



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Carolyn Stringer

v

1 Step Communications Pty Ltd
(U2020/7977)

DEPUTY PRESIDENT MASSON

MELBOURNE, 21 JULY 2020

Application for an unfair dismissal remedy – not covered by a modern award or enterprise agreement – jurisdictional objection - whether annual rate of earnings exceeded high income threshold – jurisdictional objection dismissed.

Introduction

[1] On 10 June 2020, Ms Carolyn Stringer (the Applicant) lodged an application pursuant to s 394 of the *Fair Work Act 2009* (the Act) in which she asserts that the termination of her employment with 1 Step Communications Pty Ltd (the Respondent) on 21 May 2020 was unfair.

[2] The Respondent objects to the application being heard on the basis that the Applicant earned more than the *high income threshold* and therefore the Applicant is not a person protected by the unfair dismissal provisions of the Act.

[3] Determination of the Respondent’s jurisdictional objection was set down for a hearing/conference on 20 July 2020. Materials were filed by both parties in accordance with directions issued by the Commission. Considering the views of the parties I determined to hold a conference pursuant to s. 398 of the Act. The Applicant appeared on her own behalf while Mr Steve Johnson – CEO, appeared for the Respondent

Background and evidence

[4] The Applicant commenced employment with the Respondent on 19 June 2017. Her employment termination was notified and took effect on 21 May 2020.¹ The reason cited for her dismissal on her Employment Separation Certificate was that of a “Shortage of work”.² At the time of her dismissal the Applicant was engaged as the Corporate Services Manager, a contract of employment for which position was signed on 12 June 2018 (the 2018 Employment Contract).³

¹ Exhibit A5, Letter of Termination

² Exhibit R5, Employment Separation Certificate, dated 10 June 2020

³ Exhibit R3, 2018 Employment Contract, dated 12 June 2018

[5] According to the Position Description, which was attached to the Applicant's 2018 Employment Contract, the Applicant's duties comprised a range of administrative and management activities as follows;

- Manage all accounting, financial, HR and reporting functions for the 1 Step Companies including accounts receivable, accounts payable, payroll and commissions.
- Responsible for all tax, legal and statutory requirements.
- Cashflow management.
- Develop detail monthly reporting, profitability analysis and balance sheet reconciliations.
- Develop and coordinate comprehensive budgets and forecasts.
- Maintain adequate internal controls.
- Innovate and evolve existing financial and HR processes.
- Manage, lead and mentor direct reports to achieve departmental objectives and targets.
- Ensure all statutory financial and reporting compliance and tax compliance is maintained.
- Own any external audit process and relationships with external accountants and auditors.
- Build HR systems and process' from the "ground up".
- Develop and implement remuneration, engagement and retention strategies.
- Work closely with the business on issues such as resource and organisational planning, industrial relations, change management, recruitment as well as career and succession planning.
- Analysis and reporting of people data.
- Coaching and supporting managers to develop their capability.
- Manage injuries, return to work and workers compensation.
- Maintain strong business relationships with all levels of stakeholders across the wider group.⁴

[6] On entering into the 2018 Employment Contract which was backdated and took effect from 30 April 2018, a base salary of \$140,000 was agreed, on top of which the Applicant was entitled to \$4000 "Toll Reimbursement" and \$13,300 in superannuation, bringing her Total Package to \$157,300.⁵ That salary package was increased with effect from 3 December 2018 whereupon the Base Salary was increased to \$150,700. Other package components brought the Total Package to \$165,017.⁶

[7] On 11 May 2020 Mr Johnson sent an email to staff, including the Applicant, and advised that as a result of the impact of the Covid 19 pandemic on the Respondent it had taken the decision "to reduce wages and entitlements of all employees working in the Communications side of the business by 15%." Mr Johnson went on to advise staff in the email that the decision would be reviewed at the end of January 2021 unless the situation worsens in which case a second round of decisions would be taken.⁷

⁴ Ibid at page 5.

⁵ Ibid at page 6

⁶ Exhibit R4, Salary Package Change, dated 5 March 2019

⁷ Exhibit A4, Email to staff from Mr Steve Johnson, dated 11 May 2020

[8] The Applicant was impacted by the above-referred wages and entitlements reductions. Her payslips for the pay period's ending 13 May 2020⁸ and 20 May 2020⁹ show that her "annual salary" was reduced to \$128,095.14.

