DECISION

Fair Work Act 2009
s.365 - Application to deal with contraventions involving dismissal (consent arbitration)

Jessica Hastings

v

Platform To Pty Ltd.
(C2024/3038)

DEPUTY PRESIDENT CROSS SYDNEY, 9 OCTOBER 2024

Application to deal with contraventions involving dismissal – consent arbitration

[1] Ms Jessica Hastings (the Applicant) made an application under section 369 (the Application) of the *Fair Work Act 2009* (the Act) for the Fair Work Commission to deal with a general protections dismissal related dispute. Ms Hastings alleged that Platform To Pty Ltd (the Respondent) dismissed her because she exercised a workplace right to make a complaint or inquiry in relation to her employment (s.340 of the Act), and that she was dismissed because of her mental disability, Autism Spectrum Disorder (ASD) (s.351 of the Act).

[2] A conference was conducted by another member of the Commission, however the parties were unable to reach an agreement and a certificate was issued on 24 April 2024 under s.368(3)(a) of the Act.

[3] On 12 May 2024, the parties gave notice under s.369(1)(b) that they had reached an agreement for the Commission to deal with the dispute by arbitration.

Background

[4] The Respondent is a small business that commenced operating in the disability support area in March 2020. It has 10 to 12 employees. The Respondent has two co-founding Directors:

(1) Ms Theresa Laffan, whose role at the Respondent is to oversee the Support Coordination, as well as run back office, payroll, invoicing and business development. Ms Laffan also conducts recruitment, ongoing management, performance management and termination decisions.

(2) Ms Jade Perry, whose role at the Respondent is to oversee the Direct Services function, which includes but is not limited to managing support workers on a day to day basis, managing participant (customer) interactions, services, supports and family interactions. Ms Perry is also accountable for daily rostering and regular changes, including responsibilities including but not limited to recruitment, ongoing management, performance management and termination decisions.

[5] The Applicant was employed on a casual contract from 7 October 2023 to 1 March 2024. Ms Laffan estimated that in that period the Applicant worked 6 to 7 hours a week.[1] The Applicant had previously worked for the Respondent from 20 December 2021 to 19 February 2022. The Applicant's work schedule did not follow a regular or systematic pattern.

[6] The Applicant was dismissed following three incidents that raised behavioural concerns. The incidents relied on by the Respondent can be summarised as follows:

a. An incident on 31 January 2024, where the Applicant instructed a client (referred to as AD) regarding medication management, resulting in her taking possession of the AD's medication. (the Medication Incident);

b. An incident on 21 February 2024, where the Applicant inappropriately handled a situation involving a client's pet dog, instructing a client to transfer ownership of their dog to herself. (the Dog Incident).

c. An incident on 28 February 2024, where the Respondent received a complaint from a client (KK) about inappropriate behaviour and solicitation of business by the Applicant (the Solicitation Incident).

[7] Where the Applicant identifies alleged complaints constituting an exercise of workplace rights that form the basis of the Application, those complaints arise in the factual matrix of the above allegations. The Applicant submitted:

> *The Applicant contends that the above complaints and enquiries directed to the Respondent, while not labelled as 'complaints' or 'grievances', could reasonably be understood by the Respondent as an expression of grievance demanding consideration.*

The Medication Incident

[8] On 31 January 2024, the Applicant was tasked to care for a participant who was a female in her early twenties with vision impairment (AD). The Applicant took AD to do shopping in Tuggerah and then to a doctor's appointment in Gosford. After the appointment the Applicant drove AD back to her home.

[9] Once the Applicant and AD arrived at AD's home, AD started laughing and refused to get out of the car. The Applicant asked her why she was laughing and AD said that she still had, and was taking, other antidepressants medication even though she had told her doctor and other support workers that she had ceased taking the earlier medication.

[10] The Applicant came into possession of AD's medication and returned them to a pharmacy. The Respondent considered the Applicant had instructed a client on medication management, resulting in her taking possession of the client's medication.

