DECISION

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

Clayton Crawford
v
John R Keith (NSW) Pty Limited
(C2024/2682)

DEPUTY PRESIDENT WRIGHT SYDNEY, 10 OCTOBER 2024

Application to deal with contraventions involving dismissal – jurisdictional objection – whether applicant dismissed - applicant dismissed

Introduction and outcome

[1] Mr Clayton Crawford has made an application to the Fair Work Commission (Commission) under s.365 of the *Fair Work Act 2009* (Cth) (FW Act) for the Commission to deal with a dispute arising out of allegations that he has been dismissed from his employment with John R Keith (NSW) Pty Limited (JRK) in contravention of Part 3-1 of the FW Act.

[2] JRK has objected to the application on the ground that Mr Crawford was not dismissed from his employment.

[3] Before dealing with the dispute under s.368, I must be satisfied that Mr Crawford was dismissed.

[4] In summary, I have found Mr Crawford was dismissed by JRK within the meaning of s.365 of the FW Act.

Directions and hearing

[5] The matter was listed for directions on 23 May 2024 then again on 11 June 2024.

[6] On 25 June 2024, JRK filed submissions and the following evidence:

1. Witness Statement of Rajan Khatri, Chief Financial Officer, dated 25 June 2024;
2. Witness Statement of Nathan McMahon, Operations Manager dated 25 June 2024; and
3. Witness Statement of Christian Krobot, Senior Project Manager dated 25 June 2024.

[7] On 8 July 2024, Mr Crawford filed submissions and a witness statement on his own behalf.

[8] On 17 July 2024, JRK filed submissions in reply and the following evidence:

1. Witness Statement of Thu Tran, Accountant, dated 16 July 2024;
2. Witness Statement of Nathan McMahon dated 16 July 2024; and
3. Witness Statement of Christian Krobot dated 16 July 2024.

[9] The matter was listed for hearing on 22 July 2024.

[10] Mr Crawford represented himself at the hearing. JRK was represented by Mr Glenn Fredericks of Counsel. Mr Crawford gave evidence at the hearing and was cross-examined by Mr Fredericks. Ms Thu Tran, Mr Rajan Khatri, Mr Nathan McMahon and Mr Christian Krobot were not required for cross-examination and their statements were admitted into evidence without objection by Mr Crawford.

Factual Background

[11] Mr Crawford commenced employment with JRK on 24 May 2021 as a plumber. JRK is contracted to provide plumbing, drainage and civil engineering services on building sites. The parties agree that there was no written contract of employment in relation to the plumber role.[1] Mr Crawford was appointed to the position of leading hand in September 2022 following the termination of the Site Manager. In February 2023 Mr Crawford was told by management that he would now be managing the site and would receive an hourly rate of $62.50 per hour and a company utility. At various times Mr Crawford questioned the additional hours he was working and was advised that it was included in his hourly rate. Mr Crawford says that he was not provided with an employment contract in relation to the position, nor did he apply for the position. He says that he was acting in the position at the direction of JRK management.[2]

[12] Mr McMahon said that on 16 February 2023, which is two weeks after Mr Crawford commenced in the Site Manager role, Ms Tran forwarded a draft contract of employment for Mr Crawford to Mr McMahon for Mr McMahon's approval. Mr McMahon says that JRK does not have a physical record of having provided the contract to Mr Crawford.[3]

[13] Mr Crawford explained at the hearing that as a plumber, then a leading hand, then Site Manager, he usually worked on one particular site. Mr Crawford explained that as a plumber, he worked as a tradesman working on the tools. When he became a leading hand, Mr Crawford continued to carry out his tradesman duties, but also worked on the administration side of the building site which involved filling in permits, attending meetings, attending subcontractor meetings, dealing with builders and ordering material. Mr Crawford said that his duties as a leading hand and a Site Manager were 'pretty much exactly the same'.

