[2020] FWC 2406

The attached document replaces the document previously issued with the above code on 7 May 2020.

Amendment made to correct error in the name of Respondent, see Order PR720220.

Callum Young
Associate to Deputy President Asbury

Dated 16 June 2020.

DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Mr Jose Hilario
v
ADADN Pty Ltd
(U2019/11062)

DEPUTY PRESIDENT ASBURY BRISBANE, 7 MAY 2020

Application for an unfair dismissal remedy.

Background

[1] Mr Jose Hilario (the Mr Hilario/Applicant) applies to the Fair Work Commission (the Commission) for an unfair dismissal remedy under s.394 of the *Fair Work Act 2009* (the Act) in respect of his employment by ADADN Pty Ltd (the Respondent). Mr Hilario states that he worked for the Respondent from June 2017 as a full-time carpenter and was dismissed on 27 September 2019. Mr Hilario filed his application for an unfair dismissal remedy on 2 October 2019.

[2] The Respondent failed to file a Form F3 Employer response to the Application despite being provided with the Form F3 on several occasions by staff of the Commission and failed (without excuse) to attend two scheduled conciliation conferences, notwithstanding that the second conference was listed after the documentation was sent to a member of the Respondent's staff who contacted the Commission and claimed that the Notice of Listing for the first conciliation conference had not been received.

[3] The matter was allocated to me for hearing. A Member Assisted Conciliation was conducted by another Member of the Commission and the matter was not resolved. The Respondent failed to attend a Mention/Directions Conference conducted by me and Directions were issued requiring material to be filed and the matter was listed for hearing. The Respondent did not comply with the Directions and filed no material. Correspondence was sent to the Respondent setting out the implications of failing to comply with Directions and advising that the hearing would proceed in the Respondent's absence and an Order may be made against the Respondent following the Hearing.

[4] The Applicant complied with the Directions and filed in the Commission an outline of arguments, a document list containing seven documents, and two witness statements – a statement made by the Applicant and a statement from Mr Antonio Freitas, a co-worker of the Applicant's during the period he worked for the Respondent.

[5] A hearing was originally listed on 28, 29 and 30 January 2020. In light of the fact that the Respondent failed to file any material the hearing dates were reduced and the matter was listed only on Tuesday 28 January 2020 commencing at 12.00pm. The Applicant attended but there was no attendance from the Respondent. Attempts were made by my Associate to contact the Respondent by telephone and email just prior to and after the scheduled commencement time of the hearing. The commencement of the hearing was delayed to 12.30pm and the Respondent was again informed of the implications of failing to attend. When the Respondent did not enter an appearance the Hearing proceeded in the absence of the Respondent. The Applicant was represented by his daughter, Ms Liliana Hilario. The Applicant gave evidence on his own behalf and Mr Freitas was also present to give his evidence.

[6] In relation to the preliminary matters I am required to consider, I am satisfied that the Applicant has served the minimum employment period and is a person protected from unfair dismissal. I am satisfied that the Applicant has served the minimum employment period notwithstanding that the Applicant had a four month absence during the period of his employment on the basis of his service either before or after the absence. The application was made within the time required in s. 394(2) of the Act. There is no evidence that the dismissal was a case of genuine redundancy and the Applicant's evidence is to the contrary. The Applicant asserts that the Respondent was not a small business employer. Absent any evidence to the contrary from the Respondent I accept the evidence of the Applicant on these points. It is also the case that even if the Respondent is a small business there is no evidence that the dismissal was on the basis of the Applicant's conduct or capacity, so that the Code would have applied in any event.

[7] Before turning to consider the merits of the application I set out its procedural history to illustrate my reasons for hearing it in the absence of the Respondent. The history is based on the material on the file and correspondence from my Chambers after the matter was allocated to me for hearing.

Procedural history of the application

[8] The Applicant lodged the application on 2 October 2019. The Application was listed for a conciliation conference on 4 November 2019. Prior to the conciliation conference, the Respondent was asked to provide a Form F3 – Employer's response to the application setting out its position in relation to the claim. The Respondent did not file the Form F3 Response and did not attend the conciliation conference.

