DECISION

Fair Work Act 2009
s.365 – General protections

Adriana Zanoni

v

INA Operations Trust No.1
(C2024/2934)

DEPUTY PRESIDENT BOYCE SYDNEY, 2 OCTOBER 2024

Application to deal with contraventions involving dismissal – Applicant resigned from her employment verbally and in writing – whether Applicant resigned in the 'heat of the moment' – whether Applicant was 'forced' to resign by reason of employer conduct – meaning of 'all of the circumstances of the case' – no 'sizzle' or 'heat' at the time of resignation - choices or options available to the applicant other than resignation - no "dismissal" within the meaning of s.386(1) of the Fair Work Act 2009 – application dismissed for want of jurisdiction.

Introduction

[1] Ms Adriana Zanoni (**Applicant**) has filed a general protections involving dismissal application (**Application**) under s.365 of the *Fair Work Act 2009* (**Act**). The Applicant alleges that she was dismissed by INA Operations Trust No.1 (**Respondent**) in contravention of Part 3-1 of the Act.

[2] The Respondent has raised a jurisdictional objection to the Application, namely, that the Applicant was not "dismissed" by the Respondent within the meaning of s.386 of the Act. In this regard, the Respondent submits that:

> "In this case there is no dispute that the Applicant orally resigned to her manager, Mr [Richard] Yazbek on 15 April 2024 at 9:00am, and subsequently in writing via email at 2:29pm on 15 April 2024 to [Ms] Angeleena Lee, People & Culture Advisor, and again in writing to her manager [Mr Yazbek] at 7:16am on 16 April 2024. There is no dispute that the resignation was accepted by the Respondent.
>
> The Respondent says that the Applicant resigned of her volition and not in the heat of the moment. In addition, the Respondent did not engage in any conduct that, when viewed objectively, was intended or designed to bring about the resignation of the Applicant. The evidence shows the contrary to be true."[1]

[3] The Applicant asserts that despite resigning both orally and in writing (the latter on two occasions), she:

a) resigned in the 'heat of the moment' (being a dismissal at the employer's initiative within the meaning of s.386(1)(a) of the Act);[2] and/or

b) was 'forced' to resign by the Respondent, in the sense that she had no other reasonable choice but to resign because of the Respondent's conduct (being a dismissal within the meaning of s.386(1)(b) of the Act).

[4] I conducted a hearing to resolve the jurisdictional objection (i.e. as to whether or not the Applicant was "dismissed" by the Respondent).[3] At the hearing, the Applicant was represented (with permission) by Ms *Carolyn Unwin*, Paid Agent, and the Respondent was represented (with permission) by Mr *Matthew Robinson*, Partner, Citation Legal (formerly FCB Lawyers).

Summary of evidence

[5] The Respondent's "Ingenia Holidays Cairns Coconut Holiday & Caravan Park" (**Premises**) is located in Woree, a suburb of Cairns, in Queensland. The Premises consists of tourist park style holiday cabins which are hired by guests for recreational purposes. The cabins can also be rented on a more permanent basis.

[6] The Premises has 15 permanent residents, most of whom are (on average) over 70 years of age. The Respondent affords special attention to the permanent residents' needs and requirements.

[7] The Applicant was employed by the Respondent for around 3 years and 8 months (August 2020 to 16 April 2024) as a Guest Experience Officer at the Premises (working primarily in Guest Reception). As at 15 April 2024, being the date that the Applicant proffered her resignation, she was employed by the Respondent on a fulltime basis.[4] During the course of her employment with the Respondent, the Applicant reported directly to Ms *Kerilee Taylor*, Front Office Supervisor. The Applicant's job as a Guest Experience Officer, at the very least, required her to welcome guests to the Premises, respond to guest/resident queries, and comply with health and safety obligations.[5]

[8] On 25 March 2024, at around 4:30pm an elderly resident (Resident X) telephoned the Applicant at Guest Reception requesting if someone could please check on her elderly sister (Resident Y, also a resident at the Premises) in her cabin, from whom Resident X had (unusually) not heard from for two days. Around 20 minutes later, Resident X personally attended upon the Applicant at Reception, and again inquired as to her sister (Resident Y). The Applicant did not undertake a check on Resident Y on 25 March 2024, nor did the Applicant alert anyone else of a check needing to be made on Resident Y that evening, or the next day. In her evidence, the Applicant acknowledges that she did not even attempt to make a telephone call to Resident Y (on Resident Y's landline or mobile telephone), or arrange for anyone else on the Respondent's staff to check on Resident Y.

[9] In her written evidence in chief,[6] the Applicant's evidence is that she could not understand what Resident X was saying (or asking of her) over the telephone on 25 March 2024. She says that when Resident X subsequently approached her at Reception (at about 4:50pm on 25 March 2024) she was busy, and was asked by Resident X "Have you called my Sister", to which the Applicant replied that she had not. Upon checking the Reception notes to

see if another staff member at the Premises had recently contacted Resident Y, she told Resident X that no one had contacted Resident Y, asked Resident X to check again with Ms *Jennifer Richards*, Assistant Manager, the next day, and stated that if she (Resident X) needed anything else that she (the Applicant) would be at Reception until 8:00pm that night. In her written evidence in chief the Applicant makes no mention whatsoever of stating to Resident X on 25 March 2024 (during her initial telephone conversation with Resident X) that she (the Applicant) would arrange to send "Jai", the on-site maintenance person, to speak to Resident X or check on Resident Y (at her cabin) on 25 March 2024.[7] In other words, the issue of whether or not the Applicant contacted Jai was only engaged with by the Applicant (in reply)[8] after she received the evidence filed and served by the Respondent in these proceedings.[9]

[10] On 26 March 2024, at around 11:30am, Ms Richards received a distress call from Resident X stating that she had still not heard from her sister (Resident Y). Ms Richards' evidence in this regard is as follows:

> "7. On 26 March 2024 at approximately 11:30am I received a call from [Resident X], a resident of the [Premises], expressing concern for her sister, [Resident Y], a 76 year old resident of the [Premises]. During my phone call with [Resident X] [she said] words to the effect:
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> [Resident X]: 'Jenny [Ms Richards], I haven't heard from [Resident Y].'
>
> Ms Richards: 'Why is something wrong?'
>
> [Resident X]: 'No one came down, I asked for someone to come down last night and no one came down.'
>
> Ms Richards: 'Ok, I will come down and help you.'
>
> [Resident X]: 'No just wait, I'm going back down there now. If I can't raise her [Resident Y] I will call you.'
>
> Ms Richards: 'Ok, call me in 5 minutes.'[10]
>
> 8. Approximately five minutes later, I received a from call [Resident X's] phone number and had a conversation with [Resident Z], another resident at the [Premises], with words to the effect:
>
> [Resident Z]: 'Jenny, I can hear her inside but we can't get in.'
>
> Ms Richards: '[Resident Z] we'll be right down.'
>
> 9. Following my conversation with [Resident Z], I walked into Natalie Kruger's [Accounts Manager] office, where Mr [Richard] Yazbek [General Manager] was located and said words to the effect of "Richard we need to go right now". Upon attending [Resident Y's] premises in the [Premises], we found the toilet system had been tipped over and [Resident Y] had collapsed in the bathroom unable to move, laying in her own urine and faeces and had likely been in in this state for a couple of days. Due

to her medical state, I called an ambulance and [Resident Y] was taken away in an ambulance from the [Premises] and admitted into hospital for a number of days."

10. On 26 March 2024 at approximately 3:45pm, I was informed by Ms Natalie Kruger, Accounts Manager, that [the Applicant] received a call from [Resident X] and [Resident X] visited the front office on the evening of 25 March 2024 but [the Applicant] didn't go and help her.

11. On the same day, at approximately 3:50pm I walked into Mr Yazbek's office, where [the Applicant] was, and said words to the effect:

Ms Richards: 'Adriana [Applicant] what happened last night, did you talk to [Resident X]?'

Applicant: 'I couldn't understand her; she said it 5 times, I couldn't understand her.'

Ms Richards: 'If you are having trouble understanding somebody you should've got another team member on to see if they could help.'

The discussion was not heated."[11]

[11] During a conversation with Ms Taylor, on 26 March 2024, the Applicant stated to Ms Taylor that she felt she was being blamed for the incident with Residents X and Y (for failing to perform, or arrange someone else to perform, a check on Resident Y in her cabin on 25 March 2024).[12] Ms Taylor's evidence as to this conversation is as follows:

"5. On 26 March 2024 at approximately 3:30pm, [the Applicant] arrived at work with her two children [A] and [B] and I had a conversation with [the Applicant] at the linen table located in the office with words to the effect of:

Applicant: 'What's gone on? What's happened today?'

Ms Taylor: 'I need to let you know what has happened today. [Resident Y] was found in her home today she was locked in. [Resident X] couldn't get a hold of [Resident Y] and couldn't get into the house. [Resident Y] hadn't been responding to her phone. We had to call a locksmith to break into the house and then she was taken to hospital. She had been on the floor for at least 24 hours. She was covered in her faeces and urine and her feet had gone black. It was a really tough thing to deal with today.'

Applicant: 'Oh no, [Resident X] called yesterday to say something about [Resident Y].'

