

[2023] FWC 3367

The attached document replaces the document previously issued with the above code on 14 December 2023.

Paragraph [80] amended to read: “Agripower is a public company...”

Associate to Deputy President Easton.

Dated 18 December 2023



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Raju Narendranathan Vetiyatil

v

Agripower Australia Ltd

(U2023/6837)

DEPUTY PRESIDENT EASTON

SYDNEY, 14 DECEMBER 2023

Application for relief from unfair dismissal – no valid reason found – no procedural fairness – dismissal was harsh and unreasonable – loss was fully mitigated by new employment – remedy – compensation order.

[1] Mr Raju Narendranathan Vetiyatil was employed as Agripower Australia Ltd’s Finance Manager. He worked for Agripower from November 2021 until his dismissal on 7 July 2023. Mr Vetiyatil’s duties included processing Agripower’s payroll. Mr Vetiyatil was summarily dismissed by email because he refused to alter information he provided to the Australian Taxation Office about Agripower’s payroll. Agripower alleges that the information provided to the ATO was knowingly false and caused damage to other employees.

[2] Agripower mines, processes, markets and globally exports diatomaceous earth, a silicon fertiliser and soil amendment product, from its open-cut mine near Greenvale, in the Charters Towers region in central outback Queensland, processed at its processing facility at Greenvale. Agripower employs between 14 and 30 staff depending upon its ability to recruit and retain suitable staff and its own operational and financial constraints and considerations.

[3] In 2023 Agripower had significant cash flow issues and for a period of weeks did not pay its staff any wages, including Mr Vetiyatil. During the period where no wages were paid Agripower’s fortnightly payroll was still processed by Mr Vetiyatil.

[4] Agripower provided information to the ATO through the Single Touch Payroll (STP) system. Mr Vetiyatil was authorised by Agripower to access the ATO portal and to report on behalf of Agripower on matters pertaining to the STP system.

[5] Mr Vetiyatil held the view that Agripower was required to report the wages as paid to employees through the STP portal as soon as the payroll has been processed regardless of whether any amounts in the processed payroll had been paid to the employees. Information on the ATO’s website suggests that employers enrolled in the STP system are required to report as soon as there is a “pay event” and that the processing of the payroll is a “pay event”. In short, the advice on the ATO’s website is that employers should not wait for wages to be received by the employees before they send their report through the STP.

[6] As a result of holding this view, Mr Vetiyatil reported to the ATO that certain monies had been paid to employees when those monies had not in fact been paid. This caused significant problems for some employees whose social security benefits were reduced because Centrelink adjusted the benefits paid to these employees based on information provided via the STP portal.

[7] In an escalating series of emails between Agripower's senior management and Mr Vetiyatil, Mr Vetiyatil was directed to rectify the report he had made via the STP and he refused. In the last email in the chain Agripower's Founder and Managing Director, Mr Peter Prentice, dismissed Mr Vetiyatil with immediate effect.

[8] On 26 July 2023 Mr Vetiyatil made an application to the Fair Work Commission under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy, alleging that he had been unfairly dismissed from his employment with Agripower. Mr Vetiyatil seeks reinstatement to his former position.

[9] Both Mr Vetiyatil and Agripower were represented by legal practitioners pursuant to leave granted under s.596 of the FW Act.

[10] For the reasons that follow I am satisfied that Mr Vetiyatil was unfairly dismissed, that reinstatement is not appropriate, and that an order for compensation be made.

The Evidence: Emails regarding the STP

[11] The starting point for understanding the evidence in this matter is to review the emails exchanged between Mr Vetiyatil and others regarding Agripower's STP reporting obligations. There was no evidence of any conversations on the subject so the emails are the entirety of the communications. Some further background information will assist:

- (a) Mr Peter Prentice is Agripower's Founder and Managing Director;
- (b) Mr Robbeson is the General Manager – Operations of Agripower. Agripower argued that Mr Robbeson was more senior than Mr Vetiyatil and could therefore issue directions to him. Mr Robbeson and Mr Vetiyatil shared a small office space in Sydney and apparently sat two metres apart when they both attended the office;
- (c) Ms Lee-anne Gossage is the Site Senior Executive in Queensland;
- (d) for various reasons Agripower ran out of cash in or about late May 2023 and did not pay wages for the last three fortnights (six weeks) of the financial year ending 30 June 2023. These problems were rectified by a capital injection in July 2023; and
- (e) at the time of the stand-off that led to his dismissal, Mr Vetiyatil was the only person authorised by Agripower to report matters via the STP portal.

[12] The first email exchange regarding STP requirements took place between Mr Robbeson and Mr Vetiyatil on 23 June 2023:

- (a) Mr Robbeson sent the first email:

“Raju,
If wages are not paid next week you will be instructed to remove the fraudulent information you submitted to the ATO”

(b) Mr Vetiyatil replied:

“Hi Jon
All STP reporting is done.
This will not be done.”