[14] Mr McMahon produced payslips which showed that Mr Crawford was referred to a 'Plumber Cat 1' for the week ending 24 May 2021, then a 'Plumber Cat 2' for the week ending 4 October 2022 then a Site Manager for the week ending 7 February 2023.[4]

[15] As a plumber and leading hand, Mr Crawford's employment was covered by the *John R Keith (NSW) Pty Ltd & CEPU Plumbing Division NSW Branch Plumbing Enterprise Agreement 2019-2023* (2019 Agreement) which had a nominal expiry date of 30 September 2023.[5] This Agreement was replaced by the *John R Keith (NSW) Pty Ltd & CEPU Plumbing Division NSW Branch Plumbing Enterprise Agreement 2023-2027* (2023 Agreement) which commenced on 15 December 2023 and provided that payrates would increase by 6% from 1 April 2024.[6]

[16] Mr Crawford gave evidence at the hearing that he did not raise any concerns about his pay until March 2024 and that he was prompted to do so because he was aware that the 2023 Agreement rates of pay were increasing from 1 April 2024. On 7 March 2024, Mr Crawford sent Mr McMahon an email requesting a meeting to discuss his salary review. Mr Crawford indicated that he was hoping to discuss a few things including a possible increase in salary and if JRK would consider a car allowance in lieu of a company ute. Mr McMahon replied later that day and advised that he would come out to site the following week to discuss and work through the request. It appears that this did not occur as Mr Crawford followed up the request on 15 March 2024. Later that day, Mr McMahon advised that he had been working from home that week as he had the flu and that he would arrange a time to catch up with Mr Crawford the following week.[7]

[17] Mr Crawford says that he had a conversation with Mr McMahon at approximately 10.30am on Friday 22 March 2024 where Mr McMahon advised Mr Crawford that he had put a package together for John and John Junior and Mr McMahon would get back to Mr Crawford. Mr McMahon also advised Mr Crawford that it would be unlikely that Mr Crawford would receive a car allowance.[8] Mr McMahon did not dispute that this conversation occurred.

[18] Mr Crawford produced a text message to the Commission which he sent to his wife on 22 March 2024. The text message stated:

> Nathan just rang me, he has put forward a package to John and John jnr and will get back to me. Car will be off the table by the sounds of it.

[19] Although this was not explained during the hearing, I understand that the reference to 'John' and 'John Junior', is to John Keith, Managing Director of JRK and possibly his son (also named John).

[20] Mr Crawford followed up the request for a pay review on 3 April 2024. Mr McMahon says that on 5 April 2024, Mr Crawford and Mr McMahon had a conversation to the following effect:

Mr Crawford:	Hi Nathan, can I have an update on my pay rise request?
Mr McMahon:	Clayton, I have received your request and it is still being considered, I will come back to you once I return from my holiday after 29 April 2024.
Mr Crawford:	Ok, I understand, no problem.[9]

[21] Mr Crawford says that during this conversation, Mr McMahon said,

> There is no payrise. I'm going away for two weeks next week, I will try again when I return.[10]

[22] Mr Crawford produced a text message to the Commission which he sent to his wife on 5 April 2024. The text message stated:

> No pay rise, Nathan is going away for 2 weeks as of next week. He said he would try again after that. Norman point being a site manager, not worth the stress and crap for a few bucks a week more.

[23] Mr McMahon's evidence was that due to his workload and pre-approved annual leave, he did not have capacity to properly collect all relevant data and meet with Mr Keith (who was ultimately responsible for all salary reviews) in order to consider and determine Mr Crawford's salary review request and had planned to do so upon his return from annual leave.[11]

[24] Later that day at 3:00pm on 5 April 2024, Mr Crawford sent the following email to Mr Christian Krobot, Senior Project Manager:

> Dear Christian,
>
> I hope this message finds you well.
>
> After careful consideration and reflection, I have made the difficult decision to step down from my position as a Site Manager effective from April 22 2024 and return to being a plumber on the JRK EBA Agreement should there be a position available.
>
> I have truly valued my time as a Site Manager with the company and the opportunity it has provided for personal and professional growth, however the current workload and hours required to succeed in the role have resulted in my annualised salary being significantly below the current EBA rate. While I have attempted to address these concerns with management over the course of the last month I have been unsuccessful. As a result, the benefits of the EBA agreement offer more value to me as an employee.
>
> I am committed to ensuring a smooth transition during this period and will work diligently to assist JRK find a suitable replacement for the Site Manager position. Furthermore, I will assist with any training and support requirements needed. If required I am also happy to take a leading hand role if that will benefit JRK.
>
> I want to express my deepest gratitude for the support and guidance you have provided during my tenure as a Site Manager. It has been an honor to work alongside such talented individuals and contribute to the success of our team.
>
> Thank you once again for the opportunity to be a Site Manager and for the experience I have gained. I look forward to maintaining positive relationships with my colleagues as I make this change in my career.
>
> Sincerely, Clayton Crawford[12]

