



DECISION

Fair Work Act 2009

s.120 - Application to vary redundancy pay for other employment or incapacity to pay

Australian College of Optometry

v

Mr Ho Wah Ng

(C2023/4184)

COMMISSIONER CONNOLLY

MELBOURNE, 23 AUGUST 2023

Application to vary redundancy pay for other employment or incapacity to pay – employee offered employment with applicant employer in different role – whether acceptable alternative employment obtained – same location and general terms but different status – alternative employment offer objectively acceptable – discretion exercised to reduce but not eliminate NES redundancy payment – order made.

[1] On 17 July 2023, the Australian College of Optometry (ACO) made an application pursuant to s.120 of the *Fair Work Act 2009* (the Act) seeking a reduction to zero, or another amount as determined by the Commission, in the redundancy pay otherwise due to Mr Ho Wah Ng, an employee of ACO (the Respondent).

[2] Mr Ng was employed at ACO from 27 January 2009 and is entitled under s.119 of the Act to 12 weeks redundancy pay, being \$12,330.78. ACO have applied to reduce the amount to nil, or an amount taking into account the other acceptable employment obtained for him by the Applicant. ACO advises that Mr Ng has commenced new employment from 1 July 2023 and the salary maintenance that is being provided by ACO stands until 31 December 2023.

[3] Mr Ng opposes the application and asserts that the alternative employment obtained for him by the Applicant is not acceptable alternative employment within the meaning of s.120 of the Act.

Background

[4] There is no dispute that Mr Ng was employed by the Applicant, that his previous position of Manager, Visual Services has been made redundant and that he is otherwise entitled to 12 weeks redundancy pay in accordance with the National Employment Standards (NES) and s. 119 of the Act.

[5] Further, there is no dispute as to the eligibility of ACO to bring this application, that I am satisfied it is so and that it has been made in accordance with the Act.

[6] To address these matters before the Commission, I convened an initial Mention of the parties on 28 July 2023. At the conclusion of this Mention, I issued Directions for both parties to file an outline of their submissions and any document upon which they rely on by Friday, 4 August 2023.

[7] On consideration of these submissions, my Chambers wrote to both parties seeking views on and whether they would prefer to have the matter determined on the papers or through a determinative conference. The parties were also invited to provide any additional submissions on the question of “*other acceptable employment*”, relevant authorities and sought details from the Applicant on the variance between the redundancy entitlements and the salary arrangements put in place until December 2023.

[8] Both parties indicated a preference for the matter to be determined on the papers. The Respondent relied on his initial submissions and materials provided to Chambers on the 3 August 2023. The Applicant provided further submissions to my Chambers on 16 August 2023.

[9] I have now considered this matter in full and for the reasons set out below, I have determined, on balance, that the new position obtained by ACO for Mr Ng was acceptable employment and that in light of all the circumstances of the matter, some reduction in the amount of redundancy payments due to Mr Ng should be ordered.

Legislation

[10] The redundancy payments provided by s.119 of the Act as part of the NES are established in the following terms:

“119 Redundancy pay

Entitlement to redundancy pay

- (1) An employee is entitled to be paid redundancy pay by the employer if the employee’s employment is terminated:
 - (a) at the employer’s initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
 - (b) because of the insolvency or bankruptcy of the employer.

Note: Sections 121, 122 and 123 describe situations in which the employee does not have this entitlement.”

Amount of redundancy pay

- (2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee’s base rate of pay for his or her ordinary hours of work:

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	Redundancy pay period
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

[11] The application has been made under s.120 of the FW Act which provides as follows:

“120 Variation of redundancy pay for other employment or incapacity to pay

- (1) This section applies if:
 - (a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and
 - (b) the employer:
 - (i) obtains other acceptable employment for the employee; or
 - (ii) cannot pay the amount.
- (2) On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.
- (3) The amount of redundancy pay to which the employee is entitled under section 119 is the reduced amount specified in the determination.”

The position advanced by ACO

[12] ACO was represented by Ms Chelsey Seamer, General Manager, People and Culture.