[9] The first conciliation conference did not proceed due to the Respondent's non-attendance. The Commission sent correspondence by email advising the matter would be listed for hearing. Ms Karen Rowland, Finance Officer for the Respondent, contacted the Commission by reply email advising the Respondent had not received the Notice of Listing for the conciliation conference or any documents relating to this matter. The correspondence was sent to Ms Rowland and she confirmed the material had been received. The Respondent was again asked to complete the Form F3.

[10] The matter was listed for another conciliation conference scheduled for 29 November 2019. The Respondent again failed to attend the conciliation conference and the conference could not proceed. On 2 December 2019, Ms Rowland corresponded with the Commission as follows:

> "Hi [conciliator],
>
> I was away on Friday and was under the impression the lawyers were to deal with this.
> Clearly this has not happen and I have now been given instructions I have tried to call you this morning but can not get through.
>
> If you could give me a call on [number] so I can discuss this or a number of whom I can speak to.
>
> Cheers Karen"

[11] A file note indicates that a case manager from the Commission's Unfair Dismissal Case Management Team (UDCMT) contacted Ms Rowland by telephone and advised her the matter would be referred to a Member of the Commission for arbitration. The file note also indicates that Ms Rowland advised that the Respondent sought conciliation and wanted to settle the matter and that there was dispute about pay owing. The case manager advised the Respondent could request that the matter be referred for a further conciliation conference but it is a voluntary process and the Applicant would need to agree to a further attempt at conciliation. Ms Rowland was also advised the Commission required a Form F3 to be filed. Ms Rowland said she had the form but wasn't sure if she was the one to sign it as she was just pay roll staff. The case manager advised she would send Ms Rowland an email requesting the Form F3. Ms Rowland said she understood. Ms Rowland was subsequently sent an email that same day requesting the Respondent complete a Form F3.

[12] Directions for filing of material in the matter were sent to parties on 5 December 2019. Mr Hilario was directed to file his material by 23 December 2019. The Respondent was directed to file its material by 8 January 2020. The Directions also included a Notice of Listing setting down the matter for Hearing for three days from 28 January to 30 January 2020.

[13] Further email correspondence followed in which Ms Rowland advised an offer had been made to Mr Hilario. The matter did not resolve and was referred to a Member Assisted Conciliation before another member of the Commission on 17 January 2020.

[14] On 18 December 2019, Mr Hilario wrote to UDCMT asking whether he was required to file his material prior to the Member Assisted Conference. UDCMT wrote to both parties and advised the directions required material to be filed despite the Member Assisted Conference as the matter was now listed for hearing.

[15] On 23 December 2019 Mr Hilario filed in the Commission an outline of arguments, a document list containing seven documents, and two witness statements – a statement from the Applicant and a statement from Mr Antonio Freitas, a co-worker during the time the Applicant worked for the Respondent.

[16] The Respondent did not file material in accordance with the Directions. The matter did not resolve at the Member Assisted Conference although both parties attended and the Commission's file notes indicate that there was an exchange of settlement offers. On 22 January 2020 my Associate wrote to the parties confirming the matter was allocated to me and listing the matter for Mention/Conference at 11.00 am on 24 January to discuss the hearing of the matter particularly in light of the fact that the Respondent had not filed any material. Later on 22 January 2020 the parties were advised that due to emergent circumstances the Mention/Conference would be held at 3.00 pm on 24 January.

[17] On 24 January 2020 1t 7.57 am Ms Rowland wrote to my Chambers and advised the Respondent was not available for the Mention:

> "HI All,
>
> I have just been made aware that Frank will not be available at that time either as he will be on a plane.
>
> We have had no further instruction from the Director of ADADN PTY LTD.
>
> Kind Regards
> Karen Rowland and Frank Louriero"

[18] On 24 January 2020 I instructed my Associate to correspond with the parties advising that despite the Respondent's unavailability for the Mention, the matter would proceed to Hearing on 28 January at sittings commencing at 12.00 pm. The email also placed the Respondent on notice that if it did not attend the hearing, an order could and may be made against the Respondent, on the basis that the Applicant's evidence is not contested.

[19] At the scheduled commencement time of the Hearing the Applicant was in attendance and the Respondent did not appear. My Associate contacted Ms Rowland by telephone and advised as per the correspondence on 24 January, that the hearing was proceeding that day. Ms Rowland advised that she is just a payroll officer for the Respondent and could not deal with the matter any further. Ms Rowland also advised that she had handed everything to head office. My Associate advised again that if no appearance was made by 12.30pm the Hearing would proceed. Ms Rowland said this was fine.