Ms Taylor: 'Oh, OK. Well, what did she say to you? Did she mention [Resident Y]?'

Applicant: ‘She said something like ‘did we ring [Resident Y]’ and I couldn’t see anywhere that we would have called her. I couldn’t understand what she was trying to ask. I was going to send Jai [maintenance person] down to have a look, but I got really busy and forgot to radio Jai. [Resident X] came down to the office after the phone call.’

Ms Taylor: ‘What did [Resident X] say to you when she came in?’

Applicant: ‘I couldn’t understand what she was trying to say.’

Ms Taylor: ‘[Resident X] was trying to get us to go down to check on [Resident Y]. It sucks as we could have gotten to [Resident Y] last night. It’s been very hard for everyone today that was up at the house and [Resident Y] was in a pretty bad state. It’s no one’s fault but everyone can’t help but feel sick, like her neighbours and I didn’t even know she was back from the islands and I haven’t seen her in a long time since she has been away. There’s not much we can do about it now, but maybe next time when a guest like [Resident X] visits that you can’t understand that you grab someone else to make sure we understand her. This is a big thing we missed.’

6. Later that day [26 March 2024], at 4:00pm, I saw [the Applicant] outside near the staff exit and entrance to the staff back outdoor area [and she] appeared to be unhappy, and I had a conversation with her with words to the effect of:

Ms Taylor: ‘Are you ok?’

Applicant: ‘No, Jen [Ms Richards] had a go at me.’

Ms Taylor: ‘What happened?’

Applicant: ‘After I finished talking to you, she just said to me ‘Well if you can’t understand why didn’t you go get someone that could understand’.’

Ms Taylor: ‘I don’t think [Ms Richards] meant it like she was blaming you or being nasty, today was really upsetting for them. It was hard to see [Resident Y] like that and the condition of the house and everything. It would be disappointing to hear we could have sorted this the night before. [Resident Y] could have died in the house.’

Applicant: ‘Yes, but they cannot blame this all on me, it wasn’t my fault.’

Ms Taylor: ‘No one is blaming you at all, I just mean maybe some emotions are pretty high right now. I don’t think Jen [Ms Richards] meant it that way. Just take a minute, it will be OK. You can have a chat to Jen tomorrow if you want to sort it out if you are feeling a certain way. Please don’t feel that way, try have a good night and I’ll see you in the morning.’ “[13]

[12] Mr *Richard Yazbek* is the General Manager of the Premises. His evidence as to the discussion he had with the Applicant on 26 March 2024, shortly after listening to the foregoing conversation between the Applicant and Ms Taylor (that occurred in the next room to him), is as follows:

> "11. Upon [over] hearing the conversation between Ms Zanoni [the Applicant] and Ms Taylor, I called Ms Zanoni into my office and said words to the effect:
>
> Mr Yazbek: 'I don't think you understand what has happened here, you didn't follow through, [Resident X] had called you and asked for assistance and you said you would send someone down. She then came to the office asking after you saying no one had been to [Resident Y]. I'm a little bit confused, she called asking to send someone to her sister's house, then comes to the office 20 minutes later. I'll leave it at that for the moment [but] my main concern is [Resident Y] as she is a diabetic and had no access to water or medication, but I'll have a chat to you tomorrow.'
>
> Applicant: 'No problems, we'll talk tomorrow.' "[14]

[13] The Applicant accepts that her foregoing conversation with Mr Yazbek was not heated, and that Mr Yazbek did not 'blame' her for anything during this conversation.[15] In her closing submissions filed after the hearing, the Applicant takes issue with Mr Yazbek's evidence in relation to what he overheard during the conversation between the Applicant and Ms Taylor on 26 March 2024. It is not clear why. The conversation is of no substantive significance in the context of the real issues to be resolved in these proceedings.[16]

[14] The issues (concerning Residents X and Y) were again taken up with the Applicant by both Ms Richards[17] and Mr Yazbek in the morning the next day (27 March 2024). In this regard, Mr Yazbek's evidence is that he had the following conversation with the Applicant on 27 March 2024:

> Mr Yazbek: "It was not acceptable that you did not follow through with [Resident X]. To receive [Resident X] asking for help and brushing her away, couldn't you put two and two together."
>
> Applicant: "It was busy, and I couldn't think straight."
>
> Mr Yazbek: "You should go speak to [Ms Richards] and you need to explain to her that you understand what has happened and the procedure for future events."[18]

[15] Ms Richards' evidence, as to her interactions with the Applicant on 27 March 2024, is as follows:

> "12. On 27 March 2024 at approximately 7:40am, I had a conversation with [Resident X] where [Resident X] said words to the effect of "I don't understand. Why wouldn't [the Applicant] come down and help me."

13. I understand [the Applicant] has alleged I engaged in bullying conduct towards her between the dates of 26 - 27 March 2024. I deny engaging in bullying conduct towards [the Applicant] between the dates of 26 - 27 March 2024. I simply attempted to understand what had happened and whether there had been a communication breakdown.

14. On 27 March 2024, I had a conversation with [the Applicant] in my office [in] words to the effect:

Applicant: 'I am very sorry for what happened with [Resident Y], it was an honest mistake'

Ms Richards: 'I do not blame you for [Resident Y] falling in her bathroom but how you handled the situation was not good. I am not going to sugar coat the situation, it could have been a life and death situation and thankfully we were able to get her to hospital where she is recovering.'

Applicant: 'When [Resident X] called she mentioned that she hadn't heard from her sister, [Resident Y], and asked if I could ring her and go down to check on her. I told [Resident X] that I would send Jai [maintenance person] down. After I hung up I saw guests on the security camera in the front office and went to serve them, then totally forgot to radio Jai. I was just doing my job serving the customer.'

Ms Richards: 'The phones can wait, the guests can wait, end of night balancing can wait, you needed to radio Jai [maintenance person] immediately before doing anything else.'

Applicant: 'You are just trying to make me feel bad. After [Resident X] called she came down to the office and waited to talk to me as I was serving a guest. [Resident X] then asked me if anyone had called [Resident Y], and I went to check on the computer to see if there were any notes to say that we would try call her. I told [Resident X] there were no notes to call her and that I hadn't called [Resident Y]. I couldn't understand what [Resident X] was talking about and [Resident X] ended up leaving. If [Resident X] thought it was important, why didn't she ask to speak to another receptionist if she couldn't understand me.'

Ms Richards: 'I don't need to know every detail. You've already spoken to [Mr Yazbek] and it will not change the situation.'

Applicant: 'You are just trying to make me feel bad. Oh wait, maybe I did radio Jai [maintenance person]? Oh I cannot remember and I am so confused now.'

Ms Richards: 'Let's ask Jai, he will remember if you radioed him.'

Applicant: 'No, no, I must not have.'

> Ms Richards: 'I wish you would have mentioned to someone on Tuesday morning [26 March 2024] that you had the phone call and face to face conversation with [Resident X] last night and that you couldn't understand what she wanted. I would have rung her straight away to see if everything was OK. [Mr Yazbek] came to the office on Monday night at about 7pm, you didn't think to mention it to him?'
>
> Applicant: 'So are we all good then?'
>
> Ms Richards: 'Right now all I can think about is [Resident Y] and her wellbeing.' "[19]

[16] The Applicant accepts that during the foregoing conversations with Mr Yazbek and Ms Richards, no mention was made of disciplinary proceedings being taken against her concerning the incident involving Residents X and Y.[20]

[17] Shortly after this conversation on 27 March 2024 with Ms Richards, the Applicant left work, at around 9:30am (i.e. prior to the conclusion of her shift).[21] Mr Yazbek sent various text messages to the Applicant (from around 2:02pm on 27 March 2024), which read:

> "Hey we don't really have the staff tomorrow to cover you with 90 check-ins"
>
> "I know your upset but need to move on the team needs you here"
>
> "Can you please respond"
>
> "Never mind I've sorted it"

[18] It is apparent from the foregoing text messages from Mr Yazbek to the Applicant that his intention was not for the Applicant to cease her employment with the Respondent.[22]

[19] The Applicant responded to Mr Yazbek's text messages on the same day (i.e. 27 March 2024), as follows:

> "Hi I had a migraine and put my phone on silent. Just woken up and found your miss calls and text [messages]"

[20] The Applicant sent a further text message to Mr Yazbek on 28 March 2024, at 2:38pm, which reads:

> "Hi Richard, I will be taking stress leave due to the incident and the conversation with Jennifer [Ms Richards] on Tuesday until further notice, I have already had an appointment with the doctor in relation to the work related stress and I have a follow up appointment next week. You will be receiving a detailed email in relation to the current incident and other issue that need following up, thank you in advance for your support and understanding in relation to this matter. Thanks"

[21] The Applicant never provided "a detailed email in relation to the current incident and other issue that need following up" (i.e. as she states in her foregoing text message to Mr Yazbek). The odd aspect of the Applicant's failure to provide a detailed email (as she promised Mr Yazbek in the above text message) is that the Applicant's submissions in this matter complain that the Applicant was never provided with an opportunity to explain herself about the incident involving Residents X and Y. However it is apparent that the Applicant had such an opportunity, but instead of taking it up, she chose to resign and avoid doing so.

