



DECISION

Fair Work Act 2009
s.365—General protections

Lily Hart

v

Intellisoftware Pty Ltd
(C2024/4250)

DEPUTY PRESIDENT EASTON

SYDNEY, 13 SEPTEMBER 2024

Application to deal with contraventions involving dismissal – jurisdictional objection – is the applicant a person who has been dismissed – resignation – factual dispute about a crucial conversation – impending performance review – applicant told “I want to give you the opportunity to resign ... this is your last day” – no effective or real choice but to resign – applicant was dismissed.

[1] On 21 June 2024 Ms Lily Hart made an application to the Fair Work Commission under s.365 of the *Fair Work Act 2009* (Cth). Ms Hart claims that she was dismissed from her employment with Intellisoftware Pty Ltd and that the dismissal contravened the general protection provisions of the Act.

[2] Intellisoftware maintains that Ms Hart resigned her employment and was not ever dismissed.

The Commission’s Jurisdiction

[3] The Fair Work Commission can deal with applications under s.365 of the Act by way of conciliation or mediation under s.368. If the Commission is satisfied that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful it can issue a certificate under s.368(3). Section 370 imposes a substantial restriction upon applicants by preventing a general protections court application being made unless the FWC has issued a certificate under s 368(3)(a) in relation to the dispute (*Ward v St Catherine’s School* [2016] FCA 790 at [3]).

[4] The Full Court in *Coles Supply Chain v Milford* [2020] FCAFC 152 at [51], (2020) 300 IR 146 (**Milford**) found that the FWC’s power to deal with a dispute under s.368 is only enlivened if an application is properly made under s.365. When a jurisdictional objection is raised the FWC must determine whether the application was properly made, which might include determining whether an applicant was actually dismissed from their employment.

[5] The Full Bench in *Lipa Pharmaceuticals v Jarouche* [\[2023\] FWC 101](#) at [23], (2023) 324 IR 375 at 382-3 observed by way of obiter:

“As earlier stated, the Commission conducted a conciliation conference in respect of Dr Jarouche’s application prior to the determination of Lipa’s jurisdictional objection, with Lipa’s consent. This involved the exercise of the Commission’s functions and powers under s 368(1). This should not have occurred since it was inconsistent with the Full Court’s command in *Milford* as set out in 4 above. Where the respondent to a s 365 application contends, in its response to the application or otherwise, that the application was not validly made because the applicant was not dismissed, this must be determined prior to the Commission “dealing” with the dispute under s 368 including by conducting a conciliation conference.”

“A person who has been dismissed”

[6] Ms Hart only has capacity to make a claim if she is “a person who has been dismissed” (per s.365(a)). “Dismissed” is defined in s.12 of the Act by reference to s.386. Section 386 is in the following terms:

“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.

(2) However, a person has not been dismissed if:

(a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or

(b) the person was an employee:

(i) to whom a training arrangement applied; and

(ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

and the employment has terminated at the end of the training arrangement;
or

(c) the person was demoted in employment but:

(i) the demotion does not involve a significant reduction in his or her remuneration or duties; and

(ii) he or she remains employed with the employer that effected the demotion.

(3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part."

Dismissal v Resignation

[7] In *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941 at [47]-[48], (2017) 271 IR 245 at 268-9 (**Tavassoli**), the Full Bench summarised the relevant tests under s.386 as follows:

"[47] Having regard to the above authorities and the bifurcation in the definition of "dismissal" established in s.386(1) of the FW Act, we consider that the position under the FW Act may be summarised as follows:

(1) There may be a dismissal within the first limb of the definition in s.386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the "heat of the moment" or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although "jostling" by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.

(2) A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element.

[48] It is necessary for an applicant for an unfair dismissal remedy whose employment has terminated because the employer has acted on a communication of resignation on the part of the employee to articulate whether they contend they were dismissed in the first or the second scenario above (although it may be possible for both scenarios to arise in a particular factual situation). Where the applicant is self-represented or inadequately represented, it may be necessary for the member of the Commission hearing the matter

to clarify with the applicant the precise basis upon which it is contended that the applicant was dismissed. If this is not done, it may lead to the wrong test being applied to the matter.”

The Evidence

[8] Mr Hossein Bassam is the CEO of Intellisoftware. In the afternoon of 3 June 2024 Mr Bassam had a conversation with Ms Hart that led to Ms Hart sending an email indicating that she had resigned. The email, and Mr Bassam’s reply, were as follows:

Ms Hart’s email: “Hi Hossein. As discussed, I am resigning with the agreement of one week’s wage after today. Kind regards.”

