



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Umberto Mammarella

v

Department of Parliamentary Services
(U2018/13620)

COMMISSIONER HARPER-GREENWELL

MELBOURNE, 14 APRIL 2020

Application for an unfair dismissal remedy - further decision regarding remedy.

[1] Mr Umberto Mammarella (**the Applicant**) made an application for an unfair dismissal remedy, the matter was heard and determined and I issued a decision¹ (**the Substantive Decision**) in which I found that Mr Mammarella's termination by the Department of Parliamentary Services (**the Respondent**) (DPS) was unfair. I was unable to come to a concluded view, based on the materials that were before me, on an appropriate remedy. I advised the parties that directions would be issued following my decision with respect to the filing of submissions addressing remedy.

[2] Directions were issued, the DPS sought an extension of time for filing, the extension was granted. The parties each filed written submissions addressing remedy. In the directions the parties were notified that, subject to any objections of the parties, I intended to determine the issue of remedy on the papers, however if either party sought to be heard they could advise my Chambers. A number of contentions arose from the written submissions and the matter was re-listed and both parties made further submissions on the matters in contention.

Written Submissions of the Applicant

[3] Mr Mammarella submitted that reinstatement to his former position was appropriate. He submitted that at the time of his termination he had been suspended on full pay since September 2017 when Mr Khalil Eideh's office had been closed by the Respondent. Further, he submitted that as on 24 November 2018, his termination of employment had already been triggered as Mr Eideh had not stood for re-election. Mr Mammarella had three weeks to wait from the date of the declaration of the election poll results before the provisions of clause 25.5 of the *Electorate Officers' (Victoria) Single Enterprise Agreement 2017* (**the Agreement**) would apply and he would become entitled to a compulsory termination payment.²

[4] Mr Mammarella further submitted that there was no evidence other employees could be disadvantaged by his reinstatement to his former position particularly as the provisions of clause 25.5 of the Agreement had been triggered.³

[5] Mr Mammarella submitted that given the findings of the Commission in the Substantive Decision, it is appropriate that he should be reinstated and paid remuneration between the date of termination and the date his employment would have ceased in accordance with clause 25.5 of the Agreement.⁴

[6] Mr Mammarella submitted that if, in the alternative, the Commission was not prepared to make an order reinstating him to his position, the maximum remedy available pursuant to section 392 of the *Fair Work Act 2009* (Cth) (**the Act**) should be ordered, being six month's remuneration.⁵

Written Submissions of the Respondent

[7] The DPS submitted that it is inappropriate to reinstate Mr Mammarella and it would be incompatible with the requirements of section 30 of the *Parliamentary Administration Act* (2005) (**Administration Act**).⁶ The Administration Act outlines the authority of the Presiding Officers to employ electorate officers on behalf of the Crown. DPS submitted the Presiding Officer may employ an electorate officer to assist a member of Parliament, a person nominated by that member and as Mr Eideh is no longer a Member of Parliament and Mr Mammarella has not been nominated for employment by the current Member an order for reinstatement would be incompatible with the Administration Act.

[8] The DPS submitted that Mr Eideh, the member of Parliament to which Mr Mammarella was attached for the duration of his employment, was no longer a member of Parliament and accordingly the position Mr Mammarella held no longer exists.⁷

[9] The DPS further submitted that Mr Mammarella would be unable to return to his former role due to his medical capacity and therefore it would inappropriate to order reinstatement. DPS submitted that an order for compensation is appropriate in all the circumstances.⁸

[10] The DPS also submitted that the Commission should have regard to Mr Mammarella being the subject of criminal charges resulting from the Independent Broad-based Anti-corruption Commission (**IBAC**) investigation.⁹ Further, they submitted that regard should also be given to the applicability of the Parliamentary Electorate Officer Code of Conduct and Parliamentary Values to the employment of Electorate Officers and the requirement that an electorate officer be and appear to be of good character.¹⁰ The DPS submitted due Mr Mammarella being subject to ongoing criminal proceedings arising from the IBAC investigation he is no longer able to discharge his obligations under the Code of Conduct or uphold Parliamentary Values.¹¹

[11] As to the quantum of compensation to be ordered the DPS submitted they would have initiated a process regarding possible serious misconduct and breaches of the Code of Conduct and a failure to maintain the reputation of the Parliament of Victoria immediately upon becoming aware that Mr Mammarella had been charged with criminal offences on 13 December 2018.¹² The DPS submitted that the disciplinary process would have been completed within two weeks from being made aware the charges against Mr Mammarella and would have resulted in the termination of his employment for misconduct or serious misconduct on or before 27 December 2018.

Written Submissions in Reply of the Applicant

[12] Mr Mammarella submitted that the DPS had made no inquiries between September 2017 and December 2018 as to Mr Mammarella's capacity or otherwise to perform his duties if reinstated. They further submitted that the DPS had in its letter of termination stated that it does not require Mr Mammarella to perform any further duties therefore Mr Mammarella's capacity or otherwise is not relevant.¹³

[13] Mr Mammarella further submitted that the Commission should not accept the submission of the DPS that they would have been justified in immediately terminating his employment because they relied on newspaper articles that should not be accepted as evidence.¹⁴

Consideration

[14] The Act provides the following with respect to remedy:

"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."

