DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal

Mr Nezir Zahirovic

v

Bluethumb Pty Ltd
(C2024/4156)

DEPUTY PRESIDENT ANDERSON ADELAIDE, 6 SEPTEMBER 2024

Application to deal with contraventions involving dismissal – jurisdiction – whether an "Australian-based employee" – whether "dismissed" – whether out of time – found to be an Australian-based employee – not found to have been dismissed – jurisdictional objection upheld – application dismissed

[1] On 21 June 2024, Mr Nezir Zahirovic (Mr Zahirovic or the applicant) made a general protections application under s 365 of the *Fair Work Act 2009* (FW Act) alleging contraventions associated with his alleged dismissal.

[2] The applicant alleges that he was dismissed as a senior software engineer by Bluethumb Pty Ltd (Bluethumb or the respondent) on 31 May 2024.

[3] Bluethumb oppose the application. It filed a response on 9 July 2024 raising three jurisdictional issues: that the applicant was not an "Australian-based employee" within the meaning of the FW Act; that the applicant resigned and was not dismissed; and that the application is out of time (by one day) because employment ended on 30 and not 31 May 2024.

[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 section 365 of the FW Act before the Commission can exercise the conciliation powers conferred by s 368. It is thus necessary to determine the jurisdictional issues for Mr Zahirovic's application to proceed further.

[5] I issued directions on 15 July 2024 and heard the jurisdictional matters by video on 23 August 2024.

[6] Mr Zahirovic is an overseas resident and gave evidence from Bosnia. He was self-represented. Though a Bosnian citizen, he spoke reasonable English and did not require an interpreter. Bluethumb was represented by its co-founder and CEO Mr Edward Hartley,[2] who was also overseas at the time of the hearing.

[7] I heard evidence from three persons:

- Nezir Zahirovic (applicant);
- Alexander Timofeev (Principal Engineer); and
- Alex Gibson (Chief Product Officer)

[8] All witnesses were conscientious and credible. Whilst some, generally minor, factual discrepancies arose, this can be largely attributed to the lapse of time affecting precise recall of events three months earlier.

Facts

Bluethumb

[9] Bluethumb is an Australian owned company selling artwork globally. It is incorporated in Australia. It operates wholly online and is based in Adelaide, South Australia.

[10] Bluethumb's information technology systems are a primary asset, as via that system artworks are offered for sale, communication occurs with prospective customers and dealers, and sales are transacted. To secure its optimum effectiveness across seven days a week, twenty-four hours a day, and to reduce downtime for overseas customers, Bluethumb engages software engineers in different global locations to rectify any online issues in real time.

[11] At the time of the alleged dismissal, Bluethumb engaged six software engineers located globally as follows:

- Australia (1 person)
- Asia (1 person – Mr Zahirovic)
- Europe (2 persons)
- Middle East (1 person); and
- United Kingdom (1 person).

Engagement of Mr Zahirovic

[12] Mr Zahirovic commenced as a senior software engineer on 31 May 2023, having been recruited in the preceding weeks. A contract was signed on 24 May 2023. He reported to an Australian-based supervisor, Mr Timofeev.

[13] Mr Zahirovic is a Bosnian citizen. At all relevant times he lived and worked in Indonesia. His engagement was negotiated by Bluethumb from Australia and whilst he was a resident of Indonesia.

[14] Mr Zahirovic did not travel to Australia to negotiate his contract. The agreed contract was prepared by Bluethumb in Australia and electronically sent to Mr Zahirovic in Indonesia. He countersigned it there and returned it electronically to Australia.

[15] Being based in Indonesia, there was no requirement on Mr Zahirovic to travel to Australia and he did not do so. Throughout the entire period of Mr Zahirovic's service (12 months) he performed no work in Australia, nor travelled to Australia.

[16] Mr Zahirovic was paid an agreed remuneration. The contract provided for tax to be paid by Mr Zahirovic "in the home jurisdiction" (not Australia).[3] The contract did not include a clause concerning the governing law of which jurisdiction. However, the contract made two express references to the FW Act.