[22] The Applicant took paid leave for the period Wednesday, 27 March 2024 to Friday, 12 April 2024, under the cover of medical certificates which simply state she had a "medical condition" or was "unfit for work".[23] The Applicant says that she was on "stress" leave, however, the statements in the Applicant's medical certificates provide no details of any specific medical diagnosis or condition that she was suffering from on the dates certified.

[23] Ms *Kelli-Ann Hughes*, People and Culture Business Partner, determined, along with Mr *Yazbek*, in early April 2024, that the Applicant needed to be interviewed formally about the incident involving Residents X and Y.[24] Ms Richards subsequently concurred with this view.[25] A letter to attend an interview (as part of a disciplinary process) was drafted to be handed to the Applicant upon her return to work from leave on Monday, 15 April 2024 (**Interview Letter**).[26]

[24] In a text message exchange with Mr Yazbek on 5 April 2024, the Applicant was advised that the Respondent's People & Culture [i.e. Human Resources] Team (**P&C Team**) had been advised of the incident (involving Residents X and Y) and would be getting involved.[27]

[25] When the Applicant returned to work on Monday, 15 April 2024, she had a "pleasant" conversation with Ms Taylor.[28] She then verbally resigned (in unambiguous terms) to Mr Yazbek (**Resignation Conversation**) at around 9:00am. In this regard, when Mr Yazbek sought to hand the Applicant an envelope containing the Interview Letter, his evidence is that the following conversation occurred:

> Applicant: "Don't bother, I am resigning anyway."
>
> Mr *Yazbek*: "You don't want the letter? Are you sure?"
>
> Applicant: "I'm sure. I'll send you a resignation letter today."
>
> Mr *Yazbek*: "Alright, I'll accept your notice. You should provide notice in writing."[29]

[26] The Applicant's written evidence is that she had already prepared (drafted) her Formal Resignation Email (see paragraph [29] of this decision below) prior to having the foregoing Resignation Conversation with Mr Yazbek on 15 April 2024, and would be sending her Formal Resignation Email to the Respondent's P&C Team during her break later that day.[30] In her oral evidence, the Applicant said that she drafted her Formal Resignation Email during her break on 15 April 2024.[31] She did not explain the basis for the discrepancy between her written and oral evidence about when she drafted her Formal Resignation Email. Whatever the position, it is apparent that the Applicant had (and took) some time to think about and then draft her Formal Resignation Email, crafting the words she personally wanted to use to support the points she wanted to make. In other words, this is not a case where a resignation was hastily prepared,

made in the presence of management (or anyone else), or where the Applicant was otherwise under some form of pressure to draft her written resignation at the 'time' that she did.[32]

[27] The Applicant did not receive the Interview Letter during the Resignation Conversation.[33] The Applicant's verbal resignation was proffered to Mr Yazbek in circumstances where the Applicant had not been at work, and had not been in communication with the Respondent's employees, for a period of nearly two weeks.[34] In other words, there was no specific event or circumstance on 15 April 2024 (itself) that had any connection to the Applicant's decision to provide her oral resignation to Mr Yazbek at the time that she did (i.e. during the Resignation Conversation).

[28] The Applicant disagrees with Mr Yazbek's version of the Resignation Conversation (as set out in paragraph [25] above). In particular, the Applicant takes issue with Mr Yazbek's claim that she refused to receive the Interview Letter from him. She says that Mr Yazbek put the Interview Letter to one side (in his drawer) once she advised him that she resigned, i.e. she did not refuse to receive the Interview Letter, rather, it was never provided or offered to her. The difficulty with this evidence is that the Applicant was aware that Mr Yazbek had a letter for her (contained in a sealed envelope) at the time that she verbally resigned on 15 April 2024. Even if the Interview Letter was put aside by Mr Yazbek (which has not been proven on the evidence), there is no evidence that the Applicant ever requested a copy of the Interview Letter prior to sending either her Formal Resignation Email, or her Resignation Confirmation Email (see paragraph [34] of this decision). In other words, the evidence is that the Applicant made no request or demand from Mr Yazbek for a copy of the Interview Letter prior to resigning. Significantly, the Applicant did not even see the contents of (or the words contained in) the Interview Letter prior to making her decision to resign, i.e. nothing contained in the Interview Letter could have influenced the Applicant's decision to resign as she never sighted it prior to resigning.[35] The summary is that to the extent that the Applicant's version of the Resignation Conversation with Mr Yazbek on 15 April 2024 is different, such difference is of no moment.

[29] At 2:29pm on 15 April 2024, the Applicant sent the following resignation email (**Formal Resignation Email**) to the Respondent's People and Culture Team:

> "Dear …,
>
> I am writing to tender my resignation with the required 2 weeks notice from today, following stress leave from which I am returning to work today, in order to fulfil the requirement for me to give 2 weeks notice.
>
> The reason I am resigning is that I cannot deal with the ongoing stress caused to me due to the following brief list of issues that I believe have given me no option, but to resign.
>
> ISSUES
>
> 1. Bullying and abuse
> 2. Inappropriate Conversations with my primary school children
> 3. Required to tolerate and accept abuse by Customers
> 4. Nepotism and Unfair treatment

> Please Note:
>
> I have sought legal advice re the above matters and given that the above issues may involve the Managers at my place of employment, (Ingenia Cairns Coconut Holiday Park), I am unable to meet with Coconut Park Managers re these issues. Any meetings I may be requested to attend to discuss the above issues will be with my legal advocate and/or support person present.
>
> In good faith
> Yours Sincerely
> Adriana Zanoni"[36]

[30] In relation to issues 2, 3 and 4 of the Applicant's Formal Resignation Email, evidence as to these issues was excluded at the hearing on the basis that the evidence was not probative or relevant to the real issues to be resolved in these proceedings.[37] It equally follows that to the extent that such matters are sought to be reagitated or traversed in the Applicant's written submissions (filed after the conclusion of the hearing), they warrant no consideration (beyond abstract context) in terms of the resolution of the ultimate issues in these proceedings.

[31] I note that the Respondent has no records of the Applicant ever making complaints, or even raising issues, surrounding issues 2, 3 and 4 during her employment with the Respondent, or otherwise making complaints around purported discrimination, bullying (by Ms Richards), sexual harassment, or her taking leave (paid or unpaid).[38]

[32] The Formal Resignation Email states "Please Note: I have sought legal advice re the above matters" and that the Applicant has a "legal advocate" to attend meetings (she might be "required" to attend). Oddly, during cross-examination, the Applicant stated that she had not sought legal advice prior to resigning, in part because she was on "sick leave".[39] It is not clear why a person cannot obtain legal advice when they are on "sick leave". Indeed, there is no suggestion from the Applicant's medical evidence that the Applicant was somehow so incapacitated that she was unable to make a phone call to a lawyer to obtain advice whilst she was not at work for almost two weeks. It is also not clear as to why the Applicant would state that she had sought legal advice regarding her decision to resign in the Formal Resignation Email, in circumstances where she had not sought or obtained such legal advice. The inference to be drawn is that the Applicant took the time to consider her resignation, and in doing so, determined to project a wholly false impression to the Respondent that she had sought or taken the benefit of legal advice prior to making her decision to resign.

[33] I observe that the Applicant had between around 9:00am and 2:29pm on 15 April 2024, or over five hours, to rethink or reconsider what she said in the Resignation Conversation with Mr Yazbek, prior to the sending the Formal Resignation Email to the Respondent's P&C Team. There was no specific 'moment' (or 'heat') during that whole five hour period, or in the hours or few days prior to same, that can be intelligently said to trigger or give rise to the Applicant's resignation. To the extent that the Applicant submits one ought to go back to 27 March 2024 to find the 'moment' and the 'heat', the submission falls flat. Relevantly, far too many days had passed by 15 April 2024 for any sensible or coherent assertion to be sustained that points to the events of 27 March 2024 giving rise to the 'telling moment' justifying the Applicant's decision to resign some 19 days later. What the Applicant may have thought or felt, for example, that

she would come back to work and be forced to 'apologise' to Residents X and/or Y, or be 'blamed' for the incident involving Residents X and Y, does not justify a finding that the Applicant was forced (or had no other choice) but to resign on 15 April 2024.

