[2020] FWC 2190

The attached document replaces the document previously issued with the above code on 28 April 2020 to correct a typographical error at paragraph [23].

Associate to Deputy President Mansini.

28 April 2020.

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Deliya Thushari Migunthanna Kariyakaranage
v
Promo Brands Pty Ltd
(U2020/7955)

DEPUTY PRESIDENT MANSINI MELBOURNE, 28 APRIL 2020

Application for an unfair dismissal remedy – dismissal harsh, unjust or unreasonable – compensation ordered.

[1] This decision concerns an application by Mrs Migunthanna Kariyakaranage (Applicant) for an unfair dismissal remedy pursuant to s.394 of the *Fair Work Act 2009* (Cth) (Act).

[2] The Applicant commenced employment with Promo Brands Pty Ltd (formerly named High Caliber Line of Australia Pty Ltd) (Respondent) on or around 29 July 2013. For a period of nine months following a workplace injury the Applicant was provided with light duties until, on 27 June 2019, her employment was terminated by reason of incapacity.

[3] The Applicant does not dispute that at the time of termination she was (and remains) incapacitated to perform her pre-injury role, but contends that there were light duties available that she was fit to perform. The Respondent maintains there was a valid reason related to the Applicant's incapacity and it was under no obligation to continue to provide modified duties. However it has conceded that there were some flaws in the termination procedure.

[4] The Applicant does not seek reinstatement but sought a remedy of four months' compensation. The Respondent accepts that reinstatement is inappropriate but opposed a compensation order.

[5] As the matter did not resolve after two attempts at conciliation, a program was set for arbitration and the exchange of materials in advance. The Applicant filed a witness statement and gave evidence at the hearing with the assistance of an interpreter. The Respondent filed three witness statements from the following witnesses, who also gave evidence at the hearing:

a) Christine Kane, Executive Assistant;
b) Sam Wrightson, Production Manager;
c) David Torelli, Managing Director.

[6] At the hearing, the Respondent was granted permission to be represented by Counsel having regard to the matters I am required to consider at s.596 of the Act. Following the conclusion of the hearing, closing submissions were filed in writing.

Initial matters for consideration

[7] There is no dispute between the parties, and I find on the evidence, that the initial matters set out in section 396 of the Act are, insofar as they are relevant, satisfied in this case.

The facts

[8] The Respondent is a promotional products business which prints customer logos on promotional products. It employs approximately 60 employees, with around 25 to 30 in production roles.[1] Its printing areas include pad printing, screen printing, digital printing, laser engraving and the Mimaki room.[2] The printing work is semi skilled and employees are trained to work in a particular printing area.[3] The remainder of the work is unskilled packing and unpacking jobs.[4] The nature of the Respondent's business is such that work is allocated and prioritised on a daily basis depending on client orders, with work delegated by the Production Manager and team leader and then organised within the team.[5]

[9] On or around 29 July 2013, the Applicant commenced employment with the Respondent and was initially allocated packing and unpacking duties.[6] The *Manufacturing & Associated Industries and Occupations Award* 2010 (Award) covered and applied to her employment. Initially, new employees are classified and paid as a C13 classification under the Award for approximately six months before progressing to a C12 classification.[7]

[10] From September 2013, the Applicant progressed and performed semi skilled work as Machine Operator in the Mimaki Printing Room.[8] From 13 April 2015 until 18 April 2017 the Applicant took a period of parental leave and returned to work on a part time basis until 18 July 2017 when she resumed full time employment. As at 23 August 2017, the Applicant was classified and paid as a C11 employee under the Award.[9] Her most recent contract of employment, signed on 27 March 2018, provided that her *"position"* was that of *"Day Shift - Production Area",* in the Award classification of *"C11 Full Time"* and that she may be allocated to perform other duties from time to time.[10]

