[2023] FWC 1096[Note: An appeal pursuant to s.604 (C2023/5135) was lodged against this decision - refer to Full Bench decision dated 14 March 2024 [[2024] FWCFB 147] for result of appeal.]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Matthew Kenneth Stevens and Linda Margaret Stevens
v
Pecker Maroo Verano Pty Ltd
(U2023/1198 and U2023/1199)

DEPUTY PRESIDENT LAKE BRISBANE, 31 JULY 2023

Application for an unfair dismissal remedy– jurisdictional objection – whether the Applicant was an employee – where the Applicant was held to be an employee – dismissal found to be unfair – compensation awarded.

[1] Mr Matthew and Mrs Linda Stevens (the **Applicants**) lodged applications with the Fair Work Commission (the **Commission**) for an unfair dismissal remedy pursuant to s.394 of the *Fair Work Act 2009* (the **Act**) in relation to the termination of their employment by Pecker Maroo Verano Pty Ltd (the **Respondent**).

[2] I have decided to hear and determine the matters jointly as the Applicants were dismissed on the same grounds. The Applicants are husband and wife who were employed to manage accommodation in Noosaville. The Applicants were jointly dismissed.

[3] The matter was delayed due to the lack of engagement by the Respondent who variously asserted that they did not recognise the authority of the Commission or the member to make an arbitrated decision. After several extensions and work by my Associate, the Respondent provided submissions.

[4] A hearing was held before me on 9 May 2023, where the Applicants gave evidence on their own behalf. Ms Stephanie Charlton appeared for the Respondent.

[5] Section 396 of the Act requires that four specified matters must be decided before considering the merits of the application.

[6] It is undisputed that the Applicants lodged their application with the Commission within 21-days as required by the Act.[1] The dismissal did not involve a genuine redundancy.[2] At the time of the Applicant's dismissal, the Respondent stated they are a small business with less than 15 employees. However, the Respondent did not rely on the Small Business Fair Dismissal Code.

[7] There are issues regarding whether the Applicants are persons protected from unfair dismissal. The Act prescribes that a person must be a 'National System Employee' in order to claim an unfair dismissal remedy. The Applicants and Respondent have raised factors that may indicate that the Applicants are independent contractors.

[8] I will first determine whether the Applicants are National System Employees who are protected from unfair dismissal before assessing the merits of the matter.

Are the Applicants National System Employees or Independent Contractors?

[9] The High Court of Australia in *Jamsek* and *Personnel Contracting* determined the case of whether a person is an employee or contractor.[3] The characterisation of the relationship is to be determined by reference only to the parties' legal rights and obligations.

[10] Where a comprehensive written contract is in place, this will be the primary source of the parties' legal rights and obligations, and it will be decisive in characterising the relationship. This will apply unless the contract is a sham, varied after it was made, or post agreement conduct, or context demonstrates that a term is legally ineffective.[4]

[11] Where no comprehensive written contract is in place, the High Court stated in *Jamsek* that the "multifactorial" test remains appropriate in identifying the applicable legal rights and obligations which is not derived from the post contract conduct.[5] Therefore, a multifactorial approach is to be adopted. In reliance on a considerable body of case law developed, general legal principles are applied to specific circumstances.[6] Multiple indicia are to be considered, though none alone are determinative. Analysis of the totality of the relationship between the parties is required to determine whether the relationship was one of an employee or independent contractor.

[12] The often-cited passage penned by Windeyer J in *Marshall v Whittaker's Building Supply Co*[7] later quoted by the High Court of Australia in *Hollis v Vabu* reads:

> "the distinction between an employee and an independent contractor is 'rooted fundamentally in the difference between a person who serves his employer in his, the employer's business, and a person who carries on a trade or business of his own'."[8]

[13] In *Roy Morgan Research Pty Ltd v Commissioner of Taxation*, the Full Court of the Federal Court quoted with approval the following passage from *Hall (Inspector of Taxes) v Lorimer*:

> "The object of the exercise is to paint a picture of the relationship from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another".[9]

[14] The Full Bench of the Commission adopted this passage in *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario,* and summarised the general approach to distinguish between employees and independent contractors as follows:

> "(1) In determining whether a worker is an employee or an independent contractor the ultimate question is whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business of his or her own behalf[10]: that is,
>
> whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own[11] of which the work in question forms part? This question is concerned with the objective character of the relationship. It is answered by considering the terms of the contract and the totality of the relationship.[12]
>
> (2) The nature of the work performed and the manner in which it is performed must always be considered. This will always be relevant to the identification of relevant indicia and the relative weight to be assigned to various indicia and may often be relevant to the construction of ambiguous terms in the contract.[13]
>
> (3) The terms and terminology of the contract are always important. However, the parties cannot alter the true nature of their relationship by putting a different label on it.[14] In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole:[15] the parties cannot deem the relationship between themselves to be something it is not.[16] Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract.[17]
>
> (4) Consideration should then be given to the various indicia identified in *Stevens v Brodribb Sawmilling Co Pty Ltd* and the other authorities as are relevant in the particular context. For ease of reference the following is a list of indicia identified in the authorities:
>
> - Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like.
>
> Control of this sort is indicative of a relationship of employment. The absence of such control or the right to exercise control is indicative of an independent contract. While control of this sort is a significant factor it is not by itself determinative. In particular, the absence of control over the way in which work is performed is not a strong indicator that a worker is an independent contractor where the work involves a high degree of skill and expertise.[18] On the other hand, where there is a high level of control over the way in which work is performed and the worker is presented to the world at large as a representative of the business then this weighs significantly in favour of the worker being an employee.[19]
>
> "The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual

> supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."[20] "[B]ut in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. That was made clear in *Queensland Stations Pty. Ltd v Federal Commissioner of Taxation*, a case involving a droving contract in which Dixon J observed that the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract."[21]

- Whether the worker performs work for others (or has a genuine and practical entitlement to do so).

  > The right to the exclusive services of the person engaged is characteristic of the employment relationship. On the other hand, working for others (or the genuine and practical entitlement to do so) suggests an independent contract.

- Whether the worker has a separate place of work[22] and or advertises his or her services to the world at large.

- Whether the worker provides and maintains significant tools or equipment.[23]

  > Where the worker's investment in capital equipment is substantial and a substantial degree of skill or training is required to use or operate that equipment the worker will be an independent contractor in the absence of overwhelming indications to the contrary. [24]

- Whether the work can be delegated or subcontracted.[25]

  > If the worker is contractually entitled to delegate the work to others (without reference to the putative employer) then this is a strong indicator that the worker is an independent contractor.[26] This is because a contract of service (as distinct from a contract for services) is personal in nature: it is a contract for the supply of the services of the worker personally.

- Whether the putative employer has the right to suspend or dismiss the person engaged.[27]

- Whether the putative employer presents the worker to the world at large as an emanation of the business.[28]

  > Typically, this will arise because the worker is required to wear the livery of the putative employer.

- Whether income tax is deducted from remuneration paid to the worker.

- Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.

  Employees tend to be paid a periodic wage or salary. Independent contractors tend to be paid by reference to completion of tasks. Obviously, in the modern economy this distinction has reduced relevance.

- Whether the worker is provided with paid holidays or sick leave.[29]

- Whether the work involves a profession, trade or distinct calling on the part of the person engaged.

  Such persons tend to be engaged as independent contractors rather than as employees.

- Whether the worker creates goodwill or saleable assets in the course of his or her work.

- Whether the worker spends a significant portion of his remuneration on business expenses.

  It should be borne in mind that no list of indicia is to be regarded as comprehensive or exhaustive and the weight to be given to particular indicia will vary according to the circumstances. Features of the relationship in a particular case which do not appear in this list may nevertheless be relevant to a determination of the ultimate question.