[34] Post the Resignation Conversation, and the sending of the Formal Resignation Email, the Applicant sent the following resignation confirmation email (**Resignation Confirmation Email**) to Mr Yazbek at 7:16am on 16 April 2024 (again confirming her decision to resign):

> "Good morning Richard,
>
> As requested, my last day working at Coconut [the Respondent] will be Friday the 26th of April 2024
>
> Kind Regards
>
> Adriana Zanoni".[40]

[35] I observe that the Applicant provided two weeks' notice of her resignation, to be worked out in time, but asserts and maintains that she had "no option but to resign". In other words, the Applicant's resignation conveys no suggestion by her that things are so bad at work that she needs to leave immediately or otherwise cannot return to the workplace. Further, the Applicant states in her Formal Resignation Email that she is "unable to meet with Coconut Park Managers re these issues", identifying a position of 'avoidance', and reflecting the Applicant's desire not to voluntarily have any discussions (at all) about (any of) the issues that purportedly form the basis of her resignation (i.e. the Applicant's decision to resign, as communicated by her verbally to Mr Yazbek, is a final decision by her and is not (or will not be) open to a change of mind by the Applicant, or even open discussion).[41]

[36] On 16 April 2024, at 3:02pm, under cover of email, Mr Hughes sent the following letter to the Applicant formally accepting her resignation:

> "Dear Adriana,
>
> **Acceptance of Resignation**
>
> We are writing in reference to your resignation via email received on Monday 15 April, 2024. The purpose of this letter is to acknowledge and accept your resignation.
>
> As per clause 25.2 of your Employment Agreement, you are required to provide 4 weeks' notice in writing to terminate your employment. On this occasion, we can confirm we will accept your requested reduced notice period and confirm that your last day of employment will be today 16 April 2024 and we will pay you in lieu of notice up to and including the 26 April, 2024.
>
> There are a number of tasks required to be completed prior to leaving site on your last day. Please ensure you have:
>
> • Returned all company property

> Your final payment will include any outstanding wages and any accrued leave entitlements up to and including the 26 April, 2024. Your final pay will be paid in the next pay run 24 April 2024.
>
> We acknowledge you have raised concerns regarding your employment which we are currently investigating further.
>
> Adriana, we thank you for your service with Ingenia Communities and wish you well in your future career endeavours. If you wish to discuss anything contained in this letter, please do not hesitate to contact me on M: [telephone number withheld], or [email address withheld]."[42]

[37] I note that the Respondent's decision to make payment in lieu of notice to the Applicant for the remainder of her notice period (as stated in the foregoing acceptance of resignation letter) came after an unrelated incident at the Premises involving a trespasser.[43] The Applicant's last day of employment with the Respondent was thus 16 April 2024. The Applicant has been paid in lieu of notice, along with all of her other termination (accrued and untaken leave) entitlements. In response to being told that her notice period would be paid out, the Applicant sent a text message to Mr Yazbek stating: "Hi Richard I received your message, I understand thank you. I will return my uniform on the weekend Regards, Adriana".[44]

[38] A decision by an employer to make payment in lieu of notice is at the absolute discretion of an employer (subject to applicable contractual obligations). Such a decision can be made for good reason, for bad reason, or for no reason at all. But a decision to make payment in lieu of notice is separate and distinct to a dismissal (i.e. it is another issue entirely). A decision to make payment in lieu of notice is not to be aggregated, or otherwise confused with or linked to, the act of dismissal itself.

[39] Between the time of the Resignation Conversation (around 9:00am on 15 April 2024), and the 'formal' acceptance by the Respondent of that resignation (at 3:02pm on 16 April 2024), a period of some 30 hours, there is no evidence to suggest that the Applicant did not have every opportunity to make a request that she be permitted to withdraw her resignation with either Mr Yazbek or the Respondent's P&C Team, or otherwise raise a concern that she had resigned (wrongfully) in the heat of the moment during the Resignation Conversation.[45] At no time has the Applicant ever sought to withdraw her resignation. The reality is that instead of raising concerns about her decision to resign, post 9:00am on 15 April 2024, the Applicant subsequently doubled down on that decision by sending her Formal Resignation Email (at 2:29pm on 15 April 2024), and then followed it up with her Resignation Confirmation Email (at 7:16am on 16 April 2024).

[40] The Respondent, in its closing submissions, points to various credibility issues with the Applicant's evidence, such that her evidence:

(a) is exaggerated and designed to overinflate her various interactions with Mr Yazbek and Ms Richards, essentially attempting to 'flip the script' on issues of blame and fault;

(b) displays a "thin veneer of victimhood" that does not survive scrutiny;

(c) has been drafted in a partisan fashion for the purposes of supporting her own case theory (about the absence of an apparent 'emergency' involving Resident Y on 25 March 2024, and the absence of 'welfare check procedures' to check up on permanent residents), whilst at the same time downplaying her own failings and avoidant behaviour; and

(d) seeks to paint the Applicant as a metaphorical (but false) scapegoat, in circumstances where she was basically, at best, forgetful and disorganised, or at worst, negligent.

[41] For her part, the Applicant equally makes various claims as to the credibility of the evidence of Mr Yazbek and Ms Richards.

[42] It is unnecessary that I make any specific findings as to credibility in respect of any of the witnesses in these proceedings. Rather, my approach has been to consider the witness and documentary evidence in these proceedings objectively, and thereafter determine as to whether the totality of the evidence is such that it is probative and inspires satisfaction in the existence or non-existence of the relevant fact/s in issue. Where I find in this decision that I prefer one witness's evidence over the other/s, or do not accept any particular evidence, that does not mean that I find the evidence that I have not preferred, or have not accepted, to be untruthful.

'Dismissal' under s.386(1) of the Act

[43] Section 365 of the Act reads:

> **"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."

[44] Aside from consent arbitration, the Commission's only role in a general protections involving dismissal application made under s.365 of the Act is to conduct a conference between the relevant parties (so as to assist them in attempting to resolve the unlawful termination application by agreement), or issue a certificate if a resolution is unable to be agreed (a certificate is a prerequisite to being able to progress a claim onto an eligible court for judicial determination). That said, the power to conduct such a conference and issue a certificate is provided for under the Act, and the Commission has no jurisdiction to conduct a conference, or issue a certificate post that conference (where resolution is unable to be reached), unless a

'valid' (or within jurisdiction) general protections involving dismissal application has been filed. It is for the Commission to resolve any disputes or issues as to its jurisdiction in this regard for itself.[46]

[45] Consistent with case law, I agree that the meaning of the term "dismissed" under s.365(a) of the Act is to be defined in accordance with the meaning of that term under s.12 and s.386(1) of the Act, and the applicable case law authorities in respect of same.[47]

[46] Section 386(1) of the Act reads:

> "(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."

[47] The Full Bench majority in *NSW Trains v James*[48] determined that the expression "*employment … has been terminated*" (in s.386(1)(a) of the Act) refers to termination of the employment relationship and/or termination of the contract of employment.[49]

[48] The phrase "terminated on the employer's initiative" under s.386(1)(a) of the Act is treated as a termination in which the action of the employer is the principal contributing factor (directly or consequentially) that leads to (or has the objective probable result of leading to) the termination of the employment relationship. That is, had the employer not taken the action that it did, the employee would have remained employed.[50] Further, a communication of a resignation may not be legally effective (or constitute a "dismissal" within the meaning of s.386(1)(a) of the Act) where it is made by an employee is in a state of stress (or in the heat of the moment), and accepted by an employer without confirmation of the employee's intention after a reasonable time. [51]

[49] In normal circumstances, where unequivocal words of resignation are used or conveyed by an employee, an employer is entitled to immediately accept the resignation (without further question) and act (or move on) accordingly.[52] Once proffered, a resignation may not be withdrawn unilaterally by an employee; it may only be withdrawn with the mutual consent of the employer. In other words, a resignation cannot be proffered by an employee and then unilaterally withdrawn prior to its acceptance by an employer – the employer must always consent to its withdrawal.[53]

[50] Under s.386(1)(b) of the Act, a forced resignation essentially occurs where an employee has no other choice but to resign. The onus is upon an employee to prove that their resignation was 'forced' by their employer.[54] In other words, an employee must be able to prove on the balance of probabilities that his or her employer took relevant action/s with the intent, or objectively probable result, of bringing the employment relationship to an end.[55] The fact that a resignation may have been foreseeable, or a reasonable response to the actions of an employer, is not the test. Rather, the focus is upon whether the employee's resignation was the

"objective"[56] probable result of his or her employer's action/s having regard to, or in light of, other avenues or options equally open or available to the employee (i.e. other than resignation).

[51] Where an employer raises an allegation of misconduct against an employee, without a clear indication that dismissal is likely, and provides an employee with time to prepare or consider their response, and the employee resigns prior to providing that response, or prior to an employer making a determination as to the misconduct and/or its consequences, this will ordinarily fall well short of being a 'forced' resignation.[57] Importantly, an employer engaging in or conducting an investigation, including a disciplinary investigation, is not of itself sufficient to 'force' an employee's resignation.[58]

[52] In *Rheinberger v Huxley Marketing Pty Ltd*[59], Justice Moore stated:

> "However it is plain from these passages [in *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200] that it is not sufficient to demonstrate that the employee did not voluntarily leave his or her employment to establish that there had been a termination of the employment at the initiative of the employer. Such a termination must result from some action on the part of the employer intended to bring the employment to an end and perhaps action which would, on any reasonable view, probably have that effect. I leave open the question of whether a termination of employment at the initiative of the employer requires the employer to intend by its action that the employment will conclude. I am prepared to assume, for present purposes, that there can be a termination at the initiative of the employer if the cessation of the employment relationship is the probable result of the employer's conduct".[60]

[53] In *Doumit v ABB Engineering Construction Pty Ltd*[61], the Full Bench of the Australian Industrial Relations Commission (**AIRC**) stated:

> "Where it is the immediate action of the employee that causes the employment relationship to cease, it is necessary to ensure that the employer's conduct, said to have been the principal contributing factor in the resultant termination of employment, is weighed objectively. The employer's conduct may be shown to be a sufficiently operative factor in the resignation for it to be tantamount to a reason for dismissal. In such circumstances, a resignation may fairly readily be conceived to be a termination at the initiative of the employer. The validity of any associated reason for the termination by resignation is tested. Where the conduct of the employer is ambiguous, and the bearing it has on the decision to resign is based largely on the perceptions and subjective response of the employee made unilaterally, considerable caution should be exercised in treating the resignation as other than voluntary."[62]

[54] Whilst in *O'Meara v Stanley Works Pty Ltd*[63], the Full Bench of the AIRC stated:

> "In our view the full statement of reasons in *Mohazab* which we have set out together with the further explanation by Moore J in *Rheinberger* and the decisions of Full Benches of this Commission in *Pawel* and *ABB Engineering* require that there... be some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment relationship to an end. It is not simply a question of whether "the act of the employer [resulted] directly or

> consequentially in the termination of the employment." Decisions which adopt the shorter formulation of the reasons for decision should be treated with some caution as they may not give full weight to the decision in *Mohazab*. In determining whether a termination was at the initiative of the employer an objective analysis of the employer's conduct is required to determine whether it was of such a nature that resignation was the probable result or that the appellant had no effective or real choice but to resign."[64]

Consideration – Heat of the moment resignation

[55] The Applicant's contention that she resigned in the heat of the moment on 15 April 2024 can be rejected in very short order. There was no emotion, argument, 'sizzle', or 'heat', in the Resignation Conversation between the Applicant and Mr Yazbek on 15 April 2024. The Applicant's own evidence is that she considered herself fit and well enough to return to the workplace on 15 April 2024, i.e. any concerns as to her health and/or mental state had gone away as at 15 April 2024 (and she was no longer protected by, or under the cover of, a medical certificate).[65] The Applicant also gave evidence that when she took the two weeks off (between 27 March and 12 April 2024), she took the time (or took time out) to consider her options in terms of continuing to work at the Respondent's workplace.[66] This is consistent with the evidence at the hearing disclosing that the Applicant, whilst off work on "stress leave" between 27 March and 12 April 2024, made a request of the Respondent's HR Team to supply her with a copy of her written contract of employment to review. A copy of the contract was emailed to the Applicant on or about 10 April 2024 (being five days before she resigned).[67]

[56] After the Applicant provided her verbal resignation to Mr Yazbek, she went back to work (or resumed work) as normal at Guest Reception. The Applicant sending her Formal Resignation Email to the Respondent's HR Team was also done in circumstances absent emotion, argument or heat, as the following exchange during the hearing identifies:

> Mr Robinson: "Okay. And so you had a chance from the morning [of 15 April 2024] at 9.00am or thereabouts when you spoke to Mr Yazbek [Resignation Conversation], and then you sent that, if I recall, resignation letter [Formal Resignation Email] at approximately 2.00 pm or 2.29 pm in the afternoon. Would that be about right?
>
> Applicant: "Correct. I was working a split shift that day [15 April 2024] so I was working from 8.00am to 12.00pm and then I was supposed to go back to work at four o'clock, so I was doing 8.00am to 12.00pm, 4.00pm to 7.00pm, so I have four hours' break in between the shift."

[57] I find that given there were no 'heat of the moment' circumstances surrounding the Applicant's tender of her resignation on 15 April 2024, there were no circumstances giving rise to any requirement upon the Respondent to confirm or otherwise clarify with the Applicant her intention to resign.[68] As the case law states, where unequivocal words of resignation are used or conveyed by an employee, an employer is entitled to immediately accept the resignation (without further question) and act (or move on) accordingly.[69] My ultimate finding for the purposes of s.386(1)(a) of the Act is that the Applicant was not dismissed at the initiative of the Respondent when she resigned on 15 April 2024.

Consideration – Forced resignation

[58] In her Form F8, the Applicant asserts that she was dismissed (forced to resign) for reasons of her Italian accent, for making a complaint about being abused by guests, for asking for time off during school holidays (which was refused by the Respondent), being required to take time off work when it suited the Respondent, and for not being a team player. She also says that she was routinely ignored when she turned up for work (**Applicant's Reasons**).[70] Nowhere in her Form F8 does the Applicant engage with the fact that she resigned verbally, and in writing, albeit her supporting documentation (filed with the Form F8), does enclose her Formal Resignation Email.

[59] In her written evidence the Applicant asserts that she "felt she had no choice but to resign due to the ongoing stress caused by bullying by management staff", which she says culminated in her leaving the workplace in tears on 27 March 2024. She also relies upon the Applicant's Reasons as supporting her contention that she "felt" she had no choice but to resign.[71] I note that the Applicant's evidence regarding her subjective assumptions and understandings are not helpful. What matters is what each party by their words and/or conduct, would have led a reasonable person in the position of the other party to believe as at the time of resignation (i.e. on 15 April 2024, not 26 or 27 March 2024).[72] Imputed into that reasonable person is a knowledge and awareness of all of the 'relevant' background facts, i.e. not just the facts that, or context from which, an employee asserts forms the basis of his or her decision to resign.

[60] The Applicant says that at the time that she resigned on 15 April 2024, she was not aware that there was any type of investigation into the incident involving Resident's X and Y. I do not accept this evidence. The Applicant's own evidence is that she was told that the Respondent's P&C Team had become involved on 5 April 2024 (in relation to the incident involving Residents X and Y on 25 and 26 March 2024). Whilst the P&C Team "becoming involved" and an "investigation" are not the same thing, I find that the evidence discloses that the Applicant was aware, as early as 5 April 2024, that the incident involving Residents X and Y had not been closed or concluded from the Respondent's perspective, and that further investigation (or further steps) involving the Applicant, and the Respondent's P&C Team, would (very likely) be occurring.

[61] In her written evidence and submissions the Applicant goes through her reasons (or excuses), in a myopic fashion[73] as to why she is essentially blameless for the incident involving Residents X and Y. I do not need to determine for the purposes of these jurisdictional proceedings as to whether or not the Applicant was blameworthy or blameless for her role in the incident concerning Residents X and Y. I am required to consider all of the circumstances of the case in forming a view as to whether the Applicant was forced to resign because of conduct, or a course of conduct, engaged in by the Respondent (s.386(1)(b) of the Act). But a consideration of all of the circumstances of a case does not derogate from the rule that evidence must be admissible (i.e. 'relevant' to the scope and nature of the legal issue to be ultimately determined, in the context of the applicable "facts in issue" which concern themselves with the essential maters to be proved to support a particular case outcome). In this case, some of the undisputed (or undisputable) facts, as at the 'time' that the Applicant resigned on 15 April 2024, are:

a) the Applicant was aware, from as early as 5 April 2024, that the Respondent's P&C Team had become involved in the incident concerning Residents X and Y;

b) the Applicant did not receive the Interview Letter in relation to the incident concerning Residents X and Y (and was thus unaware of its contents) prior to resigning;[74]

c) the Applicant did not attend upon any meeting, or otherwise engage with any disciplinary process, in relation to the incident concerning Residents X and Y;

d) the Respondent made no formal findings, arising from an investigation or disciplinary process, that attributed culpability or blame to the Applicant in respect of her involvement in the incident concerning Residents X and Y;

e) the 'essential' reasons for (b) to (d) above is that the Applicant resigned; and

f) there is no basis to suggest that it was not appropriate, or that the Respondent was not wholly within its rights (as part of its obligations and duties as both an employer and a business), to investigate the incident concerning Residents X and Y for root causes, risk management, and relevant adaptive changes to existing processes and procedures. The fact that the Applicant was a person of interest to that investigation is not a surprising revelation given that the Applicant was the only person in contact (in the Respondent's employ) with Resident X on 25 March 2024. Indeed, whilst the Applicant says that she did not understand what Resident X was saying to her over the telephone on 25 March 2024, the Applicant's own evidence is that she understood enough to say to Resident X that she would send Jai down to speak to her.[75]

[62] At the hearing, much of the cross-examination conducted on behalf of the Applicant went to irrelevant issues, such as:

a) whether or not the Applicant had been trained to do welfare checks;

b) whether or not the Respondent had a policy or procedure in place in respect of staff undertaking welfare checks;

c) whether or not the Applicant should have (or could have been) aware of an emergency situation involving Resident Y on 25 March 2024; and

d) who did or did not have a duty of care to Residents X and Y.

[63] The Applicant was at no time requested by anyone to do a "welfare" check, nor has there ever been an issue as to the Applicant's knowledge of an "emergency". Such matters are simply distractions, or 'red herrings', that can only lead to misplaced and wrongful conclusions.

[64] Further, much of cross-examination conducted on behalf of the Applicant at the hearing sought to:

a) challenge the foundations of a disciplinary process that had not even commenced (i.e. as the Applicant had resigned before it could commence);[76]

b) assert that the disciplinary process, that had not even commenced, was (or would be) flawed, pre-determined, biased, unfair, unjust, and/or wrongful, and based upon false allegations or claims; and

c) assert that certain outcomes from the disciplinary process were inevitable or pre-determined, being outcomes that would be contrary to the interests of the Applicant, such as the dismissal of the Applicant, the Applicant being 'blamed', or making the Applicant apologise to Residents X and Y for matters that she was apparently being wrongfully blamed for.