(c) Mr Robbeson replied:

“Hi Raju,
If wages / salaries are unable to be paid to employees by 30 June 2023, you will need to go and manually adjust the STP reporting for those employees early next week before 30 June 2023.
This will enable employees at the operations to go seek Centrelink payments for the periods they were not paid.
Please do not ignore this message.”

[13] The second set of email exchanges took place on 7 July 2023:

(a) Ms Gossage started the first chain at 8:07am:

“Morning all.
I’m not sure how the one touch reporting system works but I’ve had communication that there may have been a double up on payslip reporting on the 28th and 29th of last month. One staff member almost lost their \$500 Centrelink payment, and I assume there will be two others who may have the same issue.
Because not only are we reporting that these staff members are being paid this money, end June showed that they had been twice is my understanding.
We really shouldn’t be reporting anything to the ATO that staff are not physically being paid, as we are causing a conflict in various angles.
I would highly recommend retracting all ATO reporting that has not been physically paid. And if you could also please check for duplicates would be appreciated.”

(b) Mr Robbeson replied in the first chain at 8:44am:

“Hi All,
Please see my previous correspondence on the matter.
Requesting this to be rectified prior to 30 June 2023.
Raju, can you and Paul please rectify this ASAP with the ATO and also the employees in question.”

(c) Mr Prentice replied in the first chain at 8:51am:

“I may not be on track here.
But we can only report on a cash paid basis not on an accruals basis for employees”

(d) Mr Vetiyatil said in the first chain at 9:25am:

“Hi Peter,

Pays due and are processed based on information presented and available to the payroll processing team. Pays are to be paid on time.

Accordingly they are to be reported to ATO.

Why are they not paid on time! I will leave this one to be answered by you.”

(e) Mr Vetiyatil started the second chain with apparently the same participants but addressing Mr Prentice and Mr Robbeson at 9:43am:

“Hi Jon/Peter,

This email was sent out yesterday, being the second case with the Fairwork Ombudsman in the last few weeks. We have already built a track record of non-payment of wages. But our track record on payroll processing has been stellar with fairwork, although they have not admitting in writing but we have been not received any rebuttal on the wages that we have processed.

We have been successfully been able to respond to Fairwork Ombudsmen [sic] in the case of [redacted] on the “processing of payroll”. What is due is to be processed promptly as per the terms of the employment to be compliant with fairwork regulation. I have not received any categoric instruction to violate any laws pertaining to fairwork from any of the Directors. I received a request / advise from Jon and was promptly disregarded in writing, which I believe was written in frustration.”

(f) Mr Prentice replied in the first chain at 9:51am:

“That has nothing to do with reporting to ATO. You can only report pays paid. If you do accrual accounting in this the ATO will hammer you. Please correct”

(g) Mr Prentice replied in the second chain at 9:53am:

“Raju

Please do not communicate with Fairwork Australia as you have no knowledge of what was discussed with workers.

I am providing stay [sic] decs to them on what was discussed”

(h) Mr Vetiyatil replied in the second chain at 10:41:

“Hi Peter,

1. Knowledge of what was discussed with workers: Knowledge about pays to be processed, in the accounts, comes from SSE. SSE has clearly instructed as per routine to process pays and the pays were processed and advised for your payment. If there is a collective bargaining or similar individual agreement in writing, agreed by employees, then please share at the earliest, as we in accounts, have been kept in the dark, of any such agreement that pays are not due and so not to be processed. And from what I read yesterday from your message, SSE has been providing incorrect/incomplete information to process payroll!

2. Communication with Fairwork Ombudsman: They have contacted me on the aspect of processing pays and responses were made in good faith to them as a person incharge. Going forward, I will ask them to contact you directly.”

- (i) Mr Vetiyatil then replied in the first chain at 10:43:

“Hi Peter,

Pays are to be processed as they are due and promptly paid.

If there has been adjustment as per your confirmation which was missed by SSE (Lee-
anne) then please share urgently that so the pays can be rectified based on the signed
agreement with employees on pay adjustment.

Awaiting the pay adjustment agreement with employees.”

- (j) Mr Prentice issued the following direction in the second chain at 10:49am:

“Raju

I am instructing you to withdraw what you have lodged immediately. Or I will write to
the ATO advising that deliberate false and misleading information has been lodged

I want your undertaking by return email

In addition you are to have no further authority to provide any information to the ATO
or Fair Work Australia.

Please also confirm your undertaking on this”

- (k) Mr Vetiyatil replied to Mr Prentice in the second chain at 11:27am:

“Hi Peter,

Undertakings for your record;

a. Amendment to Payroll / ATO: Please provide new information on the form of
agreement with employees and I am happy to amend the payroll. You can instruct
Transverse of Carolyn Patment to do the revise the EOFY finalization in ATO.

b. Communication to ATO: I have instructed Carolyn Patment to remove myself from
ATO portal.

c. Communication to Fairwork: I have instructed Fairwork that I am no more in-charge
to communicate with Fairwork.

d. False information lodgement to ATO; I believe there is no false STP lodgement to
ATO, so far, based on the pay records presented by SSE and copied to General
Manager, copied herein. I am happy to amend the payroll if there is a signed
agreement with employees/new pay details confirmations, different to earlier
records. Payroll rectification is a routin process, but as it is EOFY, time is of essence
on the rectification.

e. Threat of writing to ATO: I take note of the threat.”