(5) Where a consideration of the indicia (in the context of the nature of the work performed and the terms of the contract) points one way or overwhelmingly one way so as to yield a clear result, the determination should be in accordance with that result. However, a consideration of the indicia is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture of the relationship from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The ultimate question remains as stated in (1) above. If, having approached the matter in that way, the relationship remains ambiguous, such that the ultimate question cannot be answered with satisfaction one way or the other, then the parties can remove that ambiguity a term that declares the relationship to have one character or the other.[30]

(6) If the result is still uncertain then the determination should be guided by "matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability" including the "notions" referred to in paragraphs [41] and [42] of *Hollis v Vabu*."[31]

[15] The Respondent tendered a document titled '*Management Agreement for Verano Resort, Noosaville'* (the **Agreement**) which sets out the terms of the relationship between the parties. There are no words in the Agreement that state the Applicants are independent contractors or employees.

[16] The Agreement sets out the following terms of the relationship:

a. A minimum term of two years and commencing on the 30 April 2021.
b. It included a 3-bedroom home located on the complex with a car space.
c. Annual Leave of 20 days was available but must be taken in one week blocks every 2-3 months. The leave could not be taken during peak seasons.
d. The Remuneration was to be $60,000 per annum and were paid a weekly amount of $1,153.86.
e. A mobile phone and a company credit card would be provided.
f. A bonus scheme was also applicable for unit sales which was 50% of the profit after conveyancing, advertising and other associated expenditure if the Applicants were able to sell the units.
g. The requirement to wear a uniform and name badge.
h. The list of duties that the Applicants were required to undertake.

[17] Although the Agreement purports to be a 'management agreement' I note the following contractual terms are favourable towards determining an employment relationship existed:

a. The Respondent exercised control over the manner in which the Applicants' work was performed, hours of work and the location.
b. The Applicants could not perform work for others and were expected to report to Ms Stephanie Charlton for all invoices and payment of suppliers.
c. The Applicants were required to wear work uniforms.
d. The Applicants were paid a weekly amount on a salary basis.
e. The Applicants were provided 20 days of annual leave.
f. The Applicants were provided some equipment to undertake their role. The role also required a car which was not a substantive part of the role.
g. The Applicants were provided with the company credit card to make purchases that were consistent with their role. They did not utilise business expenses.

[18] There are some contractual terms which are favourable towards finding a contracting arrangement existed:

a. The Applicants were required to provide an ABN.
b. The Applicants appeared to delegate their work when they were unavailable. In this case, to Ms Sue Barden and Mr Geoff Barden
c. The working period between the Applicants and Respondent was subject to a two-year limit.

[19] With consideration of all the contractual terms above, I find overall that the Agreement is reflective of an employment contract more than a contracting arrangement. I will now determine the merits of the matter.

Was the dismissal harsh, unjust, or unreasonable?

Applicants' submission

[20] The Applicants submitted their Form F2 applications separately. The applications raised identical issues, as set out below, as to why their dismissals were harsh, unjust or unreasonable:

> *"I believe that the dismissal was unjustified as no notice was given prior to having a conversation on the phone on Saturday morning of the 4th February.*
>
> *We had applied for emergency leave as Linda had not been well and was advised by her doctor to have 2 weeks off work immediately , to ensure her return to good health. (see attached letter)*
>
> *my wife Linda had spent a week in ICU prior to Xmas and also 2 other times over the pastmonth Linda had been rushed to hospital via ambulance. Linda had not been overly well since that time. During this time Linda was forced to take annual leave to cover my wages.*
>
> *We had sent an email to the Director of the company, Stephenie Charlton saying we required the leave from Monday for 2 weeks starting on the 6th February, on the Saturday Morning the 4th February 2023. Her response to me was a phone call saying she had decided to release us from our Contract immediately. That I was not to go into the office and to hand the keys to the office to Geoff Bardon who was coming to see him. Also to vacate our apartment within 2 weeks.*
>
> *A termination letter was received a little later that morning. (see attached letter)*
>
> *After the conservation with Stephenie Charlton we noticed that our position of employment had been placed on the employment site Seek the day before.*
>
> *We had late last year given notice to resign to move to Townsville by giving the standard 4 weeks notice, We were told at that time that we had a contract that was for 2 years and was not due to expire until the end of April and if we left they would take legal action for breach of contract.*
>
> *We cancelled our letter of resignation at this time and continued on where we were. Prior to Christmas, I had, due to stress and my health threatened verbally to resign but nothing came of it.*
>
> *Due to all this action we not only have lost our job but our place of residence too."*

[21] The Applicants were provided an opportunity to provide further materials but elected to rely on their initial application. They submit that they were terminated without any notice after Mrs Stevens had written to the Respondent that she required two weeks leave upon her doctor's advice. The Applicants subsequently received a termination notice stating that they were dismissed for their 'performance ethic' by taking unauthorised leave on 4 February 2023.