[20] Correspondence was sent from my Chambers to the parties at 12.20 pm that day confirming the telephone conversation with Ms Rowland and advising as follows:

> "Dear Parties,
>
> I refer to the above matter and the hearing listed to commence at 12.00pm today, as per correspondence sent to the parties on Friday 24 January 2020, and as per the attached notice of listing.
>
> It is noted that no appearance has been made by the Respondent at the hearing.
>
> I also refer to an earlier telephone conversation with Ms Rowland of the Respondent, who stated to chambers that in her capacity as Payroll for the Respondent she could not deal with the matter any further, and that she "handed" this matter to head office. I note Ms Rowland was also advised that if no appearance was made by the Respondent the matter would proceed to be heard in its absence.
>
> The Deputy President will give the Respondent until **12.30pm** to appear at the hearing. If no appearance is made the hearing will proceed in the Respondent's absence. As previously stated, if no appearance is made by the Respondent an order can and may be made against the Respondent, on the basis that the Applicant's evidence is not contested."

[21] My Associate then attempted to contact Mr Lourerio but was unsuccessful. I proceeded to hear the matter in the Respondent's absence.

Legislation

[22] In relation to unfair dismissal ss. 385 and 387 provide as follows:

"**385 What is an unfair dismissal**

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

(a) the person has been dismissed; and

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

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

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

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

"**387 Criteria for considering harshness etc**.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant."

The Applicant's case

[23] Mr Hilario states that he started working for the Respondent in June 2017 as a full-time carpenter working on average 50 hours per week and paid at a rate of $38 per hour. In his Form F2, and later in his witness statement of 23 December 2019, Mr Hilario said that in April 2019, he had spinal fusion surgery performed on his back for non-work-related issues and was absent on sick leave for four months. On 5 August 2019, Mr Hilario received a medical certificate confirming he was fit to return to work. Mr Hilario submitted he was advised by his supervisor, Mr Sebastian Rocco, that he must do a medical exam with one of the Respondent's doctors before he could return to work, and Mr Hilario reluctantly agreed. Between 7 and 13 August 2019, he attempted to make contact with the Respondent to get a date and time for the medical examination but was unable to speak with anyone and did not receive a call back.

[24] On 13 or 14 August 2019, Mr Hilario contacted another supervisor, "Frank", to see if he could go to work in Canberra. Mr Hilario states that the Respondent also does work and has operations in Canberra. On 19 August 2019, Mr Hilario started working in Canberra. Mr Hilario said he worked until 24 September 2019 but was only paid up until 18 September 2019.

[25] Mr Hilario states that on 24 September 2019, he received a call from another supervisor in Brisbane telling him to come back to Brisbane to work. Mr Hilario said he called Frank to tell him that he was coming back to Brisbane and Frank hung up on him. Mr Hilario said Frank called a bit later and asked when Mr Hilario was going back to Brisbane. Mr Hilario said he would be going the next day and Frank hung up again without giving Mr Hilario a chance to explain.

[26] Mr Hilario states that he presented on site in Brisbane on 26 September 2019 but was told he would not be allowed to work and that he must go back to Canberra. After a few hours, Mr Hilario was allowed to work. On 27 September 2019 Mr Hilario was required to fill out new employment papers so he could work as a casual. Mr Hilario said that he did not know why he was required to do this but he complied and filled out the forms. Mr Hilario states that after lunch, Mr Colman told him to leave the construction site immediately, and when he asked why Mr Colman said Chad, the number two in the company, had said so. Mr Hilario states that on the same afternoon he was advised his employment was terminated.

[27] Mr Hilario also said that he did not receive any termination papers or reasons for his dismissal but was later told by Ms Rowland that Mr Colman did not have the authority to call him to work back in Brisbane. Mr Hilario said he was not aware of this and that Mr Colman had previously been his foreman. Mr Hilario also said that he thought Mr Colman had sorted everything out before asking him to come back and work in Brisbane.

[28] Mr Hilario submitted the dismissal was harsh, unjust or unreasonable because there was no valid reason for the dismissal. Mr Hilario submitted he was a good worker and was not advised of any misconduct or unsatisfactory performance relating to his work. Mr Hilario said he was not notified of any reason for his dismissal and submitted he was working in Canberra and was asked to come back and work in Brisbane which is what he did, and for that he was sent home and later dismissed.

