



## DECISION NO.2

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Trudi Puszka**

v

**Ryan Wilks Pty Ltd T/A Ryan Wilks Proprietary Limited**

(U2018/8666)

COMMISSIONER CAMBRIDGE

SYDNEY, 28 FEBRUARY 2020

*Unfair dismissal - quantification of Order to restore lost pay.*

[1] This Decision provides for the determination of the quantum of a specific component of the Orders that were made as remedy for an unfair dismissal claim taken pursuant to section 394 of the *Fair Work Act 2009* (the Act). The matter has a long and difficult history.

[2] In a Decision issued on 7 March 2019, [2019] FWC 1132 (the Original Decision), the applicant, *Trudi Puszka*, obtained a remedy of reinstatement for her unfair dismissal from employment with the respondent employer, *Ryan Wilks Pty Ltd* (the employer, or Ryan Wilks). The Original Decision involved the Fair Work Commission (the Commission) making three Orders. Order 1 required Ryan Wilks to reinstate the applicant by reappointing her to the position in which she was employed immediately before her dismissal. Order 2 provided for the applicant to maintain continuity of employment. Order 3 required Ryan Wilks to pay the applicant an amount of remuneration lost, or likely to be lost because of the dismissal, as restoration of lost pay.

[3] In respect to Order 3, paragraph [82] of the Original Decision relevantly stated:

*“[82] ... In the event that the Parties are unable to agree on the amount to be paid to the applicant in accordance with Order 3, regarding an Order to restore lost pay, the application will be listed for further proceedings to enable the Commission to determine that amount. Any request for such further proceedings should be made within 21 days from the date of this Decision.”*

[4] On 28 March 2019, Ryan Wilks lodged an Appeal against the Original Decision in which, inter alia, a Stay of the Original Decision was sought. The Stay of the Original Decision was refused in a Decision issued on 2 April 2019 [2019] FWC 2135.

[5] In correspondence dated 16 April 2019 from lawyers acting for Ryan Wilks (*HWL Ebsworth*), the applicant was advised inter alia, that “...until the appeal of this matter is determined by the Fair Work Commission, you will receive your ordinary pay but you will not be required to attend the workplace.”

[6] On 17 June 2019, a Full Bench of the Commission issued a Decision [2019] FWCFB 3323 (the Appeal Decision), which granted permission to Appeal, and dismissed the Appeal.

[7] On 21 June 2019, the lawyers acting for Ryan Wilks sent a further letter to the applicant which advised inter alia, that the reappointment of the applicant to the position of Project Administrator would not involve her previous work location at the Sydney Opera House, but instead the Ryan Wilks premises at Silverwater.

[8] On 25 June 2019, the applicant lodged a request for assistance with the Fair Work Ombudsman (FWO), wherein she alleged that Ryan Wilks had not complied with Order 3, the Order to restore lost pay, as issued by the Commission on 7 March 2019 in the Original Decision.

[9] On 5 July 2019, Ryan Wilks issued the applicant with a letter directing her to attend work at the Silverwater premises.

[10] On 9 July 2019, the applicant sent an email to the lawyers acting for Ryan Wilks which relevantly stated: *“The decision to move me to Silverwater is punitive, and I have responded to the bullying by lodging an adverse action on the 28 Jun 2019, which will be served on Mr Crome by the Fair Work Commission later this week.”*

[11] On 10 July 2019, the applicant filed a Form F8 - General protections application involving dismissal. In broad terms, the applicant’s general protections claim raised complaints about being redirected to work at Silverwater rather than her previous place of employment at the Sydney Opera House, and further, that she had not received her “backpay” in accordance with Order 3, the Order to restore lost pay. Lawyers acting on behalf of Ryan Wilks filed a response dated 15 July 2019, to the applicant’s general protections application.

[12] On 16 July 2019, during conciliation proceedings conducted by Riordan C, the applicant’s general protections application was resolved. The resolution of the applicant’s general protections application included that the Parties entered into a Deed of Release, and the applicant resigned from employment with Ryan Wilks. The Deed of Release specifically permitted the applicant to maintain her claim for “backpay” which at that time was a matter being pursued by the FWO.