[11] On 29 August 2018, the Applicant's medical practitioner recommended she perform *"light duties and avoid repetitive movements"* at work until 29 September 2018.[11] On 14 September 2018, the Applicant provided a certificate of capacity which recorded a diagnosis

[1] Mr Wrightson on Transcript at PN466.
[2] Mr Wrightson on Transcript at PN462.
[3] Mr Wrightson on Transcript at PN465.
[4] Mr Wrightson on Transcript at PN467 and PN468.
[5] Applicant on Transcript at PN300 and Mr Wrightson on Transcript at PN534 and PN535.
[6] Attachment K to Applicant's Witness Statement; Applicant on Transcript at PN203.
[7] Ms Kane on Transcript at PN396; Applicant's Closing Submissions and attached payslip.
[8] Applicant on Transcript at PN205.
[9] Applicant's Closing Submissions and attached payslip.
[10] Attachment DT-2 to the Witness Statement of David Torelli.
[11] Attachment A to Applicant's Witness Statement.

of cervical disc disease and lumbar disc prolapse (Injury).[12] In October 2018, the Applicant made, and the workers' compensation insurer accepted, a claim related to the Injury.[13]

[12] From 10 October 2018 until June 2019, the Applicant was assigned to light duties when at work consistent with her certified work restrictions.[14] Specifically, she was restricted from repetitive movements, repetitive bending and lifting more than five kilograms. For the period from 6 May 2019, after the workers' compensation claim was discontinued, the Applicant provided medical certificates on a monthly basis which continued to certify her as restricted from duties involving repetitive movements, repetitive bending and lifting of more than 5 kilograms.[15]

[13] The Applicant described, and the Respondent accepted that, her work on the Mimaki JFX200-2513 machine required *"repetitive bending, excessive stretching and lifting to operate the machine"*.[16] On the basis of her restrictions, there is no dispute that the Applicant was unable to perform her pre-Injury work as a Machine Operator in the Mimaki Room.[17] However the Applicant believes that there were plenty of other jobs that she could perform.[18]

Relevant events leading to dismissal

[14] On 26 June 2019, a Production Manager (a Mr Bouchard) directed the Applicant to perform the light duty of stapling covers onto booklets. The Applicant said that she was not able to continue the assigned duty as it was causing her pain, having spent the previous day performing a similar job. The Applicant asked if she could do an alternate job where she would have less back pain, a request which she maintained is not an unusual request for an employee in this business to make.[19]

[15] On 27 June 2019, the Applicant's team leader directed her to perform the light duty of removing plastic covering from rulers.[20] The Applicant commenced at 8.30am and proceeded to perform the task using a knife. Mr Wrightson, also a Production Manager (who had commenced with the Respondent one month prior), directed the Applicant not to do the task in this way. The Applicant said that the alternative method that she was directed to use caused her pain and she had *"done this same job, the same product, many times in the past"* using her preferred method.[21]

[16] Mr Wrightson then had a discussion with Mr Torelli, the Managing Director, for which the Applicant was not present. Mr Torelli consulted with other managers and subsequently informed the Applicant that, if she could not follow instructions, then she needed to stop and go home to which the Applicant replied by saying she would attempt to do the duty as requested.[22] Mr Torelli required her to go home nonetheless, which he said was due to his concern the task would cause the Applicant pain and was a risk to her safety.[23]

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[12] Attachment C(1) to Applicant's Witness Statement.
[13] Attachment F to Applicant's Witness Statement.
[14] Applicant on Transcript at PN227, PN241, PN244 and PN247.
[15] Attachment K to Applicant's Witness Statement.
[16] Attachment E(1) to Applicant's Witness Statement; Applicant on Transcript at PN19190 to PN192.
[17] Applicant on Transcript at PN216 and PN217.
[18] Applicant on Transcript at PN200.
[19] Applicant on Transcript at PN253.
[20] Applicant on Transcript at PN255 and PN258.
[21] Applicant on Transcript at PN26, PN261 and PN264.
[22] Applicant on Transcript at PN270; Mr Torelli on Transcript at PN637.
[23] Applicant on Transcript at PN270; Mr Torelli on Transcript at PN621, PN627, PN630.

