[2020] FWC 2963

The attached document replaces the document previously issued with the above code on 5 June 2020.

Amended paragraph 1 and corrected the spelling of American Christian rapper Nathan Feuerstein

Associate to Commissioner Johns

Dated: 10 June 2020

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

George Ramirez
v
AMR Hair and Beauty Supplies Pty Ltd
(U2019/14090)

COMMISSIONER JOHNS SYDNEY, 5 JUNE 2020

Application for an unfair dismissal remedy – Jurisdictional objection – Genuine redundancy.

Introduction

[1] The Respondent in this matter, AMR Hair and Beauty Supplies Pty Ltd, produced a promotional video for which it bought the rights to Nathan Feuerstein's "Remember This". In that song, the Christian rapper sings,

> "Surround yourself with people that challenge how you think.
> Not people that nod their head and act like they agree."

[2] On 3 December 2019 the applicant, Mr Ramirez, put his head above the parapet when he complained to the Respondent's Managing Director about the abusive conduct of the Managing Director's brother. Two days later Mr Ramirez was sacked.

[3] This decision is about whether the termination of employment of Mr Ramirez was a case of genuine redundancy. Mr Ramirez's former employer, AMR Hair and Beauty Supplies Pty Ltd **(Respondent/Employer/AMR)**, terminated his employment on 5 December 2019.

[4] On 15 December 2019, Mr Ramirez made an application to the Fair Work Commission (**Commission**) pursuant to s.394 of the *Fair Work Act 2009* (Cth) **(FW Act)** seeking a remedy for unfair dismissal. He seeks an order that the Respondent pay compensation to him.

[5] On 18 December 2019, the Respondent filed a response to the unfair dismissal application signed by Mr Ammar Issa. Mr Issa initially indicated that there was no jurisdictional objection. The Form F3 was later changed to indicate that there was a jurisdictional objection in that, it was contended, "the dismissal was a case of genuine redundancy."

[6] If the termination was a genuine redundancy, then Mr Ramirez's application for an unfair dismissal remedy must be dismissed. If the termination was not a genuine redundancy it becomes necessary to determine if termination of employment was unfair.

[7] Conciliation was attempted, but the dispute remained unresolved. Consequently, the matter was listed for a jurisdictional hearing on 24 March and a substantive hearing on 30 April 2020.

[8] At the hearings:

a) the Applicant was represented by Mr D Kane. I gave Mr Kane permission to represent the Applicant under s.596 of the FW Act because I was satisfied that the jurisdictional objection invested the matter with complexity and I would be assisted in the efficient conduct of the matter if I granted the Applicant permission to be represented.
b) the Respondent was represented by Mr A Issa, its Managing Director.

[9] In relation to the matter the parties filed the following materials. In coming to this decision the Commission, as presently constituted, has had regard to the filed material, the oral evidence and other documents tendered during the determinative conference:

EXHIBIT NO.	DESCRIPTION
1	Form F2 – Application for an unfair dismissal remedy
2	Form F3 – Employer's response
3	Respondent's Outline of Argument: objections
4	Respondent's list of employees who have left the company since February 2019
5	AMR profit and loss to December 2019
6	AMR profit, sales and warehouse units picked-graph
7	Applicant's Statement dated 5 March 2020
7a	Letter of offer enclosing employment contract dated 23 March 2019
7b	Incident report dated 3 December 2019

EXHIBIT NO.	DESCRIPTION
7c	Letter of redundancy and payment receipt dated 5 December 2019
7d	Medical certificate dated 5 December 2019
8	Statement of Ammar Issa dated 18 March 2020
8a	Employment contract
8b	AMR's revenues July 2019 – December 2019
8c	AMR's monthly profits or losses July 2019 – December 2019
8d	Letter of redundancy dated 5 December 2019
9	Applicant's outline of argument
10	Supplementary statement of the Applicant dated 7 April 2020 and annexures
11	Supplementary statement of A Issar dated 22 April 2020
12	Statement of Nicole Hull dated 7 April 2020