- (l) Mr Prentice then dismissed Mr Vetiyatil in the following email sent at around 11:30am:

“Raju

I will be writing to the ATO to advise them as you have without authority provided false
information that is hurting employees.

I am appalled that you have advised false information to the ATO, and that you continue to act against instructions.

Acting recklessly like this and providing knowingly false information to the ATO, leaves me no choice than to terminate you on these grounds.

I now have to find a way to resolve these issues for the 20 plus employees at site that you by your actions are causing harm and grief to.

Your access codes to the office and access to computers and emails has now been terminated.”

Vetiyatil’s evidence

[14] Mr Vetiyatil’s explanation for reporting wages as paid when they had not been paid (and when Mr Vetiyatil did not know for certain if and when they would be paid) can be gleaned from the following excerpt from his second witness statement:

“The Respondent’s mistaken position was (and continue to be) that staff’s pays are to be paid when there is money, and the pays are to be accounted and reported to ATO only when actually paid and not when they are due in accordance with employees’ contracts.

I understand that it is unlawful not to pay staff on the due date of their salary payments (or ‘pay event’ pursuant to STP2 or ATO requirements), pursuant to s.323(1-) of the FW Act.

I personally confirmed with ATO’s helpline on the Termination Date that ‘pay event’ is defined by the FWC. Thereafter, I also confirmed over the phone with FWC’s case officer, Mr. Hugo, that ‘pay event’ is as per due date of salary payment and not when salary is actually paid. Mr. Hugo further confirmed that it is unlawful to delay the pay under section s.323(1) of the FW Act.

I reported my findings with the ATO’s helpline and the FWC’s case officer to the Respondent and tried my best effort to persuade them to follow the law and to report correctly. As a qualified and chartered accountant, I believe I have discharged my job duties to the best of my efforts. Unfortunately, Peter does not have the necessary accounting knowledge and there was no one else within the Respondent having the same level of accounting knowledge as me who could stand by my side.

I understand that this unfair dismissal application with the FWC is not the right forum to discuss about accounting treatment and ATO reporting, nor to resolve the different views between the Respondent and me regarding the Respondent’s accounting and financial reporting. I only bring these issues up to prove that I did not refuse to follow the Respondent’s reasonable and lawful instructions.”

[15] Mr Vetiyatil added:

“... As a qualified and chartered accountant hired by the Respondent to conduct the accounting and reporting jobs, I felt the obligation and need to follow legal and statutory requirements, and to educate Peter and the Respondent if they were not aware of the same.”

[16] Mr Vetiyatil said he was in a state of shock when he received the termination email because he was not warned or given any indication that such action was about to be taken.

[17] He said he was never consulted or issued with any warning letter in relation to the termination, and he was never told by Agripower that his employment was at risk. Immediately after receiving the termination email Mr Vetiyatil was denied access to Agripower's computer systems.

[18] Unsurprisingly, Mr Vetiyatil said that he was not afforded procedural fairness.

[19] Nonetheless Mr Vetiyatil decided to respond to the termination email and denied the allegations made against him and disagreed with the termination. At 3:02pm Mr Vetiyatil sent the following email to Mr Prentice and others:

“Hi Peter, Apologies, I was with the doctor. I do not agree with the contents of dismissal letter and it is not accepted. No wrong information has been submitted to ATO. Pays have been processed based on timesheet submitted and accordingly lodged with ATO. Workings have been processed and filed in the nominated folder. No one copied in the internal emails pertaining to the matter; particularly Lee-anne (SSE) or Jonathan Robbeson (General Manager Operations) admitted to wrong information submitted to payroll for processing. I have acted in good faith protecting the interest of the company and you as a director in diligently getting payroll processed on due dates for the enrolled employees and reporting the same to ATO. I have not acted against your instruction or against [sic] the interest of the company. As per your instruction, I wrote/spoke to CarolyPatman to remove me from ATO and also removed myself from Fairwork Ombudsman. If you no longer want my employment services then you have to advise me accordingly. Your email terminating my employment services is not acceptable. At this stage, I feel unsafe to be in the work place and would no longer be coming to office till you invite me back.”

[20] Mr Vetiyatil said that as far as he knew, Agripower had not paid employee superannuation contributions for the past three financial quarters. Mr Vetiyatil lodged a complaint with the ATO about Agripower's failure to pay superannuation contributions shortly after he was dismissed.

[21] Mr Vetiyatil contends that Agripower's reasons for dismissal are inconsistent and ambiguous.

[22] Mr Vetiyatil said he was paid one month's pay in lieu of notice.

[23] On 20 July 2023 Mr Vetiyatil found temporary employment on a 6-month contract. In this new employment Mr Vetiyatil works five days per week and is paid \$67.75 per hour. In this temporary employment Mr Vetiyatil is earning more than he was paid by Agripower.