[25] Mr McMahon gave evidence that at no time before 5 April 2024 had any determination been made in relation to Mr Crawford's salary review request.[13]

[26] Mr Crawford says that during the period between 5 April 2024 and 22 April 2024, he enquired almost daily with Mr Krobot in relation to what was happening with his position. Mr Crawford says that he received the following responses from Mr Krobot:

a. On 10 April 2024 he was told "its with the Johns".
b. On 16 April 2024 he was told "I spoke to Junior yesterday and they are working on it".
c. On 19 April 2024 he was told "I'm going to talk to John today".[14]

[27] On 22 April 2024, Mr Crawford sent Mr Krobot an email which stated:

> As I have not received any communication on this matter, I am just reminding you that today will officially be my last day as a Site Manager. Unless I hear otherwise I assume that I will be continuing on with JRK as a plumber on the current EBA. Could you please get back to me in regards to what JRK would like me to do about the company ute?[15]

[28] Later that morning Mr Krobot attended site and advised Mr Crawford that 'You will be finishing up today, you will need to pack your things and return the ute to head office'. Mr Krobot advised that a letter would be issued by Ms Tran when Mr Crawford dropped his ute, iPad and phone back to the office.[16]

[29] Mr Krobot's version of this conversation is that he said to Mr Crawford:

> Hey mate, I spoke with Management about you stepping down and going back into a plumber role. Unfortunately, there are no plumber roles in the company right now so we have accepted your resignation effective from today. You will need to go to head office now and drop off your company equipment and vehicle.[17]

[30] On 22 April 2024 following his conversation with Mr Krobot, Mr Crawford sent Ms Tran the following email:

> Good Morning Thu,
> Unfortunately I have informed this morning that my services are no longer required as a JRK employee. I will be at the office between 12-12.30 can I please get you to prepare a termination letter stating that I have been made redundant as of today for me to pick up whilst I am there.[18]

[31] At JRK head office Mr Crawford met with Ms Tran in the main foyer where he signed paperwork and returned all company property. Mr Crawford asked Ms Tran for a redundancy letter and she informed him that he would not be receiving one. Mr Crawford questioned why he would not be receiving a redundancy letter. Ms Tran then contacted Mr Khatri and Mr Krobot to discuss the matter.[19]

[32] Mr Crawford said that during this meeting Mr Khatri informed him that JRK will not give Mr Crawford a redundancy letter because Mr Khatri believed that Mr Crawford's position was not redundant and JRK still has a job as a Site Manager for Mr Crawford. Mr Crawford

says that he advised Rajan Khatri that he was not interested in continuing as a Site Manager due to the underpayment of wages.[20] Mr Krobot and Mr Khatri both confirmed in their evidence that Mr Crawford alleged that he had been underpaid at this meeting.[21]

[33] Mr Crawford says that Mr Khatri then agreed to provide a redundancy letter if Mr Crawford agreed to not take action against JRK for not providing two weeks' notice. Mr Crawford agreed with Mr Khatri's conditions and left the meeting.[22] Mr Krobot and Mr Khatri both gave evidence that says that Mr Khatri gave Mr Crawford the redundancy letter in return for Mr Crawford agreeing not to pursue any further action against JRK in relation to underpayments.[23] Mr Crawford gave evidence at the hearing that the reason he requested the redundancy letter was so that he could access payments through Incolink which is a building and construction industry redundancy fund. The issuing of the redundancy letter resulted in the Incolink payment being tax free.

[34] In relation to the alleged underpayment of wages, JRK produced spreadsheets which it attached to its Form 8A Response showing that from the period from 7 February 2023 to 23 April 2024, Mr Crawford received the equivalent of $180,488 as a salaried employee compared to $162,716.68 under the 2019 and 2023 Agreements.[24] Mr Crawford said he disagreed with JRK's calculations as he believed that the 20 year old vehicle that he was provided with was not worth the weekly $288.46 allowance that JRK ascribed it under JRK's calculations. Mr Crawford produced calculations which showed that he was receiving an hourly rate of $62.50 compared to the hourly rate of $58.49 under the enterprise agreement. Mr Crawford's calculations showed that if he worked five hours of overtime per week, he would receive $429.50 less per week under his current salaried arrangements compared to the 2023 Agreement.[25]

Legislation

[35] The application has been brought under s.365 of the FW Act which provides:

> **365 Application for the FWC to deal with a dismissal dispute**
>
> If:
>
> (a) a person has been dismissed; and
>
> (b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;
>
> the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.

