



DECISION

Fair Work Act 2009
s.120—Redundancy pay

Worthington Industries Pty Ltd

v

Nael Ablahad
(C2020/1789)

and

Worthington Industries Pty Ltd

v

Paul Treloar
(C2020/1790)

and

Worthington Industries Pty Ltd

v

Rivas Subair
(C2020/1791)

DEPUTY PRESIDENT CLANCY

MELBOURNE, 9 APRIL 2020

Redundancy - applications to vary NES entitlement - applications to reduce redundancy entitlements from 4 weeks to 1 week - whether employer has capacity to pay - applications dismissed.

[1] On 24 March 2020, Worthington Industries Pty Ltd (Worthington Industries) made three applications to the Fair Work Commission under s.120 of the *Fair Work Act 2009* (the Act) seeking to reduce the amount of redundancy pay to which Mr Nael Ablahad, Mr Paul Treloar and Mr Rivas Subair (the Respondent Employees) are each entitled from four weeks' pay to one.

Background

[2] Until 3 April 2020, the Respondent Employees were employed by Worthington Industries as follows:

- Mr Ablahad was employed as a full-time employee from 13 June 2018 to 3 April 2020. He was paid \$22.50 per hour.

- Mr Treloar was employed as a full-time employee from 9 April 2018 to 3 April 2020. He was paid \$22.00 per hour.
- Mr Subair was employed as a full-time employee from 4 April 2018 to 3 April 2020. He was also paid \$22.00 per hour.

[3] Worthington Industries say that even though their full-time employment has ceased, they have promised to henceforth offer each of the Respondent Employees as much casual employment as is available, even if they cannot guarantee minimum hours of work. Worthington Industries state that they advised the Respondent Employees that they will offer them full-time positions again as soon as they are able. They proffer that under the current world-wide crisis of COVID-19, this is the best that Worthington Industries can do.

[4] At item 2.3 of their Form F45A, Worthington Industries outlined that they have experienced a reduction in their production output due to both competition and COVID-19 and as a result, have had to end the full-time employment of 5 employees.

[5] The matters were first listed for a Telephone Mention on 27 March 2020. I caused an email to be sent on 26 March 2020 foreshadowing that during the Telephone Mention I would ask each of the Respondent Employees what they had to say about the applications that had been made, and in particular, the request that the amount of their redundancy pay be reduced from four weeks to one week. I also foreshadowed that I intended to ask Worthington Industries to outline the extent to which these applications are based on competition, as opposed to COVID-19. I also requested that Worthington Industries provide, ahead of the Telephone Mention, particulars of the quantum of both a four-week redundancy payment and a one-week redundancy payment for each of the Respondent Employees. Worthington Industries was also invited to provide evidence supporting their assertion that they cannot afford to pay four weeks redundancy pay to each of the Respondent Employees.

[6] Worthington Industries responded by requesting an adjournment until 9 April 2020. I therefore issued Directions for Worthington Industries to lodge with the Commission and serve on the Respondent Employees any submissions, witness statements or other material addressing how it says it cannot pay the redundancy entitlements to the Respondent Employees by no later than 3 April 2020. I also directed the parties to provide their telephone numbers to my Chambers.

[7] I further directed the Respondent Employees to lodge with the Commission and serve on Worthington Industries any submissions, statements or other material in reply to Worthington Industries' material by 8 April 2020. Finally, the matters were listed for a Telephone Mention on 9 April 2020.

Written Submissions of Worthington Industries

[8] Worthington Industries state that they manufacture a variety of products that service the building, furniture, caravan and rail industries. They say that all areas of the business except rail have been impacted at the one time due to COVID-19 and assert that based on customer advice and public announcements, they anticipate their sales will drop by up to 50% over the coming months.

[9] Taking what they describe as “a very optimistic approach”, Worthington Industries believe March 2020 actual sales are down 12% compared with March 2019 sales. Worthington Industries says that despite suffering this loss, all staff were kept on and paid in full. Further, they advise that April 2020 forecast sales are down 31% compared with April 2019 sales and similarly, for the April to June quarter of 2020, forecast sales are predicted to be down 31% compared to 2019.

[10] Worthington Industries assert that even these forecasts are optimistic and changing every day. They say they do not have actual sales orders and that their customers have variously indicated they are reducing their sales by 30%-50%, closing their businesses for weeks and contracting to three-day working weeks.

