



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Sally Reddon

v

Bogeye Pty Ltd T/A Bellevue Hotel
(U2019/14723)

DEPUTY PRESIDENT SAUNDERS

NEWCASTLE, 13 MAY 2020

Unfair dismissal – calculation of compensation.

Introduction

[1] In my earlier decision published on 30 April 2020,¹ I found that Ms Reddon was unfairly dismissed by Bogeye and set out my preliminary views in relation to the calculation of compensation to be awarded to Ms Reddon. Both parties were given an opportunity to file evidence and make submissions in relation to my preliminary views on the question of compensation.

[2] On 13 May 2020, I conducted a further determinative conference in relation to the question of compensation. Both Ms Reddon and Mr Atkinson gave evidence and made submissions at that determinative conference.

[3] Terms defined in my earlier decision have the same meaning in this decision.

Compensation

[4] It is necessary for me to assess the amount of compensation that should be ordered to be paid to Ms Reddon. 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.

[5] I will use the established methodology for assessing compensation in unfair dismissal cases which was set out in *Sprigg v Paul Licensed Festival Supermarket*² and applied and elaborated upon in the context of the current Act by Full Benches of the Commission in a number of cases.³ The approach to calculating compensation in accordance with these authorities is as follows:

¹ [2020] FWC 2248

² (1998) 88 IR 21

³ *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

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.

Remuneration Ms Reddon would have received, or would have been likely to receive, if she had not been dismissed (s 392(2)(c))

[6] 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.⁴

[7] I am satisfied on the balance of probabilities that if Ms Reddon had not resigned in December 2019 it is likely that she would have remained working in the Bellevue Hotel, with the new owner, Bellevue Pty Ltd, until the operation of the bistro at the Bellevue Hotel was outsourced to a new operator on 6 March 2020. It is possible that Ms Reddon may have resigned from her employment at the Bellevue Hotel prior to 5 March 2020, particularly in view of her conduct in putting out "feelers" for alternative employment in late 2019, but it is more likely than not, in my assessment, that Ms Reddon would not have resigned prior to 5 March 2020. Ms Reddon had worked at the Bellevue Hotel for some time and, for the most part, enjoyed her role there. It is also possible that Ms Reddon could have been dismissed in the period between 21 December 2019 and 5 March 2020, but I am satisfied, on the evidence before me, that it is not likely that she would have been dismissed during that period.

[8] In my view, it is unlikely that Ms Reddon would have remained employed at the Bellevue Hotel after 5 March 2020 because the operator of the bistro is the Head Chef, with the result that Ms Reddon could not have retained that position and it is unlikely, having regard to her significant period of employment as the Head Chef, that she would have been offered and accepted a position as a Chef working under the new Head Chef.

[9] In all the circumstances and weighing up the likelihood of the various possibilities, my finding is that Ms Reddon would have remained employed in the Bellevue Hotel until 5 March 2020 if her employment had not come to an end at the conclusion of her two week notice period on 20 December 2019.

[10] Ms Reddon's gross remuneration at the Bellevue Hotel was \$1,300 per week. As was the case in previous years, I accept that Ms Reddon would have worked more than her usual hours of work in the busy holiday period from 30 December 2019 until 26 January 2020 had

⁴ *Double N Equipment Hire Pty Ltd v Humphries* [2016] FWCFB 7206 at [16]-[17]

she remained employed in the Bellevue Hotel during that time. I also accept that in accordance with the usual practice at the Bellevue Hotel additional hours of work above 38 in a week would have been treated as time in lieu and, if not taken, paid out on the cessation of employment. I find that Ms Reddon would have worked, on average, 47.75 hours per week during the four week period from 30 December 2019 until 26 January 2020 had she remained employed in the Bellevue Hotel during that time. Those are the hours that Ms Reddon's successor to the position of Head Chef, Mr Taylor, worked in the Bellevue Hotel in that period.⁵ It follows that in the period from 21 December 2019 until 5 March 2020 Ms Reddon would have received \$15,374.19 gross ((10.8 weeks x \$1,300) + (39 hours in lieu⁶ x \$34.21)) = \$14,040 + \$1,334.19 = \$15,374.19) had she remained employed in the Bellevue Hotel during that time. In my view, that is the remuneration that Ms Reddon would have received, or would have been likely to receive, if she had not been dismissed.

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

[11] In the period from 21 December 2019 until 5 March 2020, Ms Reddon received \$11,228.34 gross remuneration from her employment at Hamilton's restaurant.⁷ That was the only remuneration Ms Reddon received during that period.