[17] Clause 3 provided:

> "**3. Terms and conditions of employment**
>
> 3.1 Unless more generous provisions are provided in this letter or in the attached Schedule, the terms and conditions of your employment will be those set out in any applicable award and any applicable legislation. This includes, but is not limited to, the National Employment Standards in the Fair Work Act 2009.
>
> 3.2 The additional terms and conditions set out in the attached Schedule will also apply to your employment."

[18] Clause 8.1 provided:

> "**8. Termination of employment**
>
> 8.1 Under the Fair Work Act 2009 the employer may terminate your employment at any time by providing you with notice in writing in accordance with this table:

Length of continuous service with employer	**Period of notice**
Not more than 1 year	1 week
More than 1 year but less than 3 years	2 weeks
More than 3 years but less than 5 years	3 weeks
More than 5 years	4 weeks"

Events 30 May 2024

[19] Mr Timofeev held regular group meetings (conducted remotely) with the team of engineers (including Mr Zahirovic). One was scheduled for 30 May 2024. Mr Timofeev also regularly spoke individually with engineers about operational and, as required, performance matters.

[20] In the days preceding 30 May 2024, the Chief Product Officer (Mr Gibson) expressed concerns to Mr Timofeev about what he (Mr Gibson) considered to be some errors being made by Mr Zahirovic, including in the use of the product coding system.

[21] Mr Timofeev decided to raise the issue during a one-on-one discussion with Mr Zahirovic prior to the 30 May group meeting.

[22] The discussion occurred remotely, with Mr Timofeev in Adelaide and Mr Zahirovic in Indonesia.

[23] Mr Timofeev informed Mr Zahirovic that he was not meeting certain performance expectations and was advised that he needed to improve in the areas of concern.

[24] Mr Zahirovic disagreed with the criticism and considered the coding system to be at fault, not he. He stated words to the effect:[4]

> *"I don't need to improve. Bluethumb needs to improve, not me."*

[25] After a further discussion in which Mr Zahirovic felt that his desire for an objective measure of performance was being ignored, he said words to the effect:

> *"I do not need this job. I quit. So let's discuss my peaceful exit on the terms of my contract."*

[26] Mr Timofeev was surprised that Mr Zahirovic decided to leave rather than address the performance concerns. The conversation concluded with the parties agreeing to communicate the next day, and with Mr Timofeev indicating that Mr Zahirovic's contractual entitlements were a matter for others in the business to deal with, not he (in particular, Mr Hartley the CEO and Ms Schwab the Chief Financial Officer (CFO)).

[27] Immediately following, Mr Timofeev informed Mr Hartley (verbally) that Mr Zahirovic had resigned.

[28] Mr Hartley was somewhat disappointed with the news that Mr Zahirovic intended to leave. Whilst he shared the performance concerns, he did not expect Mr Zahirovic's employment to end so abruptly because recruiting software engineers was not easy. However, when told that Mr Zahirovic had stated an intention to leave, Mr Hartley agreed that the CFO negotiate his exit.

[29] Later in the day on 30 May, Mr Timofeev convened the scheduled group meeting of engineers. Mr Zahirovic attended and participated in the usual manner. No mention was made of his resignation.

Events 31 May 2024

[30] The next day, 31 May 2024, Mr Timofeev and Mr Zahirovic exchanged online communication (via online platform 'slack'):

> "**Alex** (Mr Timofeev)
> Then I guess there is no much reason to resist inevitable and finish our story in May
> I'm sorry that you are leaving, but if this employment made you unhappy – it's a right thing to do
> You can share the news in #bluethumb if you like and I will follow up with the finance on the day of your last payment

Nazir (Mr Zahirovic)
Hey Alex thank you, just please be aware of this:

6. Leave

6.1 You are entitled to leave in accordance with the Company's Leave Policy.

6.2 Annual leave

(a) You are entitled to 20 days' paid annual leave for each calendar year of service with the Company (or pro-rata in relation to any part year of service) to be taken in full or in part at such times as mutually agreed upon between you and the Company.

(b) The Company may require you to take excessive annual leave entitlements which have accrued from time to time.