[11] The Applicant submitted that in the Medication Incident she exercised a workplace right on a number of occasions between 30 January 2024 and 22 February 2024, including but not limited to:

(a) On 30 January 2024 when the Applicant raised concerns that the Respondent may not be able to meet a NDIS participant's service agreement, "*especially regarding goals*". The Applicant also complained about not receiving enough information about AD and that the Applicant was "*really struggling*"; and

(b) On 31 January 2024 when the Applicant complained about the limited support given to her by the Respondent and sought a meeting "*or some sort of chat*" to "*at least make me aware of what I'm missing and a way I'm supposed to manage it.*"

The Dog Incident

[12] On 21 February 2024, the Applicant picked up a last minute shift for a participant in her 60's documented as having vision impairment (**MF**) only.

[13] MF had a dog and MF started yelling about the dog. MF started saying *"if that fucking thing comes anywhere closer I am going to fucking kill it by my own hands"*. The Applicant observed that the dog appeared to be quite sickly, it lacked fur and had pus all over its skin. The dog smelled and the smell was significant.

[14] While she was walking around with the phone in her hand, MF told the Applicant that she was *"killing the fucking thing"* that afternoon, and told the Applicant that she had booked in with the vet to euthanize the dog, but then she later said she would be killing the dog herself.

[15] The Applicant then proceeded to wash the dog, and was able to talk to Ms Laffan. Ms Laffan called while the Applicant washing the dog and asked her repeatedly why she was washing the dog and not supporting MF.

[16] The Applicant subsequently transferred the dog to her own name. At the end of her shift, she left with the dog.

[17] The Applicant submitted that in the Dog Incident, and the following day, she exercised the following workplace rights:

(a) On 21 February 2024, when the Applicant complained about an NDIS participant's behaviour not being reflective of the little information available in the progress notes and sought assistance from the Respondent on how to deal with the NDIS participant's behaviour; and

(b) On 22 February 2024, when the Applicant sought assistance from the Respondent and complained about not having access to various workplace procedures and processes by saying "*Give me a handbook. A link of what processes to follow*".

[18] The Respondent considered that on 21 February 2024, the Applicant inappropriately handled a situation involving a client's pet dog, instructing a client to transfer ownership of their dog to herself. This action breached professional boundaries and posed significant legal and ethical risks to the Respondent.

[19] Ms Laffan gave evidence and when questioned about the dog incident, she outlined it as follows:

> *Do you recall Ms Hastings sending you a message requesting some assistance? --- Yes. I was in a - I was in an Uber to a meeting and I called her. As I said, I'm in the car, I get car sickness, I can't really do a message, but I gave her a call to say, 'Is everything okay; what's happened?' and then she said that the client MF was wanting to put their dog down. Ms Hastings was quite distressed. So I advised that a vet is not going to put down a dog that's not well (sic) and that we're not there to support the dog, we're there only to support the client, we're not there to support the pet services. It's important to note that, like, this was Ms Hastings' one and only shift with this client, and we have been providing support to this client for years without any issues.*
>
> *Ms Hastings - I said to her, 'You can help the client to think about what their options are, to continue to go to the vet, you can take - you can support her to either take the dog to the pound, call the pound', and Ms Hastings said that she knew foster care placements, and I said, 'If you're happy to share your contacts, then you can help the client call the contacts, but the support has to remain about the client and not the dog.' Yes. And then, yes, I had to go because I was running into the meeting.*
>
> *MR BURN: Did you suggest that Ms Hastings could drop the dog off at the pound? --- Absolutely not. This is just ridiculous. Why would I again risk my business by saying that we would take on the dog, or anything like this? The only conversation about the pound was that you - not you - that the participant - you could discuss this with the participant. There's - we're not there to do things for people, or take things from people, we are only there to support them to do it themselves. That's the whole point of the business. It's about supporting people to do things for themselves; it's not about taking over or taking ownership of anything from a participant.*
>
> [Emphasis added]

The Solicitation Incident

[20] Clause 7 of the Applicants Employment Agreement relevantly reads:

> **7. Non-solicitation**
>
> *In order to protect the Employer against disclosure of Confidential Information and against the unfair loss of customers and clients, goodwill and employees of the Employer, you will not, during the term of your employment with the Employer and for a period of six (6) months thereafter, directly on your own account or indirectly as an employee, partner, associate or agent of any other person or entity, offer or provide, or solicit to offer or provide, products or services that are competitive with those of the Employer to any of the Employers customers and clients with whom you actually did business and had personal contact while employed by the Company.*

[21] On 28 February 2024, a staff member of the Respondent relayed a complaint received from a client regarding a shift with Ms Hastings on 10 February 2024.