Around 9.45am on 27 June 2019, the Applicant was sent home because she was unable to complete the duty as directed.[24]

[17] Mr Torelli's evidence was that, at the time of sending the Applicant home, he had not yet made any decision to dismiss the Applicant from her employment, he had sent her home to consider what was available. Mr Wrightson gave evidence that he was responsible for assessing the available duties and had concluded that there *"was literally nothing else I could give her"*.[25] There was no evidence that he discussed the matter with other production managers. In response to my questions at the hearing, he explained that he had not inquired of the team leaders but had conducted an assessment of the jobs that the Applicant could perform based on his own best discretion and a review of other jobs the Applicant had performed.[26] He assessed that no printing duties would be able to be accommodated in light of the Applicant's work restrictions.[27] Mr Torelli formed the view that the duties the Applicant was unable to perform on 26 and 27 June 2019 were *"the lightest duties available"* and there were no other duties available.[28] He believed that the Respondent had been trying hard to find a position for the Applicant by trying to find her the lightest duties in the factory over several months.[29] The Applicant does not agree that there were no other light duties for her to perform.[30]

[18] Also on 27 June 2019, Ms Kane (who handles all legal matters) contacted the Victorian Chamber of Commerce and Industry (VCCI) for advice which she subsequently communicated to Mr Torelli in words to the following effect *"..if she* (the Applicant) *can't perform the duties that she was employed for then it's ok to let her go"*.[31] Mr Torelli instructed Ms Kane to email a termination letter to the Applicant which read as follows:

> *"RE: Termination of Employment.*
>
> *A company decision has been reached to terminate your employment with Promo Brands Pty Ltd effective from today 27th June 2019.*
>
> *You have advised that you are unable to carry out the obligations of the fulltime role you were engaged to perform & refusing to process basic simple tasks when requested.*
>
> *A payment will be processed to your account by close of business on Friday 28th June for four weeks in lieu of notice, unpaid hours worked on the morning of 27th June 2019 & unused annual leave.*
>
> *Wishing you all the best for the future.*
>
> *As per David Torelli."*[32]

[24] Applicant on Transcript at PN261.
[25] Mr Wrightson on Transcript at PN541.
[26] Mr Wrightson on Transcript at PN543 and PN546.
[27] Mr Wrightson on Transcript at PN545 to PN549.
[28] Mr Torelli on Transcript at PN634.
[29] Mr Torelli on Transcript at PN643.
[30] Applicant on Transcript at PN272 and PN273.
[31] Witness statement of Christine Kane at 3 and Mr Torelli on Transcript at PN640 to PN641.
[32] Attachment J to Applicant's Witness Statement.

[19] There was no discussion with the Applicant on 26 and 27 June 2019 about what other alternative duties she might be able to perform, or that it was proposed to terminate her employment.[33]

Since the dismissal

[20] Since her dismissal, the Applicant has continued to provide monthly medical certificates which consistently reflect her ongoing work restrictions, which mean that she is unable to perform her pre-Injury work as a Machine Operator in the Mimaki Room.[34] The most recently supplied medical certificate describes the restrictions as *"no repetitive neck movements, no repetitive bending, no lifting more than 5kg"*.[35]

[21] As at 29 October 2019, the Applicant had not made formal application for any jobs or received any income. Her evidence was that she had made inquiries through her networks however is not able to secure a job in the manufacturing sector due to her medical restrictions.[36] As a qualified accountant in Sri Lanka, she had enrolled in a course to do a certificate IV in book keeping, in the hope she may find employment in that field.[37]

WAS THE DISMISSAL HARSH, UNJUST OR UNREASONABLE?

[22] Section 387 requires that I take into account the matters specified in paragraphs (a) to (h) in considering whether the Applicant's dismissal was harsh, unjust and/or unreasonable. I turn now to consider each of the matters at s.387 in turn below.