[24] Mr Vetiyatil said:

“Despite all the issues relating to my dismissal, I am still willing to work for Agripower and continue working on the same employment terms ... I agree that the relationship between me and my supervisor may have damaged due to the dismissal. However, I have no problem reporting to other directors and working with other employees in Australia and overseas of Agripower. I believe they see my ability and know me as a good and hard-working employee.”

Agripower’s evidence

[25] Mr Robbeson gave evidence on behalf of Agripower. Mr Robbeson is the General Manager – Operations. Mr Robbeson’s assessment of Mr Vetiyatil’s work performance was scathing:

- (a) Mr Vetiyatil “is unsuited to and unable to perform the senior role of Finance Manager competently ... He lacks professional skills, competence and judgement in this area despite his qualifications on paper. He also had difficulties understanding and observing Agripower’s workplace procedures and policies and behaving in communicating in a way that is appropriate and professional in the workplace”;
- (b) Mr Vetiyatil lacks insight into his own performance, his relationship with work colleagues and “he noticeably has a tin-ear and is tone deaf to such matters.” Mr Robbeson said Mr Vetiyatil lacks basic communication and interpersonal skills which are expected at senior professional roles and that these matters all played a large role in his underperformance and repudiation of his employment obligations;
- (c) Mr Vetiyatil’s underperformance was communicated to him at performance management meetings and by email on many occasions and that Mr Vetiyatil’s “views to the contrary demonstrate a lack of insight”;
- (d) Mr Vetiyatil underperformed in his role and, if the decision had been Mr Robbeson’s to make, Mr Vetiyatil would not have survived his three-month probationary period;
- (e) Mr Vetiyatil’s underperformance was “tolerable” to Mr Prentice. Mr Robbeson said that it was difficult to recruit new qualified accountants and accepted under cross examination that allowing Mr Vetiyatil to continue in employment indicated that Mr Vetiyatil’s performance was at least tolerable (to Mr Prentice).

[26] Mr Robbeson gave evidence of three conversations that took place in August 2022, December 2022 and January 2023 that he said were formal performance interviews. The most formal aspect of these interviews seems to be that Mr Robbeson took notes of the meetings. He did not give Mr Vetiyatil a copy of his notes and the notes record criticisms of Mr Vetiyatil but no kind of warning that his employment was at risk.

[27] Mr Robbeson said that he took notes of all or most meetings he attended in his employment and he said that it was “common knowledge” that is meeting notes would be available to those who attended meetings upon request.

[28] Of the meetings that were said to be formal meetings, the last meeting occurred in January 2023, being five and a half months prior to Mr Vetiyatil's dismissal. Mr Robbeson also referred to what he says was a large number of "informal mentoring" meetings with Mr Vetiyatil, although he made no mention of these meetings in his comprehensive written witness statement filed in the proceedings, and he did not provide any notes of such meetings as evidence.

[29] Mr Robbeson gave evidence of an inappropriate message sent by Mr Vetiyatil in an informal WhatsApp group in May 2022. Mr Robbeson said that in response to Mr Vetiyatil's WhatsApp message he closed down the chat group in October 2022. I have placed no weight at all on this evidence: Mr Vetiyatil was not formally or even informally warned about his conduct, his behaviour has no connection to the conduct for which he was dismissed, the purported response five months after the event was too little too late, and the fact that the episode was even raised as evidence reflects poorly on Agripower and Mr Robbeson in particular.

[30] After dismissing Mr Vetiyatil Agripower restructured and made Agripower's role redundant by outsourcing its functions to a consultant.

[31] Mr Robbeson said that Agripower has a performance management policy which has been strictly followed when staff have been terminated.

[32] In terms of reinstatement Mr Robbeson said that there are no other directors that Mr Vetiyatil could report to. He said "I would find that intolerable and unworkable [for Mr Vetiyatil to be reinstated]".

[33] Mr Prentice gave evidence for Agripower. In his written statement he adopted Mr Robbeson's more detailed version of events by indicating in his statement "I agree with the evidence and version of events as recounted by Jonathan", which is obviously problematic.

[34] However Mr Prentice was cross-examined and gave evidence clearly drawn from his own recollection of events.

[35] Mr Prentice was also critical of Mr Vetiyatil's performance and said the following regarding the possibility of reinstatement:

"I would be very uncomfortable re-employing the Applicant from a governance and risk management perspective as I consider him to be a high-risk employee and potentially dangerous due to his propensity to make decisions on his own and then not respond to or action feedback, in terms of ensuring ATO, Corporations Act and Australian Accounting Standards compliance. He is also damaging to staff morale. These risks are unacceptable to Agripower's Board, acting diligently and in the best interests of the company and its shareholders."

Consideration

[36] Section 387 of the *Fair Work Act 2009* (Cth) (**FW Act**) requires me to take into account the following matters in determining whether Mr Vetiyatil's dismissal was harsh, unjust or unreasonable:

- (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.

[37] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me. I set out my consideration of each below.

Was there a valid reason for the dismissal related to the Applicant's capacity or conduct (s.387(a))?

