DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Scott Tracey
v
BP Refinery (Kwinana) Pty Ltd
(C2019/5845)

VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI SYDNEY, 10 AUGUST 2020
COMMISSIONER BOOTH

Appeal against decision [2019] FWC 4113 of Deputy President Binet at Perth on 2 September 2019 in matter number U2019/1141.

Introduction and background

[1] In a decision issued on 28 February 2020[1] (first decision), we considered and determined an appeal made by Scott Tracey against a decision made by Deputy President Binet on 2 September 2019 dismissing Mr Tracey's application for an unfair dismissal remedy in respect of the termination of his employment with BP. We determined that permission to appeal should be granted, the appeal upheld, and the decision of the Deputy President quashed. Further, we ordered that BP reinstate Mr Tracey, maintain his continuity of employment and the period of his continuous service upon his reinstatement taking effect, and invited evidence and submissions concerning the making of a compensation order pursuant to s 391(3) of the FW Act. This decision concerns our determination of the amount of compensation to be awarded to Mr Tracey. In this decision, we will adopt the acronyms, abbreviations and defined expressions used in the first decision.

[2] In the first decision, we indicated that in making any order pursuant to s 391(3) of the FW Act to compensate Mr Tracey for the remuneration he has lost because of the dismissal, we required more information to make an order in the appropriate terms. We invited further evidence and submissions about this, including but not limited to the following matters:

> "(1) any alternative remuneration earned by Mr Tracey since his dismissal up to the date of any compensation order we might make; and
>
> (2) whether any deduction should be made for Mr Tracey's misconduct in using of a work computer to show the video to another employee during working hours."[2]

[1] [2020] FWCFB 820

[2] Ibid at [38]

[3] We also invited the parties to confer about the issue of compensation to explore whether a consent position about the making of such order may be reached. No such consent position has been advised.

[4] In the first decision, we made the following orders:

(1) Permission to appeal is granted.

(2) The appeal is upheld.

(3) The decision ([2019] FWC 4113) is quashed.

(4) BP Refinery (Kwinana) Pty Ltd is ordered to reinstate Scott Tracey to the position in which he was employed immediately before his dismissal within 14 days of the date of this decision.

(5) BP Refinery (Kwinana) Pty Ltd shall maintain the continuity of Mr Tracey's employment and the period of his continuous service upon Mr Tracey's reinstatement taking effect.

[5] We also directed that Mr Tracey and BP file any evidence and submissions concerning the making of a compensation order pursuant to s 391(3) within 21 days.

Federal Court proceedings

[6] Prior to any evidence and submissions being filed in accordance with the orders reproduced above, BP filed on 11 March 2020 an application for judicial review and a stay application in the Federal Court of Australia. The application for judicial review sought the following relief:

(1) An order that the first decision be transferred to the Federal Court and the first decision be quashed.

(2) An order permanently staying the operation of the order for reinstatement made by the Commission in the first decision.

(3) An order permanently staying the appeal proceedings before the Commission.

[7] In its submissions before the Court, BP outlined that they had undertaken to pay Mr Tracey as if he had returned to work on and from 13 March 2020 pending the final hearing of the judicial review application (undertaking).

[8] On 22 May 2020, the Court dismissed BP's application.[3] The same day, we re-issued orders (4) and (5) set out at [4] above and directed parties to file submissions in the same terms set out in [5] above.[4]

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[3] [2020] FCAFC 89

[4] PR719602

[9] We have now received evidence and submissions from the parties pursuant to the 22 May 2020 orders.

The statutory framework

[10] The relevant statutory provisions are as follows:

> **391 Remedy—reinstatement etc**.
>
> *Reinstatement*
>
> (1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:
>
> > (a) reappointing the person to the position in which the person was employed immediately before the dismissal; or
> >
> > (b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.
>
> ….
>
> *Order to restore lost pay*
>
> (3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.
>
> (4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:
>
> > (a) 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 reinstatement; and
> >
> > (b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

Mr Tracey's submissions and evidence

[11] Mr Tracey submitted that the Full Bench should make an order to restore remuneration lost or likely to have been lost because of his dismissal, and opposed any deduction being made on account of misconduct.

[12] In his submissions, Mr Tracey set out what he contends are the relevant components of remuneration, being a broader concept than salary or wages under s 391 of the FW Act. In clause 6.2 of his employment contract, remuneration is defined as including "*other non-cash*

benefits, as may be agreed with you from time to time". Mr Tracey submitted that the following components constitute remuneration (footnote omitted):

> "(a) Wages and superannuation calculated at the applicable classification in the *BP Refinery (Kwinana) Operations & Laboratory Employees Agreement 2014…*;
>
> (b) Variable Payment Plan Bonus under clause 41 of the EBA;
>
> (c) the financial benefit of the 25% discount Fuel Cards; and
>
> (d) Time Off in Lieu of overtime under clause 38 of the EBA."