Background

[10] I make the following findings of fact:

a) On 22 March 2019, the Applicant met with Mr Issar. That day Mr Issar offered the Applicant employment.
b) The Applicant commenced employment with the Respondent on 1 April 2019.
c) The Applicant was employed as the Logistics Manager.
d) The Applicant was paid $90,500 per annum.
e) The Applicant's employment was covered by the Storage Services and Wholesale Award 2010 (**Modern Award**). The Modern Award provides for consultation in Part – 7.

f) On 1 July 2019, the Applicant successfully completed his probation with the Respondent. He approached Mr Issa about a pay increase. They agreed on a $10,000 increase.
g) After the completion of the September 2019 stocktake the Applicant approached Mr Issa about the pay increase (which had not yet been paid). Mr Issa told him he would have to wait until December 2019. No reason was provided.
h) On 12 November 2019, Mr Issa boasted on Facebook about the expansion of the Respondent into the United Kingdom.
i) On 18 November 2019, Mr Issar's brother, Ahmed Ahmed, commenced working for the Respondent.
j) From 19 November 2019, the Applicant began training Mr Ahmed in the Respondent's Warehouse Management System (WMS).
k) On 1 and 2 December 2019, the Applicant attended work, but had a very sore throat.
l) At about 4.43 pm on Tuesday, 3 December 2019, the Applicant was working with Mr Ahmed. A discussion ensued between the Applicant and Mr Ahmed about how busy work was. There was a disagreement. Mr Ahmed became angry and aggressive towards the Applicant.[1] Mr Ahmed said words to the effect of:
    i. "You fuck with me and I fuck with you."
    ii. "Go fuck yourself and get fucked."
    iii. "Go and get fucked and suck my dick"
    iv. "Go and fuck yourself, you're fucked, go and suck my dick, you're fucked, fuck off and suck my dick."
m) The Applicant completed an Incident Report in relation to Mr Ahmed's conduct.
n) At about 5.30 pm on 3 December 2019, the Applicant reported the matter to Nicole Hull, the Respondent's HR and Payroll Manager.
o) At about 6.40 pm on 3 December 2019, the Applicant reported the matter to Mr Issa (i.e. to Mr Ahmed's brother).
p) Likely on Wednesday, 4 December 2019 or Thursday, 5 December 2019, Mr Issa asked Mr Ahmed to apologise to the Applicant. Mr Ahmed said words to the effect of "I am not going to apologise to George for abusing him. So just get rid of him." (the **Brothers' Conversation**).
q) On 4 December 2019, the Applicant was on sick leave. He attended a doctor and was prescribed antibiotics. He received a medical certificate for the day.
r) On 5 December 2019, the Applicant again saw a doctor. He was given a medical certificate for 5 and 6 December 2019.
s) On 5 December 2019, Mr Issa instructed Ms Hull to prepare a termination letter for Mr Ramirez.[2] Ms Hull sent the letter to Mr Issa at 12.42 pm.[3]
t) At about 1.30 pm on 5 December 2019, Mr Issa telephoned the Applicant. He told him that "it's just not working out." He terminated the Applicant's employment.
u) At 1.47 pm on 5 December 2019, Ms Hull sent the Applicant an email in the following terms:

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[1] The conduct of Mr Ahmed was an early assertion of the Applicant in the proceedings. The Respondent was, from an early date, on notice about what the Applicant alleged against Mr Ahmed. Mr Ahmed was not called by the Respondent to rebut the Applicant's evidence. The failure to call Mr Ahmed was not explained. Consequently, I am entitled to, and do, draw the inference that failure of the Respondent to call Mr Ahmed is because his evidence would not have assisted the Respondent: *Jones v Dunkel* (1959) 101 CLR 298 at 320.

[2] Transcript, 30 April 2020, PN271.

[3] Exhibit 13.

> "As per your discussion with Ammar, please find attached you letter of redundancy outlining your final pay."