[13] On 16 August 2019, the FWO sent correspondence to Ryan Wilks which inter alia, stated as follows:

*“Based on information and evidence obtained by the FWO during my investigation, I have found that the Business:*

- *has contravened section 4–5 of the Fair Work Act 2009 (FW Act): Non-compliance of an Order in relation to the FWC Order which was handed down on 7 March 2019.*

*Details of the specific contraventions are set out in **Appendix A**.*

*You are required to comply with part 3 of the Order ‘Order to Restore Lost Pay’, and provide me evidence of such by **close of business Tuesday, 3 September 2019.**”*

[14] On 3 September 2019, lawyers acting on behalf of Ryan Wilks responded to the FWO contravention letter of 16 August 2019, and disputed the contraventions finding. Relevantly, in this correspondence the lawyers acting for Ryan Wilks stated as follows:

***“Ryan Wilks is unable to meet its obligations in accordance with the Back Pay Order until Ms Puszka provides it with the documents and information identified in HWLE’s correspondence dated 4 April 2019.***

*Ryan Wilks is further of the view that the Finding is premature in circumstances where the Cambridge Decision provided specific mechanisms for the resolution of any disagreement in relation to the Back Pay Order.*

...

***Any disagreement in relation to the Back Pay Order was a matter to be determined in the first instance by the Fair Work Commission and not the Fair Work Ombudsman.”***

[15] On 20 September 2019, the FWO sent correspondence to Ryan Wilks which relevantly stated as follows:

***“FINDINGS***

*Notwithstanding the attempts of the Business to comply with the Order, the FWO remains of the view that the business contravened the Order for the reasons set out in the Contravention Letter. Failing to comply with FWC orders and their related provisions of the Fair Work Act 2009 are treated seriously by the FWO because non-compliance with them has the ability to undermine Australia’s national workplace relations framework.*

*In stating the above, the FWO also acknowledges the Business made reasonable attempts to comply with the Order and as such there is no public interest for the FWO to take any further action.”*

[16] On 29 November 2019, lawyers acting on behalf of Ryan Wilks sent correspondence to the applicant regarding their calculation of “back pay”. This correspondence relevantly involved a calculation that resulted in a payment made to the applicant on or about 26 November 2019 of \$3,314.00. This amount of \$3,314.00 had been calculated after deductions were made in respect of inter alia, payments made to the applicant by way of Newstart allowance and income protection insurance. The correspondence also advised the applicant that if she did not agree with the calculation that resulted in the payment of \$3,314.00, it was open to her to make a formal application to reopen the matter for the purposes of the procedure contemplated in paragraph [82] of the Original Decision.

[17] On 1 December 2019, the applicant filed a Form F1 in which she requested that her unfair dismissal application, U2018/8666, be reopened for the purposes of the procedure contemplated by paragraph [82] of the Original Decision. In support of the reopening of her unfair dismissal application, the applicant stated that she disagreed with the calculation that resulted in the payment to her of \$3,314.00 as she alleged that this amount was incorrect and not based on logic.

[18] On 18 December 2019, the applicant's unfair dismissal application was listed for Mention and Directions. Shortly after the commencement of the proceedings held on 18 December, the applicant indicated that she did not object to Ryan Wilks being represented by lawyers or paid agents. In the circumstances, the Commission was satisfied that the requirements of s. 596 of the Act were met, and therefore permission was granted for either side to be represented by lawyers or paid agents. The Commission made Directions which required Ryan Wilks and the applicant to file and serve all material which each would rely upon in respect to their respective assertions as to the correct quantification to be stipulated in Order 3, the Order to restore lost pay, that had been issued in conjunction with the Original Decision.

[19] Subsequently, the Parties have provided their respective materials in accordance with the Directions issued on 18 December 2019. Further, both Parties have indicated that the determination of the quantification of the amount to be stipulated in Order 3, the Order to restore lost pay, does not require any formal Hearing and can be made upon the documentary material that was filed by the Parties.

### **Consideration**

[20] The issue for determination in this instance is confined to the quantification of an amount that was not specified in Order 3, the Order to restore lost pay, issued in conjunction with the Original Decision. The Order to restore lost pay was in the following terms:

#### *Order to Restore Lost Pay*

*Pursuant to subsection 391 (3) of the Act, the employer is Ordered to pay to the applicant an amount to be determined, if it is not agreed between the Parties, as remuneration lost or likely to have been lost, because of the dismissal. This amount is to be determined in accordance with subsection 391 (4) of the Act, taking into account the amount of remuneration earned by the applicant from employment or other work during the period between the dismissal and the making of the Order for reinstatement, and the amount of any remuneration reasonably likely to be earned by the applicant during the period between the making of the Order for reinstatement and the actual reinstatement. The amount calculated as lost pay is to be paid to the applicant within 21 days from the date of this Order.*

[21] Regrettably, the Parties have been unable to agree on the quantification of the Order to restore lost pay. The difficult and protracted proceedings that have followed the Original Decision have caused a regrettable and extensive delay to the finalisation of an Order for payment to the applicant of lost pay, which was Ordered to have occurred within 21 days after 7 March 2019.