[23] Some initial observations about the evidence. As is apparent from the summary of facts above, many of the facts are not in dispute. At the hearing, the Respondent presented footage (video and photographs) of work tasks and movements involved, which the Applicant challenged on account of her attention to detail and I have taken those clarifications into account as relevant. Notwithstanding the aide of an interpreter at the hearing, the Applicant presented both orally and in writing as articulate, credible and thorough in her evidentiary accounts of tasks and events.

Section 387(a) – Was there a valid reason for the dismissal related to the capacity or conduct of the Applicant (including its effect on the safety and welfare of other employees)?

[24] It is necessary to consider whether the employer had a valid reason for the dismissal of the employee, although it need not be the reason given to the employee at the time of the dismissal. A valid reason is one that is "sound, defensible and well founded" and should not be "capricious, fanciful, spiteful or prejudiced".[38]

[25] The Act requires consideration of whether there was "a" valid reason for dismissal. Where several reasons for termination are invoked, it is not necessarily the case that all must be substantiated.[39]

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[33] Applicant on Transcript at PN274; Mr Torelli on Transcript at PN665 and PN666.
[34] Applicant on Transcript at PN279.
[35] Attachment D to the Applicant's Witness Statement.
[36] Applicant on Transcript at PN77 and PN78.
[37] Applicant on Transcript at PN77.
[38] *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373.
[39] *Hatwell and Another v Esso* [2018] FWC 2398 at [76].

[26] The Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[40] The question the Commission must address is whether there was a valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees), in the sense that it was both a good reason and a substantiated reason.

[27] A reason will be related to the capacity of an applicant where the reason is associated or connected with the ability of the employee to do their job as required by the employer.[41]

[28] The Respondent asserts that there was a valid reason for the dismissal of the Applicant related to the Applicant's capacity to perform the inherent requirements of her substantive role. In these circumstances, *"it is the substantive position or role of the employee that must be considered and not some modified, restricted duties or temporary alternative position that must be considered"*.[42] The reference to "inherent" requirements invites attention to what are the characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral.[43]

[29] There is a dispute about the inherent requirements of the Applicant's substantive role. The Applicant contended that her primary role was equivalent to a C12 classification in the Award, performing packing and unpacking duties. I understand her argument to be that this is the role that she was originally employed and paid to do. On the evidence, the light duties allocated since August 2018 involved packing and unpacking tasks. However the evidence before the Commission establishes that, at least since 27 March 2018 (if not earlier) and immediately prior to the Injury in August 2018, the Applicant accepted an employment contract which states her "position" is "Day Shift - Production Area" and describes her duties as C11 under the applicable Award. She was paid as a C11 since August 2017. In the context of this business, a C11 under the Award is equivalent to Machine Operator. The Applicant also gave evidence to the Commission that, immediately prior to her Injury, she was performing the role of Machine Operator in the Mimaki Room and consistently throughout the materials she described her role as such. I am satisfied that it is this position as Machine Operator in the Mimaki Room (and not the modified, restricted or alternative duties performed since August 2018) which is the substantive position that must be considered for the purposes of assessing whether there was a valid reason for the dismissal related to the Applicant's capacity.

[30] There is no conflict in this case about the Applicant's medical capacity or the nature of her work restrictions. The Applicant accepts that for around nine months prior to her dismissal she was (and remained, at the time of the hearing) unable to perform her pre-Injury role of Machine Operator in the Mimaki Room due to her incapacity and on the basis of her work restrictions. The termination letter of 27 June 2019 records that this was a reason for the Applicant's termination.

[31] Accordingly, I find that that there was a valid reason for the Applicant's dismissal because she could not perform the inherent requirements of her substantive, pre-injury role of

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[40] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681 at 685.
[41] *Crozier v Australian Industrial Relations Commission* [2001] FCA 1031 at [14].
[42] *J Boag & Son Brewing Pty Ltd v Button* [2010] FWAFB 4022 at [22].
[43] *X v Commonwealth* [1999] HCA 63 at [102].