6.2 Compassionate leave

(c) You will be entitled to two days paid compassionate leave on each occasion when a member of your immediate family or household:

(i) contracts or develops a personal illness that poses a serious threat to the member's life;

(ii) sustains a personal injury that poses a serious threat to the member's life; or

(iii) dies.

(d) You must provide reasonable proof of your need to take compassionate leave, if so requested by the Company.

Alex (Mr Timofeev)
for each calendar year of service", which we don't extend. So basically it means you are entitled for these 20 days when your first year of service is over and you start your second year.

Nazir (Mr Zahirovic)
heheh., nice.. so trick okay but please dont mind when I publicly mention this situation…
if I quit in Monday I should get its stated new year… or so….
or no its today is 1 day of next year if we wont to precise…

Alex (Mr Timofeev)
Technically you quit yesterday and it was your desire
Let me also remind you that one of the agreements for the company sponsoring your hardware was you staying here for a year, which you didn't
If you prefer to be complicated – good luck with that
I personally did my best to be supportive, but not going to waste anymore time
Good luck"

Nazir (Mr Zahirovic) responds with a large 'thumbs up' icon alongside Mr Timofeev's text stating that Mr Zahirovic "quit yesterday"

[31] Having been given by Mr Timofeev the go-ahead to "share the news in #bluethumb", and having foreshadowed that he would "publicly mention this situation", Mr Zahirovic then (on 31 May) sent a lengthy message (via his private email address) to the owners and senior managers (including Mr Timofeev). It read:[5]

“Hi team, I hope you are doing well.

Unfortunately, it looks like we won't finish our cooperation in the smoothest way.
So, let me recap the situation for the end. I hope this will be clear to all of you.

Yesterday I had a 1:1 call with Alex T. and he mentioned some records showing that I am 'Underperforming' with my work task. Also, he mentioned one of the tasks like it took too much time working on it.
I don't agree at all in short, we can so easily check the date and times of every step of my work on that task and all other tasks if needed.

By this I mean just to look at Linear app:
- when task is assigned to me,
- when status is changed,
- when I asked for some clarification,
- when I got reply

Also, on github we can see much more details like:
- when branch is created,
- drafted,
- pushed,
- how long I have been waiting on reviews,
- how many time I had to ask for review,
- how many reviews I got,
- how long after I pushed updates,
- how many time people asking me to do update on a part of code where they suggest one, solution and I do that and after hour or some time days come with other request on the same code which they suggested previously,

I can count more and show examples if needed, but I am aware this is not too important for your side at the moment.

Previously I had already complained a few times at procedure and doing 3-4 times of reviewing in waves and then waiting for a week to rereview changes and so on. You know why I did that? Because of time. I appreciate company money, but to other people its more important method naming and should we have code in helper or view and so on.. which is so so unimportant to business and making profit.

If anyone needs an example for wasting time with reviews here in the company I would be glad to show you. But that is also easily visible just from the following date and times on github.

Whatever, after Alex mentioned **Underperforming** I stopped him and told him that I disagree and mentioned some of those above. Also, I said that we have an easy solution, I am also disagreeing with the way of doing things in company and if I do the same as other people doing we will just waste more company money on very subjective stuff. Its ironic I am labeled as an underperformer, but 2-3 times I had been protesting about wasting time with this way of code reviewing.

Again, whatever, I have mentioned Alex I can quit and just please have in mind that I didnt use my annual leave days. Where he mentioned that like 'I won't have a right to use them' or something in that sense and that he will check with finance about it.

So, let me attach an article from my contract below.

I think I have right on those days. Today he said that its like ""for each calendar year of service", which we don't extend So basically it means you are entitled for these 20 days when your first year of service is over and you start your second year."

So, if its a goal to play games:

- Then technically my work day today is already the 1st day of next work year.
- Yesterday he said he will need day
- two to see what to consult with finance or head..
- I am just finishing my first work day and we had chat before 20min or something

Please lets finish this in the correct way, if not I will do what I can to defend my position and my rights.

6. Leave

6.1 You are entitled to leave in accordance with the Company's Leave Policy.

6.2 Annual leave

(e) You are entitled to 20 days' paid annual leave for each calendar year of service with the Company (or pro-rata in relation to any part year of service) to be taken in full or in part at such times as mutually agreed upon between you and the Company.