[36] The issue between the parties which the Commission has been asked to determine is whether Mr Crawford was dismissed by JRK. The dictionary at clause 12 of the FW Act refers to section 386 for the definition of "dismissed".

[37] Section 386 of the FW Act provides:

> **386 Meaning of *dismissed***
>
> (1) A person has been ***dismissed*** if:

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

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

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

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

(b) the person was an employee:

(i) to whom a training arrangement applied; and

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

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

(c) the person was demoted in employment but:

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

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

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

Consideration

[38] Mr Crawford alleged that he was terminated by JRK because he identified that he was paid below the current enterprise agreement which applied to his substantive employment with JRK. However, this claim cannot be determined until the Commission deals with the matter under s.368, and only if the Commission issues a certificate of attempted conciliation under s.368(3). Under s.368, the Commission may deal with the matter in numerous ways including by mediation or conciliation, or by making a recommendation or expressing an opinion.

[39] If there is a dispute as to whether the alleged dismissal the subject of the application has occurred, this is a preliminary issue which, according to the Federal Court Full Court decision in *Coles Supply Chain Pty Ltd v Milford*,[26] 'must be resolved before the powers conferred by s.368 can be exercised at all'.[27]

[40] In this regard, the Full Bench in *Lipa Pharmaceuticals Ltd v Mariam Jarouche*[28] stated,

> Where the respondent to a s.365 application contends, in its response to the application or otherwise, that the application was not validly made because the applicant was not dismissed, this must be determined prior to the Commission 'dealing' with the dispute under s.368 including by conducting a conciliation conference.[29]

[41] As JRK has claimed that Mr Crawford was not dismissed, I must find that a dismissal occurred before conducting a conciliation conference or otherwise dealing with this matter under s.368.

[42] The expression 'termination at the initiative of the employer' is well understood to be a reference to a termination that is brought about by an employer, and which is not agreed to by the employee. In circumstances where the employment relationship is not left voluntarily by the employee, the focus of the inquiry 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.[30]

[43] Mr Crawford alleges that he requested to return to his substantive position of plumber was told no positions were available. On this basis Mr Crawford's employment was terminated on redundancy grounds. In the alternative, Mr Crawford claims that he was forced to step down from the Site Manager position due to the conduct engaged in by JRK in underpaying his wages.

[44] JRK denies that Mr Crawford's substantive position was that of a plumber. JRK claims Mr Crawford initiated the termination of his employment. In the Form 8A, JRK stated that Mr Crawford's letter of 5 April 2024 was considered to be a resignation. During the hearing, JRK submitted that Mr Crawford's unilateral actions in stepping down from the Site Manager role ended the employment at Mr Crawford's initiative. In effect this amounted to a repudiation of the employment contract by Mr Crawford which was accepted by JRK. JRK also submits that on 22 April 2024, there was a meeting between the parties at which it was agreed that Mr Crawford's employment would terminate that day (as Mr Crawford had indicated) and that this would be on the basis of a redundancy.

[45] Mr Crawford was appointed to the position of Site Manager just two months before two significant changes to the 2019 Agreement were to take effect. Firstly, the rates of pay were due to increase by approximately 3.7% from 1 April 2023. Secondly, overtime rates, which were paid at time and a half for the first two hours then double time thereafter were to increase to double time from 1 April 2023.

[46] There is no evidence to support Mr Crawford's contention that he was appointed to the Site Manager position on an acting basis so I do not accept that this was the case.

[47] In my view, JRK should have provided the contract of employment to Mr Crawford prior to Mr Crawford commencing in the Site Manager role so that Mr Crawford could consider the role and the implications of his pay and conditions no longer being determined by the 2019 Agreement. The contract was not prepared until Mr Crawford was in the role for two weeks and based on the evidence was never provided to Mr Crawford.

[48] Mr Crawford was required to work 40 hours per week plus overtime in the Site Manager position. The 2019 and 2023 Agreements provide for a 36 hour week with employees expected to work eight hours per day for nine days a fortnight so they can take a rostered day off on the tenth day. If employees are required to work in excess of 36 hours per week, they are paid overtime each hour worked.