The attached letter stated:

> "The purpose of this letter is to confirm the outcome of a recent review by AMR Air and Beauty Supplies of its operational requirements, and what this means for you.
>
> As a result of the downturn in sales, AMR has had to downsize the warehouse to reduce operational costs. Therefore, unfortunately your position is no longer needed. Regrettably this means your employment will terminate. This decision is not a reflection on your performance.
>
> Your employment will end immediately. Based on a length of service, your notice period is one week. Instead of receiving the notice, you will be paid for one week.
>
> …"

v) Between the commencement and termination of his employment the Applicant was never warned about his conduct or performance.
w) Prior to the termination of his employment the Applicant was not consulted in accordance with the terms of the Modern Award.
x) On termination the Applicant was paid 1 weeks' pay in lieu of notice.
y) On 10 December 2019, Mr Ramirez returned the Respondent's property to Ms Hull. During that meeting Ms Hull reported Brothers' Conversation to the Applicant.[4]
z) Since February 2019:
    i. 7 of the Respondent's staff were made redundant (including the Applicant);
    ii. 13 casual staff ceased to be rostered,
    iii. 4 staff had their employment terminated, and
    iv. 7 staff resigned.
aa) In the period July 2019 – December 2019, the Respondent's total sales and gross profits declined. However, the business continued to have gross profits (but 3 out of 6 months recorded a net loss).
bb) On or about 1 January 2020 and 12 March 2020, the Respondent published promotional videos about its business success to the euphoric music of American Christian rapper, Nathan Feuerstein (**NF**). Mr Issa's evidence was that "the reflection of turnover and companies is false in those videos, it is purely a PR stunt." Further, he said that the upbeat Facebook posts about the business' success "were posted … to make my mum and family proud and are not a reflection on how badly the business has been performing."[5]

Was the Applicant protected from unfair dismissal?

[4] In her evidence Ms Hull said she could not recall this conversation with Mr Ramirez (Exhibit 12).

[5] Exhibit 11.

[11] An order for reinstatement or compensation may only be issued where the Commission is satisfied the Applicant was protected from unfair dismissal at the time of the dismissal. Section 382 of the FW Act sets out the circumstances that must exist for the Applicant to be protected from unfair dismissal and, in the present matter, the Respondent does not submit that the Applicant was not protected.

[12] There being no dispute, the Commission, as presently constituted, is satisfied the Applicant has completed the minimum employment period and earned less than the high-income threshold. Consequently, the Commission, as presently constituted, is satisfied the Applicant was protected from unfair dismissal.

[13] I will now consider if the dismissal of the Applicant by the Respondent was unfair within the meaning of the FW Act.

Was the dismissal unfair?

[14] A dismissal is unfair if the Commission is satisfied, on the evidence before it, that all of the circumstances set out at s.385 of the FW Act existed. Section 385 provides the following:

> "**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."

Was the Applicant dismissed?

[15] A person has been unfairly dismissed if the termination of their employment comes within the definition of "dismissed" for purposes of Part 3–2 of the FW Act. Section 386 of the FW Act sets out the meaning of "dismissed". In the present matter it is common ground that the Respondent dismissed the Applicant.

[16] Consequently, the Commission, as presently constituted, finds that the Applicant was dismissed from him employment with the Respondent within the meaning of s.386 of the FW Act.

[17] However, more needs to be said about the reason for the dismissal. At all times the Respondent contended that the reason for the dismissal was that the Applicant's position was made redundant. The Applicant contended that he was sacked because he complained about the abuse he was subjected to by Mr Ahmed (the brother of the Respondent's Managing Director, Mr Issa).

[18] True it is that the Respondent's position ended and that he was not replaced. True it is there was, over the course of 2019, a reduction in the Respondent's staffing levels. However,

that does not mean that the reason for the termination of the Applicant's employment was because the Respondent no longer wanted anyone to perform the role of Logistics Manager. Further inquiry is required.

[19] In his evidence Mr Issa stated that,

> "On the 22nd [of November 2019] I made the firm decision that the business couldn't go on the way it was financially and that George will be made redundant. Nicole prepared the redundancy letter and emailed it as an attachment ready for George to depart on the 5th of December. The letter was date[d] on the 5th of December prior to George sending through any complaint."

[20] Mr Issa attached the purported email and draft letter to his statement (**Exhibit 11)(a)**).

