DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Karen Altham-Wooding
v
PKDKAdventures Pty Ltd
(U2024/7638)

DEPUTY PRESIDENT SAUNDERS NEWCASTLE, 3 OCTOBER 2024

Application for relief from unfair dismissal – dismissal of casual employee – application dismissed

Introduction

[1] Ms Altham-Wooding was employed on a casual basis to work at the Crescent Head Holiday Park (***Park***) in housekeeping and reception from November 2022 until her employment came to an end in July 2024. Ms Altham-Wooding was initially employed in that role by Markel Management Pty Ltd (***Markel***). On 22 April 2024, PKDKAdventures Pty Ltd (***PKDK***) took over as the new manager for the Park from Markel and Ms Altham-Wooding took up casual employment with PKDK. Ms Altham-Wooding contends that she was unfairly dismissed by PKDK in July 2024. PKDK denies that it dismissed Ms Altham-Wooding or that any dismissal was unfair.

Initial matters to be considered

[2] Section 396 of the *Fair Work Act 2009* (Cth) (***Act***) sets out four matters which I am required to decide before I consider the merits of the application.

[3] I am satisfied on the material before the Commission that:

(a) Ms Altham-Wooding's application for unfair dismissal was made within the period required in s 394(2) of the Act;

(b) Ms Altham-Wooding was a person protected from unfair dismissal. I note that PKDK did not provide Ms Altham-Wooding with a written notice, before her employment with PKDK started, that her period of service with Markel would not be recognised by PKDK (s 384(2)(b) of the Act). I am satisfied that there was a transfer of business from Markel to PKDK within the meaning of s 311 of the Act, with the result that there was a transfer of employment of Ms Altham-Wooding from Markel to PKDK and her service with Markel counted as service with PKDK (s 22(5) of the Act). I am satisfied on the basis of the material before the

Commission that Ms Altham-Wooding's casual employment with Markel was as a regular casual employee and during that time Ms Altham-Wooding had a reasonable expectation of continuing employment by Markel on a regular and systematic basis;

(c) the alleged dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the alleged dismissal of Ms Altham-Wooding was not a genuine redundancy.

Dismissal

[4] The question of when a person has been dismissed is governed by s 386 of the Act. It relevantly provides:

"(1)A person has been dismissed if:

a. the person's employment with his or his employer has been terminated on the employer's initiative; or

b. the person has resigned from his or his employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or his employer."

General principles

[5] The expression termination "on the employer's initiative" in s 386(1)(a) is a reference to a termination of the employment relationship and/or termination of the contract of employment[1] that is brought about by an employer and which is not agreed to by the employee.[2]

[6] In circumstances where the employment relationship is not left voluntarily by the employee, the focus of the inquiry under s 386(1)(a) is whether an action on the part of the employer was the principal contributing factor which results, directly or consequentially, in the termination of the employment.[3]

[7] Section 386(1)(b) of the Act concerns the resignation of an employee where the resignation was "forced" by conduct or a course of conduct on the part of the employer. The question of whether a resignation did or did not occur does not depend on the parties' subjective intentions or understandings.[4] Whether an employee resigned depends on what a reasonable person in the position of the parties would have understood was the objective position, based on what each party had said or done, in light of the surrounding circumstances.[5]

[8] The test to be applied in determining whether a resignation was "forced" within the meaning of s 386(1)(b) 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. [6] The requisite employer conduct is the essential element. [7]

[9] It is necessary to consider all the relevant circumstances to determine whether there has been a dismissal by words or conduct. The range of facts or factors which may need to be examined to answer the question of whether an employment relationship has ceased to exist by reason of the communication of a dismissal by words or conduct will be determined by the circumstances of a particular case, and may include, without limitation, whether the employee is being paid a wage or other benefits or entitlements, whether the employee is attending or performing work for the employer, whether the employee is being rostered to work or offered work, whether, in the case of a business employing casuals, the employer is rostering other employees to do work in the same role as the applicant in a particular case, and whether either party has communicated to the other party a decision to terminate the relationship.

[10] The question of whether an employment relationship has ceased to exist does not depend upon the parties' subjective intentions or understandings. Rather, it depends upon what a reasonable person in the position of the parties would have understood was the objective position. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.[8]

Relevant facts re alleged dismissal

[11] Ms Altham-Wooding commenced casual employment with PKDK on 22 April 2024, which was the first day on which PKDK managed the Park under the new management arrangements. Prior to commencing employment with PKDK, Ms Altham-Wooding had provided PKDK with her availability to work shifts at the Park. On 14 April 2024, Ms Altham-Wooding updated her unavailability by informing PKDK that she usually had Fridays off work (but could make herself available) and did not like to work close shifts on Saturday or Sunday.