[49] The calculations prepared by JRK and submitted with the Form 8A do not account for the four hours of overtime which Mr Crawford was entitled to under the 2019 and 2023 Agreements as a result of working a 40 hour week. Mr Crawford's calculations have been prepared based on an assumption that he worked five hours overtime in addition to 40 hours each week. I accept that Mr Crawford regularly worked in excess of 40 hours per week and I note that this is acknowledged in JRK's calculations.

[50] To assess whether Mr Crawford's concerns about his pay were justified, I have calculated what Mr Crawford would have received for working a 40 hour week under the 2019 and 2023 Agreements during the period that he performed the Site Manager role. I have excluded travel costs as there is no evidence which explains why JRK valued the vehicle at $288.46 per week and I note that in any event, Mr Crawford was advised that the hourly rate (not the value of the vehicle) included the additional hours he was working. Although the written contract of employment did not apply to Mr Crawford as he never received or signed it, it is consistent with this advice as it provides:

> The Employee's ordinary hours of work will be an average of 40 hours per week. From time to time the Employee will be required to work reasonable additional hours or after hours when necessary to perform his or her duties.
>
> The Employee acknowledges that the Remuneration has been calculated so as to include compensation for overtime which is a normal feature of work within the building industry, and that to the extent permitted by law, the Employee will not be entitled to receive any remuneration for work performed outside ordinary business hours.

[51] In the contract, 'Remuneration' is defined as $130,000 plus superannuation. Further the contract provides that a motor vehicle may be provided to the employee in connection with the Employment by the Company at 'its absolute discretion'. In other words, the use of a motor vehicle is not an enforceable employment condition under the contract.

[52] The calculations below show that for a two month period Mr Crawford received $178.39 more under the salary arrangement compared to the 2019 Agreement if he worked a 40 hour week. By 1 April 2023, he was only better off by $51.68 per week and by 1 April 2024 he was worse off by $110.96 per week. Although overtime above 40 hours per week is not factored into the calculations below, any work which Mr Crawford performed in excess of 40 hours per week from 1 April 2023 would have been paid at the rate of $103.36 per hour, resulting in Mr Crawford being worse off under the salary arrangement.

	2019 Agreement	**2019 Agreement**	**2023 Agreement**	
	1 Feb 2023	**1 April 2023**	**1 April 2024**	**Salary**
Weekly Rate (36 hour week)	$1,773.72	$1,837.08	$1,947.24	$2,500 (40 hours)
4 hours overtime	$49.27[(1.5x 2)+(2x2)]= $344.89	$51.03 x 2 x 4 = $408.24	$54.09 x 2 x 4 = $432.72	
Site Allowance	$4.20 x 40 = $168	$4.20 x 40 = $168	$4.40 x 40 = $176	

Leading hand allowance[31]	$35.00	$35.00	$55.00	
TOTAL	$2,321.61	$2,448.32	$2,610.96	$2,500

[53] JRK submits that Mr Crawford was 'dissatisfied' with his remuneration and that he 'suffered from something akin to buyer's remorse when (according to his calculations) he determined that he was receiving less in that role then he would have if he had continued to be employed as a leading hand and been covered by the company's enterprise agreement.' I do not agree with this characterisation. There is no evidence before me which establishes that Mr Crawford agreed to accept a lower rate of pay when he became Site Manager. This would be a strange outcome given Mr Crawford's evidence that his duties as a leading hand and a Site Manager were 'pretty much exactly the same' which was not challenged by JRK. Moreover, Mr Crawford was repeatedly advised that his hourly rate of pay was calculated to include overtime. This is a matter which is also referred to in the written contract of employment. There is no evidence as to how JRK calculated the salary, however a reasonable person in Mr Crawford's position would be entitled to assume that the reference point for the calculation of a salary rate which included overtime was the applicable enterprise agreement and that any significant changes to that enterprise agreement would prompt a salary review, particularly if the salary was close to the agreement rates of pay. In this regard, I note that Mr McMahon's evidence was that annual salary reviews are undertaken around March/April each year[32]. I observe that this timeframe coincides with the rates of pay increasing in the 2019 and 2023 Agreements on 1 April each year.