[65] The short point is that these proceedings, being a 'dismissal' jurisdictional hearing, are not an occasion upon which it is appropriate for the Applicant to attack, challenge, or speculate about a disciplinary process that did not occur, in circumstances where such disciplinary process did not occur because the Applicant resigned before such a process had even commenced.[77] Relevantly:

a) there is no evidence that the Applicant was going to be dismissed for her conduct (or acts/omissions) concerning the incident involving Residents X and Y. Indeed, the evidence is to the contrary;[78] and

b) on the issue of a requirement for the Applicant to apologise to Resident X and/or Y, Ms Richards gave the following evidence (which I accept):

> Ms Unwin: "Okay. When she [the Applicant] came back, she'd been on sick leave. Would she, again, have been expected to apologise? And again, be expected to apologise and own that she had not followed through, and done a welfare check and helped the resident, that she had, as you said, not fulfilled her duty of care or followed procedures? Would that have been the situation when she returned?"
>
> Ms Richards: "No, it would not have been. We just wanted to have meeting with Ms Zanoni [the Applicant] the following day after she returned to discuss the events that happened, and like I said, in the beginning there was never any intention for Ms Zanoni to end her employment. I was quite shocked when she resigned."[79]

[66] In her closing submissions in reply, the Applicant maintains that she should not to be blamed for not asking Jai to speak to Resident X or make a check on Resident Y (in her cabin on 25 March 2024) because, whilst she told Resident X that she would do this (or alike) during their phone call on 25 March 2024, Resident X subsequently attended upon Guest Reception in person and made an inquiry as to whether or not anyone had called or spoken to her sister (Resident Y). The submission goes, as I understand it, that Resident X attending upon Guest Reception obviated or negated the need for the Applicant to follow through on her promise to send Jai (i.e. a type of 'supervening' event or moment that explains away the Applicant's failure

to even speak to Jai). Putting aside the fact that these proceedings do not involve a determination as to blameworthiness, the submission itself falls flat. It is contrary to the Applicant's own evidence that she 'forgot' to speak to Jai because she was "busy" (see paragraphs [9] to [15] of this decision). It is a submission that seeks to recalibrate facts on a retrospective basis to support a baseless case theory.[80] I reject it.

[67] I am unable to identify (on the evidence before me) any conduct of the Respondent that can be described as demonstrating an intention to bring the Applicant's employment to an end at the time that the Applicant resigned on 15 April 2024. I am equally unable to identify (on the evidence) any conduct of the Respondent (or a course of conduct) that might be said to bring about a "probable" end to the Applicant's employment. The nature of the incident (including its root cause) involving Residents X and Y needed to be investigated. The Applicant was the only person on shift to whom Resident X had interacted with on 25 March 2024. Having received some of the facts from the Applicant (during initial informal discussions between the Applicant and Mr Yazbek and Ms Richardson on 26 and 27 March 2024), the Respondent then decided to give the Applicant (upon her return to work on 15 April 2024), the opportunity to respond to concerns that had been identified about her interaction with Resident X on 25 March 2024, and her failure to subsequently follow-up on that interaction. The evidence does not disclose any sort of pre-determined outcome. What is clear is that the Respondent wanted to establish conclusive facts as part of a formal investigation or disciplinary process, to which the Applicant may have received some form of warning. It is hardly surprising given the weight of regulation faced by a Respondent running a business (especially under health and safety statutes and alike), and including as a landlord to permanent elderly residents, that the Respondent considered it not only important but necessary to conduct and complete a formal investigation and/or disciplinary process regarding the incident with Residents X and Y (including to the extent that this incident concerned or involved the Applicant). There is nothing particularly controversial about such circumstances, and there is equally nothing controversial about giving the Applicant an opportunity to provide a response before any determination as to an outcome is made.

[68] The Applicant's resignation, verbally and via email on 15 April 2024, is clear, considered and unambiguous. On the evidence before me, it was not unreasonable for the Respondent to immediately accept it without further question.

[69] In her written closing submissions, the Applicant repeatedly makes reference to the cases of *Susan Carter v Metro Trains Sydney Pty Ltd*[81] (**Carter**), and *Jenny Yang v FCS Business Service Pty Ltd*[82] (**Yang**).[83]

[70] The facts in *Carter* are not the facts of this case. In *Carter*, the employee resigned in circumstances where she was upset, and within minutes of being accused of extremely serious allegations that were at least partially based upon a factual outline that was demonstrably false.[84] The Applicant in this case is not in a similar position to the applicant (employee) in *Carter*, who was found to have resigned in the heat of the moment.[85]

[71] The facts in *Yang* stand in stark contrast to the facts in this case.[86] *Yang* also stands in contrast to the outcome in *Tanaya Kar v Action Drill & Blast Pty Ltd*[87]. It follows that Yang turned upon its own individual facts and circumstances that have no bearing to this case.

[72] It is appropriate (including for the sake of completeness) that I make the findings that follow as being against or wholly contrary to any notion that the Applicant was forced (or coerced), or had no choice but, to resign. In this regard:

a) no one at the Respondent called for the Applicant's resignation, or requested that she resign;

b) there is no evidence to suggest that it is likely that the Applicant's employment would have been terminated as part of the Respondent's investigation or disciplinary process.[88] The evidence does not support a finding that the outcome to that process was foretold, predetermined or certain;

c) there is no evidence that any special events or circumstances involving the Applicant and the Respondent, and/or the Respondent's workplace, occurred on 15 April 2024 (being the date of the Applicant's resignation). In other words, there is no evidence to suggest that the Applicant 'needed' (or had no option but) to resign at the time she did (on 15 April 2024), or that there was any requirement upon Mr Yazbek, Ms Richards, or the Respondent's P&C Team, to contact the Applicant asking - "Are you sure you want to resign? Why don't we instead set up a meeting to resolve all of your grievances and issues at the workplace before you make any decision to resign?" Employees make decisions to resign from their employment every day for a multitude of reasons. Some of those reasons might be personal (e.g. due to family circumstances), or financial (to start a better paying job), whilst some employees resign because they simply do not want to work at the employer's workplace anymore (for whatever reason);[89]

d) at no time did the Applicant put an ultimatum to the Respondent before she resigned, e.g. 'Unless you stop this, or do this, I am resigning';

e) at no time did the Applicant seek to retract her resignation, including prior to filing her Application in these proceedings. In other words, the suggestion that an employee who resigns holds no requirement whatsoever to themselves raise a concern that they may have acted improperly or without thinking, or been forced into, or had no other choice, but to tender their resignation is not to be disregarded, albeit it is but one on the facts to be taken into account in considering the overall circumstances of a case;

f) even if the Applicant was concerned about an investigation or disciplinary process being conducted by the Respondent, and/or the outcomes of same, the evidence does not disclose that she had no other choice but to resign on the specific day and at the specific time that she did (i.e. specifically at around 9:00am on 15 April 2024).[90] I find that the options wholly available to the Applicant (on an objective basis) on 15 April 2024 were or included:

    i) **Option 1:** instead of resigning, obtaining a copy of the Interview Letter and reading it, preparing her responses, and then putting her case as to blamelessness etc during the disciplinary process. Indeed, having not engaged in that process, or avoiding that process, and resigning before even receiving the Interview

Letter (or requesting a copy of it), it is not now for the Applicant to attend upon the Commission and essentially have the Commission adjudicate upon her acts and omissions on 25 March 2024, and/or her culpability (or absence thereof), and/or 'green light' her resignation (or otherwise characterise it) as a dismissal. Whether or not the Applicant was 'justified' in resigning, or had good reasons to resign, is a matter for her, not this Commission (i.e. the question before the Commission concerns a forced resignation, not a justified resignation). All of the submissions that the Applicant has made in this case could have been made during the disciplinary process. However, she chose not to avail herself of that opportunity, and instead, resigned her employment. This was a choice the Applicant made herself, being an option open to her, but it was not the only option available or open to her. As the Applicant herself states in her Formal Resignation Email "Any meetings I may be requested to attend to discuss the above issues will be with my legal advocate and/or support person present". The Applicant, in both her evidence and submissions, has failed to answer the key question in this case, being: 'Exactly why is it that you could not attend the disciplinary meeting with your legal advocate and/or support person present and respond to the issues raised against you – instead of resigning?';

ii) **Option 2:** instead of resigning, raising an internal grievance or complaint of bullying (or alike) with the Respondent's P&C Team. I do not accept the Applicant's evidence that the only person she could complain to was Mr Yazbek.[91] This is especially so in circumstances where the Applicant accepted in her evidence that she was aware of the Respondent's bullying and harassment procedures and policies,[92] and the Respondent's bullying policy specifically states that grievances and complaints can be made directly to the Respondent's P&C Team (as opposed to an on-site manager).[93] As at the time that she resigned on 15 April 2024, there is no evidence of anything at all preventing the Applicant from making an internal grievance or complaint to the Respondent's P&C Team. To be clear, there is no foundation on the evidence to support the Applicant's contention that she was unable to raise any concerns she had about local management (i.e. Mr Yazbek or Ms Richards) with the Respondent's P&C Team. Indeed, she had no trouble contacting the Respondent's P&C Team to obtain a copy of her employment contract, and in submitting her Formal Resignation Email to the P&C Team;