Machine Operator. The Applicant's contention that she could have continued to perform light duties is considered at s.387(h) below.

[32] For completeness, I note that although the termination letter appears to make reference to conduct, any reason that may have related to the Applicant's performance was not pressed in the proceedings before the Commission and is not substantiated on the materials before me.

Section 387(b) and (c) - Was the Applicant notified of that reason and given an opportunity to respond to any reason related to her capacity or conduct?

[33] It is necessary to consider and take into account whether the Applicant was notified of any valid reason(s) for his dismissal and whether she was given an opportunity to respond to any reason(s) related to her capacity or conduct. In *Crozier v Palazzo Corporation Pty Ltd* a Full Bench of the Australian Industrial Relations Commission dealing with a similar provision of the *Workplace Relations Act* 1996 stated the following (at [73]):

> *"As a matter of logic procedural fairness would require that an employee be notified of a valid reason for the 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 170(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."*

[34] The criterion concerning whether an employee was provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity should be applied in a common sense way to ensure the employee is treated fairly and should not be burdened with formality. [44]

[35] On the evidence, the Applicant was sent home on 27 June 2019 before any termination decision was made. She was not informed that termination of her employment was proposed or under consideration. She was not consulted about her work restrictions, or what alternative duties she may have perceived existed that she could perform. Later that same day the Applicant received an email attaching a termination letter.

[36] The Respondent conceded that the dismissal process was deficient because it did not notify the Applicant of the reason for the dismissal or provide her with an opportunity to respond to the reason as required by ss.387(b) and (c).

[37] Having regard to the matters referred to above, I find that the Applicant was not notified of the valid reason for her dismissal, and was not given an opportunity to respond to the reason for her dismissal, prior to the decision to dismiss being made.

Section 387(d) and (e) – Any unreasonable refusal to allow a support person present to assist at any discussions related to the dismissal and warning of unsatisfactory performance?

[44] *RMIT v Asher* (2010) 194 IR 1 at 14-15.

[38] As there were no discussions related to the dismissal, and the dismissal related to capacity not performance, the questions of a support person and prior warnings do not arise.

Section 387(f) and (g) - The degree to which the size of the Respondent's enterprise, and the absence of dedicated human resources management specialists or expertise in the enterprise, would be likely to impact on the procedures followed in effecting the dismissal?

[39] The Respondent contended that it does not employ any dedicated human resources management specialists and, to some extent, its process deficiencies flowed from a lack of relevant expertise within the Respondent's business. Notwithstanding this contention, the Respondent's evidence was that it sought and obtained expert advice from VCCI about the Applicant's dismissal prior to issuing the termination letter on 27 June 2019. There was no submission made about how the size of the Respondent's enterprise may have impacted the procedures followed.

[40] Having found that the Respondent was able to and did access human resources expertise in effecting the dismissal, the absence of dedicated human resources management specialists in the Respondent's enterprise was not likely to impact procedures followed in effecting the dismissal. On the materials before the Commission, the size of the Respondent's enterprise was also not likely to impact on the procedures followed in effecting the dismissal.

Section 387(h) - Any other matters that the Commission considers relevant?

[41] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[42] The Respondent asked the Commission to consider as relevant that its obligation to provide alternative duties under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ended on 7 May 2019 when the workers' compensation insurer rejected the Applicant's claim and the statutory "employment obligation period" came to an end in accordance with s.103. On the evidence before the Commission, there does not appear to be a contravention of any statutory return to work obligation and neither did the Applicant make such allegation.