Mr Bassam’s email: “Hi Lily. Thank you for informing me. I acknowledge your resignation effective today, with the agreement of one week’s wage. I appreciate your contributions to the team and wish you all the best in your future endeavours. Best regards.”

[9] Ms Hart and Mr Bassam gave two very different versions of the conversation that preceded the resignation email. Ms Hart’s version is as follows:

“I returned to my desk at approximately 4:50pm to continue working and a few minutes later at 5pm the CEO Hossein Bassam asked to speak to me privately. He said “I assume Hossein Khosravi has spoken to you”. I was confused as it sounded like he was put up to it. He said “Jason [Smith, Ms Hart’s direct manager] has prepared a performance review and I want to give you the opportunity to resign”. He said “Jason is not happy”, “the decision to let you go is not up to me, it’s up to Jason”, “I’m sorry” and “this is your last day”. I took a deep breath knowing this was in the works since I called Jason out in that meeting a month prior. I thought, this is what I get for standing up for myself, and I felt defeated and overpowered. Hossein told me to send an email to him stating my resignation and offered 1 week’s pay. I returned to my desk and remained quiet, knowing Graeme was watching me from his desk adjacent to mine...”

[10] Mr Bassam’s version of same conversation was as follows:

“Later in the afternoon, around 3.30pm, I was at my desk in the office and called out to Lily to invite her into my office. Lily came into my office and I closed the door. This would have occurred around 3.30pm to 4.00pm. During this meeting:

(a) I said something along the lines of “I just want to inform you that Jason is going to call you for a meeting. The purpose of the meeting is your performance for the last three months. And he will give you some feedback, also for the Summit work you have done”.

(b) Lily asked me: “Have you guys decided anything about me?”

(c) I said: “What do you mean?”

(d) Lily said: “What’s going to be the outcome? Will I get fired?”

- (e) I said: “It is just a performance meeting”.
- (f) Lily asked me: “Can you tell me what’s going to happen?”
- (g) I said: “It’s a meeting. I just want to inform you in advance and if you attend the meeting you will find out”.
- (h) Lily maybe waited 15-20 seconds and then said: “If I resign will you pay me one week?” At this point, Lily seemed a bit upset.
- (i) I said: “Put it in an email and I will think about it”.
- (j) I did not say “I want to give you the opportunity to resign”, “the decision to let you go is not up to me, it’s up to Jason”, “I’m sorry” and “this is your last day.” Consistent with Jason’s email, we were not planning on dismissing Lily, we were just going to start formally managing her performance.”

[11] This conversation is central to the resolution of the threshold matter I must decide. If the conversation occurred as Ms Hart described it, and Mr Bassam did in fact say to her that “this is your last day”, then it is reasonably clear that Mr Bassam initiated the termination of Ms Hart’s employment when he invited Ms Hart to resign. In this scenario Ms Hart had no real alternative but to provide her resignation because her employment was about to be terminated.

[12] If the conversation transpired the way Mr Bassam describes then Ms Hart appears to have resigned her employment of her own free will and not at the initiative of the employer.

[13] There was a lot of evidence about Ms Hart’s employment with Intellisoftware and her dealings with her direct manager Jason Smith in particular. It is only necessary to briefly describe this evidence. It seems reasonably clear that Mr Smith was not satisfied with Ms Hart’s performance. On 1 May 2024 Mr Smith spoke to Ms Hart on the telephone in an aggressive tone that caused her to become distressed. Mr Graeme Grant, whose desk is very close to Ms Hart’s desk in Intellisoftware’s small office space, heard the conversation and saw Ms Hart’s distress. Mr Bassam also observed the conversation in the same room as Ms Hart and Mr Grant, but did not intervene until prompted to do so by Mr Grant. Mr Bassam then took Ms Hart’s phone from her and spoke directly to Mr Smith. Mr Smith said he “categorically denied harassing Lily on the phone call” however no other witness, including Mr Bassam, thought that Mr Smith’s behaviour was appropriate.

[14] Mr Grant and Ms Hart worked together in close proximity in Intellisoftware’s office. Mr Grant said he “developed a good professional and friendly relationship with [Ms Hart] during her employment.” Mr Grant also said that time between 1 May 2024 and 22 May 2024, Ms Hart told him that she was frustrated by Mr Smith’s conduct, saying “I’ve had enough” or similar.

[15] On 24 May 2024 Mr Smith sent a draft performance plan-type document to Mr Bassam for discussion. The draft plan is highly critical of Ms Hart’s performance as the marketing

manager and does not appear to contain any kind of plan to assist Ms Hart to overcome these perceived shortfalls.