[38] To be a valid reason, the reason for the dismissal should be sound, defensible or well founded and should not be capricious, fanciful, spiteful or prejudiced. However, in assessing the validity of the reason(s) for dismissal the Commission will not stand in the shoes of the employer and determine what the Commission would do in the same position.

[39] Agripower relied on Mr Vetiyatil's unsatisfactory performance over a long period of time as a valid reason for dismissal. This proposition needs to be carefully unpacked. Apart from Mr Vetiyatil's decision to report certain payroll activity in a certain way to the ATO, there is no other particular underperformance at play in June or July 2023 beyond Agripower's general complaint of underperformance. In June and July 2023 Agripower was, on the evidence of Mr Robbeson and Mr Prentice, at least "tolerating" Mr Vetiyatil's work performance.

[40] When there was a stand-off in July 2023 about the ATO's reporting requirements, and there was a refusal by Mr Vetiyatil to follow a direction, Mr Prentice thought that dismissal was warranted because of (1) the conduct in July 2023 in refusing to change the ATO records, and (2) Mr Vetiyatil's history of underperformance.

[41] This logic has a certain compulsion insofar as an employee's single act of defiance should generally be considered in the context of the employee's wider employment history. One moment of defiance by an employee in the context of a long history of compliance should be assessed differently to a moment of defiance that followed a long history of unsatisfactory conduct.

[42] However, I do not think that there is a sufficient connection between what is said to be Mr Vetiyatil's general underperformance and the events of 7 July 2023.

[43] I am not satisfied that Mr Vetiyatil's alleged unsatisfactory work performance prior to July 2023 was a valid reason for dismissal.

[44] On 7 July 2023 there was a rapid escalation of emails in relation to the information supplied to the ATO. I accept that there were real, tangible and immediate consequences of Mr Vetiyatil's conduct upon employees who relied heavily on Centrelink benefits such as sole parent allowances and the like.

[45] I also accept that Mr Vetiyatil's contribution to the email exchanges were not helpful.

[46] To some degree Mr Vetiyatil and Mr Prentice were at cross purposes in their communications on 7 July 2023. Mr Vetiyatil held the view, which he said was based on advice from the ATO, that Agripower (and he as Agripower's authorised nominee) were required under the ATO's STP arrangements to notify the ATO of certain matters as soon as the payroll was processed.

[47] The clash between Mr Vetiyatil's conduct and common sense is that Mr Vetiyatil believed that Agripower was required to submit its STP report as soon as it "processed" its payroll for the period regardless of whether the amounts processed would ever be paid to the employees.

[48] I am not convinced that Mr Vetiyatil has properly interpreted the instructions from the ATO. To an observer with almost no accounting training the ATO's instructions make sense if the payments are in fact made to employees. The instruction from the ATO to employers is that they should not wait for their payments to reach the employees before providing a report.

[49] However Mr Vetiyatil's interpretation of the ATO's instructions appears quite illogical if a payroll is processed but no monies are actually paid to employees. Mr Vetiyatil said that the advice from the ATO was that if an employer was required to make a payment, and the employer processed the payroll internally to calculate the payment, then the employer should include such amounts in its STP disclosure.

[50] He said that the advice he received from the ATO was that if the employer did not actually make the payments it was required to make then employees could follow that up with the Fair Work Ombudsman, but that (somehow) the ATO would treat the amounts as having been paid to the employee even though they were not paid.

[51] This seems like an accrual accounting method, which Agripower is adamant does not apply to payroll.

[52] But the instruction from the ATO does not make sense at all if the payments are never made to the employees. Quite obviously, employees would suffer a double disadvantage if this was correct. The employee would be deprived of their wages from the employer, and have other social security benefits reduced because they are assumed to have received monies that they have not in fact received.

[53] On its website the ATO describes a “pay event” in the following terms:

“The file generated by an STP-enabled software or solution. This file must be lodged to us on, or before, the payment date when an employer makes a payment to an employee or payee that is subject to withholding.

<https://www.ato.gov.au/businesses-and-organisations/hiring-and-paying-your-workers/single-touch-payroll/in-detail/single-touch-payroll-employer-reporting-guidelines/definition-of-terms>)

[54] The STP system seems to integrate with employer accounting software so that information can be sent to the ATO. In relation to payroll, once certain processes are completed using an employer’s accounting software, the STP system facilitates the sending of a report to the ATO.

[55] It is not clear to me why Mr Vetiyatil processed the payroll in late June when he did not know if or when the amounts calculated would be paid. If the processing of the payroll triggered the requirement to report amounts to the ATO as if they had been paid, it is not clear if or why Mr Vetiyatil was required to process the payroll in the first place. This question was not explored at the hearing.

