DECISION

Fair Work Act 2009
s.604—Appeal of decision

NSW Trains
v
Mr Todd James
(C2021/4959)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ASBURY
DEPUTY PRESIDENT EASTON
COMMISSIONER P RYAN MELBOURNE, 8 APRIL 2022

Appeal against decision [2021] FWC 4733 of Deputy President Saunders at Newcastle on 3 August 2021 in matter number U2021/3757 – jurisdictional objection – whether applicant dismissed – demotion – permission to appeal granted – appeal allowed – jurisdictional objection upheld.

DECISION OF JUSTICE ROSS, PRESIDENT, VICE PRESIDENT CATANZARITI, DEPUTY PRESIDENT ASBURY AND COMMISSIONER RYAN

1. Introduction

[1] This Full Bench has been constituted to determine the appeal from a decision of Deputy President Saunders[1] (**the Decision**) issued on 3 August 2021.

[2] In the Decision, the Deputy President determined that Mr James had been demoted in his employment within the meaning of s.386(2)(c) of the *Fair Work Act 2009* (Cth) (**the FW Act**). The Deputy President determined that the demotion involved a significant reduction in Mr James' remuneration, and therefore, Mr James had been dismissed within the meaning of s.386 of the FW Act. Accordingly, the Deputy President dismissed the Appellant's jurisdictional objection to Mr James' unfair dismissal application.

The Decision at First Instance

[3] At [2] - [8], [10]-[11], [39], and [42] - [43] of the Decision, the Deputy President summarised the factual background and his key findings and conclusions as follows:

> **[2]** Following an investigation into allegations of misconduct, NSW Trains took disciplinary action against Mr James, a Shift Manager who has been employed by NSW

[1] [2021] FWC 4733

Trains and its predecessors for over 30 years, by reducing his grade from Rail Classification (***RC***) 6 Level E to RC6 Level A and his gross pay from $141,442 to $127,569. NSW Trains thereby demoted Mr James.

[3] Although Mr James does not agree with the unilateral decision by NSW Trains to reduce his grade and pay, he remains employed by NSW Trains in the position of Shift Manager. Neither his duties nor his location of work has changed. The employment relationship is ongoing.

[4] The decrease in Mr James's gross remuneration by $13,873 per annum involved a "significant reduction in his remuneration" within the meaning of s 386(2)(c)(i) of the Act.

[5] Because Mr James has been demoted in employment and his demotion has involved a significant reduction in his remuneration, he has been dismissed within the meaning of s 386 of the Act, notwithstanding that his employment relationship with NSW Trains is ongoing and has not been terminated and replaced by a new employment relationship. My reasoning and conclusion in this regard is consistent with, and supported by, the following appellate court authorities:

(a) First, the decision of the High Court in *Visscher v The Honourable President Justice Giudice (**Visscher**)*, where the majority (Heydon, Crennan, Kiefel and Bell JJ) held that "Section 170CD(1B), by implication, treated a demotion as a termination of employment where it involved a significant reduction in remuneration or duties of the employee" [emphasis added]. In the context of a demotion, there is no material difference between s 170CD(1B) of the *Workplace Relations Act 1996* (Cth) (***WR Act***) and s 386 of the Act; and

(b) Secondly, a recent decision of the Federal Court of Australia in *Broadlex Services Pty Ltd v United Workers' Union (**Broadlex**)*, where Justice Katzmann observed that "para 386(2)(c) necessarily implies that a demotion in employment which involved a significant reduction in the employee's remuneration or duties is a dismissal although the employee remains in the employer's employment".

[6] In my view, single-member decisions of the Commission which are inconsistent with these authorities should not, with respect, be followed. Included in this category are decisions in which it has been held that a demotion cannot constitute a dismissal within the meaning of s 386 of the Act unless there has been a termination of the employment relationship in accordance with s 386(1)(a) or (b).

[7] The analysis of whether there has been a termination at the initiative of the employer for the purpose of s 386(1)(a) of the Act is to be conducted by reference to termination of the employment relationship, not by reference to the termination of the contract of employment operative immediately before the cessation of the employment. It follows that the termination of a contract of employment, by demotion or otherwise, cannot, of itself, constitute a dismissal within the meaning of s 386 of the Act in circumstances where there has been no termination of the employment relationship.

[8] Whether a particular type of disciplinary action such as demotion is permitted by the terms of an employment contract, enterprise agreement, award or applicable legislation is irrelevant to the question of whether a demoted employee who remains employed by their employer has been dismissed within the meaning of s 386 of the Act. Accordingly, the fact that both the enterprise agreement which applies to Mr James in relation to his employment with NSW Trains and the *Transport Administration (Staff) Regulation*

2012 (NSW) (***Transport Administration Regulation***), which also applies to Mr James, confers on NSW Trains a discretion to impose particular punishments in disciplinary proceedings against employees such as Mr James, including a reduction in his "position, rank or grade and pay", does not have any bearing on the question of whether he, as an ongoing employee of NSW Trains, has been dismissed within the meaning of s 386 of the Act. The existence of such rights and the fairness with which they are exercised in particular circumstances are relevant to the s 387 factors which the Commission must consider when considering whether the dismissal was harsh, unjust or unreasonable.

…

[10] In *Harrison v FLSmidth Pty Limited* [2018] FWC 6695 (***Harrison***), I traced the legislative history concerning when and how a demotion may constitute a dismissal for the purpose of an unfair dismissal application:

…

[37] It follows from the conclusions I have reached that it is not necessary to demonstrate at the outset that an employee has been "dismissed" within the meaning of s 386(1) before determining whether or not s 386(2)(c) is applicable, as was the approach taken in cases such as *Moyle*. Nor is it necessary to find whether changes to remuneration or duties imposed by an employer on a demoted employee are authorised by a contract of employment, or alternatively, result in the existing contract being terminated and replaced by a new contract.

[38] In order for a person who has been demoted to have been dismissed within the meaning of s 386 of the FW Act, the test is whether the demotion involved a significant reduction in the employee's remuneration or duties (whether or not the reduction was authorised by the contract) and they remain employed by the employer that effected the demotion. If so, the person is taken to have been dismissed.

…

[11] I adhere to the opinions I expressed in *Harrison*.

…

[39] … I accept that the disciplinary action taken by NSW Trains against Mr James has involved a reduction in his grade and pay. It follows that NSW Trains has taken disciplinary action against Mr James in accordance with the discretion conferred on NSW Trains by clause 32.14 of the Enterprise Agreement and regulation 20(1) of the Transport Administration Regulation.

…

[42] Section 386(2)(c) of the Act necessarily implies that a demotion in employment which involves a significant reduction in the employee's remuneration or duties is a dismissal even though the employee remains in the employer's employment and there has been no termination of the employment relationship.

[43] Mr James was demoted and his demotion involved a significant reduction in his remuneration. He was therefore dismissed within the meaning of s 386 of the Act. Accordingly, the jurisdictional objection raised by NSW Trains is dismissed …

[footnotes omitted]

[4] On 23 August 2021, NSW Trains filed a notice of appeal in which it seeks permission to appeal and appeals the Decision.

[5] The relevant facts are uncontentious, save in respect of the proper characterisation of 2 issues in relation to Appeal grounds 5 and 6 (discussed at [149] – [173] below).

[6] On 12 October 2021, we issued a Statement[2] posing 8 questions concerning the proper construction and correct application of s.386 of the FW Act. An addendum to the Statement was issued on 19 October 2021.[3] In addition to filing submissions concerning permission to appeal and the merits of the appeal, the parties were directed to respond to the questions in their written submissions.

[7] The Minister for Industrial Relations and interested parties were invited to make submissions in the matter and on 17 November 2021, the Australian Council of Trade Unions (**ACTU**) advised that it wished to intervene in the proceedings.

[8] The following submissions were received:

- NSW Trains (Appellant) – Outline of Submissions on Appeal (Replacement) dated 8 November 2021 (**Appellant's submissions**); Submissions in reply to Respondent lodged 7 December 2021 (**Appellant's reply to Respondent**), Submissions in reply to the Australian Council of Trade Unions lodged 9 December 2021 (**Appellant's reply to ACTU**);
- Todd James (Respondent) – Outline of Submissions lodged 29 November 2021 (**Respondent's submissions**); and
- The ACTU – ACTU Submissions lodged 2 December 2021 (**ACTU's submissions**).

[9] This matter was listed for hearing on 14 December 2021 in respect of both permission to appeal and the merits of the appeal.

2. Permission to appeal

[10] The Appellant submits that it is in the public interest for the Fair Work Commission (**Commission**) to grant permission for the appeal, because:

> '1. The interaction between s.386(1) and s.386(2), in particular whether s.386(2) creates additional classes of circumstances giving rise to a dismissal, is a matter of general importance and has not been authoritatively resolved.
>
> 2. Whether the expression "the person's employment with his or her employer has been terminated on the employer's initiative" also refers to where the employer has repudiated the contract of employment which does not result in a termination of the employment

[2] [2021] FWCFB 6022.

[3] [2021] FWCFB 6047. This reframed question 6 and made a consequential amendment to question 7 of the 12 October Statement.

relationship is an important question applicable to a wide range of circumstances where there is a substantial change to terms and conditions of employment.

3. Whether a reduction in position, rank, grade or pay or a demotion authorised under a contract of employment, enterprise agreement or legislation involves a dismissal within the meaning of s.386(1)(a) or a invokes the operation under s.386(2)(c) is an important question for a large number of employers, in particular in the State public sector, which has not been authoritatively resolved.

4. The decision is disharmonious with other decisions of the Commission dealing with the definition of dismissal, as well as an employer's right to rely [sic] a contract of employment, industrial instrument or legislation authorising reductions in position, rank, grade or pay or otherwise amounting to a demotion.'[4]

[11] The Respondent agrees that the public interest is enlivened in this appeal.[5]

[12] The Decision subject to appeal was made under Part 3-2 - Unfair Dismissal - of the FW Act. Section 400(1) of the FW Act provides that permission to appeal must not be granted from a decision made under Part 3-2 unless the Commission considers that it is in the public interest to do so. Further, in unfair dismissal matters, appeals on a question of fact can only be made on the ground that the decision involved a 'significant error of fact' (s.400(2)). Section 400 of the FW Act manifests an intention that the threshold for a grant of permission to appeal is higher in respect of unfair dismissal appeals than the threshold pertaining to appeals generally.

[13] The public interest test in s.400(1) is not satisfied simply by the identification of error or a preference for a different result. In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Tribunal identified some of the considerations that may attract the public interest:

'... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters ...'[6]

[14] We agree that the appeal raises questions of general importance and significance to the Commission's unfair dismissal jurisdiction, in particular concerning the proper construction and correct application of ss.386(1)(a) and 386(2)(c) of the FW Act.

[15] Accordingly, we are satisfied that it is in the public interest to grant permission to appeal and we do so.

3. Appeal grounds

[16] The Appellant's grounds for appeal are:

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[4] Appellant's submissions, [57] and Annexure B to the Appellant's Notice of Appeal.

[5] Respondent's submissions, [64]. The ACTU did not address this point in its written or oral submissions.

[6] (2010) 197 IR 266, [27].

'1. The Deputy President misconstrued ss.386(1) and 386(2) of the Act by not finding that:

a. ss.386(1)(a) and (b) of the Act establish the exclusive circumstances where an employee is 'dismissed'; and

b. s.386(2) establishes the exceptions to the classes of dismissal set out in ss.386(1)(a) and 386(1)(b) of the Act and did not establish further deemed classes of circumstances when an employee is dismissed in addition to s.386(1)(a).

2. The Deputy President misconstrued s.386(1)(a) of the Act by not holding that the expression 'the person's employment with his or her employer has been terminated on the employer's initiative' is capable of being a reference to the termination of the employee's contract of employment on the employer's initiative.

3. The Deputy President misconstrued s.386(2)(c), read together with s.386(1)(a) of the Act, by not holding that:

a. the words 'demoted in employment', when read in conjunction with s.386(1)(a), means a demotion to a lower position, rank, grade or pay, on the initiative of the employer and without the employee's consent, giving rise to a repudiation of the contract of employment;

b. where an applicable industrial instrument and/or applicable legislation governing the employment relationship of the parties authorises a reduction to position, rank, grade or pay, the contract of employment must be construed subject to the applicable industrial instrument and applicable legislation prevailing over that contract; and

c. when an employer has reduced an employee's position, rank, grade or pay in accordance with provisions of an applicable industrial instrument and/or legislation authorising that action, there has been no repudiation of the contract of employment and therefore no termination of the employee's employment on the initiative of the employer for the purposes of s.386(1)(a).

4. By reason of misconstruing ss.386(1) and 386(2) of the Act, the Deputy President erred in not holding that the Respondent had not been dismissed within the meaning of s.386(1)(a) in that cl.32.14(c) of the *NSW Trains Enterprise Agreement 2018* and regulation 20(1)(c) of the *Transport Administration (Staff) Regulation 2012* (NSW) authorised the imposition of a reduction in position, rank or grade and pay as a disciplinary measure in disciplinary proceedings and therefore s.386(2)(c) did not apply to the circumstances of the case.

5. The Deputy President erred in finding that there was a significant reduction in the Respondent's remuneration for the purposes of s.386(2)(c) of the Act.

6. The Deputy President erred in finding that there was a termination of the Respondent's employment on the initiative of the Appellant in circumstances where the Respondent sought to have imposed and consented to the demotion as a potential alternative to dismissal.'[7]

4. Submissions on appeal and our consideration

[7] Annexure A to the Appellant's Notice of Appeal.

[17] The Appellant's and the Respondent's written submissions dealt with the grounds for appeal first and then the questions posed in the October Statement (as amended). The Appellant and the Respondent both dealt with Appeal grounds 2, 3 and 4 together. The ACTU did not directly address the appeal grounds in its written submissions but made submissions on the proper construction of s.386 relevant to those grounds.

[18] A background paper summarising the written submissions was circulated to the parties on 10 December 2021. No parties raised objections to the summary, although written submissions were clarified and supplemented by each of the parties at hearing.

[19] After reviewing all submissions and responses to the questions posed in the October Statement, we have decided to structure our consideration of the appeal grounds as follows: Appeal grounds 1, 2 and 3a; Appeal grounds 3b, 3c and 4; Appeal ground 5 and Appeal ground 6. The key issue in dispute between the parties centres on Appeal grounds 3b, 3c and 4 (and question 8 of the October Statement).

[20] We note here that we have taken account of all of the written and oral submissions advanced on behalf of Mr James, NSW Trains and the ACTU in reaching our decision.

[21] Before turning to the appeal grounds it is convenient to set out the legislative provisions at the heart of the issues in contention, namely the provisions dealing with the meaning of dismissal.

[22] In order for an employee to have been unfairly dismissed under the FW Act, the person must first have been dismissed.[8] 'Dismissed' is defined in s.12 of the FW Act by reference to s.386. Section 386 provides:

> '**386 Meaning of *dismissed***
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> (1) A person has been ***dismissed*** if:
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> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
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> (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
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> (b) the person was an employee:
>
> (i) to whom a training arrangement applied; and

[8] Section 385(a) of the FW Act.

(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.'

4.1 Appeal grounds 1, 2 and 3a

1. The Deputy President misconstrued ss.386(1) and 386(2) of the Act by not finding that:

a. ss.386(1)(a) and (b) of the Act establish the exclusive circumstances where an employee is 'dismissed'; and

b. s.386(2) establishes the exceptions to the classes of dismissal set out in ss.386(1)(a) and 386(1)(b) of the Act and did not establish further deemed classes of circumstances when an employee is dismissed in addition to s.386(1)(a).