(f) The Company may require you to take excessive annual leave entitlements which have accrued from time to time.

6.2 Compassionate leave

(g) You will be entitled to two days paid compassionate leave on each occasion when a member of your immediate family or household:

(iv) contracts or develops a personal illness that poses a serious threat to the member's life;

(v) sustains a personal injury that poses a serious threat to the member's life; or

(vi) dies.

(h) You must provide reasonable proof of your need to take compassionate leave, if so requested by the Company."

[32] Upon reading Mr Zahirovic's email, Mr Hartley immediately responded:[6]

"Hi Nezir
Thank you for touching base with your concerns. I have your message and will have internal chats with team members cc'd and come back to you on Monday.
Kind regards
Ed"

[33] Mr Zahirovic replied, "Thank you for your understanding".

[34] Noting that Mr Zahirovic had broadcast that he was leaving and believing that they had, that morning, agreed via slack that he finish at the end of May (that day being the last day of May), Mr Timofeev arranged for Mr Zahirovic to be removed from Bluethumb's system.

[35] Mr Zahirovic continued to transact work on 31 May until he was removed from the system. He discovered that he had been removed from the system on the afternoon of 31 May (Indonesian time) when he received an electronic notice informing that he had been removed.[7] He was removed in the mid to late afternoon (Australian time). Thereafter, Mr Zahirovic could not readily transact business in the ordinary way.

[36] Mr Zahirovic did not perform further work for Bluethumb beyond the afternoon of 31 May. Nor did he seek to have his credentials reinstated.

Events 1 to 11 June

[37] Having promised to get back to Mr Zahirovic, Mr Hartley did so on Tuesday 4 June. They had a telephone conversation, which Mr Hartley described during proceedings as an exit interview. Mr Zahirovic explained his reasons for resigning. Mr Hartley did not seek to talk Mr Zahirovic out of this course but agreed to discuss the issue further with his senior colleagues.

[38] Mr Hartley then spoke with Mr Gibson and Mr Timofeev about Mr Zahirovic's employment ending the way it did. Mr Gibson expressed the view that whilst it was difficult to recruit engineers, and whilst he too was surprised that Mr Zahirovic had resigned rather than work through the issues of concern, it was best to let the resignation stand.

[39] On 5 June 2024, Mr Hartley sent Mr Zahirovic written confirmation that his resignation was accepted "as per last week". He authorised the CFO to make up a final payment to Mr Zahirovic. The written confirmation stated:[8]

> "Hi Nezir
>
> Thanks for the talk yesterday. I have discussed it with George & Alex and appreciate hearing your views and frustrations. We believe it is best however to accept your resignation as per last week.
>
> Lesley-Anne our CFO has calculated your final pay which includes amount owing for the month $[redacted] plus, annual leave accrued $[redacted] minus the laptop $[redacted] for a final payment amount of $[redacted].
>
> If you have any questions please let me know.
>
> Kind regards
> Ed".

[40] Mr Zahirovic immediately responded rejecting the calculation of the final payment. He also asserted that he was entitled to one week's notice under the FW Act.[9]

[41] On 11 June 2024, further email communication occurred between the CFO and Mr Zahirovic on the final payment calculation.[10] This communication included disagreement over the notice period. Ms Schwab asserted that it was Mr Zahirovic who, "under Australian law", was obligated to provide two weeks' notice, that he had not done so, and that the company could "claw back 2 weeks" but had not sought to do so.

[42] In an email response, Mr Zahirovic claimed that Mr Timofeev had "asked me to finish my work on the last day of May 2024 and… I told him if he asks me to finish my engagement in May that's okay but I want to do everything by contract we assigned".[11] Mr Zahirovic concluded by stating "we are going to court".

[43] Ms Schwab replied that the business would "hold payment and await legal action from you".[12]

[44] Being in dispute, Mr Zahirovic sought and obtained legal advice. In his evidence he stated that he was informed by his legal advisers on 20 June that, as he believed his employment had ended on 31 May, he needed to file proceedings by the following day to be within time.