[22] In regard to the determination that must now be made, it is unnecessary to provide detailed criticism of all aspects of the conduct of Ryan Wilks which, in circumstances where a Stay was refused, there was no attempt to make even a conditional, preliminary payment as a means to demonstrate some attempt to comply with the timeframes anticipated in the Orders of the Commission. Notwithstanding certain initial failings of the applicant to provide clear and unequivocal evidence of remuneration she had earned from other employment during the period between the dismissal and the Orders for reinstatement, the conduct of Ryan Wilks must regrettably be recorded to have been reprehensible. The protracted failure of Ryan Wilks

to make any payment towards a conditional, partial, or preliminary satisfaction of the Order to restore lost pay represents conduct that, to use a popular contemporary phrase, is wage theft.

[23] Further, Ryan Wilks also failed to comply with Order 1, the reinstatement Order issued in conjunction with the Original Decision. Once again, in circumstances where a Stay was refused, Ryan Wilks did not reinstate the applicant, but instead, initially told her not to return to the workplace at all, and then subsequently, once the Appeal had been dismissed, directed her to return to a different workplace (without any acceptable justification for such redirection). Ryan Wilks and its lawyers might benefit from some contemplation of the following extract from the High Court Judgement in *Blackadder v Ramsey Butchering*:<sup>1</sup>

*“To reinstate means to put back in place. In this context, it means that the employment situation, as it existed immediately before the termination, must be restored. It requires restoration of the terms and conditions of the employment in the broadest sense of those terms. It empowers the Commission to do more than restore the contract of employment. So far as practicable, the employee is to be given back his “job” at the same place and with the same duties, remuneration and working conditions as existed before the termination.”*<sup>2</sup>

[24] However, the conduct of Ryan Wilks, as reprehensible as it may be, is not a matter relevant to the determination that the Commission must now make and which requires the quantification of the Order to restore lost pay. Relevantly, an Order to restore lost pay is not a statutory mechanism which could be utilised to provide some form of penalty or punishment for the conduct of an employer, nor is it a means to provide any enrichment to an unfairly dismissed employee. An Order to restore lost pay is a mechanism that is restricted to providing an unfairly dismissed employee with only restoration of lost remuneration associated with their unfair dismissal, and as such it could not include any amounts in recognition of damages, costs, or other economic or personal impacts arising from the unfair dismissal.

[25] An Order to restore lost pay is governed by the provisions of subsections 391 (3) and (4) of the Act which are in the following terms:

***“391 Remedy – reinstatement etc.***

*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.*”

**[26]** It is clear from the terms of subsections 391 (3) and (4) of the Act that an Order to restore lost pay is confined to provide an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal. Consequently, the amount of an Order to restore lost pay must represent actual, identified remuneration that was lost because of the dismissal, or remuneration that would be considered to be likely to have been lost because of the dismissal. Therefore, the amount could be either, the identified actual loss, or an amount not actually identified as a loss, but considered likely to represent the amount of the loss. Importantly, the amount could not represent or include anything other than lost remuneration, either specifically identified or otherwise considered to be likely to be lost.

**[27]** Subsection 391 (4) (a) of the Act requires the Commission to take into account remuneration earned from other employment or other work during the period between the dismissal and the making of the Order for reinstatement. Consequently, in this instance, the period relevant to subsection 391 (4) (a) of the Act is from 2 August 2018, the date of the applicant’s dismissal, to 7 March 2019, the date on which Orders for the reinstatement of the applicant were made.

**[28]** In addition to the period that can be identified in subsection 391 (4) (a) of the Act, subsection 391 (4) (b) requires the Commission to take into account any remuneration reasonably likely to be earned during the period between the making of the Order for reinstatement and the actual reinstatement. Consequently, in this instance, the period relevant to subsection 391 (4) (b) of the Act commenced from 7 March 2019, the date on which Orders for the reinstatement of the applicant were made, but, as there was no actual reinstatement of the applicant at any time, such period would logically extend up until the date on which the applicant resigned from her employment, 16 July 2019. It should be noted that although there was no actual reinstatement of the applicant, the applicant was paid her usual remuneration on and from 28 March 2019.

**[29]** The Parties made their respective submissions as to the quantification that each proposed as the determination that should be provided for in Order 3, the Order to restore lost pay. The Commission has carefully considered all of the material provided by the Parties.