[56] Agripower accused Mr Vetiyatil of making “false” statements to the ATO. Unsurprisingly there are significant penalties attached to making “false” statements to the ATO. Agripower’s evidence does not rise so high as to establish that Mr Vetiyatil made knowingly false statements to the ATO. There was disagreement between Mr Vetiyatil and others about Agripower’s STP reporting obligations. Agripower’s evidence is contrary to Mr Vetiyatil’s understanding of the STP requirements. However, Agripower’s evidence does not go further to establish that Mr Vetiyatil knew that the information he provided to the ATO was “false”. The simple version of Agripower’s argument is that Mr Vetiyatil lodged an STP report indicating that certain monies had been paid to employees when in fact the payments had not been made. The information sent to the ATO was not correct. However, there are various deeming provisions within the taxation system that may or may not require employers to report matters in a certain way when legal liabilities have been incurred or accepted, even if no money has changed hands. The accrual accounting method is an obvious example.

[57] In this matter Agripower relied on emails from its external accountants received after Mr Vetiyatil was dismissed. The emails relate to the steps Agripower took to amend its records with the ATO in relation to the previous STP lodgement, and also payroll tax annual returns. From this evidence I note that Agripower followed through on its interpretation of the taxation reporting requirements.

[58] Agripower alleged breaches of the tax legislation and invited me to make findings of fact about those allegations. I do not need to decide whether Mr Vetiyatil's interpretation of the reporting requirements is correct. I am satisfied that Mr Vetiyatil refused to change the reports sent to the ATO because he genuinely thought that he had made the initial lodgments correctly and that he was not therefore allowed to alter those reports.

[59] I am not satisfied that Mr Vetiyatil lodged reports to the ATO that he knew to be false.

[60] I am not satisfied that there was a valid reason for dismissal related to Mr Vetiyatil's capacity or conduct.

Was the Applicant notified of the valid reason (s.387(b))?

[61] Because I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances (per *Read v Gordon Square Child Care Centre* [2013] FWCFB 762 at [46]-[49]).

[62] Mr Prentice's email that dismissed Mr Vetiyatil included reasons why he was dismissed. Mr Prentice made no mention in his email of Mr Vetiyatil's alleged unsatisfactory work performance.

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct (s.387(c))?

[63] Mr Vetiyatil was not given a proper opportunity to respond to the allegations against him.

[64] The opportunity to respond to which s.387(c) refers is an opportunity to respond to the reason for which the employee may be about to be dismissed. Mr Vetiyatil was given no such opportunity to respond about Agripower's reason for dismissal.

[65] The emails on 7 July 2023 rapidly escalated and went from a direction to Mr Vetiyatil to change information lodged with the tax office to Mr Vetiyatil's dismissal without any indication that Mr Vetiyatil's ongoing refusal to comply with the direction placed his employment in jeopardy.

[66] In the email exchange Mr Vetiyatil did have the opportunity to explain his decision to refuse to amend the STP lodgement, and he took that opportunity. His emails were not as helpful as they could have been. With the benefit of hindsight it is easy to see that Mr Vetiyatil could have been more fulsome in his explanation for why he was not prepared to completely follow the direction issued to him.

[67] More significantly, Mr Vetiyatil was not given the opportunity to make a response about whether or not he should be dismissed for the reasons contemplated by the employer. It is not difficult to imagine that Mr Vetiyatil would have been more cooperative, or more communicative, if he understood that he was about to be dismissed.

[68] Agripower relies on the fact that Mr Vetiyatil is a senior manager and that he ought to have known that significant consequences might follow his ongoing refusal. To some degree that is an understandable view. Mr Vetiyatil was not a junior office clerk. He was paid \$2000 less than the high-income threshold, and he should have been savvy enough to understand that Agripower might move against him if the impasse about the STP report could not be resolved.

[69] Agripower submitted that there was some urgency to resolving the STP issue. Mr Vetiyatil was not at work on the day he was dismissed because he attended hospital for a procedure. He responded to emails nonetheless.

[70] Mr Vetiyatil did also propose a work-around that would have allowed him to alter the information provided to the ATO.

[71] The issue of STP reporting was contentious and had been contentious for more than two weeks, as evidenced by the emails between Mr Vetiyatil and Mr Robbeson on 23 June 2023. The email exchange between Mr Vetiyatil and Mr Robbeson included very specific statements from Mr Robbeson. Mr Robbeson referred to the STP reporting requirements and the specific consequences for employees in relation to social security benefits if Mr Vetiyatil reported information to the tax office in a particular way. It also contained a blunt warning, "Please do not ignore this message", which implies at least some anticipation by Mr Robbeson that Mr Vetiyatil would not comply with his directive.

[72] Mr Robbeson's second email on 23 June 2023 about his concern and is very blunt: "If wages are not paid next week you will be instructed to remove the fraudulent information you submitted to the ATO." Obviously there is some history behind Mr Robbeson's statement, and obviously Mr Robbeson and Mr Vetiyatil did not agree on Agripower's STP reporting obligations.

[73] There is no evidence of any communications between Mr Vetiyatil and either Mr Prentice or Mr Robbeson about STP reporting between 23 June 2023 and when the issue blew up again on 7 July 2023.