[29] It was submitted that but for the dismissal, Mr Hilario would have remained employed for the foreseeable future and that there were no issues with his conduct or work performance. Mr Hilario said that he had a good relationship with the supervisors in Brisbane and that was why they wanted him back from Canberra.

[30] Mr Hilario said that the Respondent undertakes commercial construction and that the Respondent had work over the Christmas period. Mr Hilario also said that the Respondent hired new staff the day after Mr Hilario was dismissed. Mr Hilario obtained other employment in December 2019, but this is casual employment.

[31] Mr Hilario gave evidence that while working for the Respondent in Brisbane, he worked approximately 50 hours per week and was paid $1,611 per week at a rate of $36 per hour. Mr Hilario said he did not have any payslips for his work in Brisbane. Mr Hilario tendered a payslip of his hours worked in Canberra and said he was paid $38 per hour in Canberra and worked longer days but averaged 50 hours per week.

[32] Mr Hilario submitted payslips for the period 23 January 2019 to 29 January 2019 and 21 November 2018 to 27 November 2018 as evidence of his earnings while working for the Respondent. Those pay slips indicate an hourly rate of $36.00 and that Mr Hilario was paid a total of $1,682.00 gross for the pay period 23 January 2019 to 29 January 2019 and $2,172.00 for the pay period from 21 November 2018 to 27 November 2018. Mr Hilario submitted that if staff went to work in Canberra they were paid an hourly rate of $38 and should continue to be paid at this increased rate if they returned to work in Brisbane.

[33] In relation to his hours of work, Mr Hilario said that he usually worked 50 hours per week comprising 9 hour days Monday to Thursday, an 8 hour day on Friday and 6 hours on Saturday and was paid in the vicinity of $1,611 per week net. This is consistent with the payslip that was tendered by Mr Hilario for the pay period 21 November to 27 November 2018, which shows a gross pay of $2,172 and that Mr Hilario's year to date earnings were $48,433.50. Assuming that this represents the financial year to date, this equates to $2,306.00 per week gross earnings and the payslips also evidence that superannuation contributions in the amount of $136.80 were made on behalf of Mr Hilario.

[34] Mr Hilario sought 15 weeks' wages as compensation for what he contended was an unfair dismissal. I put to Mr Hilario that given he was dismissed on 27 September 2019 and was seeking compensation, and that he commenced new employment in December 2019, the amount of compensation he sought appeared to exceed his loss.

[35] It was submitted that in his new employment, Mr Hilario was working as a casual at an hourly rate of $40 per hour, but did not get paid tool or travel allowances or receive any other entitlements he would have as a full time employee. Further, Mr Hilario works 8 hours per day Monday to Friday but sometimes works only one or two days per week. Mr Hilario tendered payslips from his new employment which indicate that work full weeks every week and sometimes might only work one or two days. Ms Hilario produced payslips from 22 December 2019 to 19 January 2020 which constituted evidence of all of Mr Hilario's earnings in his new position up to the date of the hearing.

[36] The payslips indicate that Mr Hilario's hours and gross earnings up to the date of the hearing were as follows:

- 9 – 15 December 2019, 45 hours, gross earnings $1,820.00;
- 16 – 22 December 2019, 40 hours, gross earnings $1,600.00;
- 30 December 2019 to 5 January 2020, 16 hours, gross earnings $640.00;
- 6 – 12 January 2020, 16 hours, gross earnings $640.00;
- 13 – 19 January 2020, 32 hours, gross earnings $1,280.00.

[37] Mr Freitas gave evidence that he was asked by Mr Colman where Mr Hilario was working. Mr Freitas said Mr Hilario was in Canberra and Mr Colman then said he was going to try and get him to come back and work in Brisbane. Mr Freitas said that the next day Mr Colman told Mr Freitas to call Mr Hilario and tell him to come back to Brisbane to work and work at the construction site Mr Colman was managing. Mr Freitas said he asked if there would be a problem with Mr Hilario coming back and Mr Colman said it was fine.