[13] There is a dispute between the parties as to the correct classification for the calculation of lost remuneration. In this respect, Mr Tracey submitted that his lost remuneration should be calculated at the rate for the CT1A classification, whereas BP contends that it should be calculated that the OT5 classification rate. Mr Tracey submitted that CT1A is the appropriate classification rate on the basis that Mr Tracey was due to commence working at this rate effective from 19 November 2018. He contends that his commencement at this rate was agreed with BP and evidenced by the fact he had been rostered on from 19 November 2018 in that classification. Mr Tracey, however, did not commence work in the CT1A classification because he was suspended from his employment on 31 October 2018 and subsequently terminated on 18 January 2019. He submits that had his employment not been terminated, he would have worked according to his rostered CT1A classification.

[14] Mr Tracey submitted that in respect of an order for lost remuneration, the following should be included:

- a sum of the Variable Payment Plan (VPP) bonus, being 4.582% in March 2020;
- an allowance for fuel savings Mr Tracey would otherwise have made had his employment not been terminated as a result of his two discount fuel cards which provided a 25% discount on fuel purchased at BP service stations, which he calculates at $2,465.00; and
- Time off in Lieu (TOIL) for overtime he would have inevitably worked had his employment not been terminated, which he calculates at 42 hours.

[15] In relation to whether any deductions should be made due to misconduct, Mr Tracey asserted that the gravity of his conduct does not justify the making of any deduction and the Commission has determined that there was not a valid reason for his dismissal. In any event, it was submitted, he has already suffered sufficient sanction arising from his conduct, being the dismissal and lengthy disciplinary process, a continued loss of companionship with his D Shift workmates (as he was reinstated to the B Shift instead) and his classification as an OT5 rather than a CT1A. These sanctions, he submitted, were sufficient as such that a deduction is not appropriate.

[16] In respect of mitigation and deductions for other earnings, Mr Tracey submitted that he had made substantial and sustained attempts to obtain alternative employment after he was dismissed by BP, applying for 182 jobs. Mr Tracey obtained alternative employment on two occasions, earning a total of $33,290.09 in gross salary and $2,971.67 in superannuation. He

was also paid a sum of $14,732 gross for 4 weeks in lieu of notice, and $43,144.07 gross and $5,177.29 superannuation consequent on the undertaking given to the Court. Mr Tracey submitted that each of these sums should be deducted from the lost remuneration.

[17] Mr Tracey submitted that the Full Bench should grant an order for lost remuneration in accordance with the CT1A classification, relevant components and quantum with the exception of TOIL of an amount totalling $226,524.09. In the alternative, Mr Tracey submitted that any such order made in accordance with the OT5 classification should total $208,209.87, excluding TOIL.

[18] In addition to the above submissions, Mr Tracey filed a witness statement, in which he gave the following evidence:

- since his employment was terminated by BP, he had obtained work at Red Dirt Personnel and FQM Australia Nickel prior to being reinstated to BP;

- the wages and superannuation paid to him by BP pursuant to the undertaking were paid at the OT5 classification. Mr Tracey consented being paid at this classification only for the purposes of BP's stay application;

- BP has not provided him with any payslips in respect of the gross sums paid pursuant to the undertaking;

- the average discount he obtained from the use of his fuel cards over the 7 years prior to his dismissal was $145 per month; and

- in respect of TOIL, the average hours of overtime that has been worked by D Shift operators since he was stood down on 31 October 2018 is 42 hours, which he discerned from the D Shift callout list upon his return to work on 8 June 2020. He gave evidence that the callout list operates in a way that ensures all operators work an equitable amount of overtime.

BP's submissions and evidence

[19] BP submitted that in exercising its discretion under s 391(3) of the FW Act to order BP to restore Mr Tracey's lost pay, the Full Bench should order that BP pay only part of the remuneration Mr Tracey lost, or was likely to have lost, because of the dismissal and his misconduct.