[21] Ms Hulls' evidence was that she prepared for the letter of termination on 5 December 2019.[6]

[22] The evidence of Ms Hull and Mr Issa was irreconcilable.

[23] Called by me to give evidence, Ms Hull presented as an honest witness without an agenda. The following exchange occurred:[7]

> Commissioner Johns: Can I ask you, Ms Hull, when did you send the redundancy letter to Mr Issa in respect of the applicant?
> Ms Hull: ---Ah - - -
> Commissioner Johns: Did you draft it?
> Ms Hull: I did email it.
> Commissioner Johns: Maybe you can help me: what's your role at the organisation?
> Ms Hull: Okay, I do payroll as well as HR.
> Commissioner Johns: Did you prepare the redundancy letter to the applicant?
> Ms Hull: I did.
> Commissioner Johns: Do you know when you did that?
> Ms Hull: Yes, just a second, I'll bring it up. Terminate on 5 December.
> Commissioner Johns: Did you email that to Mr Issa?
> Ms Hull: Hang on a sec.
> …
> I'm sorry, I'm just going through my emails.
> Commissioner Johns: That's all right, take your time?
> Ms Hull: I did send him a copy, yes.
> Commissioner Johns: Do you know when you did that?
> Ms Hull: On 5 December.
> Commissioner Johns: At what time?
> Ms Hull: At 12.42.
> Commissioner Johns: Right. Did you prepare an earlier draft at any stage or was that the first time you prepared it?
> Ms Hull: No, I'm pretty sure that was the only one.

[6] Transcript, 30 April 2020.

[7] Transcript, 30 April 2020, PN258-272.

[24] What Ms Hull's very honest evidence makes clear is that:

a) while Mr Issa and I share a regard for American Christian rapper, NF[8], we do not share the same regard for the truth. Mr Issa and the truth are strangers to each other.
b) the purported email from Ms Hull to Mr Issa dated 22 November 2019 (**Exhibit 11(a)**), was a falsified document.

[25] What flows from the contradictory evidence of Ms Hull, which I accept, is that I reject Mr Issa's evidence about when the decision was made to terminate the employment of the Applicant. Because Mr Issa was not a witness of truth, I also reject his evidence that the reason for the termination was redundancy. I find that the substantive and operative reason for the termination of Mr Ramirez's employment was his complaint to Mr Issa about the conduct of Mr Issa's brother. Mr Ahmed directed his brother to get rid of Mr Ramirez and Mr Issa complied.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[26] A person has not been unfairly dismissed where the dismissal is consistent with the *Small Business Fair Dismissal Code*. In the present matter the Respondent was not, at the time of the dismissal, a small business.

[27] Consequently, the Commission as presently constituted, finds the Respondent was not a small business employer within the meaning of s.23 of the FW Act.

Was the dismissal a genuine redundancy?

[28] In its Form F3 the Respondent submitted that I should dismiss the application because the dismissal was a case of genuine redundancy. Section 389 of the FW Act defines the meaning of genuine redundancy:

> "389 Meaning of genuine redundancy
>
> (1) A person's dismissal was a case of *genuine redundancy* if:
>
> (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
>
> (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
>
> (2) A person's dismissal was not a case of *genuine redundancy* if it would have been reasonable in all the circumstances for the person to be redeployed within:
>
> (a) the employer's enterprise; or
>
> (b) the enterprise of an associated entity of the employer."

[29] There are three aspects to the test for genuine redundancy. That:

[8] Transcript, 30 April 2020, PN229.

a) The job disappears,
b) There has been consultation, and
c) Redeployment is not reasonable.

[30] On 24 March 2020 Mr Issa withdrew the Respondent's jurisdictional objection. He conceded that there had not be consultation in accordance with the requirements of the Modern Award.

[31] Consequently, the Commission, as presently constituted, is satisfied that:

a) the Applicant was protected from unfair dismissal,
b) the dismissal was not a case of genuine redundancy within the meaning of s.389 of the FW Act because the Respondent did not comply with its obligation under the Modern Award to consult about the redundancy.

Harsh, unjust or unreasonable

[32] Having determined that the termination of Mr Ramirez's employment was not a case of genuine redundancy I must now consider whether I am satisfied the dismissal was harsh, unjust or unreasonable.