[22] Ms Laffan requested the complaint be provided in writing via email. A Statement provided by a co-worker confirmed that the co-worker was advised by a client (KK) that the Applicant continually asked her questions and that it had upset her and made her extremely uncomfortable. The client allegedly requested the co-worker to submit a complaint on her behalf as well as request that the Applicant never support her again. The client also informed the co-worker that the Applicant offered extra support and allegedly told the client "*I just won't tell Platform To*".

[23] The evidence of Ms Laffan during cross-examination was the following:[2]

> *And you didn't think to ask Ms Hastings about whether she had made that solicitation offer to KK?--- We did speak about it, and she said she didn't. But that was a minor point. The bigger point was how she'd made clients feel and how she behaved towards staff. It was the behaviour, and the pattern of behaviour that kept happening, and that we'd seen had been happening, that was the concern.*
>
> *So the non-solicitation was a minor point. The bigger - - -?---It was a point that was – it was still a point to everything, but I feel like the bigger picture is the impact she was having on the clients. Like, that's the important thing, is our clients. The trust that we had was gone, because if I don't trust – yes.*

Disclosure of medical condition

[24] On 11 February 2024, the Applicant sent a three and a half page email to Ms Laffan and Ms Perry about KK, which in two lines noted:

> *Last year I used my NDIS funding and went through some testing and if it hasn't been blatantly obvious already, I received an ASD Level 2 diagnosis.*

[25] The Applicant did not receive a response to her email. On or around 14 February 2024 the Applicant noticed that her notes from the incident with KK were missing. On 15 February 2024, the Applicant received a message from Ms Perry telling her that she didn't need to go *"really detailed"* in notes regarding KK.

Events Around the Time of Dismissal

[26] On 22 February 2024, the Applicant obtained a medical certificate that simply stated:

> *Has consulted me today*
>
> *Is unfit to work 22/02/2024 to 29/02/2024*

[27] Ms Laffan and Ms Perry considered and drafted a Performance Improvement Plan (PIP) for the Applicant from around 22 February 2024, but it was never given to the Applicant.

[28] Following the investigation of the Solicitation Incident, it became clear to Ms Laffan and Ms Perry that the Applicant demonstrated a recurring pattern of behaviour that involved

breaching professional boundaries, making unfounded assumptions, and engaging in decision-making that posed significant risks to both the business and the safety and welfare of their clients. Ms Laffan and Ms Perry decided to advise the Applicant that she would not be provided any more shifts, and the Applicant was advised of that decision on 1 March 2024, during a telephone call.

[29] On 3 March 2024, the Applicant queried the Respondent's decision by email, as follows:

Dear Jade and Theresa,

I am seeking a written response in regard to the conversation between Theresa and I on Friday, 1st March. As the language used was quite ambiguous I am requesting some clarification. You stated that 'trust had been broken' and little more other than the following:

1. A complaint was made from [redacted] regarding being 'interrogated' and that I offered to 'provide services outside of Platform To' and could 'take her places and would not inform Platform To' of this additional work performed through another service.
2. That the communication between other staff members (I mentioned Liam being this staff member, there was no denial) and I was 'inappropriate' and 'went against/did not align with the company's values'.

Can you please inform me of the date of the complaint from [redacted] as well as the name of the other service provider that I was offering to perform these additional tasks through? As stated on the phone, I am not and was never employed by another service providing paid or unpaid support work.

In regard to communication with other staff members, you did acknowledge the messages between Liam and myself, however nobody else on the day regarding the dog incident. I did not initiate contact that day and still stand by the fact that we, as a service provider failed.

I am requesting the following via e-mail attachments:
1. AN Employment Separation Certificate;
2. The certificates of all completed training modules that I completed that are in my name alongside the correct completed date; and
3. The signed employment contract that I was never provided with that was signed last year.

Additionally, there are some pay discrepancies that need to be followed up, so can you please direct me to the most suitable person who can help to rectify these issue. Furthermore, I do need to know where these completed reports from some of the previous shifts (dog – notes + incident report, [redacted] – notes + finished later than scheduled, [redacted] – notes + feedback + enquiry) as I presume that these participants will be billed for services rendered.