[12] On 24 April 2024, Ms Whittingham says that Ms Altham-Wooding was visibly upset with the new roster hours. Ms Whittingham explained that PKDK was heading into winter trading at the Park, which is much quieter than summer trading.

[13] On 28 April 2024, PKDK received a text message from Ms Altham-Wooding about minimal hours of work. Ms Altham-Wooding stated:

> "Hello.. super sorry to bring this up at this time of night.. just seen the revised roster.. I'm back to 14.5 hrs for the week. You reassured me mid week you would give me the 25 hrs p/w. No idea what's happening, but I can't have these minimal hrs"

[14] Ms Whittingham responded by text as follows:

> "Hi Kaz, I know I reassured you. We have hours in housekeeping if you're happy to pick that up? … reception roster too. We appreciate your understanding."

[15] Ms Altham-Wooding responded by text message on 30 April 2024 declining the shift in housekeeping.

[16] Ms Altham-Wooding says that at the end of the first week of PKDK's management of the Park she spoke with Ms Whittingham about the following week's roster and the reduction in her usual hours. Ms Altham-Wooding says that Ms Whittingham asked her to hang in there,

stated that her hours would be increased, and begged her and another employee, Carrie Flanagan, not to look for further employment.

[17] On 2 May 2024, PKDK offered Ms Altham-Wooding a shift from 3pm until 6pm, which she declined.

[18] On 5 May 2024, Ms Altham-Wooding texted Ms Whittingham to inform her that she could not work her shift on that day due to a migraine.

[19] On 7 May 2024, PKDK offered Ms Altham-Wooding a shift from 2pm until 6pm, to which her response was "Ok.." When Ms Altham-Wooding called Ms Whittingham she said that the shift had been filled.

[20] On 10 May 2024, Ms Altham-Wooding left during her shift at the Park at approximately 11am. Ms Altham-Wooding's shift commenced at 8am and she had about a 30 minute break to deal with her family matters (namely, a close family member had just been diagnosed with terminal cancer) and then decided to go home at 11am. Ms Altham-Wooding sent a text message to Ms Whittingham at 4:44pm in the following terms:

> "Hi demi.. so sorry. Took a pandine forte as I felt a migraine coming on, slept for 3 hrs. On my way to tell my daughter now.. that's going to be really tough.. sorry."

[21] On 24 May 2024, Ms Altham-Wooding worked her last shift for PKDK at the Park.

[22] Ms Altham-Wooding's rostered shift on 25 May 2024 was removed. PKDK says this happened because it needed to train another staff member. Ms Altham-Wooding called to speak to Mr Kennedy about this change. Ms Altham-Wooding says that Mr Kennedy initially explained that the change had been made because it was quiet and there was no work, but when Ms Altham-Wooding informed him that the shift had been given to a colleague, Mr Kennedy said that it was because the staff member had training. Ms Altham-Wooding asked for more information, to which Mr Kennedy said that she could make a time to discuss the matter further.

[23] On 25 May 2024, Mr Kennedy sent a text message in the following terms to Ms Altham-Wooding:

> "Hi Karen, tomorrow doesn't suit us. Please let me know a time that suits you to come and see me Monday? From Paul, please text me back on …"

[24] Ms Altham-Wooding did not respond to this text message. Mr Kennedy explained that PKDK was "not willing to provide further shifts to a staff member who did not respond to us. So, no further shifts were provided" to Ms Altham-Wooding.

[25] On 28 May 2024, Ms Altham-Wooding attended the office at the Park and asked to speak to Ms Whittingham or Mr Kennedy. Ms Altham-Wooding was told that they were not available at that time to have a discussion with Ms Altham-Wooding, notwithstanding that Ms Altham-Wooding saw Ms Whittingham in the office area and Mr Kennedy was about to go for a surf. Ms Altham-Wooding used her mobile phone to secretly record her attendance in the office at the Park on 28 May 2024 and sought to rely on that recording as part of her evidence

before the Commission. Ms Altham-Wooding did not obtain the consent of any person before recording her attendance at the office on 28 May 2024.