[43] The Applicant contended that one of the reasons her dismissal was unfair was that she could have continued to perform light duties. The Applicant had been performing modified or restricted duties for around nine months prior to the incident on 27 June 2019. For her part, the Respondent prevented her from at least attempting to complete her allocated work on 27 June 2019 in the manner directed. The Respondent argued that there is no statutory obligation under the workers' compensation legislation to continue to offer modified or restricted duties and it should not be held to a higher standard for the purposes of s.387 of the Act. In the alternative it relied on the evidence of Mr Wrightson that he had assessed that there was no other work for the Applicant to do. On the evidence Mr Wrightson, who was responsible for the assessment and just one month into the job, conducted a relatively cursory assessment of the Applicant's capacity and other roles she may have performed. He formed this view based on his own best discretion and did not discuss alternatives with team leaders or other production managers. I acknowledge Mr Torelli's evidence was that, at least by 26 and 27 June 2019, the declining scope of the Applicant's duties meant that her modified or restricted role was effectively unsustainable. Indeed, Mr Torelli's evidence was that the business had

been working hard to find alternate duties for the Applicant for a long time. Yet on all of the evidence his decision to terminate the Applicant was somewhat sudden. The decision was prompted by the Applicant's expressions of difficulties with her allocated duties on 26 and 27 June 2019 and made during the course of a single day on 27 June 2019. I consider the sudden decision and absence of a robust assessment of alternatives to be relevant factors which weigh towards a conclusion that the dismissal was harsh.

Conclusion on harsh, unjust and unreasonable

[44] After considering and taking into account each of the matters specified in s.387 of the Act, my value judgement is that the Respondent's dismissal of the Applicant was harsh, but not unjust or unreasonable. I accept that procedural deficiencies do not mandate a conclusion that a dismissal was unfair. However, in the circumstances of this case, I consider that this dismissal was harsh because, although there was a valid reason for the Applicant's dismissal, she was not notified of and given an opportunity to respond to the valid reason for her dismissal. The other factors which I have found relevant at s.387(h) weigh only slightly towards my conclusion that the dismissal was harsh.

REMEDY

[45] Having found that the Applicant was protected from unfair dismissal, and that her dismissal was harsh, unjust or unreasonable, it is necessary to consider what if any remedy should be granted.

[46] The Applicant asked the Commission not to order a remedy of reinstatement.[45] The Respondent does not oppose and further contended it is inappropriate to reinstate the Applicant because she was and remains unable to perform the inherent requirements of that job. Having regard to these matters, I consider that reinstatement is inappropriate. I will now consider whether a payment for compensation is appropriate in all the circumstances.

[47] Section 390(3)(b) of the Act provides the Commission may only issue an order for compensation if it is appropriate in all the circumstances. A compensation remedy is designed to compensate an unfairly dismissed employee in lieu of reinstatement for losses reasonably attributable to the unfair dismissal within the bounds of the statutory cap on compensation that is to be applied.[46]

[48] The Applicant sought four months' compensation because that was the period of her loss since 27 June 2019. The Respondent contended that an order for compensation is not appropriate because the Applicant was unable to perform the inherent requirements of the job as at 27 June 2019, she remained unable to perform the inherent requirements of the job, and there is no obligation to return to work under the applicable workers' compensation legislation. The Respondent also relied on the observations of the Full Bench in *Hanson* as to the assessment of compensation in the context of an inability to perform the inherent requirements of the job and "inevitable dismissal".[47] In that case, there was a valid reason for dismissal, there was an absence of procedural fairness and the dismissal was unfair solely due to the absence of procedural fairness. The Full Bench in that case held:

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[45] Applicant on Transcript at PN302.
[46] *Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015] FWCFB 3512 at [17].
[47] *Hanson Construction Materials Pty Ltd v Pericich* [2018] FWCFB 5690.