2. The Deputy President misconstrued s.386(1)(a) of the Act by not holding that the expression 'the person's employment with his or her employer has been terminated on the employer's initiative' is capable of being a reference to the termination of the employee's contract of employment on the employer's initiative.

3. The Deputy President misconstrued s.386(2)(c), read together with s.386(1)(a) of the Act, by not holding that:

a. the words 'demoted in employment', when read in conjunction with s.386(1)(a), means a demotion to a lower position, rank, grade or pay, on the initiative of the employer and without the employee's consent, giving rise to a repudiation of the contract of employment;

4.1.1 The relationship between ss.386(1) and 386(2)(c) of the FW Act

[23] The Deputy President found that s.386(2)(c) of the FW Act necessarily implies that a demotion in employment which involves a significant reduction in the employee's remuneration or duties is a dismissal, even if the employee remains in the employer's employment and there has been no dismissal within the meaning of s.386(1).

[24] The Appellant contends that the Deputy President misconstrued ss.386(1)(a) and 386(2)(c). The Appellant submits that the correct interpretation is that 's.386(1) defines, exhaustively and exclusively, the circumstances which give rise to a person being "dismissed"

by an employer under the FW Act and s.386(2) merely creates a series of independent exceptions to s.386(1). It follows that a person who has been demoted in employment has been "dismissed" only if that person's employment has been terminated on the employer's initiative within the meaning of s.386(1)(a) or the employee resigns from his or her employment by reason of being "forced to" by reason of the employer's conduct (which could include a demotion) (s.386(1)(b)).'[9]

[25] The Appellant raises 6 points in support of its construction:

- The plain meaning of the words used in s.386(1) indicates that it is the operative provision in defining where a 'dismissal' occurs. Section 386(1) provides by use of the conditional 'if', that a person may only be dismissed where one of the 2 circumstances in subparagraph (a) or (b) applies.[10]

- It is instructive that the chapeau in s.386(2) is in different terms to the chapeau in s.386(1). The conditional adverb 'however' indicates that it is to be contrasted with the earlier subsection, signalling the creation of a set of different circumstances for which 'a person is not dismissed'.[11] It is intended to mean 'regardless' of whether a person falls within the meaning of dismissed in s.386(1), the matters in s.386(2) are not circumstances giving rise to a dismissal.[12] It is intended to make clear for abundant caution the circumstances when a person is not dismissed.[13]

- The use of 2 separate subsections reinforces the separate operation and purpose of ss.386(1) and 386(2) and is a strong indicator that each subsection must be construed in the logical sequence in which they appear; first, s.386(1) sets out exclusively the meaning of 'dismissed'; and, second, s.386(2) sets out circumstances where a person is deemed to not be 'dismissed'. Had Parliament intended for s.386(2) to establish further circumstances capable of giving rise to a dismissal, it would have framed the chapeau to s.386(2) and the subsections in opposite terms to how they are worded, or those circumstances would have logically been inserted into further subsections of s.386(1).[14]

- 'The Deputy President's interpretation is contrary to the genesis of, and rationale for, the insertion of an earlier iteration of s.386(2) in predecessor legislation.' When s.170CD(1B) – the forerunner to the current s.386(2)(c) – was inserted into the *Workplace Relations Act 1996* (Cth) (**WR Act**), the expression 'termination of the employment' in the WR Act[15] included either the termination of the employment contract (such as demotion of an employee who remains in employment) or the termination of the employment relationship or both.[16] The insertion of s.170CB(1B)

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[9] Appellant's submissions, [14].

[10] Appellant's submissions, [15].

[11] Appellant's submissions, [16].

[12] Appellant's reply to Respondent, [2].

[13] Appellant's reply to Respondent, [2], and Appellant's submissions, [24]-[25].

[14] Appellant's submissions, [17]-[18].

[15] See WR Act, s.170CB(1).

[16] Appellant's submissions, [20] citing *Boo Hwa Chan v Christmas Island Administration* [1999] AIRC 1371, 1429/99 M Print S1443 (2 December 1999, Polites SDP) following *Advertiser Newspapers Pty Ltd v Industrial Relations Commission of South Australia and Grivell* (1999) 74 SASR 240; 90 IR 211.

was directed to the mischief that had been created by virtue of this interpretation of s.170CB(1) and was designed to exclude certain demotions from giving rise to unfair dismissal claims. Given this history, when one interprets ss.386(1)(a) and 386(2)(c) of the FW Act, it can be presumed that Parliament considered and accepted the same interpretation to the same words in the specialised field of workplace relations.[17]

- For the reasons set out in the decision of *Bradley v Solarig Australia Pty Ltd*[18] (***Solarig***), the statutory context of ss.386(2)(a) and 386(2)(b) does not support the construction that each of these paragraphs operate as independent deemed categories of dismissal. The apparent logic of the Deputy President's reasoning is that, even though s.386(2)(c) uses negative language to describe when a type of demotion does not give rise to dismissal, s.386(2)(c) is capable of being read conversely to implicitly create a further independent class of dismissal. It is not apparent why the Deputy President applied the process of inverting the first limb of s.386(2)(c) but not the second limb (remaining in employment). Had the Deputy President done so, then a demotion would only involve a dismissal if the employee did not remain in ongoing employment. The absurdity of the partial inversion of s.386(2)(c) underscores the incoherent approach of construing s.386(2)(c) as an extended category of dismissal.[19]

- The Deputy President's contention that s.386(2) extends the classes of dismissals created in s.386(1) is contrary to dicta of the Federal Court and Full Bench authorities on the construction of the predecessor provision in the WR Act. Katzmann J of the Federal Court of Australia in *Broadlex Services Pty Ltd v United Workers' Union*[20] ***(Broadlex)*** held, in referring to s. 386(2), that it 'does not erect a class of deemed dismissals'. In so doing, Katzmann J expressly renounced the contrary approach of the Deputy President in *Harrison v FLSmidth Pty Limited*[21] (***Harrison***) at [26]. The Full Bench is bound to apply the construction adopted by the Federal Court in seriously considered dicta.[22]

[26] The Respondent submits that, read fairly, the Deputy President in the Decision does no more than identify that s.386(1) does not purport to set out the bounds of circumstances which are captured by the provision, and no error is disclosed in that finding.[23] We do not agree with this reading of the Decision.

[27] The Respondent further submits that in order for a person to have been 'dismissed' for the purposes of the FW Act, the person must satisfy the definition in s.386(1):

- The word 'dismissed' is defined in the FW Act by reference to s.386: see s.12. On a plain and natural reading, s.386(1) provides the definition of 'dismissed'. The 2 limbs of s.386(1) cover 2 scenarios – the employer terminating the employment (on its initiative), or the employee resigning, but being forced to do so due to the employer's

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[17] Appellant's submissions, [20], citing *Broadlex Services Pty Ltd v United Workers' Union* [2020] FCA 867; 296 IR 425 and *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309.

[18] [2021] FWC 2805.

[19] Appellant's submissions, [22]-[23].

[20] [2020] FCA 867; 296 IR 425, [85].

[21] [2018] FWC 6695.

[22] Appellant's submissions, [27].

[23] Respondent's submissions, [10].

conduct. Both are, on their face, broad in scope and require a finding of fact that will, necessarily, require an assessment of the conduct of the employer.[24]

- Section 386(1) therefore excludes scenarios where the contract comes to an end at neither the employer's nor the employee's initiative and/or through agreement between the employer and employee.[25]

- Focusing on the text of s.386(2)(c), the Deputy President found that an employee has been 'dismissed' for the purposes of the FW Act where they have been demoted by the employer and this involves a significant reduction in the employee's remuneration or duties, even if the employee remains in employment. That is necessarily correct, reading s.386 of the FW Act as a whole.[26]

- Section 386(2) provides a list of categories of 'termination' that are, for avoidance of doubt, not 'dismissals' for the purposes of the FW Act, even though the scenario *may* be captured by s.386(1). If the scenarios in s.386(2) could never amount to a dismissal pursuant to s.386(1), then subsection (2) would have no utility.[27]

- This is evident from the language in the chapeaux to s.386(2), contrasted with the chapeaux in s.386(1). As the Full Bench in *Philip Moyle v MSS Security Pty Ltd*[28] found, at [9]: 'Section 386(1) sets out a general definition of what constitutes a dismissal. Section 386(2) then sets out three sets of circumstances which, even if they fall within the general definition, are deemed not to be dismissals. These are, in effect, exceptions to s.386(1).' That decision is correct, and is consistent with the decision in *Broadlex*, where the Federal Court observed (in obiter) at [85] that 's.386 does not erect a class of deemed dismissals'.[29]

- By the inclusion of s.386(2)(c) and reading s.386 as a whole, there is a clear inference that a demotion that does involve a significant reduction in the employee's remuneration or duties, whereby the employee remains employed with the employer, at the very least *can* amount to a dismissal for the purposes of s.386(1).[30]

[28] The Respondent also submits that even if Appeal ground 1(a) of the appeal is upheld, Appeal ground 1(b) ought to be dismissed as it is misconceived. He says the Deputy President made clear at [16] of the Decision:

> '… it has not been suggested in *Visscher*, *Broadlex* or *Harrison* that s 386 creates a class of "deemed dismissals" … it is plain from what the majority of the High Court said in *Visscher* that a demotion involving a significant reduction in remuneration or duties is a dismissal within the meaning of the statute, and this arises by implication.'[31]

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[24] Respondent's submissions, [14].

[25] Respondent's submissions, [15].

[26] Respondent's submissions, [16].

[27] Respondent's submissions, [19].

[28] (2016) 258 IR 117.

[29] Respondent's submissions, [20]-[22].

[30] Respondent's submissions, [23].

[31] Respondent's submissions, [11].

[29] In reply, the Appellant submits that it does not appear in contention between the parties that s.386(1) sets out the meaning of the word 'dismissed' and s.386(2) sets out the circumstances where a person is not 'dismissed' and does not create a further class of deemed dismissals. The Appellant contends that it follows that Ground 1 of the Notice of Appeal has been made out.[32]

[30] The ACTU submits that s.386(2) operates to modify s.386(1), and that s.386(1) must be read subject to it:

> 'Returning to s.386(1), the meaning of 'employment' is further clarified by subsection (2), which provides express exclusions. The use of the word '*however'* in the immediate chapeau indicates clearly that the exclusions are intended to contradict what came before ie the provisions of s.386(1); that is, but for subsection (2) these matters would be caught.'[33] [footnote omitted, underlining added]

[31] The ACTU submits that absent s.386(2)(c), s.386(1)(a) would encompass all demotions where a particular contract has been terminated and replaced with a new contract.[34] The ACTU further submits that the purpose of s.386(2)(c) is to 'condition this', so that 'a person will only be "*dismissed*" within the meaning of the FW Act where said demotion involves a significant reduction in their remuneration or [duties].'[35]

[32] Contrary to Deputy President Saunders' construction, we consider that s.386(1) exclusively defines the circumstances which give rise to a person being 'dismissed' by an employer for the purposes of Part 3-2 the FW Act. It follows that a person who has been demoted in employment, but who remains in the employ of the employer, has only been 'dismissed' if the person's employment has been terminated on the employer's initiative within the meaning of s.386(1)(a) of the FW Act.

[33] We agree with the Appellant's and the Respondent's construction that s.386(2) serves to clarify the scope of s.386(1). This is evident from the language and structure of ss.386(1) and 386(2).

[34] Section 386(2)(c) clarifies that s.386(1) does not apply to certain circumstances. It does not give rise (by implication or otherwise) to a category of dismissal that is separate to s.386(1). That is not to say that in the absence of s.386(2), all circumstances in ss.386(2)(a)-(c) would necessarily be caught by s.386(1)(a). Contrary to the ACTU's submission, the use of the word 'however' in the chapeau to s.386(2) cannot be sensibly read to suggest this.

[35] The effect of the Deputy President's construction of s.386(2)(c) is that by implication, a demotion in employment which involves a significant reduction in the employee's remuneration or duties is a dismissal under the FW Act. In the circumstances, Appeal ground 1 is upheld.

4.1.2 Does s.386(1)(a) encompass termination of the employment relationship and/or termination of the employment contract?

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[32] Appellant's reply to Respondent, [2].

[33] ACTU's submissions, [10].

[34] ACTU's submissions, [33].

[35] ACTU's submissions, [33]. (An apparent typographical error has been corrected by the text within square brackets).

[36] At first instance the Deputy President said—citing *Khayam v Navitas English Pty Ltd*[36] (***Navitas***) —that 'employment … has been terminated' in s.386(1)(a) means termination of the employment relationship, and that termination of a contract of employment, by demotion or otherwise, cannot of itself constitute a dismissal within the meaning of s.386 of the FW Act.[37] In *Harrison*[38] the Deputy President asserted that in reaching this view, which is contrary to *Charlton v Eastern Australian Airlines*[39] (***Charlton***), the majority in *Navitas* relied upon *Visscher v The Honourable President Justice Giudice* (***Visscher***).[40]

[37] The Appellant submits that, as a result of this construction, the Deputy President did not properly consider the Appellant's argument that s.386(2)(c) is only intended to apply where an employee's demotion had amounted to a termination of the contract of employment under s.386(1)(a) (or the employee had accepted the repudiatory breach and s.386(1)(b) applied, which did not apply in this case).[41]

[38] The Appellant submits that 'employment … has been terminated' in s.386(1)(a) means the termination of the employment relationship or the termination of the contract of employment, even though the employment relationship may continue after the contract of employment is terminated and replaced by a new contract.[42] Where an employer imposes fundamental changes to an employee's contractual arrangements, there may be a repudiation of a contract which is capable of giving rise to a termination of employment.[43] Whether there has been a termination of the employment contract depends on the employee's response to the repudiation – the employee may accept the repudiation, the parties agree to terminate the contract of employment by consent and enter into a new contract of employment, or the parties may agree to vary the contract of employment.[44]

[39] The Appellant contends that the origins of s.386(1)(a) and the authorities construing it and its predecessors, speak with one voice (other than *Harrison*) in support of construing s.386(1)(a) as including termination of the employment contract even where the employment relationship continues after the demotion.[45] The Appellant further contends that the operation of ss.386(2)(a) and 386(2)(b) confirm Parliament's intent to make clear that a termination of the contract by operation of its terms will [not] be a dismissal under s.386(1)(a).[46]

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[36] [2017] FWCFB 5162.

[37] The Decision, [7] (citing *Navitas* [75(1)] and [31]–[75]) and *Harrison*, [24] as extracted at [10].

[38] [2018] FWC 6695.

[39] (2006) 154 IR 239.

[40] [2009] HCA 34 , (2009) 239 CLR 361; *Harrison*, [24].

[41] Appellant's submissions, [33].

[42] Appellant's submissions, [59], referring to paragraphs [35]-[37] of the submissions.

[43] Appellant's submissions, [60]-[62].

[44] Appellant's submissions, [62].

[45] Appellant's submissions, [37].

46 Appellant's submissions, [38]: 'Moreover, the operation of ss 386(2)(a) and 386(2)(b) confirms that Parliament intended to make clear that a termination of the contract by operation of its terms will be a dismissal under s 386(1)(a). As the Explanatory Memorandum states, ss 386(2)(a) and 386(2)(b) merely confirm the common law position that there is no termination of employment at the initiative of the employer because the employment has ended at the end of the period, task, season or training arrangement. The insertion of these provisions reflects Parliament's intention that the termination of the contract of employment is a termination of employment under s 386(1)(a).' (An apparent typographical error has been corrected by the text within square brackets).

