DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Leslie Jones
v
S & Q Group Pty Ltd
(U2019/9330)

COMMISSIONER RIORDAN WOLLONGONG, 23 DECEMBER 2019

Application for an unfair dismissal remedy.

[1] Mr Leslie Jones (the Applicant) has applied for an unfair dismissal remedy in accordance with section 394 of the Fair Work Act 2009, (the Act), following his termination from S & Q Group Pty Ltd (the Respondent) on 9 August 2019.

[2] The Applicant was represented by Mr Alastair Sage, the Senior Legal Officer of the Australian Workers Union, NSW Branch (AWU). The Respondent was represented by its Director, Mr David Wei.

[3] Prior to the Hearing, the Respondent advised that the Applicant's employment had been transferred to S & Q Asset Management Pty Ltd on 1 July 2019. The Respondent could not provide any evidence of this transfer except for a changed company name on the Applicant's payslips form 1 July 2019. To avoid any confusion, I joined S & Q Asset Management Pty Ltd as a second respondent to the proceedings (both companies are now identified as the Respondents). I note that Mr Wei is a Director of both companies.

[4] The Applicant was employed as a casual by the Respondents in the role of a Handyman on 11 September 2017 at the Comfort Inn Fairways Motel in Primbee. The Applicant's role and duties were encapsulated by the Handyperson Level 3 classification of the Hospitality Industry (General) Award 2010 (the Award).

Background

[5] The Applicant's Handyman duties included the testing and treating of the motel's pool to ensure that it was operational, lawn mowing, gardening and sweeping of the motel's grounds, as well as doing repairs in the motel's rooms. The Applicant was originally engaged to work on Mondays and Fridays for five hours per day. The Applicant extended his working hours to include every Wednesday as well in early 2019. It is not in dispute that the Applicant worked on a regular and systemic basis.

[6] In 2019, the Respondents purchased a nearby motel, the Oasis Resort. The Applicant was asked to work on Tuesdays and Thursdays at this motel, performing similar duties to that

which he performed at the Comfort Inn. The Applicant resigned from a second job in order to fulfil the request at the Oasis, however, the role at the Oasis never eventuated.

[7] In April 2019, the Respondents decided to undertake major renovations to all rooms at the Comfort Inn. The Applicant was asked to undertake the renovations and commenced working five days a week for seven hours per day. During this renovation, the Applicant was required to undertake the following tasks:

- *Removal of existing built in wardrobes*
- *Removal of all skirting boards*
- *Removal of all furniture, beds and mattresses*
- *Removal of all soft furnishings and fixtures*
- *Cement rendering of all damage left by skirting board removal and fixtures*
- *Painting of all walls and ceilings*
- *Installation of new soft furnishings and fixtures including television wall bracket and TV tuning*
- *Installation of new Kitchen and wardrobe (flat pack)*
- *Replacement of all furniture, beds and mattresses"*[i]

(reproduced as submitted)

[8] On 28 June 2019, the Respondents announced the appointment of Mr Wei as the new Company Director:

"Dear Staffs,

How are you?

Some of you may know that I am replacing Shawn Shi as the new company director for the Fairway Motel from 1st of July.

Firstly I want to say hello to you all.

Secondly we want to say that we are going to make lots of positive changes to the business quickly.

We re brand the motel to Golf Place Inn and will put another motel (Oasis Resort changed to Lakeside Inn) nearby under the same management. We will also engage builder to finish the refurbishment ASAP.

To you it means more opportunities since we are looking at taking on full time permanent staffs rather than casuals.

Meanwhile would you please let you know your current duties and roasters as well as whether you want to convert to permanent position? It would be great if you could give me a list of current issues you may want to address about the business.

We will do a full review for this matter in the next few weeks for this matter.
Brenda King will cease to work with us from today and you could report to me for any matters you deal with her before.

Thanks and look forward to meeting you later.

Regards,

David Wei"[ii]

(my emphasis and reproduced as submitted)

[9] Relevantly, Mr Wei mentioned the engagement of a builder to "finish the refurbishment ASAP," The Applicant continued to undertake the refurbishment work up until 2 August 2019.

[10] The Applicant responded to this email, stating that he was interested in a full-time role.