[11] Worthington Industries advise their rental payments exceed \$300,000.00 per annum but that they have not yet been provided with any rental relief from their landlord.

[12] Worthington Industries state that their cashflow and profitability will be severely impacted during this period of major sales reductions and uncertainty. They say they need to be very conscious of all spending, are making every effort to keep the business viable and that almost all staff are working reduced hours now, or will be after Easter. Worthington Industries says there are other full-time employees who have been with Worthington Industries for less than a year, who have also been made casual but that they have been paid out their full entitlements and notice period.

[13] Worthington Industries said their preference was to keep the Respondent Employees on as casual employees and convert them back to full-time employment once sales pick up. They said that they would also reinstate any sick leave entitlements to the Respondent Employees once they are able to convert them back to full-time employment.

[14] Worthington Industries submitted that paying the full four weeks redundancy will cause it financial hardship and asserted that even paying each of the Respondent Employees one week of redundancy pay would be stretching their finances at the moment.

Submissions of the Respondent Employees

[15] None of the Respondent Employees filed written submissions in reply.

The Telephone Mention on 9 April 2020

[16] Ms Michelle Elovaris represented Worthington Industries during the Telephone Mention. On 8 April 2020, the Respondent Employees had again been asked to provide their best telephone numbers for contact but only Mr Ablahad replied. All three were nonetheless telephoned at the time of the Mention, with Mr Treloar and Mr Subair telephoned on the telephone numbers provided by Worthington Industries on the Application Forms. Contact was only able to be made with Mr Ablahad.

[17] During the Telephone Mention Ms Elovaris explained that the Respondent Employees were given two weeks’ notice that their full-time employment would cease on Friday 3 April 2020. Further, they were told that it was hoped that they would continue to be engaged on a casual basis. Ms Elovaris stated that the termination payment for final wages and accrued but

unused annual leave was processed and made on 8 April 2020 and that Mr Subair has already been engaged as a casual employee.

[18] I drew Ms Elovaris' attention to the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*, passed by the Federal Parliament yesterday. I also raised with Ms Elovaris some details from a [Job-Keeper Payment - Frequently Asked Questions Fact Sheet](#) (FAQ) that has been issued by the Federal Government. I suggested that Worthington Industries might like to take the time to consider the implications of this development, which has transpired since they made their initial decision to terminate the full-time employment of the Respondent Employees.

[19] Ms Elovaris confirmed that Worthington Industries had registered their interest with the Australian Tax Office (ATO) and that they have a turnover of less than \$1 billion. In response, I observed that on the information Ms Elovaris had submitted, Worthington Industries' turnover was predicted to fall by the requisite 30%, which would appear to enliven eligibility. I noted that the Respondent Employees were in the employment of Worthington Industries on 1 March 2020 and I observed that the quantum of the JobKeeper Payment appeared to equate to approximately 90% of the pre-termination fortnightly wages of each of the Respondent Employees and that JobKeeper Payments could be made until 27 September 2020.

[20] Further, I highlighted the section of the FAQ dealing with the situation where a company might have let their workers go, which indicated that if such workers were rehired, they could immediately receive the JobKeeper Payment, even if it was necessary for the employer to immediately stand them down. I indicated that there was also a section entitled "*What should I do if I want to re-hire an eligible employee who received a redundancy package?*". I noted that the answer to that particular "FAQ" was that if re-hired, the employer "*will need to consult with the employee and consider prevailing workplace arrangements to settle redundancy terms.*" I expressed a preliminary view that the applications before me might perhaps be capable of being considered part of "*prevailing workplace arrangements to settle redundancy terms*".

[21] Accordingly, I suggested that Worthington Industries may like to take the opportunity to try and establish whether it is eligible for the JobKeeper Payment, noting that the ATO will provide guidance on self-assessment. I suggested that Worthington Industries may wish to seek advice on whether the JobKeeper Payment might be something they could use. I offered to hold the matters open until Worthington Industries had ascertained their eligibility and had considered the prospect of re-hiring the Respondent Employees.

[22] Ms Elovaris considered the matters I had raised but indicated that the uncertainty of what might happen in six months' time if the business had not recovered led her to conclude that the better option for Worthington Industries was to resolve the redundancy issue instead, so as to provide certainty to all.