[9] On 21 May 2020, that being the date of the Applicant's dismissal, her annual salary was restored to \$150,699.95 for the purpose of payment of her final pay. That final pay included 8 hours pay for the 21 May 2020, 5 weeks' pay in lieu of notice and accrued statutory leave entitlements.¹⁰ Mr Johnson rejected the proposition that restoration of the higher salary for the Applicant on 21 May 2020 was done for the purpose of pushing the Applicant's salary above the *high income threshold*, thereby avoiding the unfair dismissal jurisdiction of the Commission. Rather, according to Mr Johnson the decision was taken to ensure that the Applicant received payment of her accrued entitlements at the higher rate she had been receiving prior to 11 May 2020.

[10] Mr Johnson confirmed in his evidence that the 15% remuneration reduction announced on 11 May 2020 remains in effect and that no other employee of the Respondent has had their pre 11 May 2020 salary restored at this point.

Statutory Provisions

[11] Before considering the merits of the Applicant's unfair dismissal application the Commission is required by s.396 to decide certain matters. Section 396 provides as follows:

"396 Initial matters to be considered before merits

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

- (a) whether the application was made within the period required in subsection 394(2);
- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- (d) whether the dismissal was a case of genuine redundancy."

[12] It is not contested that the application was filed within the 21 day statutory timeframe specified in s.394(2) of the Act. Therefore, the next issue that must be determined is whether the Applicant is a person protected from unfair dismissal (s.396(b)). The critical questions are about the operation of s.382(b) which relevantly provides as follows;

"382 When a person is protected from unfair dismissal

A person is *protected from unfair dismissal* at a time if, at that time:

⁸ Exhibit A7, Pay Slip for Ms Carolyn Stringer for pay period ending 13 May 2020

⁹ Exhibit A8, Pay Slip for Ms Carolyn Stringer for pay period ending 20 May 2020

¹⁰ Exhibit A9, Pay Slip for Ms Carolyn Stringer for pay period ending 21 May 2020

- (a) The person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
- (b) One or more of the following apply:
 - (i) A modern award covers the person;
 - (ii) An enterprise agreement applies to the person in relation to their employment;
 - (iii) The sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.” (emphasis added)

[13] It is not contested that the Applicant has completed the minimum employment period. Therefore it is necessary in order for me to be satisfied that the Applicant is a person *protected from unfair dismissal* to determine whether the Applicant in her employment was covered by a modern award or enterprise agreement, and if not whether in the alternative the Applicant's annual rate of earnings was less than the *high income threshold*.

[14] Section 332 of the Act defines “earnings” as follows:

“332 Earnings

- (1) An employee's earnings include:
 - (a) the employee's wages; and
 - (b) amounts applied or dealt with in any way on the employee's behalf or as the employee directs; and
 - (c) the agreed money value of non-monetary benefits; and
 - (d) amounts or benefits prescribed by the regulations.
- (2) However, an employee's earnings do not include the following:
 - (a) payments the amount of which cannot be determined in advance;
 - (b) reimbursements;
 - (c) contributions to a superannuation fund to the extent that they are contributions to which subsection (4) applies;
 - (d) amounts prescribed by the regulations.

Note: Some examples of payments covered by paragraph (a) are commissions, incentive-based payments and bonuses, and overtime (unless the overtime is guaranteed).

- (3) *Non-monetary benefits* are benefits other than an entitlement to a payment of money:
- (a) to which the employee is entitled in return for the performance of work; and
 - (b) for which a reasonable money value has been agreed by the employee and the employer;

but does not include a benefit prescribed by the regulations.

- (4) This subsection applies to contributions that the employer makes to a superannuation fund to the extent that one or more of the following applies:
- (a) the employer would have been liable to pay superannuation guarantee charge under the Superannuation Guarantee Charge Act 1992 in relation to the person if the amounts had not been so contributed;
 - (b) the employer is required to contribute to the fund for the employee's benefit in relation to a defined benefit interest (within the meaning of section 291-175 of the *Income Tax Assessment Act 1997*) of the employee;
 - (c) the Employer is required to contribute to the fund for the employee's benefit under a law of the Commonwealth, a State or a Territory.

[15] The high income threshold is an amount prescribed and worked out by operation of reg. 2.13 of the *Fair Work Commission Regulations 2009*. Applying the calculation provided by that regulation, the threshold at the time of the Applicant's dismissal was \$148,700.00.

Consideration

[16] Before turning to consider whether the annual earnings of the Applicant were below the *high income threshold*, I must firstly establish whether the Applicant was covered by a modern award or enterprise agreement. The Applicant did not contend that she was covered by either a modern award or enterprise agreement. I have also considered whether the role would fall within the coverage of a modern award and have concluded that it would not, having regard to the seniority of the role and the management responsibilities. I am satisfied that the Applicant was not covered by a modern award or enterprise agreement in her employment with the Respondent.