[40] The Respondent submits that a person can satisfy s.386(1) if an employment relationship is on foot but an employment contract has ended (including by reason of a demotion involving a significant reduction in remuneration or duties as per s.386(2)(c)).[47] The Respondent makes the following submissions:

- Properly construed and having regard to the legislative history and previous consideration of the provisions by the Commission, its predecessors, and the Federal Court, the phrase 'termination of employment' in the predecessor legislation and the phrase 'the person's employment with his or her employer has been terminated' in s.386(1) include the termination of a contract of employment and/or the termination of employment relationship.[48]

- It follows (having regard to s.386(2)(c)) that a demotion which involves a significant reduction in the employee's remuneration or duties may (as a matter of fact) amount to a repudiation of the employment contract which would satisfy s.386(1) of the FW Act.[49]

- On one view, the Deputy President purported to read down s.386(1)(a) so that the provision could only be enlivened if there is a termination of the employment relationship – and not merely a termination of an employment contract (with the employment relationship continuing): at [10]. To the extent that there was a reading down of s.386(1)(a), such a narrow construction is not supported by the authorities.[50]

- The Full Bench in *Charlton*[51] found that a termination of employment occurs when a contract of employment is terminated. It was said that this necessarily occurs when the employment relationship comes to an end. However, it can also occur even though the employment relationship continues. Where a contract of employment has been terminated, but the employment relationship continues, this will be because a new contract of employment has come into existence.[52]

[41] The ACTU contends that, correctly construed, s.386(1)(a) encompasses:

- both the situation where a particular contract has been terminated but the employment relationship persists in altered form, and the situation where the contract and the employment relationship has ended, and

- thus, circumstances including demotion (although in the case of demotion, being limited by s.386(2)(c) to demotion involving a significant reduction in remuneration or duties).[53]

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[47] Respondent's submissions, [24].

[48] Respondent's submissions, [31] and [52].

[49] Respondent's submissions, [32].

[50] Respondent's submissions, [16]-[17], citing see *Boo Hwa Chan v Christmas Island Administration* [1999] AIRC 1371, 1429/99 M Print S1443 (2 December 1999, Polites SDP).

[51] (2006) 154 IR 239.

[52] Respondent's submissions, [18].

[53] ACTU's submissions, [2], [22]-[23] and [25].

[42] The ACTU submits the meaning of 'employment' is further clarified by the express exclusions from s.386(1) in s.386(2)(a)–(c). All 3 exclusions are concerned with particular contractual arrangements coming to an end (in the case of a demotion the termination of a particular contract for alleged breach and the imposition of a new contract) and all 3 are broad enough to encompass circumstances where the employment relationship continues (and this is express in s.386(2)(c)).[54] In the ACTU's view:

> 'What this demonstrates is that the concept of 'employment' being 'terminated' in s.386(1)(a) must necessarily be broad enough to encompass both the simple situation where the contract and the relationship end, and the more complex position whereby a particular contract of employment is terminated but a relationship, governed by different contractual terms, continues but in *changed form*.'[55]

[43] The ACTU submits that if s.386(1)(a) was only concerned with the end of the employment relationship, then s.386(2)(c) would have no work to do (as its terms refer to circumstances that would never fall under s.386(1)(a)). That would be inconsistent with the legislative history and case law.[56] The ACTU submits that 'caution should be exercised' before departing from the system that existed under the predecessor legislation, as there is not textual or contextual support for such an interpretation.[57]

[44] The ACTU considers its construction consistent with *Navitas*, on the basis that that decision 'is better understood as suggesting that the termination of a contract will not *necessarily* lead to a dismissal where the persisting employment relationship remains on foot and *unchanged*, not that contract termination is irrelevant.'[58]

[45] We agree with the proposition that the expression 'employment … has been terminated' in s.386(1)(a) means termination of the employment relationship and/or termination of the contract of employment. Contrary to the Deputy President's view at first instance, on this construction, unless the circumstances in s.386(2)(c) apply, an employee may be dismissed within the terms of s.386(1)(a) if the employer has repudiated the employee's contract of employment by demoting the employee and the employee has accepted that repudiation but has continued to be employed by the employer under a new employment contract.

[46] Given our preferred construction of s.386(1)(a) of the FW Act, it is unnecessary for us to decide whether the repudiation of a contract of employment that is accepted and that gives rise to a new contract of employment also results in the termination of the employment relationship. However, we note that the Federal Court's decision in *Broadlex* provides support for this proposition.[59]

[47] Whilst the parties are in general agreement as to the proper construction of s.386(1)(a), given its central importance to the Commission's unfair dismissal jurisdiction and Deputy President Easton's dissenting view, we consider that it warrants a more detailed examination of its legislative history and Commission case law, as follows.

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[54] ACTU's submissions, [10]-[13].

[55] ACTU's submissions, [15].

[56] ACTU's submissions, [19]-[20].

[57] ACTU's submissions, [21] citing *Anglican Care v NSW Nurses and Midwives' Association* (2015) 231 FCR 316.

[58] ACTU's submissions, footnote 2.

[59] see *Broadlex*, [70] and [81].

[48] Deputy President Saunders related the origins of s.386(1)(a) and relevant authorities in *Harrison* as extracted in the Decision at first instance.[60] That history included the decision of the Full Court of the Industrial Relations Court of Australia in *Brackenridge v Toyota Motor Corporation Australia Ltd*[61] (***Brackenridge***). *Brackenridge* is authority for the proposition that 'termination' and 'termination of employment' in the Termination of Employment Convention (**Convention**) refer to termination of the employment relationship. As the *Industrial Relations Act 1988* (**IR Act**) adopted the meaning of expressions used in the Convention, a demotion after which employment continued did not constitute a 'termination of employment' for the purposes of Div. 3 of Part VIA of the then IR Act.

[49] The decision of the Full Bench of the Australian Industrial Relations Commission (**AIRC**) in *Bluesuits Pty Ltd v Graham*[62] confirmed that as a result of amendments made to the IR Act by the *Workplace Relations and Other Legislation Amendment Act 1996* there was no requirement to interpret Subdiv.B of Div.3 Part VIA of the WR Act by reference to the Convention. Shortly thereafter, the AIRC in *Boo Hwa Chan v Christmas Island Administration*[63] (***Boo Hwa Chan***) expressed a preliminary view that following the Full Court of the Supreme Court of South Australia decision in *Advertiser Newspapers P/L v Industrial Relations Commission of South Australia*,[64] a 'significant demotion in employment' where the employee continues in employment may constitute a termination of employment.[65]

[50] The *Workplace Relations Amendment (Termination of Employment) Act 2001* (Cth) inserted an exclusion for demotion in employment in similar terms to s.386(2)(c) of the FW Act. New s.170CD(1B) of the WR Act provided:

> 'For the purposes of this Division, termination or termination of employment does not include demotion in employment if:
>
> (a) the demotion does not involve a significant reduction in the remuneration of the demoted employee; and
> (b) the demoted employee remains employed with the employer who effected the demotion.'[66]

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[60] [2021] FWC 4733 [10]. See further the outline of authorities in *Navitas* at [33]-[50].

[61] (1996) 142 ALR 99.

[62] (1999) 101 IR 28.

[63] [1999] AIRC 1371, 1429/99 M Print S1443 (2 December 1999, Polites SDP).

[64] (1999) 90 IR 211; [1999] SASC 300.

[65] *Boo Hwa Chan*, [13] (although in the facts of that matter, it was not necessary for the Senior Deputy President to express a concluded view on this). The Full Bench in *Charlton* at [11] characterised the decision of *Boo Hwa Chan* as holding that 'termination of employment' 'includes both the termination of a contract of employment and the termination of the employment relationship'.

[66] The Explanatory Memorandum to the *Workplace Relations Amendment (Termination of Employment) Bill 2000* explained this amendment as follows:

> '13. Item 9 proposes to insert new subsection 170CD(1B), which will provide that, for the purposes of the termination of employment provisions of the Act (Division 3 of Part VIA), the expressions 'termination', or 'termination of employment', do not include a demotion in employment if the demotion does not involve a significant reduction in the remuneration of the demoted employee, and the demoted employee remains employed with the employer who effected the demotion.'

[51] The AIRC Full Bench in *Charlton* was of the view that if the construction of the phrases 'termination' and 'termination of employment' in Div. 3 of Part VA of the WR Act was unconstrained by the Convention then:

> 'they refer to a termination of the contract of employment or a termination of the employment relationship, and therefore extend to a demotion that involves a termination of a contract of employment even if the employment relationship continues pursuant to a new contract of employment.'[67]

[52] After surveying the history of the termination provisions in the WR Act,[68] the Full Bench found that a termination of employment occurs when an employment contract is terminated. This necessarily occurs when the employment relationship comes to an end but can occur even though the employment relationship continues (because a new employment contract has come into existence). Whether the appellant's demotion involved his employment being 'terminated by the employer' within the meaning of s.170CE turned on whether his contract of employment was terminated notwithstanding the continuing employment relationship. That question was answered by reference to general law principles relating to the termination of contracts of employment.[69]

[53] The Full Bench observed that a demotion that involves a significant reduction in remuneration will amount to a repudiation of the contract of employment (unless it is agreed to by the employee or otherwise authorised). If that repudiation is accepted, either expressly or by conduct, then the contract of employment is terminated and if the demoted employee remains in employment with the employer, this is pursuant to a new contract of employment. [70] The Full Bench found on the facts in *Charlton* that by filing an application for relief against termination of employment, the appellant had accepted the respondent's repudiation so that the pre-existing employment contract was terminated.[71]

[54] The AIRC Full Bench in *Department of Justice v Lunn*[72] (***Lunn***) cited *Charlton* in proceeding on the basis that, since the 1996 amendments to the IR Act, 'termination of employment at the initiative of the employer' in s.170CE of the WR Act 'has its ordinary meaning and refers to termination of the contract of employment'.[73]

[55] *Navitas* concerned a termination of employment at the end of a series of 'maximum term' employment contracts. The majority in *Navitas* rejected the above proposition from *Lunn* and correctly pointed out that 'it is difficult to glean that bald proposition from the reasoning in

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[67] *Charlton*, [12].

[68] *Charlton*, [6]-[31]. There, the Full Bench considered whether the 2003 amendments to the WR Act required the AIRC to give the expressions 'termination' and 'termination of employment', as they appeared in s.170CE of the WR Act, the same meaning as in the Convention. The Full Bench held that the better construction was that the amendments did not have this effect.

[69] *Charlton*, [32].

[70] *Charlton*, [34].

[71] *Charlton*, [36].

[72] (2006) 158 IR 410.

[73] *Lunn*, [28].

Charlton.'[74] The majority decision also surveys the history of s.386(1)(a) and relevant case law.[75]

[56] Prior to the 1996 amendments to the IR Act, the Full Court of the Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd*[76] (***Mohazab***) was of the view that 'termination of employment' in the then IR Act was to be understood as referring to termination of the employment relationship:

> 'Consistent with the ordinary meaning of the expression in the Convention, a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship. We proceed on the basis that the termination of the employment relationship is what is comprehended by the expression "termination of employment": *Siagian v Sanel* (1994) 1 IRCR 1 at 19; 54 IR 185 at 201.'[77]

[57] The Explanatory Memorandum for the Fair Work Bill 2008 (**EM**) cites *Mohazab* in describing s.386:

> 'This clause sets out the circumstances in which a person is taken to be dismissed. A person is dismissed if the person's employment with his or her employer was terminated on the employer's initiative. This is intended to capture the case law relating to the meaning of 'termination at the initiative of the employer' (see, e.g., *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 62 IR 200).'[78]

[58] However, as the Federal Court seems to suggest in *Broadlex*, the EM's reference to *Mohazab* can be understood as picking up only the part of the decision that deals with the meaning of 'at the initiative of the employer' (and not the reference to the employment relationship).[79]

[59] Subsequent to *Charlton* and *Lunn*, the AIRC Full Bench in *Searle v Moly Mines Limited*[80] stated that the statutory test under the then WR Act 'relates to the termination of the employment relationship' and that applying 'the common law principles relating to termination of the contract of employment may not yield the correct answer in any given case.'[81]

[60] The majority in *Navitas* assert that the High Court in *Visscher* made it 'absolutely clear' that '*Lunn* did not correctly state the position applying under the WR Act'.[82]

[61] The majority in *Visscher* emphasised that 'termination of the employment relationship' and 'discharge of a contract of employment' are 'different concepts'.[83] 'It does not follow from

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[74] *Navitas*, [43] and [50].

[75] *Navitas*, [31]-[49].

[76] (1995) 62 IR 200.

[77] *Mohazab*, 205.

[78] EM, [1528].

[79] *Broadlex*, [86]-[87].

[80] (2008) 174 IR 21.

[81] Ibid, [39]; see also [22]–[23]. In that case, the employer had purported to accept the employee's alleged repudiation of the contract of employment (her alleged abandonment of employment).

[82] *Navitas*, [45].

[83] *Visscher*, [53].

the fact that a wrongful dismissal is effective to bring the employment relationship to an end that it thereby discharges the contract of employment.'[84] The majority continued:

> 'It was said in [*Byrne v Australian Airlines Ltd* (1995) 185 CLR 410] that, for all practical purposes, the contract of employment will be at an end upon dismissal. In the case of a wrongful dismissal, the possible continuation of it will rarely be of significance. In principle, however, it remains the case that an unaccepted repudiation does not terminate a contract. In the circumstances of this case this assumes importance. To view it as automatically discharged would be to elevate a problem concerning remedies to a substantive principle concerning the termination of contracts.'[85]

[62] The majority in *Visscher* concluded:

> 'Teekay's notice of rescission did not automatically bring the contract appointing Mr Visscher a Chief Officer to an end … In order to decide whether Teekay had repudiated Mr Visscher's contract of employment in January and February 2004 it was necessary for the AIRC to determine the true contractual position between the parties at that time. It was necessary then to determine whether what was said by Teekay at that time amounted to a repudiation such that the termination of the employment relationship could be said to be at its initiative; or whether it amounted to a demotion within the meaning of s 170CD(1B). The correct legal starting point was not that Teekay had rescinded the agreement. Neither the Commissioner nor the Full Bench of the AIRC asked the correct question, as to the contract under which the parties continued after September 2001. This was an error going to jurisdiction.'[86] [emphasis added]

[63] The majority in *Navitas* explained the outcome in *Visscher* as follows:

> '[49] In summary the majority, having carefully drawn the distinction between termination of the employment relationship and termination of the contract of employment, identified the issue arising under the WR Act as whether there was a termination of the employment relationship at the initiative of the employer (or a demotion as defined in s 170CD(1B)). In the subsequent High Court decision in *Commonwealth Bank of Australia v Barker*[87], *Visscher* was cited authority for the proposition that "There is a distinction, relevant in cases of wrongful dismissal, between the employment relationship and the contract of employment, such that the contract may persist when the relationship is at an end".[88]
>
> [50] Thus it is clear, contrary to the first proposition stated in *Lunn* to which we have earlier referred, that a termination of the employment relationship might constitute a termination at the initiative of the employer under the WR Act notwithstanding that the contract of employment remains on foot. That is, under the WR Act, termination at the initiative of the employer did not, on its ordinary meaning, refer to termination of the contract of employment. The first proposition in *Lunn* to which we have earlier referred was therefore not a correct statement of the law under the WR Act ... The correct position remained as stated in *Mohazab*, namely that a termination of employment at the initiative of the employer occurs where the action of the employer is the principal contributing factor which leads to the termination of the employment relationship.'[89]

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[84] *Visscher*, [53]. The majority cites *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 427 and *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435, 454.