Reinstatement

[15] Section 390(3) of the Act provides that the Commission must not order the payment of compensation unless it is satisfied both that reinstatement of the person is not appropriate, and that it considers an order for the payment of compensation to be appropriate in all the circumstances of the case.

[16] In determining remedy, whilst it is not in contention that since the hearing of the substantive matter Mr Mammarella has been charged, at the time of the submissions being filed by the parties Mr Mammarella had not been convicted of any offence. Therefore, I have attributed no weight to the DPS's submissions related to the charges in this matter.

[17] Mr Mammarella seeks reinstatement, a remedy that in my view would be inappropriate. In my Substantive Decision I found that there was no evidence to support the

DPS's submission that Mr Mammarella was terminated because Mr Eideh had in fact lost trust and confidence in Mr Mammarella. However, during the hearing I found Mr Mammarella to be less than cooperative, I also made the observation that he had demonstrated similar behaviours towards the DPS during the investigation into the missing office equipment. Therefore, I am of the view that should I reinstate Mr Mammarella the relationship between Mr Mammarella and the DPS would not be cooperative or professional.

[18] Mr Mammarella was stood down pending an investigation into his conduct by IBAC and at the time of Mr Mammarella's termination he had been suspended on full pay due to the ongoing IBAC investigation into his conduct. Consequently, the relationship between Mr Mammarella and the DPS is in fact fractured and it is inconceivable that the DPS would in any circumstances be able to depend on the reliability or discretion of Mr Mammarella.

[19] Further Mr Mammarella was employed to perform the role of an Electorate Officer for the then member of Parliament Mr Eideh. Mr Eideh is no longer a member of Parliament and due to the operation of the Agreement Mr Mammarella's role would have ceased to exist when *inter alia* Mr Eideh either retired or was defeated in an election. Section 30 of the *Administration Act* outlines the authority of the Presiding Officer to employ electorate officers on behalf of the Crown. The electorate officer is a person nominated by the elected member and is a person who the elected member would have trust and confidence in their ability to perform the role. It is inconceivable that Mr Mammarella should be reinstated to fulfil the role as electorate officer or any other role in the office of the newly elected member. In my assessment, an award of compensation is appropriate in this case.

[20] In calculating the appropriate quantum, DPS submitted that the Commission should have regard to the formula set out in *Sprigg v Paul's Licensed Festival Supermarket*.¹⁵

Compensation

[21] The principles that apply to the question of how compensation should be calculated are well-established. The Commission does not have an open-ended discretion, but one confined by the Act. In determining the amount, all the circumstances are to be taken into account, including those prescribed by section 392(2) of the Act. The '*Sprigg*' formula is to be applied to arrive at an appropriate amount.

[22] Section 392 of the Act sets out the criteria to which I must give regard in determining any amount of compensation I might order the DPS to pay Mr Mammarella. I will consider each of those criteria in succession below.

The effect of the order on the viability of the employer's enterprise

[23] Mr Mammarella submitted that there would be no financial hardship for the Respondent as the Respondent had already budgeted to make the compulsory termination payment pursuant to clause 25.5 of the Agreement.¹⁶

[24] There is no evidence that a compensation order would have an adverse effect on the viability of the DPS. No adjustment is made on this account.

Length of the person's service with the employer

[25] Mr Mammarella had been employed by the Respondent for over 11 years.¹⁷ No adjustment to compensation is made on this basis.

Remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed.

[26] Mr Mammarella submitted that had he not been dismissed he would have received the compulsory termination payment pursuant to clause 25.5 of the Agreement.¹⁸

[27] DPS submitted that once the Applicant was charged with criminal offences arising from the IBAC investigation into his conduct within the electorate office on 13 December 2018, the Respondent would have initiated a process regarding possible serious misconduct, potential breaches of the Code of Conduct and failure to maintain the reputation of the Parliament of Victoria, which would have resulted in Mr Mammarella's dismissal.¹⁹

[28] At the time of his dismissal Mr Mammarella's annual remuneration was \$91,726.00.²⁰ That represents an amount of \$7,643.83 per calendar month or \$1,763.96 per week.

[29] Mr Mammarella made submissions at the substantive hearing of his unfair dismissal application that Mr Eideh ceased performing his duties in the Victorian Legislative Council (VLC) on 24 November 2018 and therefore the terms of the Agreement took affect and Mr Mammarella's employment was due to cease 3 weeks later. However, one cannot ignore the medical evidence given by Mr Mammarella at the hearing. During the hearing Mr Mammarella made submissions that he had been suffering from breast cancer and had undergone a number of surgeries to treat his condition. He also gave evidence that he was still in the process of being treated.²¹ Due to his incapacity Mr Mammarella was not able to provide a response to the DPS during the show cause period and therefore it was not likely that he would have been able to return to work and perform the inherent requirements of his role prior to Mr Eideh's term in office ending. In fact, at the time of the hearing Mr Mammarella gave evidence of his medical condition and his incapacity and further submitted medical evidence that his mental and physical ill health was still such that he was not capable of representing himself months later at the hearing.