[13] ACO's position is that in early 2023 it has undertaken a significant restructure of its operations and commenced a 5-week consultation period beginning on 13 February 2023 with staff in both individual and group settings to advise the impacts of the then proposed restructure, including redundancy of the role 'Manager Visual Functions Clinic', occupied by the Respondent, Mr Ng.

[14] At the end of the consultation and recruitment period, 25 positions were made redundant, 19 employees accepted a redundancy package, and the remaining employees elected an alternative path, whether that be a new role, or in Mr Ng's case, redeployment to a lower-level position. During the consultation process, the ACO identified the role of Staff Optometrist that Mr Ng was qualified to undertake and proposed that role as a redeployment option to him.

[15] The ACO submits that this new role is not unreasonably removed from Mr Ng's original duties, skill sets, qualifications, experience and other conditions of employment. In particular, they submit that the new role requires Mr Ng to continue to perform and provide the clinical expertise, application and experience to the same high standards and complexity as his redundant position.

[16] Mr Ng has accepted the offer of re-deployment, at part-time hours equivalent to his redundant role (so as to permit him to continue to engage in outside operation of a separate business), along with recognised continuity of service and salary maintenance for a period of 6 months concluding 31 December 2023. The additional value of the salary maintenance period being provided to Mr Ng is \$3,513.00.

[17] Determination of the remuneration of the Staff Optometrist's position has been done in accordance with ACO's current remuneration scales. When the salary maintenance period ends the dollar difference between Mr Ng's redundant role and new role is \$6.34 per hour (base rate) or \$7,026.00 per year (excluding super) based on the agreed part-time engagement. The ACO submits that this reduction in wages from 1 January 2024 is referable by reference to the reduction in administrative work and other managerial based responsibilities Mr Ng will no longer be required to perform in his new position.

[18] In all circumstances, it is the ACO's further assertion that the Staff Optometrist position is acceptable employment for the following reasons:

- The role is acceptable to Mr Ng as he elected to take up the deployment rather than the option to obtain a severance payment following a lengthy consultation period;
- Mr Ng has been provided with continuity of employment in the new role with his service and leave accruals being maintained;
- The central location of Mr Ng's employment has not changed nor is there a significant change in the requirement for Mr Ng to work remotely on occasion;

- Mr Ng’s requested part-time work arrangements are accommodated in the new role, with no change in allowing him to continue secondary employment in Optometry, and
- Mr Ng will continue to be required to use the same skills and expertise in the new role with no change in reporting lines.

[19] Ms Seamer’s submissions to the Commission that the ACO relies upon included the following evidentiary documents:

- Written outline of position.
- Variation of Employment – Salary Maintenance Letter of 27 June from ACO to Mr Ng.
- ACO Organisational Chart to November 2022.
- ACO Organisational Chart from July 2023.
- Letter for Employment Contact Variation of 15 December 2021 from ACO to Mr Ng.
- Position Description – Manager Visual Functions.
- Position Description – Staff Optometrist.

[20] ACO submits that the redundancy payment should be reduced to nil given the offer, salary maintenance and acceptance of alternative employment.

The position advanced by Mr Ng

[21] Mr Ng provided written statements and supporting materials in advance of his position.

[22] Mr Ng contends that the Staff Optometrist position is not acceptable employment for the following reasons:

- The significant reduction in pay being a reduction of \$6.34 per hour equating to a 13% reduction in total salary;
- A change in the location of the new role, with an expectation that he could be required to work “anywhere we need you to work” in the Staff Optometrist’s position;
- The removal of management and administrative responsibilities under the terms of the new position which are significant to him as a professional optometrist in terms of professional status, experience, and exposure within the professional community of Optometrists in addition being a source of further professional opportunities. Mr Ng contends that he no longer has access to these significant non-financial components in the new position; and

- The compounding impact of the 13% reduction in salary on his leave and other entitlements in the new position.

