# DECISION

*Fair Work Act 2009*
s.394—Unfair dismissal

**Karen Wegner**
**v**
**Roxby Hardware Pty Ltd T/A Roxby Traders**
(U2019/7548)

COMMISSIONER PLATT ADELAIDE, 23 OCTOBER 2019

*Application for an unfair dismissal remedy – whether genuine redundancy – consultation obligations in Award not followed – no genuine redundancy – no valid reason based on conduct or capacity – procedure flawed – held dismissal was unjust – compensation awarded.*

**Summary**

**[1]** Ms Wegner has lodged an application pursuant to s.394 of the *Fair Work Act 2009* (the Act) seeking a remedy for an alleged unfair dismissal by her former employer Roxby Hardware Pty Ltd T/A Roxby Traders (Roxby Hardware).

**[2]** Roxby Hardware contended that Ms Wegner's dismissal was a genuine redundancy within the meaning of s.389 of the Act, and in the alternative that the dismissal was not unfair.

**[3]** Ms Wegner contended that she was not properly consulted nor offered redeployment, that her dismissal was not a genuine redundancy and that her dismissal was unfair.

**[4]** The matter was heard by way of Determinative Conference by telephone on 22 October 2019.

**[5]** Ms Wegner represented herself and gave evidence. Mr Brian Smith represented Roxby Hardware and gave evidence together with Mr Shane Smith and Mr Michael Smith.

**[6]** The documents and statement submitted by the parties were received and the witnesses were examined. There is little by way of factual disputes.

**[7]** There is no dispute that at the time of the dismissal Roxby Hardware was a small business as defined in s.23 of the Act.

**[8]** There was no submission that Ms Wegner is not protected from unfair dismissal within the meaning of s.382 of the Act.

**[9]** At the conclusion of the Conference I determined that the dismissal was unfair and ordered compensation and advised that I would publish reasons for that decision. My reasons follow.

**Factual Matrix**

**[10]** Ms Wegner commenced employment with a predecessor to Roxby Hardware in January 2005.

**[11]** Ms Wegner was responsible for the sales, invoicing and delivery of goods to BHP and other contractors at the Olympic Dam Operation. Ms Wegner was paid a salary of $92,500 per annum.

**[12]** In early 2019 Roxby Hardware came to the realisation that it was losing a significant amount of money per month. There is no dispute that Roxby Hardware was losing money but some dispute as to the amount per month.

**[13]** Roxby Hardware commenced a review of the reasons why and determined that the volume and profitability of Ms Wegner's sales had significantly reduced (the volume had reduced from $5M to $4M in the last 12 months) to the point that the business could not afford to employ Ms Wegner.

**[14]** About three weeks before the dismissal, Roxby Hardware determined that Ms Wegner's role would not continue.

**[15]** On 9 July 2019, Mr Shane Smith advised Ms Wegner that the business was struggling and that her position would end immediately. This was confirmed in writing the same day. Ms Wegner was paid 4 weeks' notice. As a result of Roxby Hardware being a small business, no severance payment was made. There was no discussion that could reasonably be regarded as consultation within the meaning of clause 8 of the *General Retail Industry Award 2010* (the Award). No written information was provided as also required by clause 8.2 of the Award.

**[16]** Roxby Hardware appropriately conceded that it failed to consult with Ms Wegner as required by the Award.

**[17]** Ms Wenger advised she was successful in obtaining alternative employment on 30 July 2019 approximately three weeks after the dismissal at an hourly rate which was $20 less than her pre-dismissal rate.

**[18]** Ms Wegner contended that there were two alternative roles available at Roxby Hardware that would have been reasonable for her to be redeployed in, but which were not offered. One of the roles was in the trade area (but was not available until 27 August 2019 which was after the dismissal and Mr Wegner securing alternative employment); the other was in the receivables area which had not yet been filled. Roxby Hardware contended that Ms Wegner would have not accepted the receivables role as it was casual and resulted in a significant rate reduction (in the order of $18-20 per hour). In addition it was contended that Ms Wegner did not have the skills to competently perform that role.

**Consideration**

**Was the dismissal a genuine redundancy?**

**[19]** Section 389 of the Act states:

> "389 Meaning of genuine redundancy
>
> (1) A person's dismissal was a case of genuine redundancy if:
>
> (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
>
> (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
>
> (2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:
>
> (a) the employer's enterprise; or
>
> (b) the enterprise of an associated entity of the employer."