[45] Mr Zahirovic filed this application the next day, 21 June 2024.

Submissions

Bluethumb

[46] Bluethumb submit that Mr Zahirovic is not eligible to make the claim because he is not an "Australian-based employee" within the meaning of s 35 of the FW Act.

[47] Whilst Bluethumb accepts that it is an "Australian employer", it submits that Mr Zahirovic is not an "Australian-based employee" because his engagement falls within the exception in s 35(3). Specifically, Bluethumb submit that Mr Zahirovic was "engaged outside of Australia and the external Territories to perform duties outside Australia and the external Territories".

[48] In the alternative, Bluethumb submit that Mr Zahirovic resigned or that his employment ceased by mutual agreement. It submits that he was not dismissed because the employment was not terminated "on the employer's initiative". It says that it neither sought nor planned for Mr Zahirovic to leave. Bluethumb submit that it engaged in no conduct or course of conduct which "forced" Mr Zahirovic to resign.

[49] In the further alternative, Bluethumb submit that the employment ended on 30 May 2024, meaning the application is one day beyond the 21-day time limit. It submits that time should not be extended because the circumstances are not exceptional.

Mr Zahirovic

[50] Mr Zahirovic submits that he is an "Australian-based employee" within the meaning of s 35(2)(b) of the FW Act because he was employed by an Australian employer.

[51] Mr Zahirovic submits that the exception in s 35(3) does not apply because, whilst he performed duties outside of Australia, he was not "engaged outside of Australia". He submits this is because his employment contract was prepared in Australia, sent to him from Australia and returned, once signed, to Bluethumb's Australian location. He also relies on the fact that the contract expressly refers to the FW Act.

[52] Mr Zahirovic submits that he was dismissed on 31 May 2024 when the employer unilaterally withdrew his permissions to access its online systems and perform work. This was conduct on the initiative of the employer, as was its unwillingness to negotiate a peaceful exit in line with his contract.

[53] Mr Zahirovic submits that his employment did not end by resignation because his agreement to leave was conditional on there being an agreement over contractual entitlements and a peaceful exit, which did not occur.

[54] In the alternative, Mr Zahirovic submits that if he resigned, he was forced to resign by a course of conduct by the employer. This included the employer raising unreasonable performance concerns and failing to negotiate a peaceful exit.

[55] Mr Zahirovic submits that his application is not out of time because his employment did not end until 31 May 2024 when Mr Timofeev withdrew his access to the online system. All that which occurred on 30 May 2024 is that he conditionally agreed to leave.

[56] In the alternative, Mr Zahirovic submits that time for late lodgement should be extended because he reasonably believed, based on the employer's conduct, that his employment continued until at least 31 May 2024.

Consideration

[57] I now deal with the jurisdictional issues.

Was Mr Zahirovic an Australian-based employee?

[58] Only employment between an "Australian employer" (as defined) and an "Australian-based employee" (as defined) falls within the jurisdiction of Part 3-1 of the FW Act (general protections).

[59] It is not in dispute that Bluethumb was an "Australian employer" as defined. Being incorporated in Australia, the respondent is a trading corporation formed within the limits of the Commonwealth (s 35(1)(a)).

[60] An "Australian-based employee" is defined in ss 35(2) and (3):

> **(2) Meaning of Australian-based employee**
>
> "An **Australian-based employee** is an employee:
>
> (a) whose primary place of work is in Australia; or

(b) who is employed by an Australian employer (whether the employee is located in Australia or elsewhere); or

(c) who is prescribed by the regulations.

(3) However, paragraph (2)(b) does not apply to an employee who is engaged outside Australia and the external Territories to perform duties outside Australia and the external Territories."

[61] Was Mr Zahirovic "engaged outside of Australia and the external Territories to perform duties outside Australia"?

[62] Past decided cases[13] have observed that s 35(3) requires two separate factual matters to exist for the exception therein to apply; firstly, that duties are in fact performed outside of Australia and, secondly, that the person was "engaged outside of Australia" to perform those duties. The mere fact that duties are performed outside of Australia is not sufficient.

[63] I agree that s 35(2), properly construed, requires satisfaction of both limbs.