"If the Applicant's dismissal was inevitable then the Appellant is correct in contending that the starting point in assessing compensation is how long a procedurally fair process would have taken."[48]

[49] The Respondent contended that the Applicant has had the benefit of four weeks' salary in lieu of notice (4 weeks x $794.58 = $3,178.32). It asked the Commission to find that a procedurally fair process would have been completed within that four week timeframe. In the alternative, the Respondent noted that the determination in *Hanson* involved an order of five weeks' compensation. In the further alternative, the Respondent contended that an order of the full amount the Applicant seeks of 16 weeks' compensation should have a 25% discount applied given the Applicant's inadequate efforts to mitigate the loss suffered in that period.

[50] Having regard to all the circumstances of the case, including the fact that the Applicant has suffered financial loss as a result of her unfair dismissal, I consider that an order for payment of compensation to her is appropriate. It is necessary therefore for me to assess the amount of compensation that should be ordered to be paid to the Applicant. In assessing compensation, I am required by s.392(2) of the Act to take into account all the circumstances of the case including the specific matters identified in paragraphs (a) to (g) of this subsection. In undertaking this task, I shall use the established methodology for assessing compensation in unfair dismissal cases which was set out in *Sprigg v Paul Licensed Festival Supermarket*[49] and applied and elaborated upon in the context of the current Act by Full Benches of the Commission in a number of cases.[50] The approach to calculating compensation in accordance with these authorities is as follows:

Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost)
Step 2: Deduct monies earned since termination
Step 3: Discount the remaining amount for contingencies
Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment
Step 5: Apply the legislative cap on compensation

Section 392(2)(c) - Remuneration the Applicant would have received, or would have been likely to receive, if she had not been dismissed

[51] Like all calculations of damages or compensation, there is an element of speculation in determining an employee's anticipated period of employment because the task involves an assessment of what would have been likely to happen in the future had the employee not been dismissed.[51]

[52] In light of my findings and conclusions in relation to the factors under s.387, including that the Respondent had a valid reason for the Applicant's dismissal but the process was deficient I find that the Applicant's dismissal was ultimately inevitable but, had a fair and transparent injury management process been followed, then the Applicant would have been

[48] Ibid at [23].
[49] (1998) 88 IR 21.
[50] *Tabro Meat Pty Ltd v Heffernan* [2011] FWAFB 1080; *Read v Golden Square Child Care Centre* [2013] FWCFB 762; *Bowden v Ottrey Homes Cobram* [2013] FWCFB 431.
[51] *Double N Equipment Hire Pty Ltd v Humphries* [2016] FWCFB 7206 at [16]-[17].

likely to continue in employment for a further six weeks. That is a reasonable period for the Respondent to have put in place a fair and transparent injury management process, which may have included obtaining an independent medical examination or through assessment of alternative duties available; consulting with the Applicant and other managers about the possibility of alternatives; notifying of the reason for the dismissal and affording a full opportunity to respond and consider the response provided before proceeding to assess all the available information and making the decision to dismiss. Accordingly, I find that the Applicant's dismissal would have taken place six weeks after 27 June 2019 had she not been dismissed on that day.

[53] In reaching this conclusion, I have rejected the Respondent's contention that a procedurally fair process could sufficiently have concluded during the Applicant's notice period (she had received four weeks' payment in lieu of notice). A fair process requires certain procedural steps (such as notice of the valid reason and an opportunity to respond) to take place *before* the decision to terminate is made and notice is given (or paid in lieu). It follows that the Respondent could not have conducted a fair process during the Applicant's notice period. However, the Applicant was entitled to notice in accordance with the National Employment Standards in the Act.[52] The period of continuous service (which, for the purposes of counting length of service, excludes the period of unpaid parental leave) was between three and five years, and the Applicant was therefore strictly only entitled to three weeks' notice.[53] I consider this a relevant matter in determining the appropriate level of compensation such that the amount of six weeks' compensation be reduced to five weeks.

[54] It follows that the remuneration the Applicant would have received (or her loss) is in the amount of a further five weeks' remuneration. The Applicant's gross salary with the Respondent was $41,318.16 per annum, that is $794.58 per week.[54] For a further five weeks she would have received $3,972.90 gross.