[30] On 5 March 2024, the Respondent's position regarding not offering further shifts was confirmed by email, stating:

> *Hi Jessica*
>
> *The purpose of this email is to confirm Platform To will not be offering you any further casual shifts, see employment contract stating notice period of one day. As discussed on Friday the behaviours that have been demonstrated, and the impact they had on both Platform To and participants are why we have decided we are unable to offer you any further casual shifts.*

The Witnesses

[31] The Respondent was not legally represented, and did not seek to cross-examine the Applicant. Based upon the evidence filed, I have no doubt that the Applicant believes that she has suffered adverse action due to complaints she made, and her medical condition.

[32] The focus in general protections applications, however, is necessarily on the decision maker(s) whose decision enacts the adverse action.[3] In this matter, both Ms Laffan and Ms Perry were the decision makers, and I found them both to be considered, responsive, honest and compelling witnesses. They were, appropriately, squarely tested as to their reasons for their decision that adversely affected the Applicant, and their answers were clear, consistent and not structured or phrased by legal advice.

The Issues to be Determined

[33] The issues to be determined in deciding the Applicants claim are:

1. Did Ms Hastings exercise a workplace right?

2. Did the Respondent take adverse action against Ms Hastings?

3. Did the Respondent take the adverse action because of a prohibited reason or reasons that included that reason, or based upon a discriminatory ground?

Did Ms Hastings exercise a workplace right?

[34] Section 341 of the Act defines a workplace right as follows:

> ***341 Meaning of workplace right Meaning of workplace right***
>
> *(1) A person has a workplace right if the person:*
>
> *(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or*
>
> *(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or*

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee—in relation to his or her employment.

[35] In her submissions, the Applicant made reference to her exercising a workplace right on a number of occasions:

a. On 30 January 2024 when the Applicant raised concerns that the Respondent may not be able to meet an NDIS participant's service agreement and about not receiving enough information about a client and that the Applicant was *"really struggling"*.

b. On 31 January 2024 when the Applicant complained about the limited support given to her by the Respondent after the incident with an NDIS participant and sought a meeting.

c. On 11 February 2024 when the Applicant raised concerns about an NDIS participant and sought support from the Respondent.

d. On 21 February 2024 when the Applicant complained about an NDIS participant's behaviour not being reflective of the little information available in the progress notes and sought assistance from the Respondent on how to deal with the NDIS participant's behaviour.

e. On 22 February 2024 when the Applicant sought assistance from the Respondent and complained about not having access to various workplace procedures and processes.

[36] In *Shea v TRUenergy Services Pty Ltd (No 6)*[4], Dodds-Streeton J observed:

"As held in Ratnayake , it is, in my view, unnecessary that the employee, in making a complaint that he or she is able to make, expressly identifies the communication as a complaint or grievance, or uses any particular form of words. It is necessary only that relevant communication, whatever its precise form, would be reasonably understood in context as an expression of grievance or a finding of fault which seeks, whether expressly or implicitly, that the employer or other relevant party at least take notice of and consider the complaint.

Whether an employee has made a complaint is a matter of substance, not form, which should be determined in the light of all the relevant circumstances. It does not depend solely on the words used. An employee's communication of a grievance or accusation could amount to making a complaint within the meaning of s 341(1)(c)(ii) despite an express disavowal of any intention to complain if a reasonable observer would conclude from the employee's words and conduct in the circumstances (including the nature and

gravity of the grievance or accusation) that he or she intended to bring the grievance to the employee's attention for consideration or other appropriate action."

[37] The Applicant's expressed concerns and questions that have been relied upon as constituting complaints are often short comments embedded in long emails and reports. As an example, following the Dog Incident the Applicant sent the following email to the Respondent, with the words in bold in the last paragraph being submitted to constitute a complaint, (though the identified complaints in submissions were said to be *" ... including but not limited to…"*):

Oh, I guess it's good the decision remains the same. Liam messaged me first so I just answered. This is what I need to know. I know we're there to support the participant but aren't we also meant to pick up on other things that aren't just said and you know…. Put together the whole picture instead of just leave it to this point? I see this as pretty much failing her, honestly and being the unlucky sucker who copped a massive vet bill because I'm no way could I pass that dog on to any contact of mine in that state knowing it would be that high - if not higher.