[38] Mr Freitas confirmed that he still worked for the Respondent and that the Respondent's employees worked over the Christmas period other than between 20 December

2019 and 6 January 2020 where there was a close-down during which staff took leave and were paid for public holidays. Mr Freitas also said that he did not think that the Respondent had a shortage of work and confirmed that on the same day Mr Hilario was dismissed, two new employees started, and one other employee was hired the following day.

[39] I questioned Mr Freitas as to why he asked Mr Colman if he was sure there would be no problem with Mr Hilario returning to Brisbane. Mr Freitas said that two weeks prior, Mr Colman asked about Mr Hilario and when he was coming back to work. Mr Freitas told him he thought Mr Hilario was on leave without pay following surgery. Mr Freitas said at that time he rang Mr Hilario and asked when he was coming back and Mr Hilario said he had his clearance but wasn't sure if he could come back to work.

[40] Mr Freitas said he then rang the manager of the Respondent on Mr Hilario's behalf and the manager, Francisco, said he didn't know anything about Mr Hilario's return to work. Mr Freitas said he rang Ms Rowland who then rang Mr Hilario and told him to put in a medical clearance, and after that, Mr Hilario communicated directly with the manager and Ms Rowland.

[41] Mr Freitas said that a week after Mr Hilario's dismissal, an employee called Chad attended the worksite and asked Mr Freitas about the manager, Francisco. Mr Freitas said he told Chad that he didn't speak to the manager after what happened with Mr Hilario as he thought Francisco had dismissed him. Chad said that he had dismissed Mr Hilario and when Mr Freitas said he didn't believe him, he was shown a text message from Francisco to Chad which said: "*per our previous conversation, I note Jose [Hilario] is still working for the company, so you have to choose him or me*."

CONSIDERATION

[42] I turn now to consider the matters in s. 387 of the Act in relation to whether Mr Hilario was unfairly dismissed.

Whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees) – s.387 (a)

[43] Mr Hiliario had worked for the Respondent for over two years including a period of four months when he was absent due to having back surgery. Mr Hilario was given work in Canberra which is a further indication that there were no issues with his conduct or capacity. Mr Freitas's evidence is that Mr Hilario may have been dismissed because the manager, Francisco, gave an ultimatum to the Respondent that either Mr Hilario was to be dismissed or Francisco would leave. Mr Freitas' evidence on this point is not sufficient for a finding that there was a valid reason for Mr Hilario's dismissal.

[44] The Respondent bears the onus of establishing that there was a valid reason for the dismissal of Mr Hilario. The Respondent has filed no material, has disregarded Directions of the Commission and has not availed itself of the many opportunities it has been given to put its case to the Commission. I am not satisfied that there was a valid reason for the dismissal of Mr Hilario.

Whether the person was notified of that reason – s. 387(b)

[45] Notification of "the reason" for dismissal relates to the reason for dismissal based on the capacity or conduct of the dismissed person.[1] Notification of the reason must be given before the decision to terminate is made,[2] given in explicit terms and in plain and clear terms[3]. The purpose of the notification of the reason for dismissal is to give the employee an opportunity to respond to that reason and to defend against allegations relating to conduct or capacity. Notification of the reason for dismissal informs the subsequent matters required to be considered by the Commission in ss. 387(c) and (d) of the Act. As a Full Bench of the Commission observed in *Crozier v Palazzo Corporation Pty Ltd* in relation to provisions of former legislation which were substantially the same as those in s. 387(c) and (d) of the present Act:[4]

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

[46] The Applicant was dismissed without being given any reason and at the point his application was heard had still not been informed of the reason for his dismissal.

Whether the person was given an opportunity to respond to any reason related to his capacity or conduct – s. 387(c)

[47] The Applicant was dismissed without being given a reason for dismissal and as a result he was not given an opportunity to respond to any reason that may have related to his capacity or conduct.

Any unreasonable refusal to allow a support person – s. 387(d)

[48] There was no opportunity for Mr Hilario to have a support person and accordingly no refusal for the purposes of s. 387(d).

Whether the person was warned about any unsatisfactory performance – s. 387(e)

[49] The Applicant's uncontested evidence is that he was a good worker and had no previous warnings about his conduct or work performance. This is consistent with the fact that he was sent to Canberra in the course of his employment. If the Respondent did believe that the Applicant's work performance was unsatisfactory then there is no evidence of any warning to him in relation to it.