"David,

Thank you for your email. It is refreshing to have a more personal approach to staff, which is demonstrated by this email. At the end of the day, we are all important cogs in the machine that drives the business. I ce1tainly would look forward to having more permanacy in employment. There are some things that I believe could be done better. For instance, developing a maintenance management system which, at the moment is reactive rather than proactive. This was evidenced with the plumbing failure in 109. I also believe that equipment resources could be better used by sharing things between the two locations which are only used intermittantly, e.g. mowers etc. I would welcome the opportunity to talk through some of these with you.

Regards
Graham Jones"[iii]

(reproduced as submitted)

[11] On 11 July 2019, the Respondents sent a further email to their employees:

"Dear current and past staffs with Comfort Inn Fairways,

As said we are making changes quickly for good reasons. The current business is not in good condition and it would not be good for everyone involved.

First of all we will leave Comfort Inn Choice Hotel group and combine our two nearby motel sites together from 1st of August. We will use our own branding Golf Place Inn and Lake Side Inn (140-146 Windang Rd Windang). Our market positioning is to become the value for money and nice accommodation for holiday and business travelers with distinctive features. The new websites, street signs, new booking software, new uniforms and other changes are underway.

We have to look at cost cutting measurements and we just changed our waste contractor today.

The full renovation for the 30 motel rooms at the Lake Side Inn will start from next week and hopefully will be finished in 1.5-2 months time. Once we start the renovation over there we will schedule the full renovation of the Golf Place at the same time and aim at getting it done in 3-4 months time from now.

This week we appoint Hannah Lukasiak as the experienced manager for both sites to manage the motel operations. She will formally start from 21st of July and she may pay a visit during this coming weekend.

Our plan is to gradually build up our own bigger staff team with in house cleaning, laundry and catering capacities. It will not happen overnight but we will get there.
Since all of our current staffs indicate the interests of taking on the permanent full time position rather than the current casual employment our intention would be to keep it that way.

Your wages will be taken off around 25% casual loading but you will be entitled to the paid annual leaves etc which works the same way. We will send out the employment contract with the industry standard awards for your review later.

Hannah and 1 will assess each of your roles and I will discuss your individual salary or wages arrangement with confidence next week.

I will stay in Wollongong from next Thursday night to the end of July for about 1 week and hopefully we got the above matters solved to move on.

Regards,

David Wei"[iv]

(my emphasis and reproduced as submitted)

[12] On 7 August 2019, the Applicant advised Ms Lukasiak that the Award rate of pay had increased from 1 July 2019, which had not yet been recognised and paid by the Respondents. The Applicant also raised with Ms Lukasiak that his superannuation account was not up to date.

[13] A few hours later, the Applicant was approached by Mr Wei. Mr Wei advised the Applicant that the Respondents had decided to amalgamate the maintenance roles for the two motels. Mr Wei advised the Applicant that the work would be physically demanding. Mr Wei allegedly said to the Applicant that "he should be enjoying his retirement." I note that the Applicant is 74 years of age.

[14] On 9 August 2019, the Applicant sought a response from Ms Lukasiak in relation to his on-going employment situation. Mrs Lukasiak contacted Mr Wei and subsequently advised the Applicant that he could leave immediately.

Evidence

[15] The Applicant submitted two witness statements but was not cross-examined by the Respondents. In response to a question from me, the Applicant advised that he was not currently employed. The Applicant states that he has applied for a number of jobs, including Sutherland Shire Council and Bunnings. The Applicant did not pursue an application with another firm in Wollongong because they were only seeking full-time employees.

[16] The Applicant advised that if he was to be reinstated, he would accept full-time employment with the Respondents.

[17] Mr Wei represented the Respondents. He is not a lawyer or an industrial advocate. In complying with the Directions, Mr Wei submitted brief submissions in a manner which replied, in part, to the AWU's submissions. Mr Wei did not submit a witness statement. With the concurrence of the AWU, I suggested to Mr Wei that the Commission will adopt his submissions as a witness statement (Exhibit 3). This allowed Mr Wei to give evidence under affirmation and to be cross-examined by the AWU.

[18] Mr Wei testified that he had no involvement in the day-to-day management of the Comfort Inn prior to 1 July 2019.