[23] Ms Elovaris therefore confirmed that Worthington Industries pressed its applications for the redundancy pay entitlements of each of the Respondent Employees to be reduced from four weeks to one week, pursuant to s.120(1)(b)(ii) of the Act.

[24] I therefore proceeded to hear the further submissions Ms Elovaris wished to make in relation to the assertion that Worthington Industries cannot pay each of the Respondent Employees the amount that is prescribed in s.119(2) of the Act.

[25] Ms Elovaris stated that while Worthington Industries currently had the means to pay the full amount and had money in the bank today to do so, they would be dealing with a deficit and cash flow problems very quickly and she did not know how severe these would be. She stated that while the landlord of Worthington Industries had not previously been amenable to considering rental reductions and that this position may change due to Government rental assistance, Worthington Industries were trying to reduce their overall outgoing expenses immediately for what is going to be a difficult position going forward.

[26] Ms Elovaris submitted that paying the full redundancy amounts to the Respondent Employees will cause financial hardship because of the impending losses Worthington Industries know are inevitable. Ms Elovaris concluded by expressing the sadness of Worthington Industries at having to terminate the employment of the Respondent Employees in difficult circumstances.

[27] Mr Ablahad elected to make no submissions in response.

Legislation

[28] Section 120 of the Act provides:

“Variation of redundancy pay for other employment or incapacity to pay

(1) This section applies if:

(a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and

(b) the employer:

(i) obtains other acceptable employment for the employee; or

(ii) cannot pay the amount.

(2) On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.

(3) The amount of redundancy pay to which the employee is entitled under section 119 is the reduced amount specified in the determination.”

[29] Section 119(1) of the Act provides:

“Entitlement to redundancy pay

(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

- (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
- (b) because of the insolvency or bankruptcy of the employer.”

Consideration

[30] In the 2004 *Redundancy Case*,¹ the Full Bench of the Australian Industrial Relations Commission confirmed the purpose of redundancy pay is to compensate an employee for matters such as the trauma associated with the termination of employment, the loss of non-transferable credits such as sick leave, the loss of security and seniority, lower job satisfaction and diminished social status and conditions. In applications such as these, the onus lies on the employer company seeking the exemption from redundancy payment obligations and the discretion exists for the Commission to make an order to reduce or remove an employee’s statutory entitlement to redundancy pay to an amount, which may be nil, that it considers appropriate.

[31] I acknowledge the plight of Mr Ablahad, Mr Treloar and Mr Subair. The loss of their employment was not within their control and they now face a period of uncertainty, worry and financial insecurity. Sadly, they are not alone in this situation as the community comes to grips with the impacts of COVID-19.

[32] Similarly, I acknowledge the challenges and very difficult decisions faced by Worthington Industries. Worthington Industries is now subject to a changed and changing operating environment, its sales are declining and its prospects in the near term are uncertain. I note its aspiration to offer the Respondent Employees as much casual employment as it can in the short term, ahead of returning them to full-time employment when this is possible. I also note that it has offered to reinstate any personal/carer’s leave entitlements to the Respondent Employees once they are able to resume full-time employment.

[33] However, even if I accept what Worthington Industries say about the projected decline in sales and foreshadowed cash flow issues, I have before me the statement of Ms Elovaris that Worthington Industries currently has both the means to pay the full amount of the redundancy entitlement of each of the Respondent Employees and the money in the bank to do so. Having regard to this statement, I am not satisfied Worthington Industries comes within the circumstances of s.120(1)(b)(ii) of the Act and I decline to exercise the discretionary power in s.120(2) of the Act to reduce the amount of redundancy pay.

[34] The applications to reduce the four weeks’ redundancy pay that Mr Ablahad, Mr Treloar and Mr Subair are entitled to be paid by Worthington Industries are therefore not granted and it follows that each of Mr Ablahad, Mr Treloar and Mr Subair remain entitled to four weeks’ redundancy pay pursuant to s.119 of the Act.

[35] Each of the three applications made by Worthington Industries are dismissed.



DEPUTY PRESIDENT

Appearances:

M Elovaris for Worthington Industries Pty Ltd.

N Ablahad on his own behalf.

Hearing details:

2020.

Melbourne (telephone mention):

April 9.

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