I hate sharing this without him knowing, sharing it wasn't my intention but this is what I do not understand. Same with Charlotte the other day and her cat. 'Oh we're just letting it die peacefully' uh, yeah I can't like five veterinary advice or anything but uh, just using commonsense there's a thing called a vet and also things called antibiotics that would return the thing to full health. Or at least like go do right by it and not suffer? If it were a kid I'd be required to call DCJ, right? The same applies to animals but I don't know how it applies in this role and it's a little uncomfortable just…. Knowing but not being able to say anything 😬

I gave all the options and yes, I absolutely take full responsibility for taking the animal because she'd have killed it herself if the vet refused. I called to see if that was even allowed and am aware that it's a very grey area… but what is it that I'm not getting? Or is it a clash just with Liam? Same thing with the boys on the weekend. Everything and anything I did was wrong. I'd have happily helped her reach out to others and made the calls on her behalf as I don't have a safe place to live or a roof over my head and have been in the car or wherever for a good week now. It's my 'fault' but was I meant to leave it there for her to kill it the second I left out? She stated she was? Would that be grounds to call for assistance or is there a way that it can be communicated without speaking directly infront of the person? Michelle was there when I called you, but I wasn't going to say every f bomb that dropped out of her mouth and then the quick change to crying to the aggression in front of her. She walked away when I think I mentioned if I could find a rescue that I had connections with and if that was okay if she were okay and initially it was until it was heard in the phone and right after I was yelled at for 'why'd you choose to rescue this fucking filth just kill it, it's just a dog'

The only way to take was her consenting to it being taken out of her name on council paperwork that i refused to play a role in until I had to enter the other side of information and I wasn't going to dump it at the pound and get stuck with a neglect, abandonment, euthanasia and 'surrender' fee because we all know each other around here and I knew it was simply form sheer neglect. It was asked how long we had been seeing the dog and I didn't know and that morning they had a similar situation with another animal and

worked with the person and SW to treat the issue alongside ways to manage and lessen everything else that made it intolerable and the animal is safe. Should we remain oblivious to the surroundings or changes and not say anything or bring it up or make mention of it? Looking at the full picture over time its simple for me to see - Deteriorating dog or home or this or that = ?deteriorating MH state = let's intervene and support because that's what we're mean to be doing.

I'm ranting but I honestly don't even know what's expected from me because my idea is clearly really different to what I've seen so far. I never felt like this years back at all. I remember Jade speaking specifically about the 'whole picture' from day one like it was yesterday.

Photos are of the dog. It covers if you lift your leg or hand so yeah, it's definitely been hit and kicked. It's beyond sad especially when you look at how much money she invested just last year into having the leg removed, the dental, etc and then it turning into this. I had no time in between shifts yesterday to sort out placing her and chose to get vet care immediately and rushed back to somewhere I could keep it safe and then back out the door for Jesse.

*I honestly just wanted to run yesterday but between reading her reports before starting and being aware of behaviors I was fine if I was yelled at or whatever for not doing xyz right but when the previous reports don't reflect the whole picture it's like walking into an absolute sh*tshow. I really just can't put it any other way. If that dog remained there it wasn't just the dog but also her risk to herself I was extremely concerned about.*

Give me a handbook. A link of what processes to follow so I can stop pestering both you and poor Jade. *Or at this point i am just going to admit that I'm never going to actually fully 'get it' and that's the way it is at no fault of anyone's and I just.. move on*

[38] I nonetheless accept that the identified communications of the Applicant said to constitute complaints could reasonably be understood by a reasonable observer to be an expression of grievance and inquiry that the Respondent should take notice of and rectify, and so constitute an exercise of a workplace right pursuant to s.341(1)(c) of the Act.

Were the actions of the Respondent 'adverse action' within the meaning of that phrase at section 342(1) of the Act?

[39] Section 342(1) of the Act provides that an employer takes adverse action against an employee where:

Item	Adverse action is taken by…	If…
1	An employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or

(c) alters the position of the employee to the employee's prejudice; or

(d) discriminates between the employee and other employees of the employer.

[40] It was not disputed that termination of employment is adverse action. I therefore find that, by terminating the employment of Ms Hastings on 1 March 2024 when advising no further shifts would be offered, the Respondent took adverse action against her.

Was the adverse action taken was because of the workplace right or exercise/purported exercise of that workplace right, or on a discriminatory ground?