[26] On 2 July 2024, Ms Altham-Wooding sent an email in the following terms to Ms Whittingham and Mr Kennedy:

> "Good morning Demi and Paul
>
> I'm emailing you both to try to get clarification on my employment status at Crescent Head Holiday Park.
>
> I have been working consistently at the holiday Park is a casual for over 2.5 years, where my employment hours have been around 20 – 25 hours per week. I have always considered myself to have strong work ethics and I've always made myself available with last minute notice to step in and cover shifts or assist in other areas of the park.
>
> It has now been 5 weeks since I was last on the roster, to which I was only given 2 shifts, a total of 8 hours for the coming week. Within two days of that roster appearing on Deputy and two days prior to commencement of that Monday shift, I was removed from the only two shifts for that week and this shifts allocated to other staff members for reasons I am still completely unaware of and without any consultation from you on this reasoning. I contacted you immediately on this matter when I became aware of these changes (I became aware of these changes not through you but a fellow work colleague). I instantly contacted Demi's mobile phone with Paul answering. The response I received from that telephone conversation with Paul was 'it's quiet', (the shift however was never removed from the roster and allocation had been given to colleagues). I found this decision extremely odd and I presented myself to the holiday Park to discuss my roster with you and the reasoning on the removal of the from the roster. On arrival to the holiday park, Demi was sitting at the front reception desk and immediately vacated the room upon seeing me edge of the building. I could see her in the very next room and I asked the receptionist on duty if I could speak to Demi. The response was she was not available in the receptionist then asked if I would like to talk with Paul. However he too was unavailable as he was going surfing.
>
> I personally do not understand the current situation, as you both portrayed and spoke with me that you were happy with my performance at the park and not once had you discussed any concerns or problems with me or my work. Demi a couple of weeks prior, begged and pleaded with not only myself but a fellow colleague to please don't cease employment or look for other work as she valued us as great employees and an asset to the holiday park and that our job status was secure under their management. She stated to me that I was 1 of 2 she would never dispose of out of reception and nor she had no intention of employing others to come into reception, as the current staff she was completely satisfied with.
>
> To date, no-one from management has reached out to check on my well-being, nor has there been any communication or explanation about my employment status nor my future at the holiday park.
>
> As you can imagine this situation has not only impacted on me financially but the stress and anxiety is also taking a toll on my health and well-being.
>
> I would like to arrange a meeting with you both at your earliest convenience to discuss my future employment and/or resolve any issues or misunderstandings that have obviously occurred.

> Regards
>
> Karen Altham-Wooding"

[27] PKDK did not respond to this email from Ms Altham-Wooding. Mr Kennedy provided the following response to explain his decision not to respond to this email:

> "Karen emailed us on the 02/07/24 requesting information on her employment status. As Karen never chose to respond to us, we showed her the same courtesy.
>
> Karen has now commenced work at Hat Head Holiday Park."

[28] On 21 or 22 July 2024, Ms Altham-Wooding tried to use the App she ordinarily used to find out whether she had any shifts at the Park. Ms Altham-Wooding found that her ability to access the App had been removed. Mr Kennedy could not recall when Ms Altham-Wooding's access to the App was removed. In light of this evidence, I am satisfied on the balance of probabilities that Ms Altham-Wooding's ability to access the App by which she was able to find out whether she had been rostered to work shifts for PKDK was removed on 22 July 2024.

[29] On about 26 July 2024, Ms Altham-Wooding applied for a job at Hat Head Holiday Park. She was offered the job on the same day that she applied for it.

[30] On 26 July 2024, Ms Altham-Wooding sent a resignation email to PKDK in the following terms:

> "Hello Paul & Demi
>
> This email is to formally inform you of my resignation from Crescent Head Holiday Park, effective immediately 26/7/2024.
>
> I have returned my uniform and key to reception on this day too (handed to Kate).
>
> Regards
>
> Karen Altham-Wooding"

[31] On 30 July 2024, Ms Altham-Wooding commenced employment at Hat Head Holiday Park. She works, on average, 25 hours per week at Hat Head Holiday Park. This is the same number of hours that Ms Altham-Wooding worked at the Park when it was managed by Merkel.