[17] I now turn to consider whether the annual earnings of the Applicant exceeded the *high income threshold*. As stated above, the Applicant was in receipt of a base salary of \$150,700.00 up until 11 May 2020 at which point, like other employees of the Respondent, the Applicant's salary was reduced by 15%. This reduction in the Applicant's case saw her annual salary reduced to \$128,095.14. This reduced annual salary applied from 11 May 2020

up to and including the 20 May 2020. On 21 May her annual salary was restored to \$150,699.95 for the purpose of payment of her final day's pay and termination entitlements.

[18] On the authority of *Zappia v Universal Music Australia Pty Limited T/A Universal Music Australia*¹¹ it is necessary for me to ascertain the annual rate of earnings at the time of the termination of employment.¹² On the Respondent's argument the annual rate is to be ascertained by reference only to the Applicant's final payslip, which shows that her annual salary was \$150,699.95. In contrast, the Applicant contends that her annual rate of earnings should be ascertained by reference to her reduced salary of \$128,095.14 communicated to her on 11 May 2020.

[19] I do not accept the Respondent's submission that the Applicant's final payslip provides a sound basis on which to ascertain the Applicant's annual rate of earnings. That is because it is also necessary to have regard to the circumstances leading up to the Applicant's dismissal and in particular the Respondent's conduct in restoring the Applicant's salary to \$150,699.95 on the 21 May 2020.

[20] As previously stated, the Applicant was advised along with other employees by Mr Johnson in an email on 11 May 2020 that her annual salary would be reduced by 15%. The Respondent also advised the Applicant and other employees that the reduction would not be reviewed until January 2021 unless the business circumstances deteriorated further in which case the prospect of further cost cutting initiatives was raised. Tellingly, no other employee of the Respondent that has remained employed with the Respondent has had their pre 11 May 2020 salary restored in the manner that the Applicant experienced on the day of her dismissal.

[21] I am satisfied that had the Applicant remained employed by the Respondent that it is more than likely that her salary would have remained at the lower rate of \$128,095.14. I make this finding on the basis of the Respondent's treatment of its remaining employees since the Applicant's termination of employment.

[22] I make no criticism of the Respondent for taking what it regarded as a necessary step to protect its business in the face of the Covid 19 pandemic impacts by reducing staff payroll costs through a 15% reduction in wages and entitlements of employees in the Communications side of the business. The Applicant was part of the employee cohort impacted by that decision. However, I am satisfied that the decision of the Respondent to restore the Applicant's salary to \$150,699.95, even if it was not motivated by a desire to deny the Applicant an avenue to challenge her dismissal, had the potential effect of lifting her salary above the *high income threshold* at the time of her dismissal.

[23] In the above circumstances I regard the action of the Respondent in increasing the Applicant's salary on the day of her dismissal to \$150,699.95 as providing a fragile basis on which to ascertain the Applicant's annual rate of earnings. The better view based on the conduct of the Respondent is that the Applicant's annual rate of earnings at the time of her dismissal was \$128,095.14. To find otherwise would allow for the manipulation of the Applicant's salary by the Respondent with the effect of denying the Applicant a right to challenge her dismissal.

¹¹ [2012] FWAFB 6108

¹² Ibid at [9]

[24] In all of the circumstances I have ascertained based on the conduct of the Respondent that the Applicant's annual rate of earnings at the time of her dismissal was \$128,095.14. The high income threshold referred to in s. 382(b)(iii) of the Act was \$148,700 at the time of the Applicant's dismissal on 21 May 2020.

[25] It follows from the above that the Applicant's annual rate of earnings, was at the time of her dismissal, below the *high income threshold*.

Conclusion

[26] I am satisfied that because no modern award or enterprise agreement covered the Applicant and her annual rate of earnings was below the *high income threshold* of \$148,700 at the time of her dismissal, the Applicant was a person protected from unfair dismissal. The Applicant was entitled to make an unfair dismissal application.

[27] I consequently dismiss the Respondent's jurisdictional objection. The matter will now proceed to be programmed for hearing of the Applicant's unfair dismissal claim.



DEPUTY PRESIDENT

Appearances:

C. Stringer on her own behalf.

S. Johnson for the Respondent.

Hearing details:

2020
Melbourne
20 July

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<PR720729>