[19] Mr Wei denies that the Applicant was dismissed because he raised an issue about his wages and superannuation. Mr Wei claimed that he was already aware of the Award increases, but because they were transitioning to a new payment system, the employees were advised that they would have to wait to be paid. This alleged email was not supplied by the Respondents.

[20] Mr Wei admitted that he did not send the Applicant for a medical assessment to ascertain his suitability for the new Handyman role at both motels, but simply relied on his personal judgement, based on his parent's capacity to undertake these functions. Relevantly Mr Wei's parents are the same age as the Applicant.

> *"MR WEI: I want to say Mr Jones - I very respect Mr Jones, because he is at the age of my father - my mother actually'"*[v]
>
> "THE COMMISSIONER: Mr Wei appears to be saying though that he has respect for Mr Jones and that Mr Jones is the same age as his mother.
>
> *MR SAGE: His father, I think.*
>
> *MR WEI: Father and mother, yes.*
>
> *THE COMMISSIONER: And that basically he was looking out for him.*
>
> *MR WEI: Yes.*
>
> *MR SAGE: Yes, Commissioner. Well, if that were the reason it's still not a valid reason for dismissal, in our submission, because you cannot simply make your own subjective assessment of the safety requirements of a role and whether someone is fit for that job. There is a code of practice in relation to manual handling which applies in New South Wales, which sets out what is required from a safety perspective. Mr Jones himself is familiar with that code.*

Mr Wei cannot create a valid reason for dismissal by saying, 'I was worried about your health and safety,' but without any probative evidence to say that that was an issue. That is our submission, Commissioner, on that point."[vi]

(reproduced as submitted)

Statutory Provisions

[21] The relevant sections of the Act relating to an unfair dismissal application are: -

"381 Object of this Part

(1) The object of this Part is:

(a) to establish a framework for dealing with unfair dismissal that balances:

(i) the needs of business (including small business); and

(ii) the needs of employees; and

(b) to establish procedures for dealing with unfair dismissal that:

(i) are quick, flexible and informal; and

(ii) address the needs of employers and employees; and

(c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.

Note: The expression "fair go all round" was used by Sheldon J in *in re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

382 When a person is protected from unfair dismissal

A person is protected from unfair dismissal at a time if, at that time:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

384 Period of employment

(1) An employee's ***period of employment*** with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and

(b) if:

(i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

(ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised;

the period of service with the old employer does not count towards the employee's period of employment with the new employer.

385 What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

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

(d) the dismissal was not a case of genuine redundancy.

Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388.

387 Criteria for considering harshness etc.

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."

Consideration

[22] When considering whether a termination of an employee was harsh, unjust or unreasonable, the oft-quoted joint judgement of McHugh and Gummow JJ in *Byrne v Australian Airlines* (*Byrne*) is of significance:

> "It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.

… In *Lane v Arrowcrest Group Pty Ltd*, von Doussa J considered the example of the dismissal of an accountant who held a position of trust where it was discovered after the dismissal that the accountant had been systematically embezzling money from the employer. His Honour said it would be astonishing if the employer could not resist an allegation that the dismissal was harsh, unjust or unreasonable, within the meaning of the relevant award, by pointing to those facts discovered after the dismissal, so long as they concerned circumstances in existence when the decision was made. His Honour concluded:

> "Whether the decision can be so justified will depend on all the circumstances. A circumstance, likely to favour the decision to dismiss, would be that fraud or dishonesty of the employee had caused or contributed to the employer's state of ignorance. A circumstance likely to weigh against the decision would be that the employer had failed to make reasonable inquiries which would have brought existing facts to its knowledge before the dismissal occurred.""[vii]

[23] In analysing *Byrne*[viii], a Full Bench of the Australian Industrial Relations Commission in *Australian Meat Holdings Pty Ltd v McLauchlan* held:

> "The above extract is authority for the proposition that a termination of employment may be:
>
> - unjust, because the employee was not guilty of the misconduct on which the employer acted;
>
> - unreasonable, because it was decided on inferences which could not reasonably have been drawn from the material before the employer; and/or
>
> harsh, because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct."[ix]

Section 387(a) Valid Reason

[24] The meaning of the phrase "valid reasons" has been universally drawn from the judgement of Northrop J in *Selvachandran v Peteron Plastics Pty Ltd*:

> "In broad terms, the right is limited to cases where the employer is able to satisfy the Court of a valid reason or valid reasons for terminating the employment connected with the employee's capacity or performance or based on the operational requirements of the employer. …
>
> Section 170DE(1) refers to "a valid reason, or valid reasons", but the Act does not give a meaning to those phrases or the adjective "valid". A reference to dictionaries shows that the word "valid" has a number of different meanings depending on the context in which it is used. In the *Shorter Oxford Dictionary*, the relevant meaning given is: "2. Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value." In the *Macquarie Dictionary* the relevant meaning is "sound, just, or well founded; a valid reason".