[16] In the morning of 3 June 2024 Mr Grant made a complaint to Mr Bassam about Mr Smith.

[17] In the middle of the day on 3 June 2024 Mr Bassam and Mr Smith met to discuss Mr Grant's complaint and also to discuss Ms Hart's "upcoming performance review." Mr Bassam said "we agreed that I would notify [Ms Hart] that there would be a performance meeting with [Mr Smith], then I would tell [Mr Smith] he could send the email to [Ms Hart] about her performance and [Mr Smith] could then meet with [Ms Hart] for the performance review."

[18] Mr Bassam printed Mr Smith's email containing the draft performance plan. By an apparent coincidence Mr Hossein Khosravi saw the draft plan on the printer. Ms Hart described Mr Khosravi as "a close friend of [Mr Bassam]" who "acts as his right-hand man."

[19] At some point in the day Ms Hart and Mr Grant observed Mr Bassam, Mr Smith and Mr Khosravi leave the office together for approximately 30 minutes.

[20] Later that day Mr Khosravi apparently took it upon himself to speak to Ms Hart about the pending performance review. On Ms Hart's version of the conversation Mr Khosravi spent 20 minutes trying to convince her to resign and he asked her "I was wondering if you had another job in mind that you could go to." On Mr Khosravi's version he spoke to her "as her friend and colleague" because he "wanted to give [Ms Hart] more time to prepare and make sure she was not shocked." Mr Khosravi accepts that he did say to Ms Hart "I was wondering if you have another job in mind that you could go to." When cross-examined Mr Khosravi thought that a performance review was "not a good occasion" and that "of course" such a conversation might lead to termination of employment. He said he thought it was a "50:50" proposition that the performance review would lead to Ms Hart's termination.

[21] Mr Khosravi thought the conversation lasted only three minutes, not 20. I do not accept his estimate. The subject matter of the conversation was significant and not one that a friend could legitimately drop into a 3-minute conversation. Mr Khosravi said Ms Hart did not appear concerned at the prospect of a performance review, and that Ms Hart had said that she thought she would be supported by Mr Bassam.

[22] The crucial conversation between Ms Hart and Mr Bassam took place in the late afternoon/early evening of 3 June 2024. There was some debate about precisely when the conversation started but is not determinative whether the conversation happened at 4:00pm or at 5:00pm.

[23] Under cross-examination neither Ms Hart nor Mr Bassam deviated significantly from their accounts of the crucial conversation.

[24] Ms Hart did a very good job of representing herself at the hearing. That said, her cross examination of Mr Bassam did not place him under close scrutiny about his account of the meeting.

[25] Intellisoftware was represented by a solicitor who cross examined Ms Hart at length about her account of the meeting. My observation of Ms Hart under cross-examination was that she was careful to answer questions correctly, to the best of her recollection when asked about the minutiae of the conversation. Her recollection of the flow of the conversation was sound and, overall, her evidence was internally cohesive and consistent. Ms Hart’s evidence of the crucial conversation was described in Intellisoftware’s closing submissions as “confused” about what was said and when it was said”. I do not accept this characterisation.

[26] Mr Grant’s evidence is important. Although he did not see or hear the conversations between Mr Bassam and Ms Hart he gave evidence about other important peripheral matters. Mr Grant is currently employed by Intellisoftware and was called as a witness in the proceedings by Intellisoftware. I am comfortable that he gave his evidence truthfully and I considered his evidence in the context of his employment with Intellisoftware, his friendship with Ms Hart when they worked together, and his dissatisfaction with Mr Smith’s conduct.

[27] Mr Grant’s evidence of the events of 3 June 2024 included the following:

“Later that day, after 3 pm, Jason, Hossein Bassam, and the other managers left the office at the same time as a group, leaving only Lily and me behind. Approximately 30-45 minutes later, they all returned to the office. Later, Lily left the office for several minutes and I did not notice Lily’s composure when she returned to the office.

At around 5 pm, Lily was called into Hossein Bassam’s office for a conversation behind closed doors. When she exited Hossein Bassam’s office and came back to her desk, she appeared visibly upset. I have a brief text message exchange with Lily and I can confirm that the screenshot of that text exchange provided by Lily in her evidence is accurate. Lily packed-up her belongings at her desk and then went back into Hossein Bassam’s office, before leaving the workplace. After Lily left the workplace, I observed Hossein Bassam and Hossein Khosravi looking upset.”