[54] In my view, it was a fundamental term of the verbal contract of employment between Mr Crawford and JRK in relation to the Site Manager position that the annual salary would be set at a rate which included overtime. I have reached this conclusion based on the verbal assurances which were given to Mr Crawford by JRK. Although the written contract of employment does not apply to Mr Crawford as it was never provided to or signed by him, the contract confirms JRK's intention to set the annual salary for the Site Manager position at a rate which included overtime and therefore corroborates Mr Crawford's evidence about the verbal assurances. As neither party has referred to any documents which apply to JRK and its employees with respect to overtime other than the 2019 and 2023 Agreements, this leads me to conclude that the inclusion of overtime in the Site Manager rate of pay must be the overtime rates specified in those Agreements, which apply when more than 36 hours are worked. As overtime must be calculated on a specific rate of pay, and as Mr Crawford's annual salary was higher than the base rates of pay in the 2019 and 2023 Agreements, it is logical that overtime would be calculated on the base rates of pay in the 2019 and 2023 Agreements rather than Mr Crawford's hourly rate of $62.50 based on his annual salary.

[55] Although it is likely that Mr Crawford would have received less than the 2019 Agreement rate of pay from 1 April 2023 if he worked more than 40 hours per week, there is no evidence that he was aware of this at the time. However Mr Crawford's oral evidence at the hearing shows that from early March 2024, Mr Crawford was aware that he would be paid less than the 2023 Agreement rates of pay from 1 April 2024 and that he sought to rectify this on multiple occasions. Mr Crawford sent emails to Mr McMahon on 7 and 15 March and 3 April 2024 seeking a salary review and that he receive a car allowance instead of a company vehicle. Mr Crawford says he also had a conversation with Mr McMahon on 22 March 2024 where Mr McMahon advised Mr Crawford that Mr McMahon had put a package together for John and

John Junior and Mr McMahon will get back to Mr Crawford. Mr McMahon also advised that it would be unlikely Mr Crawford would receive a car allowance. Mr McMahon did not dispute that these conversations occurred. I accept Mr Crawford's evidence that he sought a salary review throughout March and early April 2024.

[56] Mr Crawford says that on 5 April 2024, Mr McMahon said that there would be no payrise but that Mr McMahon would 'try again' when he returned from leave. Mr Crawford made a contemporaneous record of that conversation by sending his wife a text message about it. Mr Crawford presented as a credible witness at the hearing. On the basis of Mr Crawford's evidence and contemporaneous record, I accept that the conversation with Mr McMahon on 5 April 2024 occurred as described by Mr Crawford.

[57] After the conversation with Mr McMahon on 5 April 2024, Mr Crawford sent the letter to JRK advising that he would step down from his position as a Site Manager effective from 22 April 2024 and return to being a plumber on the JRK EBA Agreement should there be a position available. In that letter, Mr Crawford advised that the current workload and hours required to succeed in the role had resulted in his annualised salary being significantly below the 2023 Agreement Rate. The letter noted that Mr Crawford had attempted to address these concerns with management over the course of the last month but had been unsuccessful and consequently, the benefits of the 2023 Agreement offered him more value as an employee.

[58] At all times, Mr Crawford approached the discussions about his pay in a patient, constructive and polite way. In my view this showed that Mr Crawford wanted to maintain a good relationship with JRK and to continue working for JRK. The tone of Mr Crawford's letter in expressing gratitude for the opportunity to work as a Site Manager, committing to ensure a smooth transition, offering to assist with training and support, offering to take a leading hand role and looking forward to maintaining positive relationships with colleagues indicate that Mr Crawford wanted to remain employed by JRK.

[59] It is clear from the letter that the only reason Mr Crawford wished to step down from the Site Manager role is because he was concerned about being paid less than the 2023 Agreement rates. Mr Crawford had tried to resolve this before the new rates commenced on 1 April 2024 by negotiating a pay increase. As this had been unsuccessful, he was proposing to return to a plumber or leading hand role so he could receive the 2023 Agreement rates. JRK may not have been aware that the reason that Mr Crawford was seeking a pay review during March was because he was concerned that he was receiving lower pay compared to the 2023 Agreement. However once JRK received Mr Crawford's letter on 5 April 2024, it was on notice about Mr Crawford's concerns in this regard. The letter alerted JRK to the possibility that Mr Crawford's salary was not high enough to incorporate the overtime rates. In any event this should have been obvious to JRK given that pay rates under the 2019 and 2023 Agreements had increased by almost 10% since Mr Crawford moved into the Site Manager role and all overtime was paid at double time from 1 April 2023. Although Mr McMahon was about to go on annual leave on 5 April 2024, no reason has been advanced by JRK as to why Mr Keith could not have made a decision in Mr McMahon's absence about Mr Crawford's pay and in fact the evidence establishes that Mr Keith was in discussions with Mr Krobot about Mr Crawford's position with JRK after Mr Crawford sent the letter on 5 April 2024.