Section 392(2)(e) and (f) - Remuneration earned and income reasonably likely to be earned

[55] The Applicant finished employment with the Respondent on 27 June 2019. If she had remained in employment for a further six weeks, her employment would have come to an end 8 August 2019. She had earned no income from other employment or other work as at that time. That evidence was not challenged by the Respondent. There is no evidence to suggest that the Applicant's medical capacity was likely to improve such that there was a likely prospect of income being earned between the making of the order for compensation and the actual compensation. I find accordingly that there was no remuneration earned or income reasonably likely to be earned for the purposes of ss.392(2)(e) and (f).

Section 392(2)(a) – Viability

[56] There is no dispute and I am satisfied that an order for compensation would not have an effect on the viability of the employer's enterprise.[55]

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[52] Attachment DT-2 to Witness Statement of David Torelli; see also clause 22 of the Award, which provides that notice of termination is in accordance with the National Employment Standards in the Act.
[53] See s.22 and 117 of the Act
[54] Attachment M to Applicant's Witness Statement.
[55] Mr Torelli on Transcript at PN662 and PN663.

Section 392(2)(b) – Length of service

[57] The Applicant's length of service was around four years, having regard to the period of parental leave taken which did not break the Applicant's continuous service but does not count as service for present purposes.

[58] I consider that the Applicant's length of service does not support reducing or increasing the amount of compensation ordered.

Section 392(2)(d) – Mitigation efforts

[59] It is also necessary to consider what steps the Applicant has taken (if any) to mitigate her loss. What is reasonable in this respect depends on the circumstances of the case.[56]

[60] The Applicant's evidence was that, although she had made informal inquiries about other employment in the manufacturing sector, she was unable to mitigate her losses due to her ongoing medical incapacity and work restrictions. She also gave evidence of steps taken to mitigate her loss in the future, by obtaining book keeping qualifications. The Respondent submitted that the Applicant's efforts to mitigate her loss following her dismissal were inadequate.

[61] I accept that the Applicant was constrained in her ability to mitigate her loss during the relevant period, on account of her incapacity, and am satisfied that reasonable steps were taken in the circumstances.

Section 392(2)(g) – Any other relevant matter

[62] It was not submitted that in this case it is appropriate to, and I see no basis for, applying a discount for contingencies.

[63] Save for the matters referred to above, there are no other matters which I consider relevant to the task of determining an amount for the purposes of an order under s 392(1) of the Act.

[64] I have considered the impact of taxation, but I prefer to determine compensation as a gross amount and leave taxation for determination.

Section 392(3), (4) and (5) & section 393

[65] There is no question of misconduct in this case and no basis to reduce the amount of compensation pursuant to s.392(3).

[66] I note that in accordance with s 392(4) of the Act, the amount of compensation calculated does not include a component for shock, humiliation or distress.

[67] Further, I note that the amount of $3,972.90 gross is less than half the amount of the high income threshold immediately before the dismissal and is also less than the total amount of remuneration to which the Applicant would be entitled in employment with the Respondent

[56] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002) at [39] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

during the 26 weeks immediately before her dismissal. In those circumstances, I am satisfied that there is no basis to reduce the amount of $3,972.90 gross by reason of s.392(5) of the Act.

[68] No application was made by the Respondent for any amount of compensation awarded to be paid in the form of instalments.

Conclusion on compensation

[69] In my view, the application of the *Sprigg* formula does not, in this case, yield an amount that is clearly excessive or clearly inadequate.

[70] For the reasons I have given, I am satisfied that a remedy of compensation in the sum of $3,972.90 gross (less taxation) in favour of the Applicant is appropriate in the circumstances of this case. I will issue a separate order to that effect.

DEPUTY PRESIDENT

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Appearances:

Mrs D.T. Migunthanna Kariyakaranage for herself.

Mr M. Champion for the Respondent.

Hearing details:

2019
Melbourne
29 October