[74] There is no evidence to say that Mr Robbeson followed up on his directive to Mr Vetiyatil given on 23 June 2023. Mr Vetiyatil said he sought advice from the ATO and from the FWO and it is possible that he did so in this period. But on the evidence neither Mr Robbeson nor Mr Prentice spoke to Mr Vetiyatil about the STP reporting in the days before 7 July 2023. The apparent silence cuts both ways: if Mr Vetiyatil did obtain advice during this period there is no evidence that he passed on his learnings to Mr Prentice or Mr Robbeson or approached them to resolve what he knew to be a very strong difference of opinion. During this period Mr Vetiyatil was not being paid either and in one of the emails on 7 July 2023 he appears to take a swipe at Mr Prentice about not being paid: "Why are they not paid on time! I will leave this one to be answered by you."

[75] In this context Agripower’s explanation for not taking the time to actually pause, de-escalate and try to resolve the disagreement with Mr Vetiyatil about STP reporting amicably, and not to wait for Mr Vetiyatil to return to work from his hospital stay, is not satisfactory.

[76] Agripower could have invited Mr Vetiyatil to a meeting upon his return to work and given him the opportunity to respond to the employer’s concerns at that meeting. Agripower could have referred the matter to its taxation advisers. Agripower chose to simply dismiss Mr Vetiyatil and as a result it did not give him the opportunity to respond to the reasons for his dismissal.

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal (s.387(d))?

[77] This factor is not a relevant consideration in this matter.

Was the Applicant warned about unsatisfactory performance before the dismissal (s.387(e))?

[78] On one view, the dismissal did not relate to unsatisfactory performance and this factor is not relevant to the present circumstances. However Agripower relies upon Mr Vetiyatil’s unsatisfactory performance over a long period of time as a valid reason to dismiss his employment in July 2023.

[79] In my view Mr Vetiyatil was never warned about his unsatisfactory performance. Agripower relies on three meetings where it said it warned Mr Vetiyatil. On Agripower’s version of those conversations Mr Vetiyatil was not ever squarely told that his job was at risk. There was discussion about matters of concern to Agripower but no “warning” was given that if Mr Vetiyatil’s performance did not improve then he would be terminated.

To what degree would the size of the Respondent’s enterprise be likely to impact on the procedures followed in effecting the dismissal (s.387(f))?

[80] Agripower is a public company, albeit with only 20 or so employees. It is difficult to see how the size of the business made any difference to the procedures followed in effecting the dismissal. The problems arose within Agripower’s senior management. Although at the time of Mr Vetiyatil’s dismissal Agripower apparently did not have available funds, the nature of Agripower’s business and its funding arrangements suggest that Agripower should not be seen as a typical small to medium sized business. For example, at the time that Mr Vetiyatil was dismissed Agripower did not have enough money to pay its employees their wages, but two \$1,000,000 capital injections were received shortly after Mr Vetiyatil was dismissed.

To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent’s enterprise be likely to impact on the procedures followed in effecting the dismissal (s.387(g))?

[81] Agripower’s enterprise apparently did not have access to dedicated human resource management specialists. As referred to above, on the day Mr Vetiyatil was dismissed Agripower had almost no funds but sufficient funds arrived shortly after his dismissal. Agripower could have sourced proper human resource advice or legal advice before deciding to dismiss Mr Vetiyatil.

What other matters are relevant (s.387(h))?

[82] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. In this case there are no other relevant matters to consider.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[83] I have made findings in relation to each matter specified in section 387 as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable and therefore an unfair dismissal.

[84] It was, for the reasons described above, unreasonable for Agripower to dismiss Mr Vetiyatil in the circumstances. Agripower had other reasonable actions available to it to address Mr Vetiyatil's behaviour and it was unreasonable for Agripower to take the course that it did.

[85] Mr Prentice had tolerated Mr Vetiyatil's performance for a time and then, without warning, was no longer prepared to tolerate Mr Vetiyatil. Mr Vetiyatil was entitled to assume that his performance was satisfactory because he was never told anything to the contrary.

[86] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of Mr Vetiyatil was unfair.

Remedy - reinstatement

[87] Being satisfied that Mr Vetiyatil made an application for an order granting a remedy under section 394, was a person protected from unfair dismissal and was unfairly dismissed within the meaning of section 385 of the FW Act, I may order Mr Vetiyatil's reinstatement, or the payment of compensation to Mr Vetiyatil, subject to the FW Act.

[88] The Commission must perform its functions and exercise its power in a manner that is fair and just and promotes harmonious and co-operative workplace relations (per s.577 of the FW Act) and must take into account the objects of the Act, and equity, good conscience and the merits of the matter. The power to order reinstatement is "a very drastic one" (per *Slonim v Fellows* (1984) 154 CLR 505 at 515, [1984] HCA 51, cited in *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at 548, [2005] HCA 22 at [28]). As the High Court observed in *Blackadder*, such an order is an intrusion into the personal relationship of employer and employee, and an intrusion that is "deliberate and envisioned by the Act" (at [28]).