[20] In calculating the amount of remuneration lost, or likely to have been lost, BP submitted that the relevant components pursuant to the *BP Refinery (Kwinana) Operations & AWU Operations & Laboratory Employees Agreement 2014* (2014 Agreement) are an annual salary, participation in and receipt of the VPP and superannuation at 12%, payable on the annual salary and VPP. BP submitted that in light of the above, the maximum amount that should be ordered is $247,428.01 gross, calculated from the date of Mr Tracey's dismissal on 18 January 2019 until BP recommenced paying him in accordance with the undertaking on 13 March 2020. From this amount, it was submitted, the following additional amounts should be deducted:

- $33,290.09 in gross salary and $2,971.67 in superannuation earned by Mr Tracey from obtaining alternative employment, though the superannuation amount could not be correct, as it equates to less than the statutory minimum of 9.5%;

- a further amount, as a person of Mr Tracey's skills and experience would have been reasonably likely to have earned an amount of remuneration far in excess of what he did in fact earn during the period between his termination and the undertaking;

- $15,959.80 in salary and $1,915.18 in superannuation paid as four weeks in lieu of notice to Mr Tracey upon his dismissal;

- $31,919.60 in salary and $3,830.35 in superannuation for Mr Tracey's misconduct, which equates to two months' salary; and

- $4,466.19 in salary and $535.94 in superannuation also for Mr Tracey's misconduct, being a reduction by the difference between the VPP maximum (4.582%) and minimum (2.25%) reward available.

[21] In respect of the proposed deduction for misconduct, BP contended that the above amount should be deducted from any order made because the Commission accepted that Mr Tracey misconducted himself when he breached BP's policy by using a work computer to show the video to another employee during working hours. It was submitted that Mr Tracey's overall conduct in creating and sharing the video was "*at its lowest, unhelpful and entirely inconsistent with BP's values, even having regard to the industrial circumstances at the time*". In relation to the deduction to the VPP due to misconduct, BP submitted that Mr Tracey should receive the minimum VPP as pursuant to clause 41.2 of the 2014 Agreement, the VPP awards employees for their contribution to the achievement of business and team measures for the year, to which Mr Tracey did not contribute.

[22] In total, BP submitted that the maximum amount of compensation ($247,428.01 gross) should be reduced by not less than $94,888.82. It contended that the Full Bench should make an order for compensation of not more than $152,539.19 gross, inclusive of 12% superannuation, less any other amounts the Full Bench considers Mr Tracey would reasonably likely have earned during the period when he was not being paid by BP. This represents a reduction of 38%.

[23] In addition to the above submissions, BP filed a witness statement of Mrs Taya Hill, BP's Human Resources Business Partner. Ms Hill gave evidence that at the time of Mr Tracey's dismissal, he was classified and was being paid as an OT5 and that, on the day Mr Tracey was reinstated, she requested BP's payroll department to extract a payroll report demonstrating the amount of remuneration that would have been payable to Mr Tracey for the period of his dismissal through to 13 March 2020, being $212,142.53 in gross salary and $25,457.10 in superannuation. This report was appended to her statement.

Mr Tracey's submissions in reply

[24] Mr Tracey submitted that BP erred in respect of two of its calculations in their submissions. First, Mr Tracey contended that BP erred in calculating the notice period paid to him upon the termination of his employment, in that BP substituted one month's wages for four weeks' wages. Mr Tracey referred to the payslip provided to him at the time he was paid

notice, which states he was paid $14,732.12 gross in notice and was not paid any superannuation on the notice period. Second, BP erred in its calculation of wages owing to Mr Tracey due to the start and end dates of the relevant pay periods as the pay cycle is one week in arrears and one week in advance pursuant to clause 45.2 of the 2014 Agreement. As such, Mr Tracey did not receive a salary from 17 January to 31 January 2019 and 5 March to 12 March 2020 inclusive. In respect of the March dates, Mr Tracey contended that he should have been paid $3,683.03 in wages at BP's proposed OT5 rate, rather than the $1,473.21 calculated by BP.

[25] Mr Tracey also clarified the manner in which he submits his remuneration lost should be calculated, set out above in his earlier submissions. As his salary is an annualised salary that is paid regardless of the number of shifts he works and the times at which he works them, he submitted that the Full Bench should calculate a daily rate based on the applicable wage rate, then multiply the daily rate by 501, being the number of days Mr Tracey was not employed by BP.

Consideration

[26] Mr Tracey's dismissal took effect on 18 January 2019. The reinstatement order made in the first decision required Mr Tracey to be reinstated within 14 days of the date of that decision – that is, by 14 March 2020. BP undertook to the Federal Court, as a condition of a consent order staying the reinstatement order, that it would pay Mr Tracey as if he had returned to work on and from 13 March 2020 pending the final hearing of the judicial review application. The dismissal of BP's application for judicial review necessarily had the effect of dissolving the stay order. Therefore we consider the appropriate course is to treat 13 March 2020 as the appropriate date upon which Mr Tracey was reinstated for the purpose of the assessment of compensation pursuant to s 391(3) and (4). Any dispute about what Mr Tracey should have been paid after that date is properly to be resolved by reference to the applicable industrial instrument and his contract of employment, and is not a matter which arises for consideration before us. Therefore compensation is to be assessed by reference to the period 18 January 2019 to 13 March 2020 – a period of 60 weeks.