Consideration re dismissal

[32] I consider that a reasonable person in the position of the parties would have understood that Ms Altham-Woodings' casual employment with PKDK had come to an end on 22 July 2024. This was the date on which Ms Altham-Wooding's access to PKDK's rostering App was removed. By this date 20 days had passed since Ms Altham-Wooding sent her email to Ms Whittingham and Mr Kennedy on 2 July 2024 requesting a meeting to discuss her employment, to which she had not received a response. These events occurred in a context in which PKDK had not offered Ms Altham-Wooding a casual shift at the Park since she worked her last shift on 24 May 2024. This was so notwithstanding the fact that other casual employees of PKDK

were being offered and undertaking shifts at the Park, both in reception and housekeeping roles. Further, although Mr Kennedy had asked Ms Altham-Wooding, by text message, on 25 May 2024 to reply to his text message in order to set up a time for a meeting, Ms Altham-Wooding attended the office at the Park, without prior notice or arrangement, on 28 May 2024 to speak with Ms Whittingham or Mr Kennedy about her employment. Not only were they not available to speak with Ms Altham-Wooding at that time, they made no effort to contact her at a later time. This breakdown in communication occurred, according to Mr Kennedy, because Ms Altham-Wooding attended the office at the Park on 28 May 2024, rather than responding to Mr Kennedy's text message sent on 25 May 2024 asking Ms Altham-Wooding to reply to his text so a meeting time could be set up. I am satisfied that PKDK's conduct, as summarised in this paragraph, would have led a reasonable person in the position of Ms Altham-Wooding to believe, as at 22 July 2024, that their casual employment with PKDK at the Park was at an end.

[33] Ms Altham-Wooding sent a resignation email to PKDK on 26 July 2024. But I have found, for the reasons set out above, that her employment with PKDK came to an end on 22 July 2024. Ms Altham-Wooding's employment with PKDK did not come to an end by way of Ms Altham-Wooding's resignation. Instead, I am satisfied that PKDK's conduct, as set out above and summarised in the previous paragraph, was the principal contributing factor which resulted, directly or consequentially, in the termination of the employment of Ms Altham-Wooding on 22 July 2024.

[34] For the reasons given, I am satisfied that the employment of Ms Altham-Wooding with PKDK was terminated on PKDK's initiative. It follows that Ms Altham-Wooding was dismissed within the meaning of s 386(1)(a) of the Act.

Was the dismissal harsh, unjust or unreasonable?

[35] Section 387 of the Act requires that I take into account the matters specified in paragraphs (a) to (h) of the section in considering whether Ms Altham-Wooding's dismissal was harsh, unjust or unreasonable. I will address each of these matters in turn below.

Valid reason (s 387(a))

General principles

[36] It is necessary to consider whether the employer had a valid reason for the dismissal of the employee, although it need not be the reason given to the employee at the time of the dismissal.[9] In order to be "valid", the reason for the dismissal should be "sound, defensible and well founded"[10] and should not be "capricious, fanciful, spiteful or prejudiced."[11]

[37] The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[12] The question the Commission must address is whether there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees).[13]

[38] In cases relating to alleged conduct, the Commission must make a finding, on the evidence provided, whether, on the balance of probabilities, the conduct occurred.[14] It is not

enough for an employer to establish that it had a reasonable belief that the termination was for a valid reason.[15]

[39] The question of whether there was a valid reason must be assessed by reference to facts which existed at the time of the dismissal, even if they did not come to light until after the dismissal.[16]

[40] The employer bears the evidentiary onus of proving that the conduct on which it relies took place.[17] In cases such as the present where allegations of serious misconduct are made, the *Briginshaw* standard applies so that findings that an employee engaged in the misconduct alleged are not made lightly.[18]

[41] A reason will be 'related to the capacity' of the applicant where the reason is associated or connected with the ability of the employee to do his or his job.[19] The appropriate test for capacity is not whether the employee was working to their personal best, but whether the work was performed satisfactorily when looked at objectively.[20]

Consideration re valid reason

[42] The material filed by Ms Altham-Wooding in support of her application for unfair dismissal included a recording she made of her attendance in the office at the Park on 28 May 2024. Ms Altham-Wooding secretly made that recording on her mobile phone. PKDK did not consent to the recording and did not become aware of it until Ms Altham-Wooding filed her material in chief in the Commission in accordance with my directions. Because the recording was made secretly, I rejected the request by Ms Altham-Wooding to tender the recording at the hearing.