[85] *Visscher*, [55].

[86] *Visscher*, [81], extracted in *Navitas* at [48].

[87] (2014) 253 CLR 169.

[88] Ibid, [3] (per French CJ, Bell and Keane JJ).

[89] *Navitas*, [49]-[50].

[64] The majority in *Navitas* concluded that:

> 'The analysis of whether there has been a termination at the initiative of the employer for the purpose of s 386(1)(a) is to be conducted by reference to termination of the employment *relationship*, not by reference to the termination of the contract of employment operative immediately before the cessation of the employment. This distinction is important in the case of an employment relationship made up of a sequence of time-limited contracts of employment, where the termination has occurred at the end of the term of the last of those contracts. In that situation, the analysis may, depending on the facts, require consideration of the circumstances of the entire employment relationship, not merely the terms of the final employment contract.'[90]

[65] It may assist to outline the unusual circumstances in *Visscher*. This decision concerned a seafarer who was promoted to Chief Officer in September 2001, but the employer purported to rescind the promotion a short time later that month. The employee did not accept the rescission and in fact continued to be assigned work and paid as a Chief Officer until January 2004, when the employee was informed that he would be required to work at the lower level. As such, no issue arose between the parties as to performance of the 2001 contract until 2004.[91]

[66] At issue was whether Teekay had demoted Mr Visscher in 2004 and thereby repudiated the 2001 contract with Mr Visscher accepting that repudiation (as asserted by Mr Visscher), or whether his purported demotion in 2001 had been effective and he was to be taken as having resigned in 2004 (as asserted by Teekay). Accordingly, the underlined text in extract from *Visscher* at [62] above can be understood as identifying the issue arising on the singular facts of that case, rather than identifying the test to be applied under Div.3 of Part VIA of the then WR Act more generally.[92]

[67] We note that Deputy President Easton endorses the reasoning and conclusions in *Navitas*, in concluding that there is no textual or other basis to read termination of 'employment' in s.386(1) as encompassing termination of the contract of employment only. Contrary to the position put by all of the parties in the matter, the Deputy President considers that termination of 'employment' in s.386(1)(a) means termination of the employment relationship (at [176]). The Deputy President also expresses the view that there is no textual or other basis in s.386(1) to treat the common law consequences of a repudiation differently when determining, in any particular scenario involving demotion, whether there was a termination of the employment relationship (at [193]). Accordingly, the Deputy President considers that it is only where the employee has accepted the repudiation by electing to bring about the end of the contract and leaving the employment that the employee is eligible to make an unfair dismissal application.

[68] A consequence of the Deputy President's construction is that an employee who has been demoted but remains employed by the employer who effected the demotion is not eligible to make an unfair dismissal application. This proposition was not advanced by any party in the matter and is contrary to Commission authority. For instance, in *Phillip Moyle v MSS Security*

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[90] *Navitas*, [75]. The majority in *Navitas* also observed that a construction of s.386(1) based on the notion of the employment relationship was 'more compatible' with the application of Part 3-2 of the FW Act to casuals than a construction focussing on contract: [71].

[91] *Visscher*, [57].

[92] See *Broadlex,* [69].

Pty Ltd[93], the Full Bench overturned Senior Deputy President O'Callaghan's decision at first instance, saying:

> '**[9]** … The third of these exceptions, in s.386(2)(c), relates to demotions in employment. In order to fall within this exception - that is, for a demotion that otherwise constitutes a dismissal under s.386(1) to be deemed not to be a dismissal, both limbs of the exception must be satisfied, as Mr Moyle submitted. The construction adopted by the Senior Deputy President was, with respect, in error because it inverted the exception by making it necessary for an applicant to negative both limbs of the exception in order for the demotion to be a dismissal. This would have the perverse result that a demotion in employment could never constitute a dismissal, even where it is plain that the existing contract of employment has been terminated and replaced by a new and inferior contract, because the employee will necessarily have remained in employment with the employer and thus could not negative s.386(2)(c)(ii).'

[69] In contractual terms, in response to repudiatory conduct an injured party may choose to affirm the contract and stay in the contractual relationship or accept the repudiation and bring the contractual relationship to an end. While there might be seen to be a tension between an employee both accepting a repudiation of the contract of employment (thereby bringing the contract to an end) and, at the same time, remaining in employment with the employer who effected the demotion, this is expressly contemplated by the statutory provisions and is consistent with the authorities considered below.

[70] As the Appellant contends, whether there has been a termination of the contract of employment following an employer's repudiatory conduct 'depends on the resolution of a factual inquiry as to the response to the repudiatory conduct.'[94] For example, the employee might affirm the contract by negotiating with the employer and agreeing to changes to the contract of employment. Alternatively, the employee could elect to accept the repudiation by lodging an application under Part 3-2 of the FW Act and leaving the employment or (reluctantly) continuing in employment with the employer in the demoted position under a new contract of employment, whilst pursing the unfair dismissal application.

[71] Here, Deputy President Saunders found that Mr James did not agree with the NSW Trains' unilateral decision to reduce his grade and pay, although he remained employed by NSW Trains in the position of Shift Manager. We agree with the Deputy President's findings in this regard. While Mr James continued in employment with NSW Trains as a Shift Manager, he purported to accept the employer's alleged repudiatory conduct by lodging an unfair dismissal application under Part 3-2 of the FW Act.

[72] In the context of a demotion, in *Charlton* the Full Bench of the AIRC held that if the repudiation of the contract of employment is accepted, either expressly or by conduct, then the contract of employment is terminated:

> '[34] … If, in such circumstances, the demoted employee then remains in employment with the employer, this occurs pursuant to a new contract of employment in respect of the demoted position. It may be noted that where the employment continues with the employee allegedly acquiescing in a reduction in salary or other terms of employment, difficult questions may arise as to whether the continued employment involves the continuation of the original contract of employment (but with the employer breaching that contract by paying the reduced salary), a

[93] [2016] FWCFB 372.

[94] Appellant's submissions, [62].

> consensual variation of the terms of the original contract or the termination of the original contract and a substitution of a new contract of employment.' [references omitted, emphasis added]

[73] We agree with this observation.

[74] Deputy President Easton notes that '[w]hilst an employee/innocent contractual party is generally allowed a reasonable time before they must choose between two inconsistent options, the notion of an alleged election/acquiesce, or an acquiesce that the Commission might look behind, is not a concept known to the common law' (at [189]). The Deputy President also observes that 'it may be necessary in particular cases for the Commission to inquire and make findings about whether the employee has made an election' (at [190]).

[75] The use of the term 'acquiescing' in the passage above cited above (although coupled with 'allegedly'), may be apt to confuse in this context. The central question is whether the employee has accepted the employer's repudiation of the contract of employment, thereby bringing that contract of employment to an end. We do not read the Full Bench in *Charlton* as suggesting otherwise.

[76] The question of whether a demotion constitutes a dismissal for the purposes of s.386(1)(a) must be considered in its statutory context and common law principles applied in this context. It is clear from the legislative history and previous consideration of the provisions by the Commission and its predecessors that Parliament did not intend s.386 to exclude all demoted employees who remain employed after their demotion from accessing the unfair dismissal provisions in the FW Act. Section 386(2)(c) proceeds on the premise that a demotion where employment continues can amount to a 'termination of employment' (and then clarifies that particular demotions fall outside the scope of s.386(1)). As a general proposition, provided the employee makes clear their objection to the demotion, they should not be taken to have affirmed their original contract of employment merely by continuing to work in the demoted position and being paid for that work whilst challenging the alleged dismissal before the Commission. Of course, it will be a question of fact in each case as to whether the conduct of an employee constitutes an affirmation of their contract.[95]

[77] In the Victorian Supreme Court case of *Crowe Horwath (Aust) Pty Ltd v Loone*, (***Crowe Horwath***) McDonald J found that the respondent was not to be taken to have affirmed his contract of employment, and was not thereby precluded from accepting the employer's repudiatory conduct as bringing his contract to an end, by reason of a delay of 11 days in accepting the repudiation.[96]

[78] His Honour observed:

> '65. … authorities [subsequent to *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27 (***Sharp*** or the ***Western Excavating*** **case**)] suggest that mere delay in accepting repudiation of a contract of employment does not amount to affirmation where the employee makes his or her objection to the repudiatory conduct clear.

[95] *Crowe Horwath (Aust) Pty Ltd v Loone* [2017] VSC 163, [72].

[96] Ibid [63].

66. In *WE Cox Toner Ltd v Crook,*[97] Browne-Wilkinson J considered the passage from *Sharp* … [and] noted the difficult position of an employee faced with repudiation by an employer: by continuing to work for any period of time, the employee risks affirming the contract. His Honour stated:

> "If one party ('the guilty party') commits a repudiatory breach of the contract, the other party ('the innocent party') can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible causes: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of a contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: *Allen v Robles* [1969] 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation: *Farnworth Finance Facilities Ltd v Attryde* [1970] 1 WLR 1053.
>
> It is against this background that one has to read the short summary of the law given by Lord Denning MR in the *Western Excavating* case [1978] ICR 221. The passage, at page 226:
>
> > 'Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged.'
>
> is not, and was not intended to be, a comprehensive statement of the whole law. As it seems to us Lord Denning MR was referring to an obvious difference between a contract of employment and most other contracts. An employee faced with a repudiation by his employer is in a very difficult position. If he goes to work the next day, he will himself be doing an act which, in one sense, is only consistent with the continued existence of the contract, ie he might be said to be affirming the contract. Certainly, when he accepts his pay packet (ie further performance of the contract by the guilty party) the risk of being held to affirm the contract is very great: See *Saunders v Paladin Coachworks Ltd* (1967) 3 ITR 51. Therefore, if the ordinary principles of contract law were to apply to a contract of employment, delay might be very serious, not in its own right but because any delay normally involves further performance of the contract by both parties. It is not the delay which may be fatal but what happens during the period of the delay: See *Bashir v Brillo Manufacturing Co* [1979] IRLR 295.
>
> Although we were not referred to the case, we think the remarks of Lord Denning MR in the *Western Excavating* case are a reflection of the earlier decision of the Court of Appeal in *Marriott v Oxford and District Co-operative Society Ltd (No 2)* [1970] 1 QB 186. In that case, the lawyer repudiated the contract by seeking to change the status of the employee and to reduce his wages. The employee protested at this conduct but

[97] [1981] ICR 823 ('*Crook*').

> continued to work and receive payment at the reduced rate of pay for a further month, during which he was looking for other employment. The Court of Appeal (of which Lord Denning MR was a member) held that he had not thereby lost his right to claim that he was dismissed. In the *Western Excavating* case Lord Denning MR explains, at page 227, that the case would now be treated as one of constructive dismissal. This decision to our mind establishes that, provided the employee makes clear his objection to what is being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time, even if his purpose is merely to enable him to find another job."[98]

67. In *Crook*, the employee was held to have affirmed the contract of employment. In that case, a period of seven months had elapsed between the employer's repudiatory conduct and the employee's purported acceptance of the repudiation. Browne-Wilkinson J noted that there must be some limit to the amount of time an employee can continue to work and draw a salary from his or her employer before he or she will be taken to have affirmed the contract.[99] However, his Honour held that it was unnecessary to reach a conclusion on whether seven months' delay surpassed this threshold. His Honour instead concluded that the employee had affirmed the contract on the basis that he had issued an ultimatum to his employer six months after the repudiatory conduct yet had remained in employment for one month after his employer had refused to comply with this ultimatum.[100] Importantly, Browne-Wilkinson J concluded that the tribunal below had erred in considering delay to be the only relevant consideration as to whether there had been an affirmation of the contract.[101]

68. *Crook* was cited with approval by Hodgson CJ in *Harris/D-E Pty Ltd v McClelland's Coffee & Tea Pty Ltd*.[102] His Honour also cited with approval *Bashir v Brillo Manufacturing Co,*[103] another English authority in which an employee was held not to have affirmed an employer's repudiatory conduct by reason of a delay in bringing the contract to an end …

…

70. In Harpham v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia,[104] Tracey J stated:

> "It may be accepted that the CEPU repudiated Mr Harpham's contract of employment when it substantially reduced his remuneration package in 2009: see *Cantor Fitzgerald International v Callaghan* [1999] 2 All ER 411 at 420-1. Moreover, after 1 July 2009, the CEPU breached Mr Harpham's employment contract by paying him less than the sum that had been contractually agreed in September 2008.
>
> The CEPU, dealing evidently with the eventuality that its breach was repudiatory, submitted that Mr Harpham 'elected to continue in employment'. I would accept that submission. At the point of repudiatory breach, Mr Harpham could have elected to terminate the contract: see *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403 at 435-6. He did not, however, do so. He chose to

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98 Ibid 828–9.

99 Ibid 830.

100 Ibid 830-1.

101 Ibid 830.

102 [1999] NSWSC 128, [81].

103 [1979] IRLR 295 ('*Bashir*').

104 [2016] FCA 1473.

> remain in his position as an organiser for over three years. During this period further variations to his remuneration occurred and were not objected to by him. While an immediate decision was not required on 1 July 2009 (cf *Rigby v Ferodo Ltd* [1988] ICR 29) his protracted on-going employment was consistent only with his having elected to affirm the contract: cf *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 656; *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622 at 633; and *Galafassi v Kelly* (2014) 87 NSWLR 119 at [88]."[105]
>
> 71. Consistent with the authorities referred to above, the fact that Mr Loone continued to receive a salary during the period from 1 July until 12 July 2016 does not necessitate a conclusion that he thereby affirmed the Contract. …
>
> 72. In each case it is a question of fact as to whether the conduct of an employee constitutes an affirmation of his or her contract. In the present case, the conduct of Mr Loone between 1 July and 12 July 2016 did not constitute an affirmation of the Contract …'[106]

[79] The Federal Court's decision in *Broadlex* provides an example of where repudiatory conduct (not involving demotion) was accepted by the employee, who continued in employment with the employer. In that case, the employee's full-time employment was changed to part-time employment, with a consequent 40% reduction in salary. Katzmann J observed that the employee 'was invited to sign a form of consent to this change, which was described as a "transfer from full time to part time" with a change in hourly rates. Unsurprisingly, she refused. Nevertheless, she began working the reduced hours on 12 September 2017 because she considered she had no choice.'[107]

[80] Broadlex accepted that, in reducing the employee's employment status from full-time to part-time, it had repudiated her employment contract and the magistrate found that the employee had accepted the repudiation by refusing to sign the consent form or agreeing to the variation in terms.[108] The Federal Court upheld the employee's claim that her employer was required to pay her redundancy pay under s.119 of the FW Act, finding that Broadlex's repudiation of the employment contract had brought the employment relationship to an end and that the relationship in which the employee entered after she accepted the repudiation was a fundamentally different relationship from that which the parties had previously enjoyed.[109]

[81] Before leaving this issue, we also wish to touch upon the implications of an alternative construction of s.386(1)(a) on s.386(2)(c) of the FW Act.

[82] As noted at [34], s.386(2)(c) clarifies that s.386(1) does not apply to certain circumstances and does not give rise, by implication or otherwise, to a category of dismissal that is separate to s.386(1). While Deputy President Easton recognises that 'to include only the termination of the contract of employment [within the ambit of s.386(1)(a)] is more readily

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[105] Ibid [82]–[83].

[106] McDonald J's conclusion that the contract had not been affirmed by Mr Loone's continuing in employment up to 12 July 2016 after what constituted, as his Honour found, the applicant's renunciation of a fundamental obligation under the contract, was not challenged on appeal: *Crowe Horwath (Aust) Pty Ltd v Loone* [2017] VSCA 181 (Ashley, Priest and Beach JJA).