[27] There is a dispute about the classification and rate of pay which would have applied to Mr Tracey if he had not been dismissed. We are satisfied that BP had made a decision, prior to Mr Tracey's suspension on 31 October 2018, that he would be promoted to the classification of CT1A effective from 19 November 2018. However it does not therefore follow that Mr Tracey should be compensated at the rate of pay for the CT1A classification. In the first decision, while we determined that there was no valid reason for Mr Tracey's dismissal and that his dismissal was unfair, we also found that Mr Tracey misconducted himself by using a work computer to show the video to another employee during working hours.[5] While this misconduct was not sufficiently serious to merit dismissal, a reasonable and lawful disciplinary response might have included the revocation of Mr Tracey's promotion to the CT1A classification. Accordingly we will assess compensation by reference to Mr Tracey's pre-existing classification of OT5.

[5] [2020] FWCFB 820 at [33]

[28] The rate of annualised salary for the OT5 classification under the 2014 Agreement was $191,517.59, or $3,673.14 per week.[6] Accordingly, the salary amount for 60 weeks is $220,388.40.

[29] Mr Tracey was also entitled under the 2014 Agreement to a VPP Bonus. We accept that it may have been a reasonable and lawful disciplinary response to Mr Tracey's misconduct to reduce his bonus to the minimum payable under clause 41.2, namely 2.25 percent. That would amount to additional remuneration of $4,958.74, and make a total of $225,347.14.

[30] Mr Tracey was entitled to superannuation at the rate of 12 percent of his annualised salary and his VPP bonus (see clause 41.4 of the 2014 Agreement). That amounts to $27,041.66 in lost superannuation.

[31] We reject Mr Tracey's claim for compensation for loss of the use of his fuel discount card based on the average monthly discount he received whilst employed. There is no evidence of fuel usage by him during the period from this dismissal to reinstatement. We likewise do not consider it appropriate to compensate him for lost earnings for overtime which he never worked.

[32] Two deductions need to be made to the total amounts above. First, Mr Tracey received a payment of wages in lieu of notice upon dismissal. We find that the amount actually paid by BP to Mr Tracey was $14,732.12 gross. This reduces the amount of lost salary and bonus to $210,615.02.

[33] Second, Mr Tracey earned $33,290.09 in wages and $2,971.67 in superannuation in alternative employment after his dismissal and prior to reinstatement. This reduces the amount of lost salary and bonus to $177,324.93 and the amount of lost superannuation to $24,069.99. This reduction deals with the matters we are required to take into account under s 391(4).

[34] We do not accept BP's submission that we should deduct a further arbitrary amount on account of the misconduct of Mr Tracey which we have earlier identified. We have already calculated the amount of compensation on the basis of reasonable disciplinary steps permissible under the 2014 Agreement which BP might have taken in response to the misconduct had it not dismissed him. BP could not have refused to pay Mr Tracey salary and superannuation to which he was entitled under the 2014 Agreement as a financial penalty upon him if he had not been dismissed. It would not in that circumstance be appropriate to make a further reduction from the compensation amounts on that score.

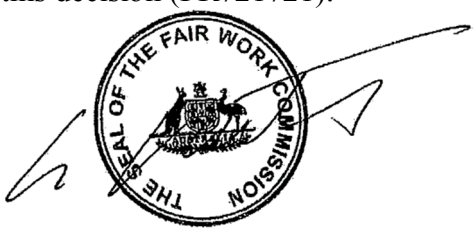
[35] We also do not accept that we should deduct a further amount based upon an assessment of what a person with Mr Tracey's skills and experience would have earned in the period between the dismissal and the reinstatement. There is no evidence about the state of the job market in the relevant geographical area upon which such an assessment could be based. We accept the evidence in Mr Tracey's witness statement that he took reasonable steps to find alternative employment and thereby mitigate his loss.

Conclusion

[6] Using a divisor of 52.14

[36] For the reasons given, we determine pursuant to s 391(3) of the FW Act that BP should pay Mr Tracey the amount of $177,324.93 on account of lost salary and bonus (less applicable taxation), and should additionally pay the amount of $24,069.99 on account of lost superannuation into a superannuation fund nominated by Mr Tracey. The amounts shall be payable within 14 days of the date of this decision.

[37] An order to give effect to the above determination shall be issued in conjunction with this decision (PR721721).



VICE PRESIDENT

Final written submissions:

Mr Tracey – 15 June 2020 and 1 July 2020.
BP – 12 June 2020.

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