[43] I am satisfied that Ms Altham-Wooding's secret recording of her attendance in the office at the Park on 28 May 2024 was a valid reason for her dismissal. That PKDK did not become aware of the secret recording by Ms Altham-Wooding until she filed her evidence in the proceedings before the Commission does not prevent the recording being considered as a potentially valid reason for Ms Altham-Wooding's dismissal because it is a matter for the Commission to determine, on the evidence before it, whether there was a valid reason for the dismissal.[21] I consider that, unless there is a justification, the secret recording of conversations in the workplace is highly inappropriate, irrespective of whether it constitutes an offence in the relevant jurisdiction, such as s 7(1) of the *Surveillance Devices Act 2007* (NSW), which prohibits a person from using a listening device to record a private conversation to which a person is a party. In this regard, I adopt the following observations made by Deputy President Colman in *Gadzikwa v Australian Government Department of Human Services*:[22]

> "The reason it is inappropriate is because it is unfair to those who are secretly recorded. They are unaware that a record of their exact words is being made. They have no opportunity to choose their words carefully, be guarded about revealing confidences or sensitive information concerning themselves or others, or to put their best foot forward in presenting an argument or a point of view. The surreptitious recorder, however, can do all of these things, and unfairly put himself at an advantage. Moreover, once it is known that a person has secretly recorded a conversation, this is apt to produce a sense of foreboding in others, an apprehension that they must be cautious and vigilant. This is potentially corrosive of a healthy and productive

> workplace environment. Generally speaking, the secret recording of conversations with colleagues in the workplace is to be deprecated."

[44] Similarly, in *Schwenke v Silcar Pty Ltd*[23] a Full Bench of the Commission found on appeal that the member at first instance "was entitled to conclude that the Appellant had made the recording in secret and that this action was contrary to his duty of good faith and fidelity to the employer and undermined the trust and confidence required in the employment relationship. This action, in itself, was grounds for summary dismissal."[24]

[45] I do not consider that Ms Altham-Wooding had any legitimate justification for secretly recording her attendance in the office at the Park on 28 May 2024. Ms Altham-Wooding had only been employed by PKDK for about a month at the time she made the secret recording. She was attending the office at the Park to speak to Ms Whittingham or Mr Kennedy about her employment. Mr Kennedy had, three days earlier, sent Ms Altham-Wooding a text message asking her to text him to set up a time for them to meet. Ms Altham-Wooding did not respond to that text message and instead just turned up at the office on 28 May 2024.

[46] I am satisfied that Ms Altham-Wooding's conduct in secretly recording her attendance at the office in the Park was contrary to her duty of good faith and fidelity to her employer and undermined the trust and confidence required in the employment relationship. It provided PKDK with a sound, defensible and well-founded reason to terminate Ms Altham-Wooding's employment.

Conclusion re valid reason

[47] I am satisfied on the evidence that PKDK had a valid reason to terminate Ms Altham-Wooding's employment.

[48] That PKDK had sound, defensible and well-founded reasons to terminate Ms Altham-Wooding's employment weighs against Ms Altham-Wooding's contention that her dismissal was harsh, unjust and unreasonable.

Notification of reason (s 387(b))

[49] PKDK did not notify Ms Altham-Wooding of the reason connected with her secret recording of her attendance in the office at the Park on 28 May 2024. However, this was because PKDK was not aware of the secret recording until Ms Altham-Wooding filed her evidence in these proceedings.

Opportunity to respond (s 387(c))

[50] PKDK did not give Ms Altham-Wooding an opportunity to respond to the reason connected with her secret recording of her attendance in the office at the Park on 28 May 2024. Again, this was because PKDK was not aware of the secret recording until Ms Altham-Wooding filed her evidence in these proceedings.

Unreasonable refusal to allow a support person (s 387(d))

[51] There was not any unreasonable refusal by PKDK to allow Ms Altham-Wooding to have a support person present to assist in any discussions relating to her dismissal. There were no such discussions.

Warnings of unsatisfactory performance (s 387(e))

[52] Ms Altham-Wooding was not dismissed for unsatisfactory performance. This factor is not relevant to my assessment of the fairness of Ms Altham-Wooding's dismissal.

Size of enterprise and absence of human resource specialists or expertise (s 387(f) and (g))

[53] PKDK operates a small business. It does not have human resource management specialists or expertise. However, expertise or experience in human resources is not necessary to appreciate that it is unfair not to communicate with a casual employee about why they are not being given shifts when other casual employees are being offered such work, just because the employee in question attended their workplace to have a discussion instead of responding to a text message from their employer to organise a time to meet. In all the circumstances, I am satisfied that neither the size of PKDK's enterprise nor any absence of human resource management specialists or expertise had any material impact on the procedures followed in effecting Ms Altham-Wooding's dismissal.

Other relevant matters

[54] PKDK submits that it has "heard" that Ms Altham-Wooding's attacks were pre-planned because she is bitter that she did not get the Park manager role after applying for it. Ms Altham-Wooding denies that she ever applied, enquired or spoke to anyone about the manager's position at the Park. There is no evidence to support this speculative suggestion by PKDK. I reject it.