[12] Thus, my view is that \$4,145.85 is the gross amount of remuneration Ms Reddon would likely have earned had she not been dismissed by Bogeye and instead continued to be employed in the Bellevue Hotel until 5 March 2020 (\$15,374.19 - \$11,228.34 = \$4,145.85). This calculation is intended to put Ms Reddon in the position she would have been in but for the termination of her employment.⁸

Viability (s 392(2)(a))

[13] No submission was made on behalf of Bogeye that any particular amount of compensation would affect the viability of Bogeye's enterprise.

[14] My view is that no adjustment will be made on this account.

Length of service (s 392(2)(b))

[15] My view is that Ms Reddon's period of service with Bogeye (almost 2.5 years) does not justify any adjustment to the amount of compensation.

Mitigation efforts (s 392(2)(d))

[16] The evidence establishes that Ms Reddon made reasonable efforts to obtain alternative employment following her dismissal on 20 December 2019. In particular, Ms Reddon sought and obtained employment with Hamilton's and sought other employment to top up her casual hours of work at Hamilton's.

⁵ Ex R4

⁶ 39 hours = 4 weeks @ 9.75 hours' time in lieu per week (47.75 - 38 = 9.75)

⁷ Ex A8 - Ms Reddon's payslips from Hamilton's restaurant (\$1,330.40 + \$3,586.53 + \$2,518.84 + \$1,337.84 + \$1,446.21 + (9/14 (days between 26 Feb and 5 March) x \$1,568.81 = \$1,008.52) = \$11,228.34

⁸ *Bowden* at [24], citing *Ellawala v Australian Postal Corporation* Print S5109 at [35]

[17] In all the circumstances, my view is that Ms Reddon acted reasonably to mitigate the loss suffered by her because of the dismissal and I do not consider it appropriate to reduce the compensation on this account.

Any other relevant matter (s 392(2)(g))

[18] It is necessary to consider whether to discount the remaining amount (\$4,145.85) for “contingencies”. This step is a means of taking into account the possibility that the occurrence of contingencies to which Ms Reddon was subject might have brought about some change in earning capacity or earnings.⁹ Positive considerations which might have resulted in advancement and increased earnings are also taken into account.

[19] The discount for contingencies should only be applied in respect to an “anticipated period of employment” that is not actually known, that is a period that is prospective to the date of the decision.¹⁰

[20] Because I am looking in this matter at an anticipated period of employment which has already passed (21 December 2019 to 5 March 2020), there is no uncertainty about Ms Reddon’s earnings, capacity or any other matters during that period of time.

[21] In all the circumstances, my view is that it is not appropriate to discount or increase the figure of \$4,145.85 for contingencies.

[22] Save for the matters referred to in this decision, my view is that 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.

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

Misconduct (s 392(3))

[24] Ms Reddon did not commit any misconduct, so my view is that this has no relevance to the assessment of compensation.

Shock, distress or humiliation, or other analogous hurt (s 392(4))

[25] 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.

Compensation cap (s 392(5)-(6))

[26] The amount of \$4,145.85 is less than half the amount of the high income threshold immediately before the dismissal. It is also less than the total amount of remuneration to which Ms Reddon was entitled in her employment with Bogeye during the 26 weeks immediately before her dismissal. In those circumstances, my view is that there is no basis to reduce the amount of \$4,145.85 by reason of s 392(5) of the Act.

⁹ *Ellawala v Australian Postal Corporation* Print S5109 at [36]

¹⁰ *Enhance Systems Pty Ltd v Cox* PR910779 at [39]

Instalments (s 393)

[27] No application has been made to date by Bogeye for any amount of compensation awarded to be paid in the form of instalments.

Conclusion on compensation

[28] In my view, the application of the *Sprigg* formula does not, in this case, yield an amount that is clearly excessive or clearly inadequate. Accordingly, my view is that there is no basis for me to reassess the assumptions made in reaching the amount of \$4,145.85.¹¹

[29] For the reasons I have given, my view is that a remedy of compensation in the sum of \$4,145.85 (less taxation as required by law) in favour of Ms Reddon is appropriate in the circumstances of this case. An order will be made to that effect [PR719342].



DEPUTY PRESIDENT

Appearances:

Ms Reddon, on behalf of herself.

Mr Atkinson, on behalf of the respondent.

Hearing details:

2020

Newcastle:

13 May.

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¹¹ *Smith v Moore Paragon Australia Ltd* (2004) 130 IR 446 at [32]