**[30]** In summary, the submissions made on behalf of Ryan Wilks asserted that no further amount should be paid to the applicant because the amount of \$3,314.00 paid to the applicant on or about 26 November 2019, represented full and correct satisfaction of the amount to be Ordered in accordance with Order 3, the Order to restore lost pay. The amount of \$3,314.00 was determined in accordance with what lawyers acting for Ryan Wilks described as “Backpay calculations” which were set out in pages 2 and 3 of their correspondence to the applicant dated 29 November 2019.

**[31]** Relevantly, the “Backpay calculations” contained in the correspondence dated 29 November 2019, were confined to what was described as the “Relevant Period” being from 2 August 2018 to 7 March 2019. The “Backpay calculations” established a remuneration figure for this “Relevant Period” being \$36,704.00, and from this figure deductions were made in respect of identified remuneration from other employment (referred to as the “Kennedy Reid Amount”) and further deductions were made in respect of Newstart allowance and income

protection insurance payments that were made to the applicant. The resulting figure that was generated after these deductions were made was \$3,314.00. Therefore, it was submitted on behalf of Ryan Wilks that the quantification for Order 3, the Order to restore lost pay was the figure of \$3,314.00, and as that figure had been paid to the applicant in November 2019, no further payment to the applicant should be Ordered.

[32] The applicant made submissions which rejected the proposition that the correct quantification of Order 3, the Order to restore lost pay, was the figure of \$3,314.00, as had been advanced on behalf of Ryan Wilks. The applicant provided submissions which included alternative calculations displayed in a spreadsheet that encompassed the entire period between dismissal on 2 August 2018, and her resignation from employment on 16 July 2019.

[33] The alternative calculations that were submitted by the applicant generated total figures for the quantification for Order 3, the Order to restore lost pay, of either \$24,372.00 or \$24,965.00, if a 3% CPI increase was applied to her remuneration level operative from late March 2019. Although the applicant asserted that her alternative calculations were based on clear documentation including tax information, there were numerous identifiable discrepancies with various figures that the applicant included and incorporated into the amounts contained in the spreadsheet upon which she relied.

[34] The respective positions of the Parties as to the quantification of Order 3, the Order to restore lost pay, can be summarised to be; on the part of Ryan Wilks, \$3,314.00, which had been paid, and therefore no further Order should be made; whilst alternatively, the applicant asserted that a further Order of either \$24,372.00 or \$24,965.00 should be made.

## **Conclusion**

[35] The Commission has carefully considered the competing submissions made by the Parties. The Commission has taken into account the amount of any remuneration earned by the applicant from employment or other work during the period between her dismissal, 2 August 2018, and the making of the Orders for reinstatement, 7 March 2019. Further, the Commission has taken into account the amount of any remuneration reasonably likely to be earned by the applicant during the period between the making of the Order for reinstatement and the actual reinstatement.

[36] In broad terms, the Commission is not prepared to adopt either of the Parties respective methods for calculation of Order 3, the Order to restore lost pay. In particular, the Commission rejects deductions made by Ryan Wilks in respect to amounts received by the applicant in the form of Newstart allowance and income protection insurance payments. Further, the Commission rejects the applicant's proposition that the calculation should include an adjustment for a 3% CPI increase.

[37] In the absence of agreement between the Parties, the Commission determines that the amount to be paid to the applicant in accordance with Order 3, the Order to restore lost pay shall be \$17,758.00. This amount is to be paid in addition to all other amounts that the applicant has received from Ryan Wilks including the \$3,314.00 that was paid to the applicant in November 2019.

[38] The figure of \$17,758.00 has been derived by notionally accepting the gross salary figure for the period 2 August 2018 to 7 March 2019 to be \$36,704.00, from which the "Gross

payments–individual” figure contained in the applicant’s ATO income statement of \$18,946.00 has been subtracted. No further deduction in respect to the \$3,314.00 paid in November 2019 has been made as this amount has been considered to reflect further remuneration lost or likely to have been lost because of the dismissal, and encompassing the entire period from dismissal on 2 August 2018 until resignation on 16 July 2019.

**[39]** The amount of \$17,758.00 is a gross figure which shall be taxed according to law, and it shall similarly attract superannuation treatment according to law. The amount of \$17,758.00 less applicable tax is to be paid to the applicant within seven days of the date of the Order.

**[40]** An Order specifying the amount to be paid in accordance with Order 3, the Order to restore lost pay, shall be issued separately.

COMMISSIONER

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<sup>1</sup> Blackadder v Ramsey Butchering Services Pty Ltd [2005] HCA 22 (221 CLR 539).

<sup>2</sup> Ibid @ 221 CLR 544-545.