[22] The Applicants are seeking 12 weeks compensation on the basis that their contract would have concluded on 30 April 2023 and seek any remaining annual leave entitlements.

Respondent's submissions

[23] The Respondent did not file a Form F3 as directed and were provided an extension. The Respondent variously asserted that they would not engage with the Commission process. The Respondent was provided notice that the failure to attend the hearing or file material may result in the matter being determined in their absence. After much to-and-froing by my Associate, the Respondent filed several documents and submissions.

[24] The Respondent filed a series of documents titled "Amicable Agreement" and "The Standard" which I regard nonsensical. The documents assert high treason being undertaken by various members of the judiciary and elected officials, variously quoting biblical scripture and arcane legal phrases. I have not had regard to these documents which on a generous interpretation look to have been prepared as a challenge to the responses by various governments to the COVID-19 pandemic.

[25] The Respondent also filed materials regarding the dismissal. The Respondent argues that the termination of the Applicants was valid on the basis that they did not perform the role they were required to do. The Respondent states:

> *"Points for termination of Matt & Linda Stevens contract with Pecker Maroo Verano Pty Ltd*
>
> - *the Dr's certificate written to Linda Stevens stating to have 2 weeks holiday was 5 days AFTER Matt & Linda demanded to go on holidays for 2 weeks.*
> - *Why did Matt Stevens have to go on a holiday when he was not sick?*
> - *Matt & Linda Stevens gave us an ultimatum **on 3 separate occasions** and **threated us** that if we did not comply with their **demands** they would abandon their post and terminate their contract with Pecker Maroo Verano Pty Ltd.*
> - *Matt & Linda's work performance and standards were not of a satisfactory standard to the owners and the body corporate and management of Pecker Maroo Verano Pty Ltd*
> - *we had to pay an extra $3000 to an outside contractor to bring the resort up to standard required by body corporate in November 2022.*
> - *The body corporate has also **denied our option renewal** request based on the poor performance of the onsite managers - Matt & Linda Stevens.*
> - *As a NON- smoking resort – the owner of unit 5 complained about continuous smoking coming from the managers unit.- Unit 1. Linda admitted she was still smoking. Matt also admitted that Linda still smoked*
> - *Bad language – heard by many people – guests and owners by Matt & Linda Stevens*
> - *Use of owners apartments FREE OF CHARGE for Matt & Linda's family over 3 months duration. - Sep to Dec 2022 - this equates to theft.*
> - *Correct Office Hours stated on the contract and stipulated by the body corporate were not adhered to by Matt & Linda Stevens- the office was often*

> *unattended after 12.00pm many days. Owners would attend to clients and show them how to access the security box to gain access to their units."*

[26] The Respondent alleged the Applicants lied about Mrs Stevens having an accident by falling out of a car which resulted in a foot injury. They allege that Mrs Stevens was having planned surgery to prevent undertaking her duties.

[27] The Respondent have submitted statements provided by Mr Geoffrey Alan Barden and Ms Susan Ann Barden (the Bardens) to support their claim.

[28] The Respondent submitted a response from Mr Geoff Coy, the Chairman of Verano Owners Corporation, regarding the Applicants' performance in the resort. In summary, it notes some upkeep issues regarding the footpaths, lawn, watering system, the maintenance of the gardens and the requirement to replace a door.

[29] The Respondent argues that the termination of the Applicants was substantiated and justified. They seek to dismiss the applications.

Consideration

[30] Section 387 of the Act provides the criteria and considerations the Commission must take into account when deciding if the dismissal was harsh, unjust, or unreasonable. As required by the Act, I note the following:

(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.