**[20]** It was agreed that the work performed by Ms Wegner was covered by the *General Retail Industry Award 2010*. Clause 8 of the Award relevantly states:

> "8.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:
>
> (a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and
>
> (b) discuss with affected employees and their representatives (if any):
>
> (i) the introduction of the changes; and
>
> (ii) their likely effect on employees; and
>
> (iii) measures to avoid or reduce the adverse effects of the changes on employees; and
>
> (c) commence discussions as soon as practicable after a definite decision has been made.
>
> 8.2 For the purposes of the discussion under clause 8.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

(a) their nature; and

(b) their expected effect on employees; and

(c) any other matters likely to affect employees.

8.3 Clause 8.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

8.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 8.1(b).

8.5 In clause 8:

significant effects, on employees, includes any of the following:

(a) termination of employment; or

(b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or

(c) loss of, or reduction in, job or promotion opportunities; or

(d) loss of, or reduction in, job tenure; or

(e) alteration of hours of work; or

(f) the need for employees to be retrained or transferred to other work or locations; or

(g) job restructuring.

8.6 Where this award makes provision for alteration of any of the matters defined at clause 8.5, such alteration is taken not to have significant effect."

**[21]** I find on the evidence given by Mr Brian Smith that Roxby Hardware could no longer afford to employ Ms Wegner, predominantly as a result of the declining sales to BHP and other Olympic Dam Contractors. Ms Wegner appropriately conceded this point and I find that the decision to dismiss arose as a result of a change in Roxby Hardware's operational requirements.

**[22]** Roxby Hardware appropriately conceded that it did not meet the Consultation requirements imposed by the Award.

**[23]** With respect to redeployment options, employers who wish to comply with the requirements of s.389(2) should be mindful not to prejudge a redeployee's attitude to an alternative role by substituting their own view. However, in the circumstances I accept that Roxby Hardware had genuine concerns about Ms Wegner's capacity to complete the

requirements and I accept that it was not reasonable for Ms Wegner to be redeployed in the receivables role.

**[24]** As a result of my finding in relation to the consultation deficiencies, the dismissal cannot be regarded as a genuine redundancy as described in s.389 of the Act.

**[25]** I have considered and adopted the approach adopted by the majority of the Full Bench in *UES (International) Pty Ltd v Harvey,*[1] and Vice President Watson in *Jamil Maswan v Escada Textilvertrieb T/A Escada*.[2] These cases similarly involved dismissals which arose from redundancy, where the Award consultation requirements were not met.

**[26]** I now turn to consider whether the dismissal was harsh, unjust or unreasonable pursuant to s.387 of the Act.

**What the dismissal harsh unjust or unreasonable?**

**[27]** Pursuant to s.387 of the Act, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

> "(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
>
> (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
>
> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (h) any other matters that the FWC considers relevant."

**Section 387(a)**

**[28]** Notwithstanding its formulation under a different legislative environment, I have adopted the definition of a valid reason set out by Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*[3] which requires the reason for termination to be "sound, defensible or well founded."

**[29]** The reason for the dismissal of Ms Wegner related to the inability of Roxby Hardware to continue to incur losses, and as they could not afford to continue to employ Ms Wegner they determined to remove her role. I accept that there was no valid reason for the dismissal related to her capacity or conduct.

**Sections 387(b) and (c)**

**[30]** The matters in s.387(b) and (c) of the Act deal with whether there was procedural fairness in respect of a dismissal related to capacity or conduct. As stated above, I have found that Ms Wegner's dismissal was not related to her capacity or conduct and therefore it must follow that she was not notified of or given an opportunity to respond to a reason for her dismissal related to her capacity or conduct. Ms Wegner was aware of the poor financial performance of Roxby Hardware.

**Section 387(d)**

**[31]** Roxby Hardware did not refuse to allow Ms Wegner to have a support person attend the meeting on 9 July 2019, however the lack of notice of the subject matter of the meeting did not permit any request to be made.

**Section 387(e)**

**[32]** Ms Wegner's dismissal did not relate to unsatisfactory performance.

**Sections 387(f) and (g)**

**[33]** Roxby Hardware had eight employees and no internal human resource management capability at the time of the dismissal, this matter assists in understanding the procedural defects in the dismissal.

**Section 387(h)**

**[34]** Apart from the personal circumstances of Ms Wegner there are no other relevant matters.

**[35]** I have made findings in relation to each matter specified in s.387 of the Act as relevant.

**[36]** I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[4]

**[37]** Having considered each of the matters specified in s.387 of the Act, I am satisfied that the dismissal of Ms Wegner was unjust, particularly in light of the failure to consult with her.

**Remedy**

**[38]** The relevant provisions of Division 4 of Part 3-2 of the Act state:

> "Division 4—Remedies for unfair dismissal

390 When the FWC may order remedy for unfair dismissal

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:

(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) the FWC may make the order only if the person has made an application under section 394.