[64] It is not in dispute that Indonesia, where Mr Zahirovic was required to perform his duties and did in fact do so, is outside of Australia (the second limb).

[65] The question which then arises is whether Mr Zahirovic was "engaged outside Australia" to perform those duties (the first limb)?

[66] Past decided cases have interpreted the phrase "engaged outside Australia" to refer to the legal creation of the employment contract (contractual principles) and not a narrower construction whereby "engaged outside Australia" simply means the geographical location of the employee at the time they accept the contractual offer of employment.

[67] I consider this narrower construction to be tolerably arguable as it gives to the phrase "engaged outside Australia" a plain meaning consistent with its focus on geographic location, and reflects a legislative intent that persons engaged outside Australia and who work solely outside Australia do not have a sufficient Australian connection to be an "Australian-based employee".

[68] However, this narrower construction, as Deputy President Boyce in *Parimoo* observed, requires the phrase to be interpreted as if it reads "engaged 'while' (or 'when' or 'whilst') outside Australia". Though I consider this meaning open on a plain construction, it is also clear that the word "engaged" can be reasonably interpreted as referring to the overall creation of the contract and not just the geographic location of the employee.

[69] As this broader construction is also consistent with the principles of statutory interpretation, and as it is the established construction adopted by past cases, then in the absence of full bench or court guidance to the contrary, I apply the established construction for the purposes of this matter.

[70] Leaving aside that both Bluethumb and Mr Zahirovic contemplated that his duties be wholly performed outside of Australia (the first limb), it is not in dispute that the employer, from its Australian base, prepared the contract and sent it to Mr Zahirovic at his overseas base. This was, in contractual terms, an offer. Nor is it in dispute that the employee, from his overseas base, signed the contract and sent it back to the Australian employer. This was, in contractual terms, an acceptance. The acceptance was received by the employer when it opened the email attaching the signed contract. That occurred at Bluethumb's Australian base.

[71] Did this mean that Mr Zahirovic was "engaged outside Australia"?

[72] The facts in this matter are broadly analogous with the case of *Winter v GHD Services Pty Ltd*[14] where the Federal Court held that an employee was not engaged outside Australia simply because they signed an employment contract in the United States. In that case, as with this matter, the employer was an Australian company located in Australia and received the signed contract in Australia.

[73] For these reasons, and despite recognising that a contrary conclusion is tolerably arguable, I find that Mr Zahirovic was not "engaged outside Australia". That being so, the second limb of s 35(2) is not made out. The exception to s 35(2)(b) does not apply.

[74] Accordingly, Mr Zahirovic was an "Australian-based employee" as defined.

[75] This being so, it is not necessary to deal to finality with Mr Zahirovic's associated submission that the parties intended the governing law to be the FW Ac. However, the facts strongly support such a conclusion given that the contract specifically referred, in two clauses, to rights and obligations under the FW Act.

[76] Whilst it may be arguable whether my finding accords neatly with the legislative intent (given that Mr Zahirovic was not a resident of Australia, had never entered the Australian territory nor had performed work from or in Australia), my finding clearly accords with the intent of the parties.

[77] The jurisdictional objection by Bluethumb that Mr Zahirovic was not an Australian-based employee is dismissed.

Was Mr Zahirovic dismissed?

[78] I now consider whether Mr Zahirovic was dismissed within the meaning of the FW Act.

[79] Section 365 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."

[80] 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 section 386(1):

"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."

[81] Mr Zahirovic relies on both limbs of s 386 to advance the proposition that he was dismissed.

[82] It is well established that dismissal for the purpose of s 386 concerns the termination of the employment relationship and not necessarily the ending of a particular contract of employment.[15]

[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 a person was "dismissed" is based on a consideration of the evidence as a whole, including inferences reasonably drawn from the conduct of the parties. These principles were summarised in the Federal Court judgement of Rares J in *Koutalis v Pollett*:[16]

"…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".

[85] 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*[17].

[86] Further, a finding that a person did not voluntarily resign does not, of itself, equate to a finding that the person was dismissed.[18] There must be a properly made finding of dismissal within the meaning of the FW Act for the application to be within jurisdiction. 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).