Conclusion

[55] After considering each of the matters specified in section 387 of the Act, my evaluative assessment is that PKDK's dismissal of Ms Altham-Wooding was not harsh, unjust or unreasonable in all the circumstances. As a casual employee, Ms Altham-Wooding had no right to any particular hours of work when PKDK took over management of the Park. However, fairness required that PKDK at least communicate with Ms Altham-Wooding and explain why she was not being given the hours she wanted, or as many hours as other casual employees. PKDK refused to communicate with Ms Altham-Wooding because, according to Mr Kennedy, Ms Altham-Wooding did not respond to Mr Kennedy's text message sent on 25 May 2024. Instead, Ms Altham-Wooding attended the office on 28 May 2024 to speak with Ms Whittingham or Mr Kennedy. Ms Altham-Wooding also sent an email on 2 July 2024 asking to speak with Mr Kennedy or Ms Whittingham. They deliberately ignored that email and refused to engage with Ms Altham-Wooding. These factors support Ms Altham-Wooding's contention that she was unfairly dismissed. However, I consider that Ms Altham-Wooding's secret recording of her attendance in the office at the Park on 28 May 2024 destroyed the trust and confidence in her employment relationship with PKDK. This betrayal of trust outweighs the facts and circumstances which support Ms Altham-Wooding's claim that she was unfairly dismissed.

[56] Having regard to all the circumstances, I find that PKDK's dismissal of Ms Altham-Wooding was not unfair. Even if I had found that Ms Altham-Wooding's dismissal on 22 July 2024 was unfair, I would have concluded that she would only have remained employed by PKDK for a further period of about 4 days because she needed regular hours of work and it was inevitable that she would leave PKDK and obtain employment elsewhere, as she did when she sent her resignation email to PKDK on 26 July 2024 and commenced employment at Hat Head Holiday Park on 30 July 2024. It is unlikely that Ms Altham-Wooding would have been offered any casual shifts by PKDK at the Park in the period from 22 to 26 July 2024 had she remained in employment with PKDK during that time.

[57] Ms Altham-Wooding's application for an unfair dismissal remedy is dismissed.

DEPUTY PRESIDENT

Appearances:

Ms K. Altham-Wooding appeared for herself

Ms D. Whittingham and Mr P. Kennedy appeared for the respondent

Hearing details:
2024.
Newcastle (by Microsoft Teams):
27 September.

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[1] *NSW Trains v James* [2022] FWCFB 55 at [45]

[2] *Mohazab v Dick Smith Electronics Pty Ltd* [1995] IRCA 625; (1995) 62 IR 200

[3] *Mohazab v Dick Smith Electronics Pty Ltd* [1995] IRCA 625; (1995) 62 IR 200

[4] *Koutalis v Pollett* [2015] FCA 1165 at [43]; *Canberra Urology Pty Ltd v Lancaster* [2021] FWCFB 1704 at [30]

[5] *Koutalis v Pollett* [2015] FCA 1165 at [43]; *Canberra Urology Pty Ltd v Lancaster* [2021] FWCFB 1704 at [30]

[6] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941 at [47(2)]

[7] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941 at [47(2)]

[8] *Bupa Aged Care Australia Pty Ltd v Tavassoli* [2017] FWCFB 3941 at [45], applying *Koutalis v Pollett* [2015] FCA 1165; 235 FCR 370 at [43]

[9] *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377-8

[10] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373

[11] Ibid

[12] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685

[13] Ibid

[14] *King v Freshmore (Vic) Pty Ltd* (unreported, AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000) Print S4213 [24]

[15] Ibid

[16] *Newton v Toll Transport Pty Ltd* [2021] FWCFB 3457 at [99]

[17] Ibid

[18] *Sodeman v The King* [1936] HCA 75; (1936) 55 CLR 192 at 216 per Dixon J

[19] *Crozier v Australian Industrial Relations Commission* [2001] FCA 1031 at [14]

[20] *Crozie v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport* (2000) 98 IR 137 at [62]

[21] *Lane v Arrowcrest Group Ltd* (1990) 27 FCR 427 at 456); *Byrne and Frew v Australian Airlines Limited* [1995] 185 CLR 410 at 467

[22] [2018] FWC 4878 at [83]

[23] [2013] FWCFB 9842 at [33]

[24] See, too, *Chandler v Bed Bath N' Table* [2020] FWC 3706 at [100]-[101] and *Coles v Scale Supermarkets Australia Pty Ltd* [2022] FWC 1593 at [28]-[30]