its publication.¹⁹



DEPUTY PRESIDENT

Appearances:

E. Womersley, of the Construction, Forestry and Maritime Employees Union, on behalf of T. Zibert.

L. Allouche, of and on behalf of SA Steel Works Pty Ltd

Hearing details:

2024.

Adelaide;

20 August

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<PR778793>

¹ [2020] FCAFC 152

² A1 TZ1; R13

³ A1 TZ2; R12

⁴ *ibid*

⁵ A2 TZ7

⁶ R11

⁷ R11

⁸ R11

⁹ A1 TZ5

¹⁰ [2015] FCA 1165, [43]

¹¹ [\[2017\] FWCFB 3941](#) (Bupa)

¹² *Appeal by HCF* (2023) AIRC Full Bench Print 934213, [10]

¹³ *City of Sydney RSL & Community Club Ltd v Balgowan* [\[2018\] FWCFB 5](#) citing *Mohazab v Dick Smith Electronics (No 2)* (1995) 62 IR 200; *Khayam v Navitas English Pty Ltd* [\[2017\] FWCFB 5162](#), [75]

¹⁴ Audio recording 20.8.2024 1.25pm (Mr Allouche)

¹⁵ *Bupa*, [47]

¹⁶ Audio recording 20.8.2024 1.28pm; 1.31pm; 1.52pm (Mr Allouche)

¹⁷ Audio recording 20.8.2024 3.27pm (Ms Allouche)

¹⁸ Audio recording 20.8.2024 1.57 – 1.59pm; 2.14pm (Mr Allouche)

¹⁹ [PR778794](#)