[107] *Broadlex*, [4].

[108] *Broadlex*, [7].

[109] *Broadlex*, [70].

reconcilable with the exception found in s.386(2)(c), at least in relation to demotion', he holds that '[t]here is no conflict between the two provisions and there is ample work for s.386(2)(c) to do without requiring a different construction of s.386(1)' (at [191]-[192]).

[83] While we agree that there is no direct conflict between the operation of s.386(2)(c) and a construction of s.386(1)(a) that confines termination of employment to termination of the employment relationship, in view of the legislative history the 2 provisions cannot be read comfortably together and we do not consider that there would nevertheless be 'ample work for s.386(2)(c) to do'.

[84] On the Deputy President's construction of s.386(1)(a), s.386(2)(c) might be seen to wrongly suggest that a demotion involving a significant reduction in remuneration or duties may be a dismissal, whether or not the employee remains employed with the employer that effected the demotion. Further, if Parliament had intended to exclude all demoted employees who remain employed with the employer following their demotion from accessing the unfair dismissal provisions, it could simply have provided for this − that a person is not dismissed if they have been demoted in employment but remain employed with the employer who effected the demotion.

[85] Accordingly, for the above reasons Appeal grounds 2 and 3a are upheld.

[86] For completeness, we take the opportunity here to address some aspects of the decision in *Solarig*, referred to above.

[87] We agree with Deputy President Anderson's conclusion in *Solarig* that s.386(2) does not create independent categories of deemed dismissal, and that a person who has been demoted in employment (and does not fall within the description in s.386(2)(c)(i)) must meet the statutory definition in s.386(1) in order to have been 'dismissed' within the meaning of the FW Act.

[88] However, we do not agree with certain aspects of Deputy President Anderson's reasoning and make the following observations:

[89] First, in considering whether Mr Bradley was dismissed for the purposes of s.386(1) of the FW Act, Deputy President Anderson held that 'dismissal' means termination of the employment relationship.[110] For the reasons given above, we disagree with this construction.

[90] The Deputy President then goes on to suggest, citing *Broadlex* (at [70]), that a repudiatory breach that has been accepted by the employee may have the effect of terminating the employment relationship, even where the employee continues working for the employer, 'where the post-repudiation relationship "was a fundamentally different relationship from the relationship the parties previously enjoyed"'.[111] We disagree with any suggestion that, where an employee has been demoted but remains in employment and the demotion amounts to repudiatory conduct that has been accepted by the employee, the Commission must nevertheless undertake an additional assessment of the 'post-repudiation relationship' in order to ascertain whether s.386(1)(a) has been satisfied.

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[110] *Solarig*, [114].

[111] *Solarig*, [115].

[91] Second, while paragraph [92] of *Solarig* correctly takes issue with a construction of s.386(2)(c) that creates a category of deemed dismissal, it is difficult to follow its internal logic where it says: 'Under this construction, section 386(2)(c) creates a category of dismissed employee where the person continues in employment but has not been "demoted" within the meaning of section 386(2)(c) because each of sections 386(2)(c) (i) and (ii) do not apply to the given facts. Such decisions construe section 386(2) as deeming a dismissal to have occurred in circumstances where the statutory definition of demotion is not made out.' Our concerns include that there is no 'statutory definition of demotion' in the FW Act, and there is no scenario where an applicant could continue in employment and yet s.386(2)(c)(ii) not apply to their circumstances.

[92] Third, *Solarig* says that a construction of s.386(2) that creates categories of deemed dismissal risks failing to provide a 'fair go all round' because:

- if a dismissal is deemed 'where subsections (i) and (i) [sic, of s.386(2)(c)] are not made out, then no factor other than a significant reduction in remuneration or duties would be relevant to whether there had been a dismissal'[112], and

- when considering if a person has been dismissed because they have been employed on varied terms, there are other relevant factors in addition to remuneration or duties which may arise and warrant consideration.[113]

[93] These propositions are confusing and do not seem to follow from the premise. Section 386(2)(c) deals with demotions in employment, not with other unilateral variations to an employment contract that may give rise to a repudiation of the employment contract.

4.2 Appeal grounds 3b, 3c and 4

3. The Deputy President misconstrued s.386(2)(c), read together with s.386(1)(a) of the Act, by not holding that:

> *b. where an applicable industrial instrument and/or applicable legislation governing the employment relationship of the parties authorises a reduction to position, rank, grade or pay, the contract of employment must be construed subject to the applicable industrial instrument and applicable legislation prevailing over that contract; and*
>
> *c. when an employer has reduced an employee's position, rank, grade or pay in accordance with provisions of an applicable industrial instrument and/or legislation authorising that action, there has been no repudiation of the contract of employment and therefore no termination of the employee's employment on the initiative of the employer for the purposes of s.386(1)(a).*

4. By reason of misconstruing ss.386(1) and 386(2) of the Act, the Deputy President erred in not holding that the Respondent had not been dismissed within the meaning of s.386(1)(a) in that cl.32.14(c) of the NSW Trains Enterprise Agreement 2018 *and regulation 20(1)(c) of the* Transport Administration (Staff) Regulation 2012 *(NSW) authorised the imposition of a*

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[112] *Solarig*, [103].

[113] *Solarig*, [103]-[104].

reduction in position, rank or grade and pay as a disciplinary measure in disciplinary proceedings and therefore s.386(2)(c) did not apply to the circumstances of the case.

[94] The issues raised by Appeal grounds 3b, 3c and 4, which are central to the proceedings, are also encapsulated in question 8 of the October Statement, which was in the following terms:

> '**Question 8:** If an employer exercises rights under a statute, enterprise agreement or contract of employment to demote a person and the demotion involves a significant reduction in the person's remuneration or duties within the meaning of s.386(2)(c)(i), has the person been 'dismissed' within the meaning of s.386?'

[95] The Deputy President at first instance was of the view that a legal right to demote an employee under an industrial instrument or legislation 'does not say anything about whether the employee was dismissed within the meaning of the FW Act.'[114] Accordingly, the fact that both the *NSW Trains Enterprise Agreement 2018* (**Enterprise Agreement**) and the *Transport Administration (Staff) Regulation 2012* (NSW) (**Transport Regulations**) conferred on NSW Trains a discretion to reduce employees', such as Mr James', 'position, rank or grade and pay' did not have any bearing on whether Mr James had been dismissed within the meaning of s.386 of the FW Act.[115]

[96] Instead, the Deputy President held that the existence of such rights and the fairness with which they are exercised in particular circumstances are relevant to the s.387 factors which the Commission must consider when considering whether the dismissal was harsh, unjust or unreasonable.[116]

[97] The Appellant submits that as Mr James' demotion was authorised under cl.32.14 of the Enterprise Agreement and reg.20(1)(c) of the Transport Regulations, there was no repudiation of his employment contract and no dismissal under s.386(1)(a).

[98] Clause 32.14 of the Enterprise Agreement sets out the disciplinary measures that may be taken after an investigation by NSW Trains that concludes in a finding of fault and includes '(c) reduction in position, rank or grade and pay.' Regulation 20(1) of the Transport Regulations makes similar provision and includes as one of the 'punishments in disciplinary proceedings' that may be imposed: '(c) reduction in position, rank or grade and pay.'[117]

[99] As Mr James' demotion had a statutory basis, the Appellant says that it could not amount to a termination of his employment under s.386(1)(a) and that there is a long line of Commission and AIRC authority to this effect.[118]

[100] The Respondent submits that the Deputy President did not err in his findings above[119] and that Appeal grounds 3(b), 3(c) and 4 ought be dismissed for the following reasons:

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[114] [2021] FWC 4733, [40].

[115] The Decision, [8].

[116] The Decision, [8].

[117] Respondent's submissions, [33]-[34].

[118] Appellant's submissions, [34]-[35].

[119] Respondent's submissions, [41].

- The authorities on repudiation of contract in an employment context have made it plain that whether there has been repudiation is a question of fact and, in the context of employment contracts, a significant diminution in remuneration, status or responsibility may constitute a repudiation. This is a question of fact in each case.[120]

- As summarised in *City of Sydney RSL & Community Club Limited v Balgowan*[121] at [18]:

> 'The question whether there has been a repudiation of the contract of employment is determined objectively, it is unnecessary to show a subjective intention to repudiate and is a question of fact not law. Relevantly, for present purposes, repudiation may exist where an employer reduces the wages of an employee without the employee's consent or where there is a serious non-consensual intrusion on the nature of the employee's status and responsibilities in a way which is not permitted by the contract. Similarly, if an employer seeks to bring about a change in the employee's duties or place of work which is not within the scope of the express or implied terms of the contract of employment, the conduct may evince an intention to no longer be bound by those terms. Therefore, in these circumstances if an employee does not agree to the change, which if agreed would amount to a variation of the contract, the employee may claim to have been constructively dismissed.' [emphasis added]

- The provisions of the Enterprise Agreement and Transport Regulations say nothing as to the question of whether an employee has been dismissed for the purposes of the FW Act. The provisions deal with the possible outcomes of a disciplinary process (including dismissal). The fact that a reduction in (relevantly) pay is contemplated as an outcome says nothing as to whether there has been a repudiation of the employment contract. Section 386(2)(c) clearly contemplates the situation where there has been a demotion but the employment continues. Statutory rights and obligations are not converted to contractual rights and obligations.[122]

- The provisions of the Enterprise Agreement and the Transport Regulations do not answer the question as to whether there has been a demotion involving a 'significant reduction' in the employee's remuneration or duties. The mere fact that there is a statutory right for the Appellant to demote an employee (following a disciplinary process) under one statutory regime cannot (and does not) limit the operation of the unfair dismissal protections afforded by the FW Act.[123] While an enterprise agreement may confer a right to demote an employee, the exercise of that right has contractual consequences.[124]

[101] The ACTU submits that powers to demote under statute or in enterprise agreements tend to be facilitative rather than necessarily substantive and therefore the exercise of these powers

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[120] Respondent's submissions, [36], where the Respondent cites *Cameron v Asciano Services Pty Ltd* [2011] VSC 36 citing *Earney v Australian Property Investment Strategic Pty Ltd* [2010] VSC 62; *Fishlock v Campaign Palace Pty Ltd* (2013) 234 IR 1.

[121] (2018) 273 IR 126, [2018] FWCFB 5.

[122] Respondent's submissions, [38] citing *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410 at [11].

[123] Respondent's submissions, [39]-[40], citing *Cottle v NSW Commissioner of Police; Police Association of New South Wales v Commissioner of Police (NSW Police Force)* (2020) 298 IR 202 at [70]. This case was determined on the basis of whether or not the NSW Police Act operated to the exclusion of relevant parts of NSW industrial relations legislation.

[124] See Transcript PN176, 196 and 223.

is more likely to mean that the demotion is not separately unlawful, not that the conduct falls outside s.386(1)(a).

[102] The ACTU further contends that such powers to demote stand separately to the contract of employment (subject to incorporation), and the exercise of such powers would, as a consequence, lead to the termination of the underpinning contract and to the employee being 'dismissed' for the purposes of Part 3-2.[125]

[103] In its reply submissions, the Appellant refers to *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited*[126] (***Koompahtoo***) and *Cameron v Asciano Services Pty Limited*[127] and submits that it is telling that the Respondent does not address or point to an express or implied term of his contract of employment which is alleged to have been breached, 'let alone whether such a term is an essential term, a serious breach of [a] non-essential term, whether there has been an unwillingness or inability to render substantial performance of the contract or a renunciation of the whole of the contract or of a fundamental term.' Further, the Respondent does not refer to the terms and conditions contained in his written contract of employment and has opposed admitting evidence of his contract of employment.[128]

[104] The Appellant submits that the uncontested facts indicate that there has been no repudiation of the contract of employment as there have been no adverse changes to Mr James' terms and conditions of the contract of employment − following the demotion, Mr James has been placed in the same grade in which he was initially employed and his reduced salary remains substantially higher than the salary contained in his written contract of employment.[129]

[105] The Appellant submits further that it is clear that Mr James' contract of employment is intended to operate together with and have his terms and conditions of employment supplemented by applicable industrial instruments. Other than his position, classification and starting remuneration, Mr James' contract does not contain his substantive terms and conditions of employment but refers to an applicable enterprise agreement and policies and procedures. The reference to the RailCorp Enterprise Agreement is intended to refer to enterprise agreements which may apply to Mr James' employment from time to time.[130]

[106] We have decided to admit into evidence Mr James' written offer of employment dated 15 July 2013 (accepted on 24 July 2013), as it relevant to establishing the jurisdictional fact of whether or not Mr James has been dismissed for the purposes of s.386 of the FW Act. Due to the findings that follow, it is not necessary for us to determine whether, as submitted by the Appellant, Mr James' employment contract is represented solely by this written offer of employment (and therefore there have been no adverse changes to Mr James' terms and conditions of employment based on the written contract).[131]

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[125] ACTU's submissions, [35]-[37].

[126] (2007) 233 CLR 115, [43]-[58].

[127] [2011] VSC 36, [44]-[46].

[128] Appellant's reply to Respondent, [6] and [8].

[129] Appellant's reply to Respondent, [11].

[130] Appellant's reply to Respondent, [12] citing *Quickenden v O'Connor* (2001) 109 FCR 243 at [26], [67], [70].

[131] Appellant reply to Respondent, [11].

[107] It was not in dispute that the Enterprise Agreement and the Transport Regulations on their terms authorise the demotion of NSW Trains employees as a disciplinary outcome.[132] We agree that clause 32.14 of the Enterprise Agreement and reg.20(1)(c) of the Transport Regulations empower NSW Trains to demote its employees as an outcome of disciplinary proceedings, after following prescribed steps.

[108] It was agreed at the hearing that Mr James' contract of employment does not incorporate the Enterprise Agreement or the Transport Regulations.[133] However, an employee's contract of employment will be governed by an applicable statute or enterprise agreement in respect of the matters with which the statute or enterprise agreement deals. As the High Court observed in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169:

> 'The employment relationship, in Australia, operates within a legal framework defined by statute and common law principles, informing the construction and content of the contract of employment.'[134]

[109] In *Ansett Transport Industries (Operations) Pty Ltd v Wardley*[135] Wilson J said:

> '… It will be seldom … that an award will lend itself to the "covering the field" test of inconsistency on the subject of the contract of employment. Few, if any, awards reflect an intention to express completely, exhaustively or exclusively the law governing that contract between the parties. It will generally be a case of specific provisions which will, of course, have the effect of rendering inoperative any provisions of subordinate law, whether common law or statutory, touching that employment with which they are inconsistent. In *R v Industrial Court of South Australia; Ex parte General Motors-Holden's Pty Ltd* Walters and Wells JJ., in a passage with which I respectfully agree, discuss the relationship of an award to the common law and to statute law and refer with approval to the following passage from Webb: *Industrial Relations and the Contract of Employment* (1974), p 21:
>
> > "The significance of the common law can be recognised if contracts of employment are seen to be stratified. First there is a foundation strata being the common law. Superimposed on this are State Acts, regulations and State industrial determinations; in places such State law cuts through and replaces the common law foundational strata. Above this again are Commonwealth Acts, regulations and awards of the Arbitration Commission. Federal law cuts through State law in places, sometimes at the point where State law has already cut through common law, sometimes direct into common law."'[136]

[110] In *Quickenden v O'Connor*[137] (***Quickenden***) Black CJ and French J said:

> 'The broad brush complaint that common law contractual rights were displaced by the certified agreement faced another threshold issue. For while the agreement bound Dr Quickenden by force of law, it did not thereby terminate his contract of employment. It created rights and

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[132] See, for example, Transcript PN86, 134, 196 and 245.