Impact the size of the employer's enterprise would likely have on procedures followed in effecting the dismissal – s. 387(f)

[50] There is no evidence about the size of the employer or the impact this would likely have on procedures followed in effecting the Applicant's dismissal. The employer was large enough to mobilise a section of its workforce to Canberra and to employ a payroll person. In circumstances where the employer had repeated communication from the Commission about what was required to put its case and the implications of failing to do so and could not even file a Form F3 Response to the application, I am not prepared to make any allowances for the employer on the grounds in s. 387(f). Quite simply there were no procedures followed and

absent evidence about why this was so, this is not a factor that weighs against a finding of unfairness.

The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal – s. 387(g)

[51] For the reasons given in relation to s. 387(f) this is not a factor that weighs against a finding of unfairness.

Other relevant matters – s. 387(h)

[52] The Applicant had worked for the Respondent for almost two years and upon recovering from his back surgery had been assigned to work in Canberra. The Applicant's uncontested evidence was that he was requested to return to Brisbane and he did so only to be dismissed without any substantive or procedural fairness.

[53] The Applicant said that he was not paid for the last four weeks that he worked in Canberra and was not paid any amount of notice on termination of his employment. These are matters to which I have regard in weighing the fairness of the dismissal.

Conclusion in relation to whether the Applicant's dismissal was unfair

[54] On balance and after considering the matters in s. 387 of the Act, I am satisfied that Mr Hilario's dismissal was unfair. He was dismissed with no reason after being employed for almost two years.

Remedy

[55] Given that I have found that the Applicant's dismissal was unfair, it will be necessary to consider the question of remedy. As required by s.390 of the Act, I am satisfied that the Applicant was a person protected from unfair dismissal and that he has been unfairly dismissed. I am also of the view that the Applicant should have a remedy for his unfair dismissal. The Applicant seeks compensation.

[56] Reinstatement is the primary remedy for unfair dismissal. Compensation can only be awarded where the Commission is satisfied that reinstatement is inappropriate. In the present case my view is that reinstatement is inappropriate. The Respondent has shown complete disregard for its obligations in relation to these proceedings and it is not apparent that the Respondent has afforded even the most basic level of substantive and procedural fairness to the Applicant in dismissing him. I am satisfied that in all of the circumstances reinstatement would not be appropriate and that compensation should be awarded to the Applicant for his unfair dismissal.

[57] In relation to the assessment of compensation, s. 392 of the Act provides as follows:

> "**392 Remedy—compensation**
>
> *Compensation*

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) 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 compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

> (b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations."

[58] The approach to the calculation of compensation is set out in a decision of a Full Bench of the Australian Industrial Relations Commission in *Sprigg v Paul's Licensed Festival Supermarket*.[5] That approach, with some refinement, has subsequently been endorsed and adopted by Full Benches of the Commission in *Bowden v Ottrey Homes Cobram and District Retirement Villages inc T/A Ottrey*;[6] *Jetstar Airways Pty Ltd v Neeteson-Lemkes*[7] and *McCulloch v Calvary Health Care* (*McCulloch*).[8]

[59] In *McCulloch*, the Full Bench considered, in some detail, the question of how a contingency discount should be applied to the calculation of the remuneration the dismissed person would have received, or would have been likely to receive, if the person had not been dismissed. The Full Bench pointed out in *McCulloch* that a deduction for contingencies is applied to prospective losses, or losses occasioned after the date of the hearing. The Full Bench also noted that at the time of the hearing any such impact on the earning capacity of the dismissed person between the date of dismissal and hearing will be known, and a finding can be made on the basis of whether the dismissed person's earning capacity has in fact been affected during the relevant period.

[60] I turn now to the particular criteria I am required to consider in deciding the amount of compensation to be awarded to the Applicant for his unfair dismissal.

The effect of the order on the viability of the Respondent – s. 392(2)(a)

[61] There is no evidence that an Order for compensation will have any impact on the viability of the Respondent. If this was an issue, I assume that the Respondent would have attended the hearing and put some material before the Commission given that the Respondent was warned that if it did not do so an Order could be made against it.

Length of the Applicant's service – s. 392(2)(b)

[62] The Applicant was employed by the Respondent for a period in excess of two years. This is not a lengthy period of service. The Applicant was also absent for a four month period during the period of his employment and this is a matter to which I have had regard in assessing compensation.