[87] Leaving aside when the employment relationship in this matter terminated (considered below), did it terminate "on the employer's initiative"? Was the employer's conduct the "principal contributing factor" which led to the termination such that, had the employer not taken the action it did, the employee would have remained in the employment relationship?[19]

[88] Mr Zahirovic submits that the employment relationship was terminated when Bluethumb unilaterally withdrew his permissions to access the online system on the afternoon of 31 May.

[89] Bluethumb submit that this was not so because, when it withdrew the permissions, it was giving effect to an agreement with Mr Zahirovic that his resignation, notified the day prior, would take effect that day (31 May).

[90] In response, Mr Zahirovic submits that his resignation was conditional on an agreement for a "peaceful exit" consistent with his contract, and that it was apparent from 31 May 2024 that a dispute over contractual entitlements existed.

[91] Based upon the findings I have made, Mr Zahirovic plainly stated to Mr Timofeev on 30 May 2024 that he was resigning. He used the words "I quit".

[92] What was simply left to finalise was when the employment would cease and the contractual entitlements on leaving, which Mr Zahirovic considered to be sufficient for a "peaceful exit".

[93] I am well satisfied that the conduct of and communication between the parties on 30 and then 31 May amounted to a mutual agreement that the resignation would take effect at close of business on 31 May. In particular, I have regard to Mr Timofeev suggesting that Mr Zahirovic's employment finish that day ("finish our story in May") and Mr Zahirovic agreeing to this ("hey Alex thank you"). It was neither intended nor required that Mr Zahirovic provide additional notice or work beyond that date.

[94] If notice of resignation was not clear from the events of 30 May, it was made abundantly clear on 31 May when Mr Timofeev reminded Mr Zahirovic in writing that "technically you quit yesterday and that was your desire" and Mr Zahirovic responded with a large 'thumbs up' emoji.

[95] Given this, and whilst Bluethumb could have waited until the following day to withdraw online permissions, their withdrawal on the afternoon of 31 May 2024 was not conduct terminating the employment relationship. By then, there was already a sufficiently clear mutual agreement that the employment relationship would end that day. The withdrawal of permissions was conduct consequential on that mutual understanding.

[96] I do not accept that the resignation was, of itself, conditional. Whilst it is clear that Mr Zahirovic wanted a peaceful exit and considered that this meant being paid what he understood to be his contractual entitlements, the disagreement that followed over the following eleven days (and still appears unresolved) was not about whether contractual entitlements would be paid but what they actually were.

[97] Further supporting this conclusion is that Mr Zahirovic did not continue performing active work beyond 31 May 2024 nor seek to have his permissions restored. In his email to Mr Hartley on 11 June 2024, Mr Zahirovic expressly acknowledged that he had agreed with Mr Timofeev's proposal that his last day be 31 May:[20]

> "…I told him if he asks me to finish my engagement in May that's okay…"

[98] It was not unreasonable for Mr Hartley to conduct an exit interview on 4 June to better understand Mr Zahirovic's reasons for having resigned, and consider whether he would try to change his mind. In this context, the written confirmation sent by Mr Hartley on 5 June 2023 is best characterised as confirmation of what had already occurred (resignation). There is no sense in which a resignation is subject to acceptance by an employer for it to take effect on its terms. To conclude otherwise would hold an employee hostage to an employer's whim.

[99] I take into account that Mr Zahirovic's resignation on 30 May was impulsive and somewhat of a knee-jerk reaction to unexpected criticism. The impulsiveness of the resignation could characterise it as having been made in the heat of the moment. There are instances in which it may be unreasonable for an employer to give effect to a resignation made in the heat of the moment. This is not one such situation. Firstly, both Mr Zahirovic and Mr Timofeev were professionals, and the 30 May conversation was direct but not heated. Secondly, Mr Timofeev did follow up with Mr Zahirovic the following day. By then, Mr Zahirovic had time overnight to calm down. Thirdly, Mr Zahirovic did not withdraw or recant his decision to leave. Rather he affirmed it, with a thumbs-up emoji.

