

Article Information

Authors: Tim Capelin, Emily Setter

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Commission clarifies law on constructive dismissals

The recent decision in *Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli* [2018] FWC 1074 has implications for employers when handling resignations received from employees. Commissioner Cambridge's judgment provides important guidance on what conduct will constitute termination at the employer's initiative.

The judgement arose as a result of a re-hearing on the discrete question of whether the Applicant, who had brought proceedings on the basis that she had been forced to resign within the meaning of section 386(1)(b) of the *Fair Work Act* 2009 (Cth), was actually dismissed at the initiative of the employer within the meaning of section 386(1)(a) of the Act.

Background

Ms Tavassoli (**Applicant**), who is a refugee from Iran with limited English language skills, was employed by Bupa (**Respondent**) for approximately thirteen years as an Assistant in Nursing. On the day of the Applicant's alleged (but ultimately unproven) resignation, the Acting General Manager of the facility required the Applicant to step outside the premises for a "quick chat". The Applicant waited outside the premises for approximately two hours with no idea what allegations had been made against her. Deeply upset, she came to the conclusion that the allegation may involve a six pack of beer that had been offered to her by a resident.

The Applicant testified that she particularly did not want to be accused of being a thief or have her employment terminated for stealing due to her cultural background. As a result, when a colleague walked past her as she waited outside, she asked for her help to draft a resignation letter. The hand written letter, which had the incorrect date, contained a provision for 4 weeks' notice of resignation. The Applicant proceeded into the premises and handed the letter to the General Manager, who did not accept her resignation. The Applicant then attended a meeting with the Facility's Care Manager and the General Manager who read out letters from the Respondent containing allegations of unrelated misconduct. Relevantly, the Applicant was not provided with a copy of these letters. The Applicant claimed that she did not fully understand the meaning of the correspondence but did not want to participate in the proposed investigation. Accordingly, she scribbled out the 4 weeks' notice on her handwritten resignation letter, purporting to resign with immediate effect, and handed the letter back to the General Manager.

The following day, the General Manager accepted the Applicant's resignation via letter. The Applicant then attended the premises and sought to rescind her resignation. This attempt was refused by the General Manager. In response, the Applicant filed an unfair dismissal application on the basis that she was "forced to resign" within the meaning of section 386(1)(b) of the Act because of the employer's conduct. Her claim was upheld at first instance.

The Full Bench upheld the Respondent's appeal, finding that the Applicant had not been forced to resign, and referred the matter for re-hearing by Commissioner Cambridge on the question of whether the Applicant was actually dismissed at the initiative of the Respondent (as per 386(1)(a)). The re-hearing was considered appropriate by the Full Bench to ensure the Respondent was not "...denied the opportunity to mount an evidentiary case which addressed s.386(1)(a)".

Decision

Commissioner Cambridge considered whether the Applicant's purported resignations before the meeting and during the meeting, and the Respondent's refusal to accept the Applicant's withdrawal of her resignation, amounted to termination at the initiative of the Respondent. The Commissioner acknowledged that this matter had "traversed an area of employment law which has been the subject of considerable conjecture over many decades." [1] In respect of section 386(1)(a) of the

Act, the Commissioner noted as follows:

- Overt dismissal by the employer undeniably represents termination of employment at the employer's initiative.^[2]
- Resignations in the "heat of the moment" where it is unreasonable for an employer to assume that a resignation was genuinely intended can amount to dismissal. It will be unreasonable to assume that a resignation is genuinely intended where special circumstances or other factors exist.
- Repudiatory conduct by an employer in unilaterally imposing terms which are inconsistent with continuation of employment can amount to termination at the employer's initiative.^[3]

Commissioner Cambridge took the view that the Applicant's resignation was not "given freely, deliberately and as a result of any reasoned deliberation". The Applicant was crying and distressed, and described herself as being in "panic mode". Particular weight was given to the Applicant's lack of English language skills and the Applicant's heightened concerns about stealing which stemmed from her ethnic and cultural background. Accordingly, Commissioner Cambridge held that the Applicant was dismissed at the employer's initiative within the meaning of section 386(1)(a) of the Act. The file was returned to the Full Bench for determination of what further Orders should be made in respect of the Applicant's unfair dismissal claim.

Implications

Employers should be cautious in thinking they will be safe to rely upon resignations given "in the heat of the moment" or when the employee is clearly distressed and then soon withdrawn.

We do not recommend that employers refuse to accept such resignations when given or suggest the employee withdraw it and take time to think about their decision. However, if the employee seeks to withdraw the resignation soon after, you should obtain advice before making a decision if you do not wish to allow the retraction.

Should you have any questions concerning how the decision may affect your business, please contact a member of Piper Alderman's Employment Relations team.

^[1]Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli [2018] FWC 1074 at [32].

^[2]Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli [2018] FWC 1074 at [38].

^[3]Bupa Aged Care Australia Pty Ltd T/A Bupa Aged Care Mosman v Shahin Tavassoli [2018] FWC 1074 at [42].