> In its context in s 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly…"[x]

[25] In Rode v Burwood Mitsubishi Print a Full Bench of the AIRC held:

> ***"[19]*** *We agree with the appellant's submission that in order to constitute a valid reason within the meaning of s.170CG(3)(a) the reason for termination must be defensible or justifiable on an objective analysis of the relevant facts. It is not sufficient for an employer to simply show that he or she acted in the belief that the termination was for a valid reason."*[xi]

[26] Mr Wei admitted that he considered the Applicant unsuitable for the combined handyman role because he did not believe that he was strong enough to perform the role. This assessment of the Applicant's capacity to perform the role defies logic. Whilst the Applicant is only a relatively small 74-year-old man, he is clearly highly skilled, energetic and quite strong, based on his ability to fully renovate six rooms of the Comfort Inn with little or no assistance. Mr Wei's comparison of the Applicant to the physical capability of his parents was flawed and did not provide a valid reason for his termination. To dismiss the Applicant due to his age was unsound, capricious and fanciful.

[27] The Applicant was not notified of the reasons for his dismissal. Mr Wei simply explained to the Applicant that the combined handyman role would be "heavily physical work" and said words to the effect 'that he should be enjoying his retirement.'

[28] I have taken into account that Mr Wei did not send the Applicant for a medical assessment in relation to the Applicant's capacity to perform the role to which he was employed.

[29] I have taken into account that the new "combined" role of handyman across both motels was first offered to the Applicant in January 2019. Obviously, the previous management had no concern as to the Applicant's physical capacity to perform this role.

Section 387(b) Notified of the reason

[30] In *Crozier v Palazzo Corporation*, a Full Bench of the Commission said:

> "As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170CG(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a

> decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."[xii]

[31] The Applicant was not provided with either a verbal or written reason for this termination but simply a remark from Mr Wei about the arduous nature of the new role.

Section 387(c) Opportunity to respond

[32] The Applicant was not notified of the reason for his termination. Two days after his discussion with Mr Wei, the Applicant approached management to ascertain his future and was advised that, if desired, he could finish up immediately. As a result, the Applicant was not given an opportunity to respond. I have taken this into account.

Section 387(d) Refusal to Support Person

[33] The Applicant did not request to have a support person present at the meeting with Mr Wei on 7 August 2019.

Section 387(e) Warning about unsatisfactory performance

[34] At the hearing, Mr Wei claimed that there was complaints made against the Applicant. Mr Wei claimed that these complaints were made to him verbally and were in relation to the excessive time that the Applicant was taking to renovate the rooms. Mr Wei accepted that he did not raise these complaints with the Applicant because he is Chinese and it is contrary to their custom to complain about or to criticise others.

[35] I have given very little weight to these assertions of Mr Wei. There is no documentary evidence of any unsatisfactory performance of the Applicant, or in fact of any complaint about the Applicant. I also note that Mr Wei had decided, before he started as the Director of the two motels, to outsource the refurbishment to builders in his email of 28 June 2019.

Section 387(f) Size of Enterprise – Procedures Followed

[36] The Respondents appear to be a small employer with few staff across the two motels. I have taken this into account.

Section 387(g) Dedicated HR Management

[37] The Respondents did not employ a specialist HR professional. I have taken this into account.

Section 387(h) Any other matter

[38] The Applicant has claimed that he was terminated because he made an enquiry in relation to his wages and superannuation. This claim is disputed by the Respondent. I am not convinced of the Applicant's argument. Mr Wei's explanation is plausible. I have not formed the view that Mr Wei is anything but an honourable man – a description which was self provided by Mr Wei. I have taken this into account.