(a) Valid reason for the dismissal:

[31] It is well established that the factual basis for the reason for dismissal will not of itself demonstrate the existence of a valid reason.[32] It must, as s.387(a) makes clear, be a valid reason for dismissal. A valid reason for dismissal should be "sound, defensible or well founded"[33] and should not be "capricious, fanciful, spiteful or prejudiced."[34] As summarised by the then

Deputy President Asbury in *Smith v Bank of Queensland Ltd*, a "dismissal must be a justifiable response to the relevant conduct or issue of capacity".[35]

[32] Mrs Stevens requested leave because she had recently been hospitalised and required time off work, with Mr Stevens to take care of her. It was a reasonable request for leave. The Applicants contacted the Respondent regarding the reasons for leave on 4 February 2023. The Respondent asserts this was not communicated in a timely manner.

[33] The Respondent argues that the Applicants were dismissed on the basis of poor performance of their duties. I note that this was not stated in the termination letter.

[34] The termination letter states issues of 'performance ethic' and the failure to provide proper notice for annual leave. It does not take into account poor performance of duties. Therefore, I can only consider the issues of 'performance ethic' and the failure to provide proper notice for annual leave in determining whether there was a valid reason for dismissal.

[35] The Applicants had sent an email to the Respondent regarding their reason for leave, and had contacted the Bardens' stating that they were required to fill in.

[36] The Agreement stated that the Applicants must notify the Respondent by email and phone a week prior to undertaking annual leave. However, there was leave entitled to the Applicants called 'other leave'. Mrs Stevens was unwell and had a medical certificate supporting her reasons for leave which could have been taken as 'other leave'. There were employees who could cover the Applicants in their absence.

[37] I find that the reason for dismissal appeared to be capricious, spiteful or prejudiced. The Applicants had wanted to resign on two previous occasions. The Respondent had threatened legal action if they had resigned. The termination notice stated, 'despite ignoring your two previous threats of walking out of Verano Resort and abandoning your post with Pecker Maroo Verano Pty Ltd, prior to Christmas 2022, we can no longer ignore your third threat of leaving the business with one days' notice.

[38] The Respondent did not provide a valid reason for dismissal.

(b) Notification of reason and (c) Opportunity to respond:

[39] Although the employer is not required to take any 'particular steps' in carrying out the dismissal, it is commonly accepted practice that notice in explicit, plain and clear terms must be given regarding termination of an employee except in cases of serious misconduct.[36] It is a statutory protection derived from the principles of procedural fairness that require employees to be treated fairly before a decision is made regarding their livelihood.[37]

[40] Notice was given by a phone call around 10.15am on 4 February 2023. However, I am not satisfied that the Applicants were provided an opportunity to respond to the notice of dismissal. The Applicants received a phone call on the morning of the termination on 4 February 2023, and were terminated on the same day. The Applicants did not have an opportunity to respond and were instructed to vacate the premises in two weeks and hand back their keys.

[41] Although there was evidence provided by the Respondent regarding poor performance, there was no evidence indicating that they warned of their poor performance, nor was it reflected in the termination notice.

[42] The Applicants were not provided an opportunity to respond.

(d) Unreasonable refusal by the employer to allow the Applicant a support person:

[43] There is no positive obligation on an employer to offer an employee the opportunity to have a support person and is only relevant when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses.[38] The Applicant did not ask to have a support person during the phone call, as such this factor is not relevant.

(e) Warning of unsatisfactory performance before the dismissal:

[44] The Respondent submitted the Applicants' performance was unsatisfactory on several occasions, as evidenced by written complaints from apartment owners. The Respondent asserted there had been verbal discussions with the Applicants regarding the level of service and upkeep of the apartments, and that they required a contractor to undertake further work to keep the apartments to the requisite standard.

[45] The Respondent did not provide any evidence regarding written notice of unsatisfactory performance to the Applicant at any stage. The Respondent provided statements from other people who complained about their performance, along with a response from the body corporate regarding the state of the resort and the repairs required. However, these statements were provided post the Applicants termination.

[46] I am not satisfied that sufficient evidence was provided to conclude a finding that the Applicants received any warning of unsatisfactory performance prior to dismissal.