[41] This issue brings into consideration the reverse onus provision of s.361 of the Act, which provides:

> *"Reason for action to be presumed unless proved otherwise*
>
> *(1) If:*
>
> *(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and*
>
> *(b) taking that action for that reason or with that intent would constitute a contravention of this Part; it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.*
>
> *(2) Subsection (1) does not apply in relation to orders for an interim injunction."*

[42] In *Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 2)*,[5] Wigney J provided a distillation of the principles in relation to the application of s.361 from the decisions of the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*,[6] and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd*,[7] as follows:

> *"As has already been noted, s 361 creates a statutory presumption that operates in cases where it is alleged that a person contravened s 340. Relevantly, where it is alleged that a person has taken adverse action against another person because that other person has a workplace right, or has exercised a workplace right, it is presumed that the action was taken for that reason, unless the person proves otherwise. Here, the CFMEU alleged that De Martin & Gasparini took adverse action against its employees for reasons that included that the employees had or had exercised workplace rights. Those workplace rights were the benefit of the Enterprise Agreement (a workplace instrument), and the ability to approve or not approve a variation of the Enterprise Agreement (a process*

under the Fair Work Act). By reason of s 361, it is to be presumed that De Martin & Gasparini took the adverse action for those reasons unless it proves otherwise.

One might be forgiven for thinking, at least at first blush, that the question whether a person took certain action for a particular prohibited reason is a fairly straightforward question. It is, however, a question which, in the context of s 340 and cognate provisions (for example s 346 of the Fair Work Act), has excited some considerable debate and controversy. Following the decisions of the High Court in Barclay and BHP Coal , however, it could now be said that the relevant principles are relatively well-settled. The key principles, in simple terms, are as follows.

First, the question is one of fact: Barclay at [41], [45], [101]; BHP at [7].

Second, the question is why the adverse action was taken: Barclay at [5], [44]. The focus of the inquiry is the reason or reasons of the relevant decision-maker: Barclay at [101], [127], [140], [146]; BHP Coal at [7], [19], [85]. More particularly, the question is whether the alleged prohibited reason was a "substantial and operative" reason for taking the adverse action: Barclay at [56]-[59], [104], [127]; or an operative or immediate reason: Barclay at [140].

Third, the test does not involve any objective element: Barclay at [107], [121], [129]; BHP Coal at [9]. To speak of objectively obtained reasons risks the substitution by the court of its view, rather than making a finding of fact as to the true reasons of the decision-maker: Barclay at [121]; BHP Coal at [9].

Fourth, the inquiry is not concerned with mere causation, in the sense that it is not sufficient that there is factual or temporal connection between the relevant protected workplace rights and the adverse action: BHP Coal at [18]-[20]. Any such connection, however, may necessitate some consideration as to the true motivation or reasons of the decision-maker: BHP Coal at [22].

Fifth, the question must be answered having regard to all of the relevant facts and circumstances and the inferences available from them: Barclay at [45], [127]; BHP Coal at [7].

Sixth, direct testimony from the decision-maker as to why the adverse action was taken is capable of discharging the burden imposed by s 361: Barclay at [45], [71]; BHP Coal at [38]. However, declarations that the action was taken for an innocent reason may not discharge the onus if contrary inferences are available on the facts: Barclay at [54], [79], [141]. The reliability and weight to be given to such evidence must be assessed having regard to the overall facts and circumstances: Barclay at [127].

Seventh, it is not necessary for the decision-maker to establish that the reason for the adverse action was entirely disassociated from the relevant protected workplace right: Barclay at [62]."

[Emphasis added]

[43] Notwithstanding the burden imposed by s.361 of the Act, Ms Laffan and Ms Perry comprehensively and completely discharged that burden, and established that no part of their decision to take adverse action against the Applicant was for a prohibited or discriminatory reason.