[23] Mr Ng further contends that there has been an overall lack of clarity and precision in the way in which ACO has communicated with him in relation to its decision and the proposed terms and conditions of the new role for his circumstances. In particular, he submits that the employer was unable to provide him certainty with regard to his parental leave entitlements and that as he became a new father on the 20 July 2023, only added to his frustration and concern. He further contends that these changes in the circumstances of his family financial commitments are not immaterial to the Commissions considerations.

[24] Mr Ng has provided a series of emails and correspondence between himself and ACO in support of this position.

[25] Mr Ng seeks the full payment of the statutory redundancy entitlements and, in effect, that this application be dismissed.

Considerations

[26] In the 2004 Redundancy Case,¹ the Full Bench of the Australian Industrial Relations Commission confirmed the purpose of redundancy pay is to compensate an employee for matters such as the trauma associated with the termination of employment, the loss of non-transferable credits such as sick leave, the loss of security and seniority, lower job satisfaction and diminished social status and conditions.

[27] In applications such as these, the onus lies on the employer company seeking the exemption from redundancy payment obligations and the discretion exists for the Commission to make an order to reduce or remove an employee's statutory entitlement to redundancy pay to an amount, which may be nil, that it considers appropriate.

[28] The Full Bench of the Commission in *Australian Catering Pty Ltd v Powell and Togia; Powell v Australian Commercial Catering Pty Ltd*² outlines the approach I intend to follow in considering ACO's application to reduce Mr Ng's redundancy pay is set out below:

“In considering an application made by an employer under s120, the Commission must first consider whether the circumstances set out in paragraphs (a) or (b) of s.120(1) applies. Consideration under s.120 is enlivened upon an application being made by the employer for a reduction in the amount of redundancy pay otherwise payable under s.119. In dealing with such an application, the Commission must first determine whether the pre-conditions for the application of the section set out in s.120(1) are satisfied – that is, that the employee subject of the application has an entitlement under s.119 to redundancy pay, and that the employer has either obtained other acceptable employment for the employee or cannot pay the redundancy entitlement.”

[29] As was identified in the Federal Court decision, *“The origin of s 120 lies in the decision of the Full Bench of the Conciliation and Arbitration Commission in Termination, Change and Redundancy Case (1984) 8 IR 34 to introduce an entitlement to severance pay for all employees under federal awards whose employment had been terminated because of redundancy.”*³ Cases

decided in relation to Award provisions established pursuant to those test cases are therefore relevant in the consideration of s.120.

[30] In relation to s.120(1)(b)(i), whether alternative employment obtained by the employer is “*acceptable*”, the question is to be determined objectively, not by reference to whether the employment is subjectively acceptable to the employee.⁴ The determination of whether alternative employment is acceptable requires an assessment and value judgment on the part of the decision maker.⁵ The employer “*obtains*” other acceptable employment when it acquires or gets employment by its conscious, intended acts.⁶

[31] Once it is concluded that the pre-conditions in s.120(1) are satisfied so that s.120 is applicable, it will be necessary for the Commission to determine under s.120(2) whether the employee’s entitlement to redundancy pay under s.119 should be reduced and, if so, by how much. This requires the exercise of a broad discretionary power.⁷ Any determination by the Commission for a reduced amount of redundancy pay then becomes the employees entitlement under s.119 in accordance with s.120(3).

Section 119(1)(a)

[32] There is no dispute that at its own initiative, ACO has made the position of Manager Visual Services redundant within the meaning s.119(1)(a) and I am satisfied that Mr Ng is entitled to be paid an amount of redundancy pay.

Section 120(1)(b)(i)

[33] As identified, the established test here is twofold. Firstly, whether the Applicant “**obtained**” employment by their own conscious and intended acts. And secondly, whether the alternative position is “**acceptable**”.

[34] There is no dispute that ACO has “**obtained**” the alternative position of Staff Optometrist for Mr Ng by its own conscious and intended acts. ACO organised the position within its own business and made a definite and informed offer which subsequently was accepted by Mr Ng, and I am satisfied on the evidence presented that this is so.

[35] The critical issue here is whether the alternative position was “**acceptable**”.