iii) **Option 3:** instead of resigning, making an external claim (including a dispute, a general protections not involving dismissal claim, or a bullying claim) to the Fair Work Commission.[94] In other words, Parliament enacted Parts 3-1 (Subdivision B of Division 8), 6-2 and 6-4B of the Act for people to use. It is available for employees to use, and therefore cannot be disregarded, excluded or otherwise discounted as an option available to any employee when assessing all of the objective circumstances (and available options) open to an employee to utilise or engage with (i.e. as an alternative to resigning). This is especially so in circumstances where the Act also contains protections (or workplace rights) for employees who utilise such provisions (see s.340 and s.341 of the Act). Indeed, the presence of these vast array of statutory provisions and protections for employees to utilise, and be protected by statute when utilising, points

strongly against an employee not availing themselves of such provisions, but then asserting that they had no other option but to resign. As at the time that she resigned on 15 April 2024, there is no evidence of anything at all preventing the Applicant from making an external claim;[95] and/or

iv) **Option 4:** instead of resigning, taking (or requesting to take) a further period of time off as leave, call it "stress" or personal leave or annual leave, just like the Applicant had similarly done on 27 March 2024 when she left work in the middle of her shift and ended up being absent from work for over two weeks under the cover of medical certificates that simply state "medical condition" and "unfit for work".[96] This would give the Applicant time to prepare her response and have her legal advocate and/or support person present, and/or raise or make an internal or external grievance, complaint or claim. In other words, Option 4 fits neatly within Options 1 to 3 above.

[73] Having regard to the evidence, the submissions of the parties, and the reasoning and findings that I have set out in this decision, I make the following four ultimate findings:

a) the Applicant's employment with the Respondent ended at the hand of the Applicant herself. It was the action of the Applicant in voluntarily resigning both verbally and in writing (the latter twice) that brought her employment to an end (i.e. the ending of the Applicant's employment was at her own personal initiative, and a choice that she made for herself);

b) consistent with case law authority (*Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245; *Bruce v Fingal Glen Pty Ltd (in Liq)* [2013] FWCFB 5279, and *Australian Hearing v Perry* (2009) 185 IR 359, at 367-368; [209] AIRCFB 680),[97] on the evidence before me, and in the facts and circumstances of this case, the Applicant's resignation was not forced or coerced, nor did it have any kind of compulsory element to it whatsoever. There is no basis on the evidence before me to suggest (let alone make a finding) that the Respondent sought to, in any way, procure the Applicant's resignation from her;

c) there was no conduct, or course of conduct, engaged in by the Respondent that objectively (on the evidence) forced the Applicant to resign at the time she did (i.e. on 15 April 2024), or gave her no other choice (or option) but to resign at that time;

d) further to (c), the Applicant had choices open to her other than resignation. She at no time sought to withdraw her resignation. It was her choice to resign, rather than pursue the other choices (or the four other options) equally open and available to her on 15 April 2024; and

e) on the basis of (a) to (d) above, the Applicant was not 'forced to resign' or otherwise "dismissed" by the Respondent within the meaning of s.386(1)(b) of the Act. The Applicant has failed to prove on the balance of probabilities to the contrary.

[74] The Applicant's cessation of employment with the Respondent does not fall within the scope of either s.386(1)(a) or s.386(1)(b) of the Act. Given that the Applicant was not

"dismissed" by the Respondent within the meaning of s.386 of the Act, the Commission has no further jurisdiction to deal with the Applicant's Application. An Order PR779832 has been issued contemporaneously with this decision dismissing the Applicant's case.

DEPUTY PRESIDENT

Appearances:

Ms *Carolyn Unwin*, Paid Agent, on behalf of the Applicant.

Mr *Matthew Robinson*, Partner, Citation Legal (formerly FCB Lawyers), on behalf of the Respondent.

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<PR778930>

[1] Respondent's Closing Submissions, 29 July 2024, at [8]-[9].
[2] Albeit, see Transcript, PN5-PN20.
[3] As per Directions issued on 4 June 2024.
[4] Note Attachment G to Form F8A. The Applicant worked as a casual, part-time and fulltime employee with the Respondent. At the time she tendered her resignation, the Applicant was a fulltime employee of the Respondent.
[5] Richard Yazbek Statement, 2 July 2024, at [7].
[6] Applicant's Evidence/Submissions, "June 2024" (filed 16 June 2024).
[7] Ibid.
[8] Applicant's evidence and submissions in reply were filed on 11 July 2024.
[9] Respondent's evidence and submissions were filed on 2 July 2024.
[10] See Transcript, PN827, PN829-PN830, and PN844. Ms Richards' conversation with Resident X was had in circumstances where the Applicant had not advised Ms Richards (or anyone else) of her (the Applicant's) interactions with Resident X the day prior, and there had been no handover by the Applicant of any information about Resident X or Resident Y to any other staff member at the Respondent's workplace.
[11] Jennifer Richards Statement, 3 July 2024, at [7]-[11]. See also Kerilee Taylor Statement, 2 July 2024, at [5] (the Applicant accepts the evidence of Ms Taylor: see Statement of Applicant in response to Taylor Statement, at [5]); Richard Yazbek Statement, 2 July 2024, at [11]. I note that Ms Richards and Mr Yazbek had to get a locksmith to obtain entry into Resident Y's cabin. Upon her attendance at hospital, Resident Y was suffering from injuries, stress, dehydration, and diabetic issues (the latter associated with Resident Y not having had her regular diabetic medication).
[12] Kerilee Taylor Statement, 2 July 2024, at [5]-[6]. The Applicant accepts the evidence of Ms Taylor: see Statement of Applicant in response to Taylor Statement, at [5].
[13] Kerilee Taylor Statement, 2 July 2024, at [5]-[6].
[14] Richard Yazbek Statement, 2 July 2024, at [11].
[15] Transcript, PN238, PN240 and PN242.
[16] Respondent's Closing Submissions, at [15].
[17] Jennifer Richards Statement, 3 July 2024, at [14].
[18] Richard Yazbek Statement, 2 July 2024, at [12].

[19] Jennifer Richards Statement, 3 July 2024, at [12]-[14].
[20] Transcript, PN246, see also at PN638-PN640, and PN650-PN651.
[21] Kerilee Taylor Statement, 2 July 2024, at [7]. The Applicant accepts the evidence of Ms Taylor: see Statement of Applicant in response to Taylor Statement, at [5].
[22] Note also Transcript, PN780 and PN925 (Ms Richards), and Richard Yazbek Statement, 2 July 2024, at [18].
[23] Applicant's Evidence/Submissions, "June 2024", p.9; Richard Yazbek Statement, 2 July 2024, at [15]-[16].
[24] Kelli-Ann Hughes Statement, 2 July 2024, at [3]-[4].
[25] Jennifer Richards Statement, 3 July 2024, at [16].
[26] Richard Yazbek Statement, 2 July 2024, Annexure 'D'.
[27] This text message exchange is contained in a typed (undated and unsigned) document from the Applicant titled (on its first page in the top left corner) "Back Ground of Situation". It is referenced in the Applicant's Evidence/Submissions, "June 2024", pp.2 (under the first paragraph of the bold heading "Paragraph 2"). See also the Applicant's Statement in response to Mr Yazbek's statement, p.3, under paragraph number [13] (halfway down the page).
[28] Transcript, PN287-PN288.
[29] Richard Yazbek Statement, 2 July 2024, at [17]-[19], and Annexure 'E'.
[30] Applicant's Evidence/Submissions, "June 2024", pp.11.
[31] Transcript, PN289.
[32] Compare and contrast the facts in the case of *Jenny Yang v FCS Business Service Pty Ltd* [2020] FWC 4560.
[33] Richard Yazbek Statement, 2 July 2024, at [17].
[34] Applicant's Evidence/Submissions, "June 2024", pp.9-10. It appears that the Applicant and Mr Yazbek exchanged emails and missed calls on 27 March, and 4 and 5 April 2024, regarding whether and when the Applicant would be returning to work, noting that the Applicant had provided no clear indication of her return to work date to the Respondent. The Applicant also supplied her medical certificates to the Respondent whilst she was off on leave. The relevant text message exchange is contained in a typed (undated and unsigned) document from the Applicant titled (on its first page in the top left corner) "Back Ground of Situation".
[35] Transcript, PN353, see also PN1052 (I note that the cross-examination of Ms Hughes proceeds on the basis that the Applicant did not receive or otherwise sight the Interview Letter).
[36] Kelli-Ann Hughes Statement, 2 July 2024, Annexure 'B'.
[37] Transcript, PN34, and PN83-PN153.
[38] Kelli-Ann Hughes Witness Statement, 5 July 2024, at [13]-[19].
[39] Transcript, PN280-PN281.
[40] Attachment B to Form F8A. The Applicant made no enquiries about the health or welfare of Resident Y upon her return to work on 15 and 16 April 2024, see Richard Yazbek Statement, 2 July 2024, at [19] and Annexure 'E' (final text message at bottom of page).
[41] I note that the Formal Resignation Email states that if the Applicant is forced or "required to attend to discuss the above issues" she wishes to have a support person present. There is nothing voluntary about this statement as it concerns the Applicant attending an interview, in that she will only attend such an interview is if she is "required". The Applicant provided two weeks' notice of her resignation, where her employment contract required four weeks. The fact that the Applicant provided less notice than her contract required is not a relevant consideration in these proceedings given that the Applicant did not explain why she provided short notice, and the Respondent accepted her short notice and made payment in lieu in any event.
[42] Kelli-Ann Hughes Statement, 2 July 2024, Annexure 'C'.
[43] Richard Yazbek Statement, 2 July 2024, at [21]-[24]; Kelli-Ann Hughes Statement, 2 July 2024, at [8]-[10];
[44] Richard Yazbek Statement, 2 July 2024, at Annexure 'F'.
[45] Whilst Mr Yazbek verbally accepted the Applicant's resignation during the Resignation Conversation on 15 April 2024, that is not to the point in the sense that the Applicant advances a heat of the moment resignation in circumstances where she remained in the workplace after the Resignation Conversation and continued to work as normal.
[46] See the decision of the Full Federal Court in *Coles Supply Chain v Milford* [2020] FCAFC 152, at [74]-[75], and *Lipa Pharmaceuticals Ltd v Mariam Jarouche* [2023] FWCFB 101, at [23].
[47] In relation to the application of s.386 of the Act to general protections involving dismissal claims, see *Coles Supply Chain v Milford* (2020) 300 IR 146, and *Fair Work Ombudsman v Austrend International* (2018) 273 IR 439. See also the discussion in *Morris v Allied Express Transport* [2016] FCCA 1589, at [116] and [117], and *Searle v Moly Mines Limited* [2008] AIRCFB 1088; (2008) 174 IR 21, at [17].
[48] [2022] FWCFB 55; (2022) 316 IR 1.