[44] While a chronology that progressed in one week from consideration of a PIP, the presentation of a medical certificate, and then termination of employment, may be seen to constitute relevant facts and circumstances that readily infer prohibited conduct notwithstanding the Respondent's evidence, Ms Laffan's evidence was:[8]

> *And this is the evidence that you were relying on to change your approach from a performance improvement plan to a dismissal, is that correct? --- No. It was all of this, combined. So it was the fact that we had already had two big incidences. Then we got the complaint from client KK, saying that they felt – Ms Hastings had made them feel uncomfortable, that they felt on edge, and that they felt interrogated. Then, when we looked through, we see language that's being used, we see that staff members have a completely different version of events to things from Ms Hastings. And that's when we start to realise, 'Things just aren't working here, and you're not a good fit for this organisation. And the trust that we need to have in our staff members has gone, because now you're berating other staff members'. That means there's not a good relationship between them. Now can we fit that into a team? We're a small business. Like I said, we're inexperienced in HR. We don't have a legal department. We're just trying to do the best with what we've got. We're not this big corporation that may be – might be a better fit for Ms Hastings if that's something maybe that she needs or wants. We can only do the best with what we've done, and we were trying to do our best. And we were trying to work with Ms Hastings, up to a point where we realised, 'Actually, there's a lot of behaviours indicating that you're not a good fit for us. Might be for another company, but not for us'.*

And:[9]

> *And you spoke to them with the purpose of ascertaining their views as to whether Ms Hastings was a good fit with the organisation? --- No. I just spoke to them to find how shifts had gone – the joint shift, because Mr Camilleri had joint shifts, and wanted more feedback from Ms Emery regarding client KK and MF. And Ms Pritchard, because they had shared AD, and I know they had been messaging a good bit on Slack – I wasn't actually aware that they were texting, but I had seen the messages on Slack. But we're a small company. Ms Hastings was a casual employee who worked on average I think about seven hours a week, six or seven hours a week. We would just like to know, it's not working, it's not a good fit; it's time for us to part ways. We can't keep having potential big business risks, and Ms Hastings making judgments and decisions for herself, and not following the support that we're supposed to be providing, which is just support and guidance; not decision-making for doing things for people, in terms of taking the dogs and stuff like that, and taking the medication.*

[45] The Applicant's conduct during the Dog Incident and the Medication Incident went beyond her scope of duties and breached guidelines, and this was a significant factor ultimately

resulting in her dismissal. It is apparent that the Applicant engaged on multiple occasions in conduct that put the Respondent at risk.

[46] As to the suggestion that the Respondent took adverse action against the Applicant due to the disclosure of her Autism diagnosis, Ms Laffan dealt completely with that suggestion with her evidence, in particular:[10]

> *My apologies. Ms Laffan, I put it to you that the reason you started to investigate those historical issues is because of the email Ms Hastings sent on 26 February at 9.23 pm. Is that correct? --- No. This is really upsetting. Like, I spent my whole career working in this industry, and for someone to say that I'm trying to discriminate against them is so upsetting. I feel like we're going over and over and over this. No. I don't know how many times I've tried to explain it. There were incidences that came up that raised concerns. Look, this question is quite upsetting.*

[47] The incredulity expressed in Ms Laffan's above evidence was palpable and well founded. The suggestion that two individuals who established a company which provides for people with special needs, made the decision to terminate the Applicant because she was neurodivergent lacks any basis, and was understandably considered offensive.

[48] I am also satisfied that the reason for the adverse action stated by Ms Laffan and Ms Perry was supported by all of the relevant facts and circumstances and the inferences available from them, as outlined above.

Conclusion

[49] I find that while complaints were made, and adverse action against the Applicant was taken, the Respondent has discharged the onus of proving that no part of that action was taken for the prohibited or discriminatory reasons alleged. I am satisfied that the reason for the adverse action stated by Ms Laffan and Ms Perry was supported by all of the relevant facts, circumstances and inferences available.

[50] The Application is dismissed.

DEPUTY PRESIDENT

Appearances:

Mr B Burn, Solicitor, on behalf of the Applicant.

Ms J Perry, on behalf of the Respondent (over Microsoft Teams).
Ms T Laffan, on behalf of the Respondent (over Microsoft Teams).

Hearing details:

Microsoft Teams and In-person.
Sydney.
10AM.
23 August 2024.

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[1] Transcript PN 412.

[2] Transcript PN 420 and 421.

[3] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*, [3] (2012) 248 CLR 500, at [45] and [71];

[4] 2014) 242 IR 1, at [626] and [627].

[5] [2017] FCA 1046, at [295] to [303].

[6] (2012) 248 CLR 500.

[7] (2014) 253 CLR 243.

[8] Transcript PN 409.

[9] Transcript PN 412.

[10] Transcript PN 435.