Remuneration that the Applicant would have or would likely have received – s. 392(2)(c)

[63] This consideration requires an assessment of how long the Applicant would have remained in employment but for his dismissal. The Applicant had worked for the Respondent for two years including on a site in Canberra. There is no evidence of any issue with his conduct or work performance and I can see no reason why he would not have remained in employment for at least the 15 week period he seeks compensation for.

[64] The evidence tendered by the Applicant indicates that his average earnings were $2,306.00 per week and that he received superannuation contributions in the amount of $136.80 per week. Accordingly, in the fifteen week period after his dismissal the Applicant would have earned the amount of $34,590 in gross wages and superannuation contributions in the amount of $2,052.00.

The Applicant's efforts to mitigate loss – s. 392(2)(d)

[65] The Applicant made reasonable attempts to mitigate the loss of his employment and obtained alternative employment in December 2019.

The amount of any remuneration earned since dismissal – s. 392(2)(e)

[66] The Applicant earned an amount of $5,980 from December 2019 until his application was heard in January 2020. I do not intend to deduct that amount from the compensation I intend to award on the basis that the Applicant was without income for at least two months and was not paid for the work he performed in Canberra prior to his dismissal.

The amount of any income reasonably likely to be earned during the period between the making of the order for compensation and the actual compensation – s. 392(2)(f)

[67] Given the period which has elapsed since the Applicant was dismissed and the period I have assessed that he would likely have remained in employment, I make no adjustment to the amount of compensation on this basis.

Any other matter that the FWC considers relevant – s. 392(2)(g)

[68] I consider to be relevant that the Applicant lost full-time employment and the alternative employment he has obtained is casual.

Deduction for misconduct

[69] The Applicant did not engage in misconduct and this consideration is not relevant in the present case.

CONCLUSION

[70] In summary I have decided that:

1. An order for the payment of compensation would not affect the viability of the Respondent's business (s.392(2)(a)).

2. The length of the Applicant's service favours the making of an award of compensation albeit not the maximum amount (s.392(2)(b)).

3. The remuneration that the Applicant would have been likely to receive, but for his dismissal, is $34,590 in gross wages and superannuation contributions in the amount of $2,052.00 (s.392(2)(c)).

4. I make no deduction for contingencies on the basis of the time frame over which I have assessed that the Applicant would likely have remained in employment.

5. I make no deduction on account of a failure to mitigate loss (s.392(2)(d)).

6. I make no deduction for remuneration earned since dismissal (s.392(2)(e)).

7. I make no deduction for income likely to be earned during the period between the making of the order and the actual compensation (s.392(2)(f)).

8. The amount of compensation I have decided to award takes into account that the alternative employment that the Applicant has obtained is casual in nature and the employment he lost due to his unfair dismissal was full-time (s. 392(2)(g)).

9. I make no deduction for misconduct (s.392(3)).

[71] An Order requiring that the Respondent pay compensation to Mr Hilario of the amount is $34,590 in gross wages, to be taxed according to law, and superannuation contributions in the amount of $2,052.00 into Mr Hilario's superannuation account will issue with this Decision. The Order will also provide that such payments are to be made within 21 days of the date of this Decision.

[72] In the event of non-compliance with the Order, I refer the parties to the information set out on the Commission's website in relation to the enforcement of Fair Work Commission orders in an appropriate court which can be found at the following link. (https://www.fwc.gov.au/unfair-dismissals-benchbook/role-of-the-court#field-content-0-heading)

DEPUTY PRESIDENT

Appearances:

Ms L Hilario on behalf of the Applicant.

No appearance from the Respondent.

Hearing details:

28 January.

2020.

Brisbane.

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<PR719206>

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[1] *Chubb Security Australia Pty Ltd v Thomas*, Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) at para. 41.

[2] *Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport*, Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at paras 70–73, [(2000) 98 IR 137].

[3] *Previsic v Australian Quarantine Inspection Services*, Print Q3730 (AIRC, Holmes C, 6 October 1998).

[4] (2000) 98 IR 151 at [73].

[5] (1998) 88 IR 21.

[6] [2013] FWCFB 431.

[7] [2014] FWCFB 8683.

[8] [2015] FWCFB 2267.