(f) Size of employer's enterprise, and (g) impact on procedures caused by absence of dedicated human resources:

[47] The Respondent is a small business with 8 employees. The Respondent submitted that it did not have a dedicated human resources department. I take into consideration that the Respondent's business did not have the resources of a larger organisation in this matter.

(h) any other matters that the FWC considers relevant:

[48] If the Respondent had let the Applicants resign, the Applicants may have not been eligible to claim an unfair dismissal unless there was constructive dismissal. However, the Respondent's threat of taking the Applicants to court had they not fulfilled their contract and then dismissing them have made them liable to the unfair dismissal claims made by the Applicant.

[49] There are no other factors that I consider relevant in consideration of the above circumstances.

Conclusion

[50] I am satisfied that the Applicants' dismissals were harsh, unjust or unreasonable in consideration of all the relevant factors and the evidence provided by the parties, and find the Applicants were unfairly dismissed. The Respondent failed to provide a valid reason, or an opportunity to respond prior to the termination taking effect.

[51] I turn now to remedy.

Remedy

[52] Given that I have found that the Applicants' dismissal were unfair, it is necessary to consider the question of remedy. The Applicants have made an application under s. 394 of the Act seeking remedy for unfair dismissal.

[53] Pursuant to section 390 of the Act, this Commission may order:

> **"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 FWC may make the order only if the person has made an application under section 394.
> (3) The FWC 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."

[54] The Applicants and Respondent have stated that reinstatement is something that they do not wish to consider. As a result, I do not find this to be an appropriate remedy.

[55] Section 392 sets out the considerations for awarding 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."

[56] The established approach to assessing compensation in unfair dismissal cases was set out in *Sprigg v Paul Licensed Festival Supermarket*,[39] and has been applied and developed by Full Benches of the Commission.[40]

[57] The assessment of compensation involves a four-step process, however, the note guidelines are not a substitute for the words in the Act:

> "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). I also take into account the length of service with the employer[41] and the ability to find a new role as a relevant factor in calculating compensation per s392(2).
>
> Step 2: Deduct monies earned since termination.[42]
>
> Step 3: Discount the remaining amount for contingencies.[43]
>
> Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount they would have received if they had continued in their employment."

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).

[58] The Applicants worked with the Respondent for just over a year. The contract did not have a termination clause. I note, however the contract was a fixed term contract subject to review on 30 April 2023. The Applicants were dismissed on 4 February 2023 with 12 weeks remaining on the Agreement. I am satisfied that the Applicants would have likely remained until the completion of the Agreement if they had not been dismissed earlier by the Respondent.

[59] Thus, I find that the maximum compensation that the Applicants would have received is 12 weeks which amounts to $13,846.32.

Step 2: Deduct monies earned since termination.

[60] The Applicants have not been employed and have not received an income since the termination. As such, no monies will be deducted pursuant to this consideration.

Step 3: Discount the remaining amount for contingencies.

[61] I have made no deduction 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."

[62] In *Bowden v Ottrey Homes Cobram and District Retirement Villages*,[44] the Full Bench noted that in relation to the fourth step, the usual practice is to settle a gross amount and leave taxation for determination. I will leave the issue of taxation for determination by the Respondent.

Viability

[63] The Respondent states that they no longer operate the resort and therefore there may be issues with viability. I have provided additional time for the Respondent to pay the Applicants the amount of $13,846.32 in instalments.

Conclusion

[64] The Respondent is ordered to pay the sum of $13,846.32 gross ($6,932.16 individually). The Respondent is to pay in 2 instalments. The first instalment of $6,932.16 within 30 days of issuing this Decision is to be paid to the Applicants' nominated bank account that was on payroll. The second instalment of $6,932.16 must be paid to the Applicants' nominated bank account within 60 days on issuing this Decision. I Order accordingly.

DEPUTY PRESIDENT

Appearances:
M. Stevens and L. Stevens for the Applicants
S. Charlton for the Respondent

Hearing details:

Brisbane
9 May 2023
Hearing via Microsoft Teams

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[1] *Fair Work Act 2009* (Cth) s.394.

[2] Ibid s.396.