[133] See also Appellant reply to Respondent, [12] citing *Soliman v University of Technology, Sydney* (2008) 176 IR 183 at [67]; see also *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482 at [247]-[252]; *Moama Bowling Club Ltd v Armstrong* (No 1) (1995) 64 IR 238; *Gramotnev v Queensland University of Technology* [2013] QSC 158 at [57]-[65], affirmed on appeal in *Gramotnev v Queensland University of Technology* (2015) 251 IR 448 at [43]-[68].

[134] (2014) 253 CLR 169, [1].

[135] (1980) 142 CLR 237.

[136] Ibid, 287-8; cited at *Soliman v University of Technology, Sydney (No. 2)* (2009) 191 IR 277, [21].

[137] (2001) 109 FCR 243.

> obligations which were statutory in character and could operate in addition to the rights and obligations under his contract and, where inconsistent, no doubt displace them. There is nothing in the agreement however which expressly sets aside or displaces the terms of existing or common law rights generally. The agreement itself is not, on the face of it, and is not expressed to be, exhaustive of the rights and duties of those bound by it. If anything it focuses upon the rights of employees, rather than their obligations.'[138]

[111] In *Quickenden* Carr J said:

> '… As the High Court of Australia explained in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 420–421 an award imposes certain statutory terms and conditions which do not necessarily displace underlying common law contractual relations. If they conflict, the award or certified agreement may modify the contractual provisions, but otherwise they continue to co-exist. *Byrne* involved an award, but there does not seem to be any relevant distinction, for present purposes, between an award and a certified agreement …'[139]

[112] Mr James' employment with NSW Trains was highly regulated by the Enterprise Agreement. The Enterprise Agreement and Transport Regulations are superior instruments that prevail over Mr James' employment in the event of inconsistency. It seems clear, given the detail of the matters regulated by the Enterprise Agreement and the brevity of the written contract, that Mr James' contract of employment sat within the framework of the Enterprise Agreement and was intended to operate together with and be supplemented by the Enterprise Agreement. In this context, it is unsurprising that the terms of the contract of employment do not conflict with the regulatory framework established by the Enterprise Agreement and Transport Regulations and do not deal with matters dealt with by that regulatory framework.

[113] Implicit to the Full Court's decision in *Brackenridge* was the proposition that there is no general right at common law to demote an employee in the absence of an express or implied contractual right to do so or other governing instrument authorising this. The Court noted in the course of its decision that Ms Brackenridge's employment was governed by the *Toyota Australia Vehicle Industry Award 1988*, and observed:

> 'The trial judge noted, correctly, that there was no express term of the contract of employment which permitted demotion, nor was there any term of the Toyota Australia Vehicle Industry Award 1988 (the award), which applied to the parties, which would entitle Toyota to effect a demotion.'[140]

[114] In *Visscher*, the High Court majority held:

> '71. Buchanan J referred to the Certified Agreement as having that superior legal force, because of the provisions of the WRA [*Workplace Relations Act 1996*]. So much may be accepted. An agreement which is certified by the AIRC prevails over terms and conditions specified in a State law, award or employment agreement and displaces conditions of employment specified in certain Commonwealth laws, to the extent of any inconsistency. Moreover an agreement made under Div 2 of Pt VIB, as this agreement was, binds the employer and all persons whose employment is, at any time when the agreement is in operation, subject to the agreement. The terms of the Certified Agreement confirmed that to be so. In *Amalgamated Collieries of WA Ltd v True* Latham CJ pointed out that where there was an award the legal relations between

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[138] Ibid, [69]; cited in *Soliman v University of Technology, Sydney (No. 2)* (2009) 191 IR 277, [22].

[139] Ibid, [131]; cited in *Soliman v University of Technology, Sydney (No. 2)* (2009) 191 IR 277, [23].

[140] *Brackenridge*, 105.

> employer and employee are determined partly by the award and partly by the contract between them, but "[t]he award governs their relations as to all matters with which it deals." And in *Byrne* it was said that the contract of employment cannot derogate from the terms and conditions of an award, which operates with statutory force. The same may be said of a certified agreement. The question then is the extent to which the agreement has effect with respect to Mr Visscher's grading. That question is to be determined as a matter of the construction of the Certified Agreement, which involves considering the subjects with which it was concerned and its terms.'[141] [references omitted]

[115] Unlike in *Visscher*, where the majority held that there was nothing in the Certified Agreement which suggested that its subject matter included a reallocation of the positions of individual officers (such as Mr Visscher's position),[142] the Enterprise Agreement and Transport Regulations in this case clearly contemplate demotion as a disciplinary outcome separate to dismissal.

[116] As the Appellant submits, there is a long line of authority of the AIRC and the Commission concerning demotions authorised under an employment contract or industrial instrument.[143] These authorities are to the effect that, where a demotion is authorised by the employment contract or an instrument governing it, and pursuant to the contract or governing instrument the demotion does not constitute termination of employment, then the demotion will not constitute termination of employment for the purposes of the unfair dismissal provisions.[144] Subject to the observations made below (at [130] onwards), we agree with this proposition.

[117] In *Elizabeth Gorczyca v RMIT University*[145] (***Gorczyca)*** a Full Bench of the AIRC considered an argument to the effect that a certified agreement permitting demotion could not operate so as to exclude the statutory jurisdiction of the AIRC over unfair dismissals. However, the Full Bench found that as the agreement had the effect that there was no termination (ie it displaced the common law trigger for jurisdiction under the unfair dismissal laws), no right to contest a dismissal was excluded.[146] The Full Bench held:

> '**[14]** We turn first to determine whether the certified agreement gave the Vice-Chancellor an unfettered right to demote the appellant. We think it did. We have set out the provisions earlier and in our opinion they provide that, assuming the correct procedures were followed and it was not suggested they were not, the appellant could be demoted. Such a demotion does not in our view constitute at law a termination. This is because whatever be the contractual position, … the certified agreement provides for the demotion. The certified agreement derives its legal effect from the Act. It prevails over the contractual position. So much is clear from the judgements in *Amalgamated Collieries* and *Byrne and Frew v Australian Airlines Limited* (*Byrne and Frew*) [(1995-96) 185 CLR 410].
>
> **[15]** In *Amalgamated Collieries* Latham CJ said:
>
> > "But an award never deals with all the matters which affect the relations of any particular employer and any particular employee. The creation of the relation of employer and employee depends upon an agreement between them and not upon any award. Thus, the

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[141] *Visscher*, [71] (per Heydon, Crennan, Kiefel and Bell JJ).

[142] Ibid, [78].

[143] Appellant's submissions, [35].

[144] See the authorities cited at Appellant's submissions, footnote 14.

[145] [2002] AIRC 1115, PR922414 (12 September 2002, Polites SDP, O'Callaghan SDP, Hingley C).

[146] Ibid, [18]-[19].

> existence of the obligations under an award in relation to a particular employer and employee always depends on the existence of a contract between them. So, also, there are terms of their relationship which do not depend upon any award. For example, the employee must always obey the lawful orders of his employer, but awards do not commonly include a term to that effect.
> . . .
>
> I am, therefore, of opinion that the concluding words of the section are not limited to cases of evasion by contract or pretended contract and that they apply in the present case. This court (Latham CJ, Dixon and McTiernan JJ), in the case of *McKerlie v. Lake View and Star Ltd.* [(1937) 58 CLR 396], considered sec. 176 when it appeared in an earlier statute. In that case a worker sued for a balance of wages alleged to be due, and the facts would have supported a contention that there was a settled account between the worker and his employer. Such a defence was excluded by the section. The particular point which calls for decision in the present case (whether the section is limited to cases of evasion by a contract or pretended contract) was not decided in *McKerlie's Case*, but the view which I have taken is consistent with the reasoning in the judgments in that case." [(1937-38) 59 CLR 417 at p.423 and p.425]

[16] In *Byrne and Frew* the Court said:

> "In a system of industrial regulation where some, but not all, of the incidents of an employment relationship are determined by award, it is plainly unnecessary that the contract of employment should provide for those matters already covered by the award. The contract may provide additional benefits, but cannot derogate from the terms and conditions imposed by the award [See *Kilminster v Sun Newspapers Ltd* (1931) 46 CLR 284] and, as we have said, the award operates with statutory force to secure those terms and conditions. Neither from the point of view of the employer nor the employee is there any need to convert those statutory rights and obligations to contractual rights and obligations." [(1995-96) 185 CLR 410 at p.421]

[17] It is appropriate to regard the certified agreement in this as the equivalent of the award on the passages mentioned. This position adopted in both these cases is consistent with the decisions of the Commission in *Herman's Case* and *Boo Hwa Chan*.' [emphasis added]

[118] In *Boo Hwa Chan* Senior Deputy President Polites said:

'**[19]** … The award draws a clear distinction in its terms between redeployment and termination giving the employer the option of terminating or redeploying. If redeployment takes place, termination does not. Therefore, giving effect to the award I am of the view that if the Administration had finally exercised the redeployment option under the award there would at law as a result of the operation of the award, been no termination. Put another way I conclude that because of the award provisions whatever may be the effect of the notice at common law on either the employment contract or the employment, had the employer exercised the rights of redeployment under the award there would for purposes of the Act be no termination by virtue of the operation of the award. See *Amalgamated Collieries of W.A. Ltd. v. True* [(1937-38) 59 CLR 417 particularly Latham CJ at 423.'

[119] As noted at [53], in *Charlton* the Full Bench of the AIRC held:

'**[34]** Unless the contract of employment or an applicable award or certified/workplace agreement authorises an employer to demote an employee, a demotion, not agreed to by the employee, that involves a significant reduction in remuneration will amount to a repudiation of the contract of employment. If that repudiation is accepted, either expressly or by conduct, then the contract of

> employment is terminated. If, in such circumstances, the demoted employee then remains in employment with the employer, this occurs pursuant to a new contract of employment in respect of the demoted position …' [references omitted]

[120] The demotion of an employee exercised under a power in an industrial instrument or statute and in accordance with its terms will not constitute a dismissal for the purposes of s.386 of the FW Act, where the instrument provides that demotion does not constitute termination of employment. In such circumstances there has not been a termination at law because the instrument operates to preclude there being one in the circumstances.[147]

[121] In *Visscher*, Gummow J (in dissent, but not on these principles) observed:

> '12. … But the terms and conditions of his employment were to a significant degree governed by the 2001 Certified Agreement.
>
> 13. It is well settled that, in those circumstances, the relationship between the 2001 Certified Agreement and the terms of any contract between Mr Visscher and the employer, was that the former controlled the relationship as to all matters to which it applied. The result is that the "employment", the termination of which Mr Visscher complained pursuant to s 170CE(1), was a relationship which represented a compound of statutory elements (by operation of the Act upon the certified agreements) and of the common law of contract, but the statutory elements predominated. The employer correctly submits that it would be a distraction to construct and apply an hypothesis of what would have been the contractual relationship between the parties in the absence of the legislation.
>
> 14. … as Buchanan J, who gave the leading judgment in the Full Court, pointed out, whatever Mr Visscher's position under the general law may have been in a legislative vacuum, the general law was subordinated to the superior operation of the 2001 Certified Agreement from the time it came into operation on 5 May 2002. Accordingly, the treatment of the general law respecting unaccepted repudiation of employment contracts by this Court in *Automatic Fire Sprinklers Pty Ltd v Watson* and the House of Lords in *Rigby v Ferodo Ltd* cannot be determinative of the application of the Act in the present case.' [emphasis added, references omitted]

[122] We consider, properly construed, the relevant clauses in the Enterprise Agreement and the Transport Regulations support the conclusion that demotions authorised by those instruments do not constitute termination of employment:

- The Enterprise Agreement contains a number of clauses which separately deal with termination of employment, including clause 18. Clause 32 deals with disciplinary matters and sets out a range of procedural matters, including the timeframes for investigation and giving of updates and pay arrangements during an investigation. Clause 32.14 sets out the disciplinary measures NSW Trains may take after an investigation, including demotion ('reduction in position, rank or grade and pay)', suspension from duty without pay and dismissal.

- Reg.20(1) of the Transport Regulations is framed in similar terms to clause 32.14. Division 2 of Part 4 of the Transport Regulations sets out the disciplinary proceedings for NSW Trains staff. Under reg.20(1)(c), punishments in disciplinary proceedings include demotion ('reduction in position, rank or grade and pay'), suspension from duty without pay and dismissal. Regulation 23 sets out the procedure in disciplinary

[147] See *Gorczyca*, [19].

> hearings. Regulation 27, which deals with the return of property on termination of employment or suspension, defines 'termination' for the purposes of that clause only as 'resignation, retirement, dismissal, retrenchment or other cessation of employment, and includes unauthorised absence from duty'.

[123] It was not in issue before us that Mr James' demotion was authorised by and taken in accordance with the Enterprise Agreement. Accordingly, for the reasons given above we do not consider that the demotion of Mr James could be characterised as repudiatory conduct. The Appellant was acting within the provisions of the Enterprise Agreement, which prevailed over the contract of employment and displaced the contract of employment to the extent of any inconsistency.[148]

[124] While Mr James' written employment contract was silent as to the right to demote, the contract clearly sat alongside and was intended to operate together with the Enterprise Agreement (as well as the Transport Regulations), which expressly contemplate demotion without termination of employment. As we have observed it is well established that:

> 'Where the contract is silent, but an award or other industrial instrument provided for under the Act allows the employer to demote an employee, there will be no termination of employment for the purposes of section 170CE(1).'[149]

[125] The High Court has described repudiation as referring to conduct of a party 'which evinces an unwillingness or an inability to render substantial performance of the contract' or 'which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations'.[150] 'Repudiation of a contract is a serious matter and is not to be lightly found or inferred'.[151] The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.[152]

[126] As the Appellant submits, the Respondent has not identified any contractual provision which had been repudiated.[153]

[127] If this conclusion were wrong, then taking the example of another disciplinary outcome contemplated by the Enterprise Agreement and the Transport Regulations – suspension from duty without pay – any such suspension that was not in accordance with a contractual term would also likely be a repudiatory breach which could be accepted by the employee to bring the contract to an end. In both such cases, the employer's capacity to exercise powers under statute or under an industrial instrument with statutory force – to demote or suspend without pay – would be undermined and a different disciplinary outcome imposed on the employer. This would give primacy to the employment contract over these superior instruments, contrary to legal authority.

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[148] See *Kinnaird v National Jet Systems Pty Ltd T/A Cobham Aviation Services Australia - Airline Services* [2017] FWC 6055, [166]; *Quickenden v O'Connor* (2001) 109 FCR 243, [69].

[149] *Blair v Chubb Security Australia Pty Ltd* [2003] AIRC 1006, PR936527 (19 August 2003, Whelan C), [35], citing *Gorczyca v RMIT University* [2002] AIRC 705, PR919363 (24 June 2002, Whelan C), upheld on appeal *Gorczyca*.

[150] *Koompahtoo*, [44] (per Gleeson CJ, Gummow, Heydon and Crennan JJ).

[151] *Shevill v Builders Licensing Board* (1982) 149 CLR 620, 633.

[152] *Koompahtoo*, [44] (per Gleeson CJ, Gummow, Heydon and Crennan JJ).

[153] See Appellant's reply to Respondent, [8].