[39] I have taken into account that the Applicant did not receive any negative feedback from his employer when he was working, either part time or full time.

[40] I have taken into account the submission of the Respondent where it submitted:

> *"At every single communication and meeting with staffs we state that we do not tolerate any discrimination against race, gender and age etc. But we have to assess the suitability of each staff for each specific position. The maintenance person's role involved a lot of physical works. Sometimes the work can be hard and heavy. Mr Jones is 74 years old now. Please use common sense to assess this situation."*[xiii]
>
> *(my emphasis and reproduced as submitted)*

Determination

[41] I have taken into account all the submissions and evidence of the parties.

[42] I'm satisfied that the Applicant has satisfied the tests under section 384 (2)(a)(i) and (ii). The Applicant worked regular hours as a Handyman, initially every Monday and Friday for five hours per day. At the request of his manager the applicant added Wednesday to his regular routine in early 2019. The Applicant was then requested to work five days a week in order to undertake the refurbishment of the rooms. I find that the Applicant's work history satisfies the "regular and systemic" test.

[43] I find that the Applicant has a reasonable expectation of ongoing employment. The Applicant, in response to an email from the Respondents, agreed to transfer from being a casual employee to a permanent employee. This offer from the Respondents and response from the Applicant, satisfies the expectation test of ongoing employment.

[44] I find that the Applicant was dismissed by the Respondents because the Respondents believed that the Applicant could not fulfil the new role of Handyman across the two motels because he was 74 years of age and did not have the physical capacity to do the work. The Respondents failed to take into account the Applicant's skill, experience and competency in performing the refurbishment of the rooms as well as undertaking his normal handyman functions.

[45] The reasoning behind the Applicant's termination was that the Director simply allocated the capacity of his 74-year-old parents to the Applicant. This process was totally subjective and undertaken without any medical advice or assessment. As a result, the reason for termination was unsound, fanciful and capricious.

[46] I find that there was no valid reason to terminate the Applicant.

[47] Whilst it is impossible for any dismissal to be fair without a valid reason, together with the other considerations of section 387 outlined above, I find that the Applicant was unfairly dismissed.

Remedy

[48] The relevant provisions of the Act in relation to remedy are:

"**Section 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."

391 Remedy—reinstatement etc.

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the
time of the dismissal reinstate the person by:

(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or

(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) 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 reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

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

(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."

Consideration

[49] The Applicant seeks the primary remedy of the Act i.e. reinstatement to his former position.

[50] I note that the Respondent's did not suggest that they had lost trust or confidence in the Applicant but merely that he should be enjoying his retirement instead of undertaking arduous work.

[51] Whilst I accept that Mr Wei's sentiments and comments towards the Applicant were genuinely made due to his care and concern for the Applicant, the commentary was, nevertheless, inappropriate and condescending. The age of the Applicant is of little or no concern to the Respondents. The Applicant is legally entitled to work and clearly capable of performing the work. I can find no logical reason why the Applicant should not be the beneficiary of the primary remedy under the Act. I have taken this into account.

Conclusion

[52] Having previously found that the Applicant had been unfairly dismissed, I Order that the Applicant be reinstated to the role of Handyman. I note that the Applicant's role has been restructured and is now a five day a week job across two motels. The Applicant is to be reinstated to that position.

[53] On the basis that the Applicant had been working five days per week for the six months prior to his termination, in accordance with section 391 (3) of the Act, I Order that the Applicant be back paid his normal five day per week gross salary to the date of his termination.

[54] I Order that the Applicant maintain continuity of employment in accordance with section 391 (2) of the Act.

[55] I so Order.

COMMISSIONER

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[i] Applicant Form F2 - Statement of Leslie Graham Jones

[ii] Exhibit 1 Annexure 6

[iii] Exhibit 1 Annexure 7

[iv] Exhibit 1 Annexure 8

[v] Transcript 29 November 2019; PN 335

[vi] Transcript 29 November 2019; PN 434-440

[vii] (1995) 185 CLR 410, 465-7.

[viii] (1995) 185 CLR 410.

[ix] (1998) 84 IR 1, 10.

[x] (1995) 62 IR 371, 372-3

[xi] Print R4471 [19]

[xii] (2000) 98 IR 137 [73]

[xiii] Exhibit [5]