[49] Ibid, at [45].
[50] *Mohazab v Dick Smith Electronics* (2005) 62 IR 200, at 205 to 206. See also: *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 496, at [19] to [23]; *Mahony v White* [2016] FCAFC 160, at [23]; *Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162, at [75]; *Rheinberger v Huxley Marketing Pty Ltd* (1996) 67 IR 154, at 160.
[51] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245, at [47] (see also at [35]-[46]).
[52] *Birrell v Australian National Airlines Commission* (1984) 5 FCR 447; [1984] FCA 378. See also *Ngo v Link Printing Pty Ltd* (1999) 94 IR 375, Print R7005, AIRCFB (McIntrye VP, Marsh SDP and Harrison C), 7 July 1999, and the authorities cited at 377-378, [12]-[16]. See also *Koutalis v Pollett* [2015] FCA 1165; (2015) 235 FCR 370, at [44], citing *Sovereign House Security Services Limited v Savage* [1989] IRLR 115, at 116.
[53] *Birrell v Australian National Airlines Commission* (1984) 5 FCR 447, at 458. See also *Saddington v Building Workers Industrial Union of Australia* (1993) 49 IR 323, at 336-337; *Emery v Commonwealth* [1963] VR 586; *Australian Wool Selling Brokers Employers' Federation v Federated Storemen and Packers Union of Australia* (1976) 176 CAR 884.
[54] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245. See also *Bruce v Fingal Glen Pty Ltd (in Liq)* [2013] FWCFB 5279, and *Australian Hearing v Perry* [2009] AIRCFB 680; (2009) 185 IR 359, at 367-368.
[55] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245, at [44] and [47]; *Kylie Bruce v Fingal Glen Pty Ltd (in Liq)* [2013] FWCFB 5279; *Pawel v Advanced Precast Pty Ltd* AIRC Print S5904 (12 May 2000).
[56] *McGregor v Melbourne Equine Veterinary Group* [2012] FWA 6712, at [37]; *Morley v Intelitec Pacific Pty Ltd* [2015] FWC 3168, at [40].
[57] *Tanaya Kar v Action Drill & Blast Pty Ltd* [2023] FWCFB 204; *Moore v Woolworths Group Limited T/A Big W* [2020] FWC 963; *Davidson v Commonwealth* [2011] FWA 3610, at [97]-[98], and [104]; *Davidson v Commonwealth* [2011] FWAFB 6265; *Love v Alcoa of Australia Limited* [2012] FWAFB 6754; (2012) 224 IR 50; *McGregor v Melbourne Equine Veterinary Group* [2012] FWA 6712, at [40]-[41]; *Pacific National (NSW) Limited v Bell* [2008] AIRCFB 555; (2008) 175 IR 208; *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941; (2017) 271 IR 245, at [47].
[58] Ibid.
[59] (1996) 67 IR 154.
[60] Ibid, at 160-161.
[61] Unreported, Print N6999 (Munro J, Duncan DP, Merriman C, 9 December 1996). This print does not contain page or paragraph numbers.
[62] Ibid.
[63] AIRC Print PR973462 (11 August 2006).
[64] Ibid, at [23].
[65] Transcript, PN284. See also Respondent's Closing Submissions, 29 July 2024, at [21]-[22].
[66] Ibid, PN279.
[67] Ibid, PN1085 and PN1088. The issue here is the fact that the request for a copy of this employment contract was made by the Applicant whilst she was off on sick leave (i.e. she was competent enough, even though she was absent from work on "sick leave", to engage in communication and make the request for a copy of her employment contract). The issue is not what type of contract (i.e. casual or permanent) was actually supplied to the Applicant arising from her request (Transcript, PN1140-PN1142).
[68] The Applicant was no longer in a "state of stress" or alike - any concerns as to her health and/or mental state had gone away as at 15 April 2024.
[69] *Birrell v Australian National Airlines Commission* (1984) 5 FCR 447; [1984] FCA 378. See also *Ngo v Link Printing Pty Ltd* (1999) 94 IR 375, Print R7005, AIRCFB (McIntrye VP, Marsh SDP and Harrison C), 7 July 1999, and the authorities cited at 377-378, [12]-[16].
[70] Form F8, filed 6 May 2024, at Items 2.2 and 2.3.
[71] Applicant's Evidence/Submissions, "June 2024", pp.1-2.
[72] See, for example, *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52 at [40], (2004) 219 CLR 165.
[73] Ibid. See also Applicant's submissions and submissions in reply filed post the hearing.
[74] Applicant's Evidence/Submissions, "June 2024", p.10. Transcript, PN1052.
[75] Transcript, PN201.
[76] Respondent's Closing Submissions, 29 July 2024, at [28] and [30].
[77] Note the difference between a disciplinary process and a disciplinary outcome: Transcript, PN1045-PN1051.

[78] Transcript, PN780, PN916, PN925, and PN930 (perhaps a warning after the disciplinary process had been completed).
[79] Transcript, PN916.
[80] See also Respondent's Closing Submissions, 29 July 2024, at [16], and footnote [4].
[81] [2023] FWC 379.
[82] [2020] FWC 4560.
[83] The Applicant's Submissions (filed 23 July 2024) also cite the case of *Lefei Fasavalu v HD Projects Pty Ltd* [2019] FWC 430, but the facts of *Fasavalu* have no relationship to the facts of this case. Note Respondent's Closing Submissions, 29 July 2024, at [34]-[38].
[84] [2023] FWC 379, at [84].
[85] [2023] FWC 379, at [29], [72]-[77], and [81].
[86] [2020] FWC 4560, at [53]-[54].
[87] [2023] FWCFB 204.
[88] Richard Yazbek Statement, 2 July 2024, at [18].
[89] Respondent's Closing Submissions, 29 July 2024, at [26].
[90] Ibid, at [29]-[32].
[91] Transcript, PN298-PN301.
[92] Ibid.
[93] Kelli-Ann Hughes Witness Statement, 5 July 2024, at [11]-[12], Annexures 'D' (Appropriate Workplace Behaviours Policy (including bullying and grievance raising)), and 'E' (Whistle Blower Policy).
[94] Note coverage under clause 4.2 of the *Hospitality Industry (General) Award 2020*, and Clause 40, Dispute Resolution, of that Award, and the statutory obligation upon employers to provide employees with the Fair Work Information Statement notifying employees of their basic rights under fair work legislation, awards, enterprise agreements, and employment contracts (and where to get further information beyond the 'basic' should they be so inclined at any time during their employment post its commencement).
[95] The Applicant's June 2024 submissions (on page 1) refer to s.789FD of the *Fair Work Act 2009*.
[96] Applicant's Evidence/Submissions, "June 2024", p.9; Richard Yazbek Statement, 2 July 2024, at [15]-[16].
[97] See also *Tanaya Kar v Action Drill & Blast Pty Ltd* [2023] FWCFB 204; *Moore v Woolworths Group Limited T/A Big W* [2020] FWC 963; *Davidson v Commonwealth* [2011] FWA 3610, at [97]-[98], and [104]; *Davidson v Commonwealth* [2011] FWAFB 6265; *Love v Alcoa of Australia Limited* [2012] FWAFB 6754; (2012) 224 IR 50; *McGregor v Melbourne Equine Veterinary Group* [2012] FWA 6712, at [40]-[41]; *Pacific National (NSW) Limited v Bell* [2008] AIRCFB 555; (2008) 175 IR 208.