[128] In these circumstances, we are satisfied that the Appellant's demotion of Mr James, in reducing his grade from Rail Classification (RC) 6 Level E to RC6 Level A and his gross pay from $141,442 to $127,569, does not give rise to a dismissal under s.386(1)(a) of the FW Act.

[129] We recognise that a consequence of this finding is that it deprives Mr James of access to the statutory unfair dismissal provisions. The implications of this are considered further in our observations below.

[130] The existence of a power to demote in contract or other governing instrument is not necessarily determinative in all cases.

[131] A critical question in each case will be whether properly construed, the relevant instrument(s) provide that a demotion authorised by the instrument does not constitute termination of employment. Put simply, a demotion may not amount to a termination of employment for the purposes of Part 3-2 of the FW Act where the instrument permits the demotion and provides in effect that it is not a termination. This will require consideration of the terms of the specific instrument purportedly authorising the demotion to ascertain its effect in the particular case.[154]

[132] We note that in *Holland v Qantas Airways Limited*[155], Senior Deputy President Drake rejected a submission that a clause dealing with demotion must necessarily make it clear by its express terms that any demotion the subject of a particular clause is not a termination of employment and that if the clause does not do so, such a demotion must be a termination of the employment contract if there is also a significant decrease in remuneration and responsibilities.[156]

[133] The Senior Deputy President concluded in that case that the context of the clause in the enterprise agreement (which dealt with termination of employment in separate clauses), the subject matter of the clause itself and the language of the clause were all factors that distinguished a demotion pursuant to the clause from a termination of employment at the initiative of the employer.[157] In the circumstances, the Commission was satisfied that the clause authorised Qantas to consider the flight competence of a pilot and demote that pilot if appropriate, and a demotion arising from the application of the clause was not a termination of employment at the initiative of the employer or a repudiation of the employment contract.

[134] This 'is a matter that arises for consideration having regard to the facts of each case and the construction of each clause and agreement.'[158]

[135] The Commission must also be satisfied that the employer has acted in accordance with the terms of the instrument authorising the employee's demotion, in effecting a demotion.[159]

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[154] *Holland v Qantas Airways Limited* [2011] FWA 3778, [11].

[155] [2011] FWA 3778.

[156] Ibid, [11].

[157] Ibid, [15].

[158] Ibid, [11].

[159] See *Gorczyca*, [14] and *Lollback v University of Southern Queensland* [2014] FWC 2011, [58].

[136] Further, the FW Act itself protects the operation of the unfair dismissal provisions in Part 3-2. Section 194(d) of the FW Act provides that a term of an enterprise agreement is an unlawful term if it excludes or modifies the application of a provision under Part 3-2 of the FW Act to the detriment of an employee. The EM gives as an example a term of an agreement that purports to extend the minimum employment period (from 6 or 12 months) to 24 months. However, an agreement may supplement the unfair dismissal provisions, such as by including a term that provides that the employer must not dismiss an employee for poor performance except in accordance with the employer's performance management procedure, as this is for the benefit of an employee.[160]

[137] It is also clear that parties cannot simply 'contract out' of the Commission's unfair dismissal jurisdiction.

[138] As explained in *Gorczyca*, a demotion may not amount to a termination of employment for the purposes of Part 3-2 of the FW Act where the industrial instrument that authorises the demotion provides in effect that it is not a termination. That is because the industrial instrument derives its legal effect from the FW Act and prevails over the contractual position. In such circumstances, a demotion permitted by the instrument is not 'contracting out' or 'ousting' the unfair dismissals provisions.

[139] In this case, the Enterprise Agreement contained detailed provisions regarding the investigation and disciplining of NSW Train employees, and the penalty decision was subject to merits review. It was not suggested that NSW Trains demoted Mr James as a means to avoid the Commission's unfair dismissals jurisdiction. Indeed, this could not be the case given the Appellant's initial decision was to dismiss Mr James; this was reduced to demotion following a review application made by Mr James.

[140] In contrast, a standard form contract containing a bare statement that the employee may be demoted, and that does not include any procedural protections such as merits review, might be regarded by the Commission as a mere device that impermissibly seeks to oust its unfair dismissals jurisdiction.

[141] In considering whether a contractual term that provides for demotion may be a device, some guidance might be drawn from the following observations in *Brackenridge* (where the Full Court was considering whether Ms Brackenridge's contract of employment contained an implied term empowering Toyota to demote her):

> 'In the case of a large employer even if it were appropriate to imply a power to reclassify employees, or to vary their duties, to accommodate changing demands or other market forces outside the control of the employer, that would be very different to implying a term that empowered the employer to demote an employee as a disciplinary measure. In our opinion there is no need to imply into Ms Brackenridge's contract of employment a term giving Toyota a power to demote as a disciplinary measure. The contract would not be rendered ineffective or unworkable without such a term.
>
> A disciplinary procedure which includes a power to demote, with consequential effect on remuneration, in the case of a large employer could be expected to be complex, and probably the result of protracted industrial negotiation. In the United Kingdom when procedures of this kind are incorporated into contracts of employment, the publication of a handbook setting out

[160] Explanatory Memorandum to the *Fair Work Bill 2008*, [832].

> the terms of the disciplinary procedures and powers is common: see *Halsbury Laws of England*, vol. 16, 4th Edition Reissue at para. 299. The types of matter which might be covered in provisions providing disciplinary procedure are extensive: for example, the kinds and degrees of conduct that attract the disciplinary power, the circumstances in which the power may be exercised (who may initiate the exercise of disciplinary procedures and whether on complaint and if so from whom), how the power is to be exercised (the form of notice to the employee, whether there is to be an inquiry or hearing of some sort, and who is to be the decision-maker), whether there is a right of appeal or review to a higher authority, and the range of sanctions that can be imposed in the event of a disciplinary transgression being established. The complexity and extent of these matters all tell against the implication of a general power of demotion which lacks the "clear expression" required by the fourth of the conditions stated by the Privy Council: compare the reference to "lack of precision" in the judgment of Gibbs J in *Ansett Transport Industries (Operations) Pty Limited v The Commonwealth* [1977] HCA 71; (1977) 139 CLR 54 at 62.'[161] [emphasis added]

[142] We have not needed to consider, for the purposes of the controversy before us, whether different considerations might also arise where a demotion results in resignation and the application is made under s.386(1)(b) of the FW Act, or whether the exercise of a power to demote in a particular case may be subject to any types of implied limitations on its exercise (additional to express limitations in the authorising clause, properly construed).

[143] Finally, the Commission may need to consider in a particular case whether the terms of the written contract of employment permitting demotion reflect the actual agreement between the parties at the time of the employee's demotion. There are some authorities to the effect that a change in working arrangements can involve the making of a new contract or the variation of the contract in some circumstances. For example, in *Quinn v Jack Chia (Australia) Ltd*[162] Ashley J said:

> '…where employer and employee agree to an alteration in the employee's duties and responsibilities which is profound, the court should be more ready to hold (unless the original contract of employment provided for the contingency) that a new contract has replaced the old; or at the least the old contract, as varied, contained terms objectively appropriate to the new relationship created.'[163]

[144] That case concerned an employee who commenced employment as an assistant to the construction manager of a building project and subsequently progressed to the role of General Manager-Construction for the company group, as well as taking up directorships with related companies. The employer later dismissed the employee with 1 month's pay in lieu of notice in accordance with his original employment contract. On the facts before him, Ashley J found:

> '… (T)he change to the plaintiff's situation in August 1985 was exceptional, far reaching, not within the original contemplation of the parties and not comprehended by the contract initially made between them ...'[164]

[145] The court found that these far-reaching changes to the employee's position had given rise to a new employment contract and that the employee was entitled to 12 months' notice. The court stated:

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[161] (1996) 142 ALR 99, 106 (per Wilcox CJ, von Doussa and Marshall JJ).

[162] (1992) 1 VR 567.

[163] Ibid, 576.

[164] Ibid, 577.

> 'I have concluded that the original contract between the plaintiff and defendant was replaced rather than varied not simply by taking the position that any change in position and salary not contemplated by the original agreement necessarily requires the conclusion that a new contract has been set up, but rather by focussing on the circumstances that a change of great magnitude in the relationship of the parties was effected as at August 1985. In my opinion, a new and very different employment relationship then arose …'[165]

[146] However, in *Easling v Mahoney Insurance Brokers Pty Ltd*,[166] Doyle CJ said that 'a court should not too readily assume that a change in working arrangements, or in the duties of an employee, involves either a variation to an existing contract, or the making of a new contract'.[167]

[147] The High Court, in its decisions of *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[168] (***Personnel Contracting***) and *ZG Operations Australia Pty Ltd v Jamsek*[169](***Jamsek)***, has also recently emphasised that the character of the relationship between parties was to be determined by reference to the rights and duties created by the written agreements which comprehensively regulated those relationships.

[148] In the majority judgment in each decision, Kiefel CJ, Keane and Edelman JJ held that where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the rights and obligations established by the contract should be decisive of the character of the relationship (as well as its legal terms).[170] Absent a suggestion that the written contract has been varied, or that there has been conduct giving rise to an estoppel or waiver, a wide-ranging review of the parties' subsequent conduct is unnecessary and inappropriate.[171] However, the majority judgment in *Personnel Contracting* recognised that 'there may be cases where subsequent agreement or conduct effects a variation to the terms of the original contract or gives rise to an estoppel or waiver.'[172]

4.3 Appeal ground 5

5. The Deputy President erred in finding that there was a significant reduction in the Respondent's remuneration for the purposes of s.386(2)(c) of the Act.

[149] Under s.386(2), a person has not been dismissed if the person was demoted in employment, but the demotion does not involve a significant reduction in the person's remuneration or duties and the person remains employed with the employer that effected the demotion: s.386(2)(c).

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[165] [1992] 1 VR 567, 578. In relation to the impact of change in duties on an existing employment contract see further Sappideen C, O'Grady P, Riley J and Warburton G, *Macken's Law of Employment*, 6th Edn, Lawbook Co, 2011 at [9.190].

[166] (2001) 78 SASR 489.

[167] Ibid, [8].

[168] [2022] HCA 1.

[169] [2022] HCA 2.

[170] See *Personnel Contracting*, [43]; *Jamsek*, [8].

[171] See *Personnel Contracting*, [59].

[172] *Personnel Contracting*, [42].

[150] It was not argued before us that the reduction in Mr James' pay within the classification for his position was not a demotion in employment. We agree with this position.

[151] While the term 'demoted' is not defined in the FW Act, as related by the Deputy President at first instance, the Macquarie Dictionary defines 'demote' as: 'to reduce to a lower grade or class (opposed to promote)'.[173] We consider that 'demote' has its ordinary meaning in s.386(2)(c). As contended by the Respondent, it follows that 'demoted in employment' means a change – that is, a decrease – in an employee's grade or class.[174] We also consider that the ordinary meaning of 'demote' entails it being an act of the employer.

[152] The phrase 'remains employed with the employer that effected the demotion' should also be given its plain meaning; it simply means that the employee continues to be employed by the employer that effected the demotion. It is unnecessary to read into this, as suggested by the Appellant and the Respondent, that this is pursuant to a new contract of employment[175] or that it entails an 'ongoing employment relationship' with the person responsible for the demotion.[176]

[153] As a general proposition, the Appellant submits that whether a reduction in remuneration or duties is 'significant' involves consideration of the size of the reduction in the employee's remuneration or duties relative to the employee's entitlement to receive wages and other monetary benefits and the duties of the employee's role under the contract of employment.[177]

[154] The Appellant contends that the Deputy President erred in finding that there was a significant reduction in Mr James' remuneration in circumstances where the reduction did no more than reduce his pay within the classification for his position, and which another Shift Manager would earn for the same duties if hired into the position.[178]

[155] In its reply, the Appellant submits that '[w]hether the reduction in remuneration is significant is a relative assessment that cannot be considered by looking at absolute numbers but the pay of others in the same position.'[179] As submitted by the Appellant, this involves an evaluative consideration of the size of the reduction in the employee's remuneration and/or the nature of the employee's duties.[180]

[156] The Respondent submits that pursuant to s.400(2) of the FW Act, the Appellant is required to establish that there was a significant error of fact, as it relates to the Deputy President's finding. This was not challenged by the Appellant.

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[173] *Macquarie Dictionary* online 2021. The *Macquarie Dictionary* online 2021 relevantly defines 'promote' as 'to advance in rank, dignity, position, etc'.

[174] Respondent's submissions, [56] (referring to the Decision at [24]) and [57]. See also ACTU's submissions, [28]-[29].

[175] Appellant's submissions, [66], relying on paragraphs [40]-[41] and [43]-[44] of the submissions; Respondent's submissions, [60].

[176] ACTU's submissions, [30].

[177] Appellant's submissions, [65].

[178] Appellant's submissions, [51]-[52].

[179] Appellant's reply to Respondent, [16].

[180] Appellant's submissions, [65]

[157] The Respondent submits that the only submission made in support of this ground amounts to no more than a bare assertion that the Deputy President erred and that submission ought be rejected.[181]

[158] The Respondent submits that the Deputy President was correct to find that a significant reduction in remuneration or duties is one which is important, or notable, or of consequence, having regard to its context and intensity. The purpose of the adjective 'significant' is to exclude impacts that are properly seen as minor or unlikely.[182]

[159] The Respondent submits that whether a reduction in remuneration or duties is 'significant' is an objective test, having regard to all the relevant circumstances.[183]

[160] The Respondent contends that the demotion of Mr James resulted in NSW Trains reducing his remuneration by almost 10%. As noted in the Decision (at [33]), there are other flow on effects, including a decrease to the value of Mr James' accrued annual leave entitlements, accrued long service leave entitlements, superannuation benefits and, importantly and relevantly, Mr James' redundancy pay benefits. It is submitted that on no view can such a reduction in remuneration be regarded as minor.[184]

[161] We agree that the expression 'significant reduction [in remuneration or duties]' takes its ordinary meaning as being a reduction that is 'important; of consequence'.[185] Previous AIRC and Commission decisions give an indication of the magnitude of a reduction that may constitute a significant reduction.[186] We also agree that whether a reduction in remuneration or duties is 'significant' is an objective test, having regard to all the circumstances.

[162] While we do not need to decide this point in view of our overall conclusion that Mr James' demotion does not constitute a dismissal within the meaning of s.386(1)(a), we are not satisfied that the Appellant has established a significant error of fact in relation to the Deputy President's finding of a significant reduction in remuneration. Accordingly, this appeal ground is dismissed.

4.4 Appeal ground 6

6. The Deputy President erred in finding that there was a termination of the Respondent's employment on the initiative of the Appellant in circumstances where the Respondent sought to have imposed and consented to the demotion as a potential alternative to dismissal.

[163] While the relevant facts in this appeal are largely uncontentious, the Deputy President's finding that it was 'the unilateral decision by NSW Trains to reduce [Mr James'] grade and pay'[187] is disputed.

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[181] Respondent's submissions, [27].

[182] Respondent's submissions, [58], referring to the Decision at [31].

[183] Respondent's submissions, [59], referring to the Decision at [32].

[184] Respondent's submissions, [28]-[29].

[185] *Macquarie Dictionary* online 2021.

[186] See for example, *Solarig*, [126]; *Harrison*, [53]; *Carter v MSS Security* [2017] FWC 82, [84]; *Charlton*, [36] and *Blair v Chubb Security Australia Pty Ltd* [2003] AIRC 1006, PR936527 (19 August 2003, Whelan C), [40]–[63].

[187] See Decision at [3] (emphasis added).