[33] The ambit of the conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 465 by McHugh and Gummow JJ as follows:

> ".... It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

[34] The criteria the Commission must take into account when assessing whether the dismissal was harsh, unjust or unreasonable are set out at s387 of the FW Act:

> "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."

[35] Ordinarily I would be under a duty to consider each of these criteria in reaching my conclusion.[9] However, because the dismissal was not a case of genuine redundancy the consideration of the matters specified in s.387(a), (b) and (c) are neutral, unless in the circumstances another valid reason is identified. No other valid reason was identified by the Respondent.

[36] Matters arising from the redundancy (e.g. if relevant, a failure to consult with an employee) fall within s.387(h).[10]

[37] Therefore, in relation to the dismissal of the Applicant I am satisfied that:

Valid reason – s.387(a)

(a) The Respondent did not assert that the reason for the dismissal of the Applicant was related to his capacity or conduct. Accordingly, there cannot have been, and there was not, a valid reason for the dismissal related to him capacity or conduct.

(b) In all the circumstances of this case I regard this element of s.387 as a neutral consideration in respect of whether the dismissal of the Applicant was harsh, unjust or unreasonable.

Notification of the valid reason and opportunity to respond – s.387(b); (c)

(a) The matters in s.387(b) and (c) of the FW Act deal with whether there was procedural fairness in respect of a reason for dismissal related to capacity or conduct.

(b) The dismissal of the Applicant was not related to capacity or conduct.

(c) Consequently, in all the circumstances of this case I regard this element of s.387 as a neutral consideration in respect of whether the dismissal of the Applicant was harsh, unjust or unreasonable.

Unreasonable refusal by the employer to allow a support person – s.387(d)

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[9] *Sayer v Melsteel* [2011] FWAFB 7498.
[10] *UES (Int'l) Pty Ltd v Harvey* (2012) 215 IR 263.

a) Where an employee protected from unfair dismissal requests a support person be present to assist in discussions relating to the dismissal, the employer should not unreasonably refuse that person being present.

b) In the present matter this is not a relevant consideration.

c) In all the circumstances of this case I regard this element of s.387 as a neutral consideration in respect of whether the dismissal of the Applicant was harsh, unjust or unreasonable.

Warnings regarding unsatisfactory performance - s.387(e)

(a) The Respondent did not assert that the dismissal of the Applicant related to his unsatisfactory performance, so this matter is not relevant to my consideration as to whether the dismissal was harsh, unjust or unreasonable.

(b) In all the circumstances of this case I regard this element of s.387 as a neutral consideration in respect of whether the dismissal of the Applicant was harsh, unjust or unreasonable.

Impact of the size of the Respondent on procedures followed and Absence of dedicated human resources management specialist/expertise on procedures followed - s.387(f); (g)

(a) The size of a Respondent's enterprise may impact on the procedures followed by it in effecting a dismissal. Further, the presence of dedicated human resource management or expertise in a Respondent's enterprise should ensure a higher standard of management of human resources.

(b) In this matter the Respondent has an in-house human resource function. However, that function clearly has no influence over the cowboy behaviour of Mr Issa.

(c) In all the circumstances of this case I regard this element of s.387 as a neutral consideration in respect of whether the dismissal of the Applicant was harsh, unjust or unreasonable.

Any other matters that the FWC considers relevant – s.387(h)

[38] Having considered each of ss.387(a)-(g) of the FW Act, it remains necessary to now consider subsection 387(h) in respect of the Applicant. Section 387(h) provides the Commission with a broad scope to consider any other matters it considers relevant.

[39] Once I have considered s.387(h) in combination with each of ss.387(a) - (g) of the FW Act, I must then decide (in respect of the Applicant) if, in all the circumstances, the termination of the Applicant's employment was harsh, unjust or unreasonable. Deciding whether the termination was ultimately unfair involves the exercise of discretion.