(3) the FWC must not order the payment of compensation to the person unless:

(a) the FWC is satisfied that reinstatement of the person is inappropriate; and

(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies.

…

392 Remedy—compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

**[39]** The prerequisites contained in ss.390(1) and (2) have been met in this case.

**[40]** Ms Wegner advised me that she did not seek reinstatement as a result of the deterioration in the relationship with Mr Brian Smith. Having regard to that submission I consider that reinstatement is inappropriate.

**[41]** Section 390 of the Act makes it clear that compensation is only to be awarded as a remedy where the Commission is satisfied that reinstatement is inappropriate and that compensation is appropriate in all the circumstances.

**[42]** I now turn to whether compensation in lieu of reinstatement is appropriate.

**[43]** The Full Bench in *McCulloch v Calvary Health Care Adelaide*[5] confirmed, in general terms, that the approach to the assessment of compensation, as undertaken in cases such as *Sprigg v Paul's Licensed Festival Supermarket,*[6] remains appropriate.

**[44]** Section 392(2) of the Act requires the Commission to take into account all of the circumstances of the case including the factors that are listed in paragraphs (a) to (g). Without detracting from the overall assessment required by the Act,[7] it is convenient to discuss the identified considerations under the various matters raised by each of the provisions.

**The effect of the order on the viability of the employer - s.392(a)**

**[45]** There is no material before me which suggests that the viability of Roxby Hardware would be affected by the proposed award of compensation.

**The length of service with the employer - s.392(b)**

**[46]** Ms Wegner was employed by Roxby Hardware for 14 and a half years.

**The remuneration Ms Wegner would have received, or would have been likely to receive if she had not been dismissed - s.392(c)**

**[47]** This involves, in part, a consideration of the likely duration of Ms Wegner's employment in the absence of what I have found to be an unfair dismissal.

**[48]** It is clear that Roxby Hardware needed to reduce its operating costs. The area of most concern was the area that Ms Wegner was responsible for. But for the failures in consultation, the dismissal of Ms Wegner would not have been unfair. In my view, an appropriate consultation process could have been concluded in a week.

**The efforts of Ms Wegner to mitigate the loss suffered by her because of the dismissal - s.392(d)**

**[49]** Ms Wegner obtained alternative employment after three weeks (albeit at a reduced rate).

**Remuneration earned by Ms Wegner during the period between the dismissal and the making of the order for compensation s.392(e)**

**[50]** At the time of the dismissal, Ms Wegner was paid four weeks' notice. No reduction in respect of notice arises as Ms Wegner would have been required to be provided with notice

had she been dismissed for any reason other than summary dismissal. No severance payment was payable as a result of the number of employees engaged by Roxby Hardware.

**[51]** Ms Wegner's new employment resulted in her hourly earnings being $20.00 per hour less than that received from Roxby Hardware.

**The amount of any income likely to be earned by Ms Wegner during the period between the making of the order for compensation and the actual compensation s.392(f)**

**[52]** I have assumed that Ms Wegner will continue to be employed in her new role.

**Any other matter that the FWC considers relevant s.392(g)**

**[53]** There are no other relevant matters.

**[54]** In accordance with s.392(4) of the Act, I make no allowance for any shock, distress or humiliation that may have been caused by the dismissal.

**Conclusion**

**[55]** The maximum compensation limit in this case would be the lesser of 26 weeks remuneration or $74,350.[8] The amount of compensation awarded is less than that amount.

**[56]** The compensation confirmed below is also appropriate having regard to all of the circumstances of this matter and the considerations specified by the Act.[9]

**[57]** In light of the above, on 22 October 2019 I made an Order[10] that the Respondent pay $1778 gross less taxation as required by law to Ms Wegner in lieu of reinstatement within 14 days of the date of the Order.


COMMISSIONER

*Appearances (by telephone)*:

*Ms K Wegner* on her own behalf.

*Mr B Smith* on behalf of the Respondent.

*Hearing details:*

2019.
Adelaide:
October 22.

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<PR713593>

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[1] [2012] FWAFB 5241.

[2] PR511174.

[3](1995) 62 IR 371 at 373.

[4] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].

[5] [2015] FWCFB 873.

[6] (1998) 88 IR 21. See also *Bowden v Ottrey Homes Cobram and District Retirement Villages Inc T/A Ottrey Lodge* [2013] FWCFB 431.

[7] *Smith and Others v Moore Paragon Australia Ltd* (2004) 130 IR 446.

[8] Section 392(5) of the Act.

[9] *Smith and Others v Moore Paragon Australia Ltd* (2004) 130 IR 446, [32].

[10] PR713594.