[3] *Asim Nawaz v Raiser Pacific Pty Ltd* [2022] FWC 1189 at [50]-[51] citing *Jamsek v ZG Operations Pty Ltd* [2022] HCA 2 ('**Jamsek**'); *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 ('**Personnel Contracting**').

[4] *Jamsek* per Kiefel CJ, Keane and Edelman JJ at [40]-[62], *Personnel Contracting* per Gordon J at [172]-[178]:

[5] *Personnel Contracting* per Kiefel CJ, Keane and Edelman JJ at [33]-[34], [47], [61], per Gordon J at [174], [186]-[189].

[6] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Abdalla v Viewdaze Pty Ltd* (2003) 122IR 215; *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448; *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* [2011] FWAFB 8307.

[7] *Whittaker's Building Supply Co* (1963) 109 CLR 210, 217.

[8] *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 [40].

[9] *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939; endorsed in *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448.

[10] *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210, 217 per Windeyer J approved by the majority in *Hollis v Vabu* (2001) 207 CLR 21 [40]; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

[11] *Hollis v Vabu* (2001) 207 CLR 21 [47] and [58].

[12] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16

[13] Ibid.

[14] The parties cannot create something which has every feature of a rooster, but call it a duck and insist that everyone else recognise it as a duck": *Re Porter* (1989) 34 IR 179, 184 per Gray J; *Massey v Crown Life Insurance* [1978] 2 All ER 576, 579 per Lord Denning approved by the Privy Council in *AMP v Chaplin* (1978) 18 ALR 385, 389.

[15] *AMP v Chaplin* (1978) 18 ALR 385, 389.

[16] *Hollis v Vabu* (2001) 207 CLR 21 [58].

[17] *AMP v Chaplin* (1978) 18 ALR 385, 394.

[18] *Zuijs v Wirth Bros. Pty Ltd* (1955) 93 CLR 561, 571.

[19] *Hollis v Vabu* (2001) 207 CLR 21.

[20] *Humberstone v Northern Timber Mills* (1949) 79 CLR 389, 404 per Dixon J.

[21] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 36.

[22] Ibid.

[23] Ibid 24.

[24] *Hollis v Vabu* (2001) 207 CLR 21 [47] and [58].

[25] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 24.

[26] *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539; *AMP v Chaplin* (1978) 18 ALR 385, 389.

[27] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 24.

[28] *Hollis v Vabu* (2001) 207 CLR 21 [39].

[29] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 24.

[30] *Massey v Crown Life Insurance* [1978] 2 All ER 576, 579 per Lord Denning.

[31] *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* [2011] FWAFB 8307 [30].

[32] *Raj Bista v Group Pty Ltd t/a Glad Commercial Cleaning* [2016] FWC 3009.

[33] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

[34] Ibid.

[35] [2021] FWC 4 at 118.

[36] *Chubb Security Australia Pty Ltd v Thomas* (2000) AIRCFB at [41] Print S2679 (McIntyre VP, Marsh SDP and Larkin C); *Crozier v Palazzo Corporation Pty Ltd* [2000] 98 IR 137 at 73 (Ross VP, Acton SDP and Cribb C); *Previsic v Australian Quarantine Inspection Services*, Print Q3730 (AIRC, Holmes C, 6 October 1998). The principles still apply to the provisions of s.389(b) and (c) of the *Fair Work Act 2009* (Cth), see *William Eskander v Visy Board Pty Ltd* [2021] FWC 3122 (Harper-Greenwell C) upheld in [2021] FWCFB 6036.

[37] *Crozier v Palazzo Corporation Pty Ltd* [2000] 98 IR 137 at 73 (Ross VP, Acton SDP and Cribb C)

[38] *Explanatory Memorandum to Fair Work Bill 2008* at para. 1542

[39] (1998) 88 IR 21.

[40] *Bank of Sydney Ltd T/A Bank of Sydney v Repici* [2015] FWCFB 7939.

[41] *Fair Work Act 2009* (Cth) s392(2)(b) -(c) and s392(2)(g).

[42] Ibid s392(2)(e)

[43] Ibid s392(2)(a), (d) and (f).

[44] [2013] FWCFB 431.