[89] As the Full Court in *Perkins v Grace Worldwide Australia Pty Ltd* (1997) 72 IR 186 at 190, [1997] IRCA 15 observed, the employment relationship is capable of withstanding some friction and doubts:

"Each case must be decided on its own merits. There may be cases where any ripple on the surface of the employment relationship will destroy its viability. For example the life of the employer, or some other person or persons, might depend on the reliability of the terminated employee, and the employer has a reasonable doubt about that reliability. There may be a case where there is a question about the discretion of an employee who is required to handle highly confidential information. But those are relatively uncommon situations. In most cases, the employment relationship is capable of withstanding some

friction and doubts. Trust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party.”

[90] Acrimony that often arises out of litigation is irrelevant to consideration of the appropriateness of reinstatement, however, as the Full Bench in *Lee v Superior Wood Pty Ltd* (2020) 295 IR 242, [\[2020\] FWCFB 1301](#) at [55] found:

“... to the extent that evidence and conduct [in the litigation] shed light upon the likely conduct and attitudes towards the relationships of the parties in the workplace in the event of a reinstatement, this was potentially relevant to the assessment of whether that remedy was appropriate.”

[91] Mr Robbeson’s evidence regarding Mr Vetiyatil’s work performance was scathing. Mr Vetiyatil’s evidence in reply regarding Mr Robbeson was worse. I have chosen not to describe that evidence in detail in this decision.

[92] Mr Vetiyatil held a very senior position. I am not satisfied that trust and confidence could be restored in this matter to make the employment relationship viable and productive.

[93] Taking all these matters into account I find that it would not be appropriate to order that Mr Vetiyatil be reinstated to his former position pursuant to s.391 of the FW Act.

[94] Mr Vetiyatil found new employment approximately two weeks after he was dismissed on higher wages but on a temporary 6-month contract. Mr Vetiyatil was paid one months’ pay in lieu of notice.

Is an order for payment of compensation appropriate in all the circumstances of the case?

[95] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. The question whether to order a remedy remains a discretionary one (per *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [\[2014\] FWCFB 7198](#) at [9]).

[96] Mr Vetiyatil has suffered no financial loss as a result of the dismissal, although his new employment is less secure.

Compensation – what must be taken into account in determining an amount?

[97] Section 392(2) of the FW Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant in lieu of reinstatement including:

- (a) the effect of the order on the viability of the Respondent’s enterprise;
- (b) the length of the Applicant’s service;
- (c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;

- (d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;
- (e) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;
- (f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the Commission considers relevant.

[98] I will consider these factors in sequence:

- a) There is no dispute and I am satisfied that an order for compensation would not have an effect on the viability of the employer's enterprise;
- b) Mr Vetiyatil's length of service was less than two years, which is not insubstantial and slightly favours a greater amount of compensation;
- c) if Mr Vetiyatil had not been dismissed on 7 July 2023 his employment was unlikely to have continued for very long. As the evidence revealed, Mr Vetiyatil's employment was far from secure. Mr Robbeson would have dismissed him long before July 2023 but Mr Prentice's view prevailed. Mr Prentice was not happy with Mr Vetiyatil's work performance but was prepared to tolerate it. In all likelihood the STP episode would have resulted in the end of Mr Vetiyatil's employment. Agripower could have, and so I will assume would have, fairly dismissed Mr Vetiyatil within only a few short weeks;
- d) Mr Vetiyatil mitigated his loss by finding other employment within two weeks;
- e) the amount of income reasonably likely to be earned by Mr Vetiyatil between the making of the order for compensation and the payment of compensation is not directly relevant; and
- f) There are no other directly relevant matters.

Compensation – how is the amount to be calculated?

[99] The well-established approach to the assessment of compensation under s.392 of the FW Act is to apply the "Sprigg formula" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21 (*Sprigg*) (see also *Bowden v Ottrey Homes Cobram and District Retirement Villages* (2013) 229 IR 6; [\[2013\] FWCFB 431](#) and *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [\[2016\] FWCFB 7206](#) at [16]).

[100] The approach in *Sprigg* is as follows:

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).

Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure of an applicant to mitigate his loss may lead to a reduction in the amount of compensation ordered.

Step 3: Discount the remaining amount 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.

[101] Applying the formula in *Sprigg* would not deliver Mr Vetiyatil any compensation at all because his loss was fully mitigated.

[102] I am nevertheless required to ensure that “the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case” (see *Double N Equipment Hire Pty Ltd t/a AI Distributions v Humphries* [2016] FWCFB 7206 at [17]).

[103] In the circumstances of this case I am satisfied that it is appropriate that Agripower pay one weeks’ pay as compensation for the fact that Mr Vetiyatil was unfairly dismissed.

[104] In this matter the amount of the order for compensation is not to be reduced on account of misconduct (per s.392(3)). The cap on compensation in s.392(5) of the FW Act has no impact upon the present matter.

[105] In light of the above, I will make an order that Agripower pay \$3,076 less taxation as required by law to Mr Vetiyatil in lieu of reinstatement within 21 days of the date of this decision, plus an additional component for superannuation ([PR769468](#)).



DEPUTY PRESIDENT

Appearances:

J Hui for the Applicant

A Moriarty for the Respondent

Hearing details:

2023.

Sydney (By Video using Microsoft Teams)

November 1, 9.

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