[60] The cessation of Mr Crawford's employment was initially characterised by JRK as a resignation. It is not surprising that JRK moved away from this characterisation during the hearing and contended that the contract ended as a result of JRK's acceptance of Mr Crawford's repudiation of the contract. The usual position is that where an employee uses unambiguous words of resignation, the employer is entitled to treat this as an effective resignation which operates to terminate the employment.[33] In my view, it was not open for JRK to argue that Mr Crawford's letter of 5 April 2024 used 'unambiguous words of resignation' and therefore constituted a resignation. The letter does not use the word 'resignation'. Further, as described above, the tone and language of the letter is indicative of Mr Crawford wishing to remain employed by JRK. Although the logical consequence of Mr Crawford relinquishing the role of Site Manager in circumstances where a plumber's role is not available is that the employment would end, this is not an outcome which is referred to in the letter and in my view in not readily discernible on the basis of an objective reading of the letter.

[61] I do not accept JRK's argument that Mr Crawford's actions in relinquishing the Site Manager role constituted a repudiatory breach of his contract of employment. JRK should have been proactively reviewing Mr Crawford's salary to ensure that it was set at a rate which included overtime rates in the weeks leading up to the increase in the 2023 Agreement Rates on 1 April 2024. Mr McMahon's evidence that no determination been made in relation to Mr Crawford's salary review request at any time before 5 April 2024 establishes that JRK did not fulfil its obligations in this regard. In my view, JRK was in breach of its obligation under the contract of employment to set Mr Crawford's salary at a rate which included overtime rates when Mr Crawford's salary remained unchanged on 1 April 2024. This entitled Mr Crawford to accept JRK's repudiation of the employment contract and to relinquish the Site Manger role. This amounted to a termination of the contract of employment at the initiative of JRK. The fact that Mr Crawford remained willing to work for JRK as a plumber or leading hand is consistent with decisions of this Commission which have found that an employment relationship can remain on foot although the employment contract has been terminated due to repudiatory conduct by the employer.[34]

[62] As I have found that Mr Crawford's employment was terminated at the initiative of JRK due to JRK's repudiatory conduct, it is not necessary for me to determine whether Mr Crawford was forced to resign, however I do so for completeness given that both parties have made submissions about this matter.

[63] In *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Tavassoli*[35]the Full Bench stated the following in relation to the proper construction of s.386(1) of the FW Act with respect to resignation:

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

employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.

(2) A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s.386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element.[36]

[64] Mr Crawford's argument relies upon the second limb of the definition in s.386(1)(b). If Mr Crawford's conduct in relinquishing the Site Manager role is regarded as a resignation, I find that this was the probable result of JRK's conduct such that Mr Crawford had no effective or real choice but to resign. Mr Crawford worked under the 2019 Agreement for approximately two years then was appointed to the Site Manager role without having the benefit of a written contract which explained he was expected to work a 40 hour week plus regular overtime. When he asked about regularly working additional hours, he was advised by JRK that this was included in his salary. However this advice was incorrect from 1 April 2023 as whenever Mr Crawford was required to work more than 40 hours he was receiving less than he would have under the 2019 Agreement. After almost a year, Mr Crawford became aware that the 2023 Agreement rates of pay would increase from 1 April 2024. He tried to negotiate a salary increase before 1 April 2024 but was unsuccessful and was told by Mr McMahon that the matter would not be revisited until Mr McMahon returned from leave at the end of April 2024. In my view, based upon these events, including the conduct of JRK throughout this period, it was reasonable for Mr Crawford to expect that his Site Manager salary would not be increased at the end of April 2024. Further, I believe, based on my assessment of the conduct of JRK, that the only way that Mr Crawford could avoid being paid below the 2023 Agreement rates once they applied from 1 April 2024 was for Mr Crawford to step down from the Site Manager position and request appointment to a leading hand or plumber position.

[65] Although I am not required to determine this matter for the purpose of considering whether Mr Crawford was dismissed, I observe that it is likely that the 2019 and 2023 Agreements continued to apply to Mr Crawford in the role of Site Manager, given that the role is not referred to in clause 2.3 of the Agreements which specifies the roles that are not covered by the Agreements.