[100] Nor do I consider this to be a case of ambiguous conduct by an employee that would reasonably require an employer to clarify or confirm an employee's intention before giving effect to a resignation. Mr Zahirovic's express desire on 30 May was to "quit". That was unambiguous. He slept on it overnight and the following day accepted Mr Timofeev's suggestion that his employment finish up that day.

[101] Not having found that Mr Zahirovic was terminated on the initiative of the employer, was he forced to resign by the conduct or a course of conduct by the employer?

[102] The case of forced resignation advanced by Mr Zahirovic is weak. There was nothing unreasonable about Bluethumb raising performance concerns with him. I accept Mr Gibson's evidence that the concerns were genuinely held. Bluethumb raised the concerns in a fair and orderly manner, via a one-on-one discussion and not, for example, during a group meeting of engineers.

[103] Mr Zahirovic, as was his right, defended himself, believed that more objective criteria should be applied to assess his performance, and responded with criticism of the Bluethumb coding system rather than his coding practices.

[104] As unexpected and uncomfortable as it was for Mr Zahirovic to hear the criticism, and irrespective of whether it was fair or warranted, there is no basis upon which to objectively conclude that the resignation was forced. There was nothing unorthodox about the steps taken by Bluethumb to raise its concerns in the proper management of its operations.

[105] That Mr Zahirovic reacted by taking exception to the expressed concerns, and advised that he had enough and was quitting, was his decision and his alone, not the employer's. The decision was not forced.

[106] Nor was termination of the employment relationship by resignation the probable result of the employer's conduct in withdrawing online permissions because, by the time Bluethumb did so, Mr Zahirovic has already notified his resignation.

[107] For these reasons I do not find that the employment relationship ended by forced resignation.

[108] That being so, neither s 386(1)(a) or (b) of the definition of "dismissal" is made out.

[109] As Mr Zahirovic was not dismissed within the meaning of the FW Act, his general protections application to deal with a dismissal dispute is beyond jurisdiction.

Whether out of time?

[110] It is not necessary to determine if the application is out of time because it is not within jurisdiction.

[111] However, given my findings, it is clear that the ending of the employment relationship by resignation took effect on 31 May 2024, and not 30 May as claimed by Bluethumb.

[112] That being so, the application is within time and no issue of whether an extension should be granted would arise.

Conclusion

[113] I have found the application to be within time.

[114] I have found that Mr Zahirovic was an Australian-based employee within the meaning of the FW Act. The respondent's jurisdictional objection on that ground is dismissed.

[115] However, I have not found that Mr Zahirovic was dismissed within the meaning of the FW Act. The respondent's jurisdictional objection on that ground is upheld.

[116] As application C2024/4156 fails for want of jurisdiction it must be dismissed. An order giving effect to this decision is issued in conjunction with its publication.[21]

DEPUTY PRESIDENT

Appearances:

N. Zahirovic, on his own behalf

E. Hartley, of and on behalf of Bluethumb Pty Ltd

Hearing details:

2024.
Adelaide (by video to overseas locations);
23 August.

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[1] [2020] FCAFC 152

[2] A reference to "Mr Hartley" in this decision is a reference to Mr Edward Hartley and not to be confused with another co-owner, Mr George Hartley

[3] A1 Annexure B

[4] A1 paragraph 2(c) and (d); see also audio recording 1:04:00 and 1:07:00

[5] A2

[6] A2

[7] A3

[8] A2 Email 5 June 12.31pm

[9] A2 Email 5 June 1.06pm

[10] A2 Email 11 June 9.44am

[11] A2 Email 11 June 10.06am

[12] A2 Email 11 June 10.10am

[13] *Munjoma v Salvation Army (NSW) Property Trust as Trustee for the Social Work* [2013] FWC 3337, [38] to [46]; see also *Parimoo v Lake Resources NL* [2023] FWC 2543 (Parimoo)

[14] [2019] FCAA 775 at [5] and [10] per Heffernan J

[15] *NSW Trains v James* [2022] FWCFB 55, [45]

[16] [2015] FCA 1165, [43]

[17] [2017] FWCFB 3941 (Bupa)

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

[19] *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]

[20] A2 Email 11 June 10.06am

[21] PR779027