[28] The text exchange referred to by Mr Grant was in evidence:

“Mr Grant: Everything okay?
Ms Hart: No
I’m resigning
Mr Grant: Oh no. What did Jason do?
Ms Hart: He got me fired
Mr Grant: Wtf!
[Redacted]
Please do not be a stranger
Ms Hart: I knew he was going to do that to me”

Consideration

[29] In this matter it is a difficult task to resolve the factual dispute about the conversation between Mr Bassam and Ms Hart. Each account is, to some degree, plausible.

[30] It is possible that Ms Hart decided to cut and run when faced with the prospect of undergoing a performance management process with Mr Smith. It is also plausible that Mr Bassam (and Mr Smith) decided to exit Ms Hart from the business before the expiration of her three-month probationary period and that Mr Bassam squarely told Ms Hart that her employment must finish before passing the three-month mark.

[31] On balance I prefer Ms Hart's account of events.

[32] By the time Ms Hart sent the email recording her resignation she was alert to the fact that her contract of employment required/allowed her to give one months' notice to resign her employment. If in fact she had decided to resign instead of facing a performance management process with Mr Smith, it does not make commercial sense for her to plead for a concession from Mr Bassam (that Intellisoftware pay her one weeks' pay in lieu of notice).

[33] The surrounding circumstances support her account. Whilst Mr Khosravi appeared to have genuine concern for the well-being of Ms Hart, I am nonetheless sceptical about the apparent coincidence that on 3 June 2024 he happened to see a printout of the draft performance plan, and then happen to take it upon himself to speak to Ms Hart privately to suggest that she resign or look for other employment – all shortly before Mr Bassam spoke to Ms Hart about her resignation. On Ms Hart's version of the conversation with Mr Bassam, the first words Mr Bassam said to her in the meeting were "I assume Hossein Khosravi has spoken to you" which strongly suggests some coordination between Mr Bassam and Mr Khosravi.

[34] Mr Grant's evidence supports Ms Hart's account of events. He thought she looked "visibly upset" after speaking to Mr Bassam. This assessment is reinforced by the fact that he and Ms Hart did not have a conversation about the meeting with Mr Bassam. This assessment is even further reinforced by the content of the SMS exchange between Mr Grant and Ms Hart. His response to Ms Hart's message "I am resigning" is telling. He asked "what did [Mr Smith] do?", meaning of course that he assumed Mr Smith had done something to make Ms Hart resign. Ms Hart's spontaneous response "he got me fired" is even more telling about Ms Hart's state of mind in that moment.

[35] I am also sceptical of Mr Bassam's claimed purpose for speaking to Ms Hart about the performance management plan prior to Mr Smith raising it with Ms Hart. If Mr Bassam was concerned about Ms Hart's welfare, or genuinely concerned about the ongoing difficulties in the relationship between Ms Hart and Mr Smith, then it would make sense for him to give Ms Hart a 'heads up' about the performance plan. However, on his own version of the conversation, after giving Ms Hart the "heads up" Ms Hart resigned. When Ms Hart asked him to agree to pay one weeks' notice if she resigned (as he claims) Mr Bassam did not make any effort to dissuade Ms Hart from resigning, or any effort to suggest to her that she carefully consider her decision to resign. If he was concerned about Ms Hart and her interests and if he thought Ms Hart had nothing to fear from the performance meeting with Mr Smith, he would not have immediately accepted her resignation. I am not satisfied that the conversation occurred in the way that Mr Bassam said it did.

[36] On balance I accept that Mr Bassam said to Ms Hart that “this is your last day” when discussing her resignation. When he said these words, Ms Hart had no reasonable option but to resign. Quite obviously, if she did not resign in that moment she would have been dismissed on the same day.

[37] Applying the reasoning in *Tavassoli* I am satisfied that Mr Bassam, as agent of Intellisoftware, spoke to Ms Hart with the intention of bringing her employment to an end. When Mr Bassam said the words “I assume Hossein Khosravi has spoken to you” (after Mr Khosravi had said shortly before “I was wondering if you have another job in mind that you could go to”), and when he said the words “I want to give you the opportunity to resign” and also “this is your last day”, Ms Hart had no effective or real choice but to resign.

[38] As such I am satisfied that Ms Hart was an employee who was dismissed within the meaning of s.386 of the Act and that she is entitled to make an application under the general protection provisions.

[39] A conference will shortly be convened to deal with Ms Hart’s claim against Intellisoftware.



DEPUTY PRESIDENT

Appearances:

L Hart, Applicant

R Burn, for the Respondent

Hearing details:

2024

Sydney (By Video using Microsoft Teams)

August 21.

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