[66] I finally deal with the letter of termination which was issued at Mr Crawford's request so that he could access redundancy benefits through Incolink. The letter was requested and issued once it was clear to both parties that the employment relationship had ended so I do not regard the letter as either establishing that Mr Crawford's employment was terminated at the initiative of JRK or that the termination occurred by agreement of both parties. There is simply no evidence to support JRK's submission that the outcome of the meeting on 22 April 2024, between Mr Crawford, Mr Kahtri, Mr Krobot and Ms Tran was that there was an agreement between the parties confirming that Mr Crawford's employment would terminate that day and that it would be treated as a redundancy.[37]

Conclusion

[67] Taking into account the parties' submissions and the evidence before me, I find that the actions of JMK in failing to ensure that Mr Crawford's annual salary was set at a rate which included overtime was the principal contributing factor which resulted directly or consequentially in the termination of Mr Crawford's employment. Therefore, Mr Crawford's employment was terminated on the initiative of JRK. The termination took effect on 22 April 2024.

[68] There is no evidence that establishes, and the parties have not submitted, that the exemptions in s.386(2)(a)-(c) apply. Accordingly, I find that Mr Crawford has been dismissed within the meaning of s.365 of the FW Act.

[69] The jurisdictional objection raised by JRK is dismissed and I order accordingly.

[70] The matter will shortly be listed for Conference so that the Commission can deal with the matter as required by s.368 of the FW Act.

DEPUTY PRESIDENT

Appearances:

Mr C. *Crawford,* Applicant

Mr G. *Fredericks,* Counsel, for the Respondent
Ms K. *Potter,* Solicitor from Yates Law, for the Respondent

Hearing details:

2024
22 July
In person, Sydney

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[1] Witness Statement of Nathan McMahon dated 16 July 2024, [3], Digital Hearing Book (DHB), 175.

[2] DHB, 112-3.

[3] Witness Statement of Nathan McMahon dated 16 July 2024, [8], [9] (DHB, 176).

[4] DHB, 269-271.

[5] DHB, 177-268.

[6] DHB, 6-87.

[7] Witness Statement of Nathan McMahon dated 25 June 2024, [4] (DHB, 149, 151-2).

[8] DHB, 117

[9] Witness Statement of Nathan McMahon dated 25 June 2024, [5], (DHB, 149).

[10] DHB, 117

[11] Witness Statement of Nathan McMahon dated 25 June 2024, [8], (DHB, 149).

[12] Witness Statement of Christian Krobot, Senior Project Manager dated 25 June 2024, [5], (DHB, 145, 148).

[13] Witness Statement of Nathan McMahon dated 25 June 2024, [9], (DHB, 149).

[14] DHB, 111.

[15] DHB, 123.

[16] DHB, 112.

[17] Witness Statement of Christian Krobot, Senior Project Manager dated 25 June 2024, [8], (DHB, 146).

[18] DHB, 124.

[19] DHB, 119.

[20] DHB, 119.

[21] Witness Statement of Christian Krobot, Senior Project Manager dated 25 June 2024, [9], (DHB, 146); Witness Statement of Rajan Khatri, Chief Financial Officer, dated 25 June 2024, [5], (DHB, 153).

[22] DHB, 119.

[23] Witness Statement of Christian Krobot, Senior Project Manager dated 25 June 2024, [9], (DHB, 146); Witness Statement of Rajan Khatri, Chief Financial Officer, dated 25 June 2024, [5], (DHB, 53).

[24] DHB, 106-107.

[25] DHB, 110, 121.

[26] [2020] FCAFC 152.

[27] Ibid, [67].

[28] [2023] FWCFB 101.

[29] Ibid, [23].

[30] *Mohazab v Dick Smith Electronics Pty Ltd* [1995] IRCA 625; 62 IR 200.

[31] These calculations follow JRK's approach to the leading hand allowance at DHB 106. Initially the weekly leading hand allowance is specified as $35. It increases to $55 per week from 30 January 2024.

[32] Witness Statement of Nathan McMahon dated 25 June 2024, [9], (DHB, 149).

[33] *Bupa Aged Care Australia Pty Ltd v Shahin Tavassoli* [2017] FWCFB 3941, [35].

[34] See for example *NSW Trains* v *Mr Todd James* [2022] FWCFB 55, [45].

[35] [2017] FWCFB 3941.

[36] Ibid, [47].

[37] Respondent's Outline of Submissions on Jurisdictional Objection [13] DHB 143.