[40] Although s.387 includes matters that the Commission must take into account in deciding how to exercise its discretion, the discretion conferred is otherwise expressed in

general, unqualified terms. Of course, the discretion conferred must be exercised judicially, that is to say not arbitrarily, capriciously, or so as to frustrate the legislative purpose. Further, the discretion is also confined by the subject matter, legislative context and purpose.

[41] In exercising the discretion, guidance can be drawn from s.381 of the FW Act. It provides that:

> "381 Object of this Part
>
> (1) The object of this Part is:
>
> (a) To establish a framework for dealing with unfair dismissal that balances:
>
> a. The needs of business (including small business); and
>
> b. The needs of employees; and
>
> (b) To establish procedures for dealing with unfair dismissal that:
>
> a. Are quick, flexible and informal; and
>
> b. Address the needs of employers and employees; and
>
> (c) To provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.
>
> (2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.
>
> Note: the expression "fair go all round" was used by Heldon J in in *re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95."

[42] In respect of Mr Ramirez I consider the following matters to be relevant to the determination of whether him dismissal was harsh, unjust or unreasonable:

Matters that support a conclusion that the dismissal was harsh, unjust or unreasonable

a) Mr Ramirez's position was not made redundant because of any operational requirements on 5 December 2019. The substantive and operative reason for the dismissal was the Applicant's complaint about the conduct of Mr Issa's brother. The termination of the Applicant's employment was a spiteful act of retaliation against him by Mr Issa on behalf of his foul-mouthed brother.
b) Mr Ramirez was not consulted about the termination of his employment.
c) There were no issues with Mr Ramirez's conduct or performance.
d) The dismissal occurred when the Applicant was on sick leave.
e) The dismissal occurred very late in the year when it is traditionally difficult to secure alternative employment

Matters telling against a conclusion that the dismissal was harsh, unjust or unreasonable

f) Noting the decline in the Respondent's staffing since February 2019 it is likely that, at some point, the Applicant's employment would have genuinely been made redundant.

[43] Having considered each of the matters specified in s.387, the Commission, as presently constituted, is satisfied that, overall, and having regard to the obligation to afford a "fair go all round" the dismissal of the Applicant was unreasonable and harsh.

[44] Accordingly, the Commission, as presently constituted, finds Mr Ramirez's dismissal was unfair within the meaning of the FW Act.

Remedy

[45] Section 390 of the FW Act sets out the circumstances in which I may make an order for reinstatement or compensation:

> "390 When the FWC may order remedy for unfair dismissal
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
> (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
> (b) the person has been unfairly dismissed (see Division 3).
> (2) The Commission may make the order only if the person has made an application under section 394.
> (3) The Commission must not order the payment of compensation to the person unless:
> (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
> (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.
> Note: Division 5 deals with procedural matters such as applications for remedies."

[46] I have already dealt with the issues at s.390(1)(a)–(b) above. The Commission, as presently constituted, is satisfied the Applicant was protected from unfair dismissal pursuant to s.382 of the FW Act and the Applicant was dismissed unfairly. An order dismissing the jurisdictional objection will be issued with this decision.

[47] As a consequence of the above, the Commission is now required to determine whether to order:

a) the reinstatement of the Applicant or, in circumstances where reinstatement is inappropriate,
b) compensation if it is satisfied such an order is appropriate in all the circumstances.

Reinstatement

[48] The Applicant seeks compensation as the primary remedy. Regardless of the remedy sought by the Applicant, s.390 of the FW Act requires I first determine whether reinstatement is appropriate before I may consider an order for compensation.

[49] Noting the decline in the Respondent's business and the dishonest way in which Mr Issa treated Mr Ramirez, in the circumstances the Commission, as presently constituted, is satisfied that I should order reinstatement is inappropriate.

Compensation

[50] Section 390(3)(b) provides the Commission may only issue an order for compensation to the Applicant if it is appropriate in all the circumstances.

[51] Noting the harsh and unreasonable way that the Applicant was treated, the Commission, as presently constituted, is satisfied that an order for compensation is appropriate in all the circumstances of this case.

[52] Section 392 of the FW Act sets out the circumstances that must be taken into consideration when determining an amount of compensation, the effect of any findings of misconduct on that compensation amount and the upper limit of compensation that may be ordered:

> "**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."