[30] One also cannot ignore that Mr Mammarella had been stood down for a significant length of time pending the outcome of an investigation into his conduct. The evidence supports a finding that due to the investigation there was some friction in the employment relationship between Mr Mammarella and the DPS. Accordingly I judge that on the evidence before me at the substantive hearing and taking into consideration the written submissions of the parties, it is reasonable to estimate that had Mr Mammarella not been dismissed he would not have continued in his employment beyond the findings being handed down by IBAC or beyond the point in time that Mr Eideh ceased performing his duties in the VLC. Therefore, it is reasonable to conclude regardless of Mr Mammarella's health his employment would not have proceeded beyond 14 December 2018 in any case.

The efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal

[31] Mr Mammarella did not make any submissions addressing this criteria. No adjustment to compensation has been made on this basis.

The amount of remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation

[32] I have adopted the approach of the Full Bench of the AIRC in *Ellawala v Australian Postal Corporation*²² as follows:

“Lost remuneration is usually calculated by estimating how long the employee would have remained in the relevant employment but for the termination of their employment. We refer to this period as the “*anticipated period of employment*”. This amount is then reduced by deducting monies earned since termination. Only monies earned during the period from termination until the end of the “*anticipated period of employment*” are deducted. An example may assist to illustrate the approach to be taken.

In a particular case the Commission estimates that if the applicant had not been terminated then he or she would have remained in employment for a further 12 months. The applicant has earned \$3,000 a month for the 18 months since termination, that is \$54,000. Only the money earned in the first 12 months after termination (that is \$36,000) is deducted from the Commission’s estimate of the applicant’s lost remuneration. Monies earned after the end of the “*anticipated period of employment*”, 12 months after termination in this example, are not deducted. This is because the calculation is intended to put the applicant in the financial position he or she would have been in but for the termination of their employment.”

[33] Mr Mammarella did not make any submissions in this regard. It is unclear whether Mr Mammarella received remuneration after 7 December 2018.

[34] Mr Mammarella’s remuneration since the time of the termination of his employment and up to the end of the period for which I believe that he would have remained in employment would have been \$1,763.96.

Any amount of income reasonably likely to be earned during the period between the making of the order and the actual compensation.

[35] Mr Mammarella did not make any submissions that go towards any income likely to have been earned during the period between making of the order and the actual compensation. I have considered Mr Mammarella’s submissions and evidence relating to his medical condition and have not made any deductions for contingencies in the absence of submissions about income that may or may not have been earned by Mr Mammarella. No adjustments to compensation has been made on this basis.

Any other matter that the FWC considers relevant.

[36] There are no other reasons relevant to my consideration.

[37] I do not consider there has been any misconduct which would require me to reduce the amount of compensation.

[38] I do not include any component by way of compensation for shock, distress or humiliation caused by the manner of the dismissal.

Conclusion

[39] There were no objections by the parties to the Commission making a decision on remedy based on the materials before me.

[40] In light of my consideration of the criteria above and for the reasons I have discussed, the DPS must pay to Mr Mammarella the amount of \$1,763.96, plus Mr Mammarella's superannuation entitlements, less appropriate taxation as required by law.

[41] I deem it appropriate that the compensation be paid within 7 days from the date of the accompanying order²³ (as issued simultaneously with this decision).



COMMISSIONER

Appearances:

N Riggs of Rubicon Compensation Lawyers for the Applicant.

M Jordon with *R Jordan* from the Respondent.

Hearing details:

2019.

Melbourne (by telephone):

December 20.

Final written submissions:

Applicant: 27 September 2019

Respondent: 18 October 2019

Applicant reply: 20 November 2019

Printed by authority of the Commonwealth Government Printer

<PR717576>

¹[2019] FWC 6340

² Applicant's remedy submissions, 14

³ Applicant's remedy submissions, 15

⁴ Applicant's remedy submissions, 18

⁵ Applicant's remedy submissions, 19

⁶ Respondent's remedy submissions, 1

⁷ Respondent's remedy submissions, 4 & 5

⁸ Respondent's remedy submissions, 2

⁹ Respondent's remedy submissions, 6

¹⁰ Respondent's remedy submissions, 7

¹¹ Respondent's remedy submissions, 8

¹² Respondent's remedy submission, 16

¹³ Applicants's remedy reply submissions, 2

¹⁴ Applicant's remedy reply submissions, 3

¹⁵ (1998) 88 IR 21

¹⁶ Applicant's remedy submissions, 19(a)

¹⁷ Applicant's remedy submissions, 19(b)

¹⁸ Applicant's remedy submissions, 19(c)

¹⁹ Respondent's remedy submissions, 16

²⁰ Applicant's remedy submissions, 3

²¹ Transcript 11 April 2019, PN 141

²² *Ellawala v Australian Postal Corporation* (unreported, AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000) Print S5109

²³ PR717577