[164] The Appellant submits that the uncontested evidence shows that Mr James requested a disciplinary outcome short of termination, in response to disciplinary action proposed against him:[188]

> '(a) from November 2020 to January 2021, in response to the proposed disciplinary action of dismissal, Mr James specifically sought non-dismissal outcomes from NSW Trains and submitted that the 'preferred and appropriate course of action' was 'independent disciplinary action' short of dismissal';[189]
>
> '(b) on 19 March 2021, the disciplinary review panel of Transport for NSW (to whom Mr James appealed the preliminary decision of dismissal) confirmed that NSW Trains was to make a new decision about disciplinary account other than dismissal';[190] and
>
> '(c) on 8 April 2021, NSW Trains decided to reduce Mr James' grade and pay in lieu of dismissal'.[191]

[165] The Appellant submits that based on this evidence, the Deputy President erred in not finding that the Respondent sought and consented to the demotion and as a result, there was no termination of employment on the initiative of the Appellant for the purposes of s 386(1)(a).

[166] As a threshold point, the Respondent contends that the Appellant requires leave to press this argument, as it was not squarely put to the Deputy President below. [192] In reply, the Appellant submits that the relevant facts are not in dispute and concern a jurisdictional objection that the Respondent has addressed in his submissions (at [46]-[49]), and no prejudice has been shown to have been suffered by Mr James having to address this point on appeal.[193]

[167] For expediency and in the interests of justice, we have decided to entertain this point. However, for the reasons that follow Appeal ground 6 must fail.

[168] The Respondent contends that the Appellant must establish that the Deputy President's finding involves a significant error of fact, pursuant to s.400(2) of the FW Act.[194] We agree.

[169] The Respondent submits that he did not, at any stage, consent to the demotion and the evidence does not support a submission to the contrary.[195] The Appellant's submission ought to be rejected as:

- on any fair reading of the correspondence between the parties in the period from 20 November 2020 to 21 January 2021, it is evident that the Respondent, through his solicitors, was seeking an outcome other than dismissal;

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[188] Appellant's submissions, [10]; [54]-[55].

[189] Appellant's submissions, [54] citing Appeal Book 309 and 316.

[190] Appellant's submissions, [54] citing Appeal Book 325.

[191] Appellant's submissions, [54] citing Appeal Book 283 and 284 and 355.

[192] Respondent's submissions, [45].

[193] Appellant's reply to Respondent at [17], citing *Suttor v Gundowda* (1950) 81 CLR 418 at 438, *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8, *Sze Tu v Lowe* (2014) 89 NSWLR 317 at [136]- [139] and *Cassegrain v Cassegrain* [2016] NSWCA 71 at [19]; and *University of Wollongong v Metwally* (No.2) (1985) 60 ALR 68 at 71 and *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319.

[194] Respondent's submissions, [44].

[195] Respondent's submissions, [49].

- the Respondent offered up as appropriate outcomes a 'caution or reprimand' or 'fine of an amount not exceeding $100', and not the outcome of a demotion or a reduction in his pay.[196]

[170] The Appellant contends that although the Respondent did not specifically identify demotion as a disciplinary non-dismissal outcome, his solicitor's correspondence makes clear that he sought an 'alternative disciplinary penalty' and gave some examples of this. The Respondent left open other independent disciplinary action short of dismissal as being a preferred and appropriate course of action, which necessarily must include demotion by reducing grade and pay.'[197]

[171] We agree that in the context of termination of employment, where an employee voluntarily consents to a demotion and the employer acts on that consent, there will be a mutually agreed outcome that does not amount to a dismissal. Such consent can be express or implied or inferred from the circumstances of the case.[198] However, that is not the case here.

[172] It is clear that between November 2020 and January 2021, the Respondent was facing dismissal. In these circumstances, it is understandable that the Respondent would seek an outcome alternative to dismissal. Contrary to the Appellant's contention, the fact that the Respondent specifically sought non-dismissal outcomes does not amount to him impliedly consenting to the imposition of *any* alternative penalty, including demotion. The evidence does not sustain this contention.

[173] The Deputy President did not err in this regard. Appeal ground 6 must fail.

5. Conclusion

[174] The Appeal is allowed and the Decision is quashed. The Appellant's jurisdictional objection to Mr James' application under s.394 of the FW Act is upheld.

[175] Accordingly, Mr James' application for an unfair dismissal remedy under s.394 of the FW Act is dismissed.

DECISION OF DEPUTY PRESIDENT EASTON

[176] There is one matter about which I do not agree with the majority: in my view the words "employment … has been terminated" in s386(1) refer to the termination of the employment relationship, but do not refer to termination of only the contract of employment. Recognising that the views of the majority will prevail, I will only briefly explain the basis of my different conclusion. I agree with the majority on all other points, and I agree with the orders to be made to dispose of the present appeal.

[177] In *Khayam v Navitas English Pty Ltd*[199] (***Navitas***) the Full Bench considered, amongst other things, whether the expression "termination of employment at the initiative of the

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[196] Respondent's submissions, [46]-[49].

[197] Appellant's reply to Respondent, [18].

[198] See Appellant's reply to Respondent, [53] citing *Robinson v Commissioner of Police* [2014] NSWIRComm 35, [81]; and Respondent's submissions, [15].

[199] (2017) 273 IR 44, [2017] FWCFB 5162.

employer" bore its "ordinary meaning" and referred to the termination of a contract of employment, and not to the termination of the employment relationship.[200] Vice President Hatcher and Deputy President Saunders undertook a close examination of the key authorities at [33]-[49], including *Siagian v Sanel Pty Ltd* (1994) 54 IR 185, *Strachan v Liquorland (Aust) Pty Ltd* [1996] IRCA 48, *Brackenridge v Toyota Motor Corp Australia Ltd* (1996) 142 ALR 99, *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200, *Bluesuits Pty Ltd (t/as Toongabbie Hotel) v Graham* (1999) 101 IR 28, *Advertiser Newspapers Pty Ltd v Industrial Relations Commission (SA)* (1999) 90 IR 211, *Boo Hwa Chan v Christmas Island Administration* [1999] AIRC 1371, *Charlton v Eastern Australia Airlines Pty Ltd* (2006) 154 IR 239, *Searle v Moly Mines Ltd* (2008) 174 IR 21, *Visscher v Giudice* (2009) 239 CLR 361; 187 IR 96 and *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169; 244 IR 425. In *Navitas* VP Hatcher and DP Saunders concluded:

> '[50] Thus it is clear, contrary to the first proposition stated in *Lunn* to which we have earlier referred, that a termination of the employment relationship might constitute a termination at the initiative of the employer under the WR Act notwithstanding that the contract of employment remains on foot. That is, under the WR Act, termination at the initiative of the employer did not, on its ordinary meaning, refer to termination of the contract of employment. The first proposition in *Lunn* to which we have earlier referred was therefore not a correct statement of the law under the WR Act, and as a result the Full Bench's analysis in *Lunn* proceeded on the wrong premise that it was necessary to analyse whether the final employment contract was terminated at the initiative of the employer, not whether the employment relationship was terminated at the initiative of the employer. **The correct position remained as stated in *Mohazab*, namely that a termination of employment at the initiative of the employer occurs where the action of the employer is the principal contributing factor which leads to the termination of the employment relationship**."
>
> …
>
> [65] For the above reasons, we do not consider that *Lunn* stated in a correct or complete way the proper approach to the interpretation of the expression "termination of employment at the initiative of the employer" in s 170CD(1) of the WR Act and its application to the circumstances of an employee employed pursuant to a time-limited contract or contracts. **It should not therefore be treated as determinative of the interpretation of s 386(1) of the FW Act and its application to the same circumstances.'**
>
> [Emphasis added]

[178] Deputy President Colman's separate decision in *Navitas* recorded the same conclusion at [114] in relation to the WR Act, and at [124] by reference to s.386(1) of the FW Act:

> "The use of the term 'employment' in s 386(1) can be contrasted with the reference to 'contract of employment' in the following subsection. The use of these two different expressions in successive provisions points to a distinction. **There is no textual or other basis to read termination of 'employment' in s 386(1) as a reference to termination**

[200] (2017) 273 IR 44 at 62, [2017] FWCFB 5162 at [31] reciting the propositions drawn from *Department of Justice v Lunn* (2006) 158 IR 410.

> **of the contract of employment.** It is quite evident in my view that the FW Act does not define dismissal by reference to the contract of employment alone. Section 386(1) and (2) reflect the conceptual distinction referred to earlier. This conclusion is reinforced by paragraph 1528 of the Explanatory Memorandum, which states that s 386(1) is intended to capture the case law relating to the meaning of 'termination at the initiative of the employer', and express reference is made to *Mohazab."*
>
> [Emphasis added]

[179] Although the Full Bench in *Navitas* considered fixed term contracts rather than demotion, in my view the reasoning and conclusions are correct and are directly applicable to demotions.

Demotion and repudiation

[180] Courts and tribunals generally consider cases involving demotion by reference to notions of repudiation of contract.

[181] In the employment context, an employer's decision to demote an employee is generally understood to be an indication that the employer is prepared to continue the employment of the employee, but on different/reduced terms. Cases invariably focus on the degree to which the terms are changed or reduced.[201]

[182] This approach to demotion properly aligns with common law notions of repudiation. Repudiation can be broadly understood to encompass a party breaching a contact in a way that evinces an intention to no longer to be bound by the contract, and/or an intention to fulfil the contract only in a manner substantially inconsistent with that party's obligations.[202] The focus in repudiation cases may be on whether the conduct is in breach of an essential/material term of the contract, whether the conduct is a sufficiently serious breach of a non-essential term, and whether the other party is entitled to conclude that the contract will not be performed substantially according to its requirements.

[183] At common law repudiatory conduct does not terminate the contract of itself.[203] A repudiation gives the innocent party the right to elect to terminate the contract. The innocent party is "confronted" by two inconsistent options: either to accept the repudiation and bring about the end of the contract, or to affirm the contract and continue it. The innocent party may "keep the question open, so long as he does not affirm the contract … and so long as the delay does not cause prejudice to the other side"[204], but ultimately must make an election because the law does not allow a party to maintain two inconsistent rights (or positions) and requires a choice to be made.[205]

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[201] See *Whittaker v Unisys Australia Pty Ltd* (2010) 192 IR 311 at 320, [2010] VSC 9 at [41] citing *Quinn v Jack Chia (Aust) Ltd* (1991) 43 IR 91 at 98-99, [1992] 1 VR 567 at 576 and *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 142 ALR 99 at 108.

[202] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* (2007) 233 CLR 115 at 135-6, [2007] HCA 61 at [44].

[203] *Visscher v The Honourable President Justice Giudice* (2009) 239 CLR 361 at 379-381 and 388, [2009] HCA 34 at [53]-[55] and [81].

[204] *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 656.

[205] See for example *Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788* [2021] FCAFC 121 at [80]-[93].

[184] If an employer engages in repudiatory conduct by demoting an employee, at common law the employee has the right to elect to terminate the employment. If the employee so elects then, for the purposes of s.386(1), the employment is likely to have been terminated at the initiative of the employer. That is, where an employee elects to terminate the employment because of the repudiation by the employer, they are likely to be "a person who has been dismissed" for the purposes of s.386(1) and s.385(a). Importantly, it is only once the employee makes the election to accept the repudiation that the dismissal occurs.

[185] Alternatively, if an employee elects to stay in employment then the employment relationship continues under either a new or varied contract of employment. Recognising the long-established distinction between the employment relationship and the contract of employment, the previous contract of employment may or may not have been terminated, but the employment relationship continues.[206]

[186] If the employee elects to stay in employment with full knowledge of the employer's repudiation, then there has been no termination of the employment relationship.

[187] If the words "employment … has been terminated" in s.386(1) are read to include the termination of an employment relationship and/or a contract of employment, then an employee who elects to continue the employment relationship may be a "person who has been dismissed" – even if only the contract of employment has been terminated.

[188] In *Charlton v Eastern Australia Airlines Pty Ltd* (2006) 154 IR 239 a Full Bench endorsed the obiter comments of SDP Polities in *Boo Hwa Chan v Christmas Island Administration* [1999] AIRC 1371 and adopted the analysis in *Advertiser Newspapers Pty Ltd v Industrial Relations Commission (SA)* (1999) 90 IR 211 to conclude that a termination of employment occurs when a contract of employment is terminated.[207] As the majority in *Navitas* observed of the conclusion in *Charlton*, "no reasoning process for these propositions was disclosed in the decision."[208]

[189] In my view there is no room for an employee to "allegedly acquiesce" (per *Charlton* at [34]) to a change in the terms of their employment – either they have elected to take action to rescind the contract (i.e. constructive dismissal) or they have elected to abandon their right to rescind the contract. Whilst an employee/innocent contractual party is generally allowed a reasonable time before they must choose between two inconsistent options, the notion of an alleged election/acquiesce, or an acquiesce that the Commission might look behind, is not a concept known to the common law.

[190] Recognising that an unaccepted repudiation is "a thing writ in water"[209], and that a dismissal can only occur once the employee has made an election, it may be necessary in particular cases for the Commission to inquire and make findings about whether the employee

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[206] See for example *Visscher v The Honourable President Justice Giudice* (2009) 239 CLR 361 at 381, [2009] HCA 34 at [57].

[207] *Charlton v Eastern Australia Airlines Pty Ltd* (2006) 154 IR 239 at 247 [32]-[33].

[208] (2017) 273 IR 44 at 66, [2017] FWCFB 5162 at [42].

[209] *Visscher v The Honourable President Justice Giudice* (2009) 239 CLR 361 at 361-362, [2009] HCA 34 at [58] citing *Rigby v Ferodo Ltd* [1988] ICR 29 at 34-45.

has made an election.[210] If, as a matter of fact, the employee has not made any election at all, then no dismissal has occurred.

[191] In reaching my overall conclusion I recognise that understanding the words "employment … has been terminated" in s.386(1) to include only the termination of the contract of employment is more readily reconcilable with the exception found in s.386(2)(c), at least in relation to demotion. The exception in s.386(2)(c) does imply that other kinds of demotion might constitute a dismissal and there is some attraction to the argument that interpreting s.386(1) in this way gives s.386(2)(c) more work to do.

[192] However, s.386(2)(c) does not change the way s.386(1) is understood to apply to only the termination of the employment relationship. There is no conflict between the two provisions and there is ample work for s.386(2)(c) to do without requiring a different construction of s.386(1). In this regard s.386(2)(c) can be understood as one of three circumstances that parliament has specified do not constitute a dismissal. Each subsection of s.386(2) contains a scenario with two essential components.

[193] I also recognise that parliament can specifically include or exclude scenarios from the unfair dismissal jurisdiction regardless of the way in which the common law might treat the same circumstance. However, as Deputy President Colman concluded in *Navitas*[211], "there is no textual or other basis to read termination of 'employment' in s 386(1) as a reference to termination of the contract of employment" and, in my view, there is no textual or other basis in s.386(1) to treat the common law consequences of a repudiation differently when determining, in any particular scenario involving demotion, whether there was a termination of the employment relationship.

PRESIDENT

Appearances:

Mr Seck, Counsel for the Appellant.
Mr Shariff, Senior Counsel for the Respondent.
Ms Saunders, Counsel for the ACTU

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[210] See *Visscher v The Honourable President Justice Giudice* (2009) 239 CLR 361 at 381-382, [2009] HCA 34 at [57]-[63] where the majority observed that it was possible that Mr Visscher had not made an election in 2001 but had kept the contract alive by his refusal to accept the rescission, and that Teekay resiled from its threat to demote him.

[211] (2017) 273 IR 44 at 96, [2017] FWCFB 5162 at [124]

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