[53] The method for calculating compensation under s.392 of the FW Act was dealt with by a Full Bench of the Commission in *Bowden, G v Ottrey Homes Cobram and District Retirement Villages Inc. T/A Ottrey Lodge*[11] (Bowden). In that decision the Full Bench set out the order in which the criteria and other factors should be applied, taking into account authority under the Workplace Relations FW Act 1996 in *Sprigg v Paul's Licensed Festival Supermarket*[12] and *Ellawala v Australian Postal Corporation*[13]. I have adopted the methodology utilised in Bowden in determining the amount of a payment of compensation.

[54] I will now consider each of the criteria in s.392 of the FW Act.

Remuneration that would have been received: s.392(2)(c)

[55] The Applicant's remuneration with the Respondent was $90,500 per annum.

[56] I should now determine the period of time the Applicant would have remained employed by the Respondent, or would have likely remained employed with the Respondent, had they not been dismissed.

[57] Noting the decline in the Respondent's business during 2019 and since the termination of the Applicant's employment I find that the Applicant would have continued to be employed by the Respondent for no more than 8 weeks not been dismissed. The amount the Applicant would have received is therefore $13,923.04.

Remuneration earned: s.392(2)(e)

[11] [2013] FWCFB 431.

[12] (1998) 88 IR 21.

[13] Print S5109.

[58] I should deduct from that amount:

a) the 1 weeks' notice payment paid to the Applicant, and

b) the income he earned from his new job from 23 January 2020,

leaving a balance of $11,170.16.

Other matters: s.392(2)(g)
[59] I find it is not appropriate in the circumstances that a contingency should be applied.

Viability: s.392(2)(a)
[60] While I appreciate that the Respondent's sales have declined Mr Issa made no submission about whether any order for compensation will affect viability of the Respondent's enterprise.

[61] I find an order for compensation in the amount proposed will not affect the viability of the Respondent's enterprise.

Length of service: section (s.392(2)(b))
[62] I find that the Applicant's period of service with the Respondent, being 8 months, albeit a relatively short period, should not affect the amount of compensation to be ordered.

Mitigating efforts: s.392(2)(b)
[63] In considering whether the Applicant has taken steps to mitigate the loss suffered as a result of the dismissal, I should take into account whether the Applicant acted reasonably in the circumstances.[14] On 23 January 2020, the Applicant found alternative employment at a slightly lesser rate of pay.[15] Had he not done so, the measure of compensation I would have awarded would have been higher. The Respondent is spared that by virtue of the Applicant's efforts to mitigate his loss.

Misconduct: s.392(3)
[64] I have not found any misconduct by the Applicant that contributed to the dismissal.

Shock, Distress: s.392(4)
[65] I note that the amount of compensation calculated does not include a component for shock, humiliation or distress.

Compensation cap: s.392(5)
[66] I must reduce the amount of compensation to be ordered if it exceeds the lesser of the total amount of remuneration received by the Applicant, or to which the Applicant was entitled, for any period of employment with the employer during the 26 weeks immediately before the dismissal, or the high income threshold immediately prior to the dismissal.

[67] The high income threshold immediately prior to the dismissal was $148,700.

[68] The amount the Applicant would have earned, or to which the Applicant was entitled, for the 26 week period immediately prior to the dismissal was $45,250.

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[14] *Biviano v Suji Kim Collection* PR915963 at [34].

[15] Transcript, 30 April 2020, PN57-65.

[69] The amount of compensation I will order does not exceed the compensation cap.

Payment by instalments: s.393
[70] The Respondent made no submission about instalments, but I give it liberty to apply in relation to the same.

Conclusion

[71] The Commission, as presently constituted, is satisfied that the Applicant was protected from unfair dismissal, that the dismissal was unfair and a remedy of compensation in the amount of $11,170.16 is appropriate.

[72] An order will be issued with this decision.

COMMISSIONER

Appearances:

Mr D Kane, Solicitor, for the Applicant.
Mr A Issa, Managing Director, for the Respondent

Hearing details:

2020.
24 March.
Sydney.

2020.
30 May.
Sydney via videoconference.

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