[36] It is well established in this jurisdiction that the concept of acceptable alternative employment is to be determined objectively and that the mere rejection of the alternative does not make it objectively unacceptable. As noted by the Full Bench in *Derole*:

“What constitutes “acceptable alternative employment” is a matter to be determined, as we have said, on an objective basis. Alternative employment accepted by the employee (and its corollary, alternative employment acceptable to the employee) cannot be an appropriate application of the words because that meaning would give an employee an unreasonable and uncontrollable opportunity to reject the new employment in order to receive redundancy pay; the exemption provision would be without practical effect.”

Yet, the use of the qualification "acceptable" is a clear indication that it is not any employment which complies but that which meets the relevant standard. In our opinion there are obvious elements of such a standard including the work being of like nature; the location being not unreasonably distant; the pay arrangements complying with award requirements. There will probably be others.”⁸

[37] The onus of establishing that the alternative employment in question is acceptable rests with the Applicant employer⁹ and it is a serious step for the Commission to make an order to limit or remove an employee’s statutory entitlement to redundancy payments.¹⁰ In order to establish whether the alternative employment obtained by the employer is acceptable, it is necessary to have regard to all relevant matters including factors such as pay levels, hours of work, seniority, fringe benefits, workload and speed, job security and other matters including the location of the employment and travelling time.¹¹

[38] It is also clear that acceptable employment does not mean identical employment; however, it has been held by the Commission that:

“...the objective test of acceptability appears to be that the alternative work bears a sufficient comparability to the original work and is not unreasonably removed from the employee’s original duties, skills set, qualifications, experience and other terms and conditions of employment. The test is not whether or not the employee is capable of carrying out the new employment as such, it is whether there is sufficient correlation between the relevant indicia of the current work and the alternative employment as proposed.”¹²

[39] As observed by Bissett C,¹³ this approach is consistent with other authorities.¹⁴

[40] If the Commission is satisfied that acceptable alternative employment has been obtained, a discretion arises to reduce all or some of the redundancy pay having regard to all of the relevant circumstances.¹⁵

[41] The question to be determined is, was the Staff Optometrist position as obtained for Mr Ng by ACO objectively acceptable.

[42] There are many features of the Staff Optometrist role that support the submissions of ACO in these circumstances. This included that there is a common use of optometry skills and experience, and the application and provisions of clinical skills and services. Further, the continuation of the part-time work arrangements sought by the Respondent from the same base work location, along with a maintenance of all other entitlements and continuous service, are consistent with an objectively acceptable alternative position. ACO also provided a commitment to a period of salary maintenance until the 31 December 2023.

[43] There are some differences in the positions. The new position has a salary level of some 13% lower than the redundant position, a difference that is compounded as Mr Ng continues his employment. The new position does not require Mr Ng to perform management and administrative functions and no longer provides him with the status of being a manager and leader in his chosen profession. There is also the prospect that in the new role there is an

increased chance Mr Ng will be expected to work from different locations within 100km of his former base of employment.

[44] These contrasts are relevant as the objective assessment must consider the actual circumstances of the parties involved, albeit judged independently with most weight being given to quantifiable matters.

[45] Considering all the materials presented by both parties, on balance, I am satisfied that the alternative position proposed bears a sufficient comparability to the original work and is not unreasonably removed from the Respondent employee's original duties, skills set, qualifications, experience and other terms and conditions of employment.

[46] Specifically, I am satisfied that Mr Ng's clinical skills and expertise as a professional optometrist continue to be required in the new role and that he will have the opportunity to perform his clinical duties to the same high standard and complexity in this position. The removal of managerial duties has no bearing on this and is in fact a justification for the reduction in salary. I am also satisfied that the expectation on Mr Ng to travel in the new role shall be no more than they have previously been.

[47] Having regard to this, and the circumstances more generally, I find on balance that ACO obtained acceptable alternative employment within the meaning of s.120(1)(b)(i) of the Act.

[48] There are, however, certain elements of the proposed new position that may also be relevant to the exercise of discretion resulting from this finding.

s.120(2) - Is it appropriate for the Commission to make an order to reduce the amount of redundancy pay?

[49] Given that the employer has obtained acceptable alternative employment for the Respondent employee, the final issue is whether there should be a reduction (including potentially to zero as sought by ACO) in the amount of the redundancy payments. As outlined previously, this is a matter of discretion to be exercised having regard to all the relevant circumstances of a particular matter.

[50] In all the circumstances of this matter, I consider a reduction in redundancy payment is appropriate.

[51] In the present case, ACO has provided Mr Ng with no loss of continuity of service, no break in his employment contract and further provided a period of salary maintenance at this previous salary level for the period up to 31 December 2023. Each of these are significant in minimising the loss, inconvenience and hardship that form the basis of redundancy payments and must be taken into account in considering an order to reduce the amount of redundancy pay.

[52] However, some of the contrary features of the alternative position should be taken into account, in particular the loss of practical seniority, and the ongoing reduction in salary from 1 January 2024 that are, in my view, relevant to the discretion I am required to exercise. Mr Ng's submission as to his changed family circumstances and the lack of precision in the

communication between the parties have also been considered and I am satisfied, in the circumstances, that they have some bearing in this matter. Further, Mr Ng commenced employment with the applicant in 2009 and has served in a management position for over 14 years.

[53] In making its assessment, the Commission must exercise any discretion having regard to all of the relevant circumstances including the apparent purpose of the provision, the objects¹⁶ of the Act and what is fair and just.¹⁷ Having regard to all of my findings, I consider that the redundancy payments should be significantly reduced but not to nil as sought by ACO. Rather, I consider that a reduction of 50 per cent is fair and reasonable in all the circumstances of this matter.

Conclusion

[54] I have, on balance, found that the Staff Optometrist position is acceptable alternative employment within the meaning of s.120(1)(b)(i) of the Act. I have also found that it is appropriate to exercise my discretion to reduce the redundancy payment otherwise due to Mr Ng.

[55] In all circumstances, I have determined that the redundancy payments should be reduced to 50 per cent of the NES entitlement. An Order¹⁸ to that effect is issued in conjunction with this decision.



COMMISSIONER

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<PR765446>

¹ (2004)129 IR 155.

² [\[2016\] FWCFB 5467](#).

³ [2015] FCAFC 189 at [12].

⁴ *Clothing & Allied Trades Union of Australia v Hot Tuna Pty Ltd* (1988) 27 IRC 226; *Clothing Trades Award 1982(1)* [1990] AIRC 980; (1990)140 IR 123.

⁵ [2015] FCAFC 189 at [45].

⁶ FBIS International Protective Services (Aust) Pty Ltd v Maritime Union of Australia [2015] FCAFC 90 at [20].

⁷ Ibid at [21]; [2015] FCAFC 189 at [42], [60].

⁸ *Australian Chamber of Manufacturers and Derole Nominees Pty Ltd - Clothing Trades Award 1982 (1)*, (1990) 140 IR 123 per Peterson J, Marsh DP and Oldmeadow C at [128].

⁹ *Target Australia Pty Ltd v Shop, Distributive and Allied Employees Association re Target Retail Agreement 2001 - PR916204* [2002] AIRC 369 at [6].

¹⁰ *Clothing & Allied Trades Union v Hot Tuna* (1988) 27 IR 226.

¹¹ *Clerks Salaried Staffs (Agriculture Award) 1999*, Print S1216, 24 November 1999, drawing upon *Derole*.

¹² *Von Bibra Robina Autovillage Pty Ltd* [2007] AIRC 397 (16 May 2007) at [26].

¹³ In *Vicstaff Pty Ltd T/A Stratco v May and McFerran* [2010] FWA 3141 at [28].

¹⁴ *Clothing and Allied Trades Union v Hot Tuna* (1988) 27 IR 226.

¹⁵ *Clerks Salaried Staffs (Agriculture Award) 1999*, Print S1216, 24 November 1999, drawing upon *Derole*.

¹⁶ Section 3 of the Act.

¹⁷ Section 577 of the Act.

¹⁸ [PR765482](#)