DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Marc Hahn
v
Hewitt Holdings Bathurst Pty Ltd
(U2023/9956)

DEPUTY PRESIDENT ROBERTS SYDNEY, 5 FEBRUARY 2024

Application for an unfair dismissal remedy

[1] On 12 October 2023 Mr. Marc Robert Hahn (Applicant) applied to the Fair Work Commission (Commission) under s.394 of the *Fair Work Act 2009* (Cth) (Act) for a remedy having alleged that he had been unfairly dismissed from his employment with Hewitt Holdings Bathurst Pty Ltd (Respondent). By his original application the Applicant sought orders for reinstatement and compensation. At the conclusion of the hearing, the Applicant did not press for reinstatement and sought only orders for compensation pursuant to s.392 of the FW Act.

When can the Commission order a remedy for unfair dismissal?

[2] Section 390 of the Act provides that the Commission may order a person's reinstatement, or the payment of compensation to a person if satisfied that the person was protected from unfair dismissal at the time of being dismissed and the person has been unfairly dismissed. Section 382 provides that a person is protected from unfair dismissal if the person is an employee who has completed a period of employment of at least the minimum employment period and the person is covered by a modern award, an enterprise agreement applies to the person, or the person earns less than the high-income threshold.

[3] Section 385 relevantly provides that a person has been unfairly dismissed if the Commission is satisfied of four matters: the person has been dismissed, the dismissal was harsh, unjust or unreasonable, the dismissal was not consistent with the Small Business Fair Dismissal Code and the dismissal was not a case of genuine redundancy.

[4] It was not contested, and I am satisfied, that the Applicant is protected from unfair dismissal for the purposes of s.382 as he was employed for longer than the minimum employment period and was covered by a modern award. The Respondent employs 4 employees. The Applicant gave uncontested evidence that he was employed full-time as a labourer/plant operator for more than 12 months. The Respondent accepted that the Applicant was employed under the Building and Construction General On-Site Award 2020. The Respondent did not contend that the dismissal was consistent with the Small Business Code or

that the dismissal was a case of genuine redundancy. I am satisfied that those factors are not relevant here.

[5] The Applicant was dismissed on 11 October 2023 and lodged his application for relief within the requisite time period.[1] No jurisdictional issues arise with the application. That being the case, the question of whether the Applicant has been unfairly dismissed will depend on whether the Commission is satisfied that the dismissal was harsh, unjust or unreasonable within the meaning of s.385.

Background

[6] On 22 June 2023 the Applicant suffered an injury to his right knee while at work in the Mudgee area. He reported his injury and a workers compensation claim was made. He was thereafter certified as fit to continue on light duties with certain limitations on lifting and carrying and pushing/pulling. He resumed work on light duties and continued to perform those duties during his usual hours with the Respondent until on or about 4 September 2023. To that point the Applicant had received some reimbursement for medical and travel expenses from the Respondent's workers' compensation insurer (the insurer) but did not receive any payment for weekly workers' compensation.

[7] On 5 September 2023 the Respondent advised the Applicant that they no longer had any suitable duties for the Applicant to perform. The Respondent began to make weekly payments to the Applicant and sought reimbursement of those payments from their insurer. The Applicant claimed that the payments he received from the Respondent from that point were less than the assessment that had been made by the insurer as to his pre-injury average weekly earnings. The Applicant asked the Respondent to back pay the difference. The Respondent declined to do so until they had been reimbursed by the insurer. The insurer decided to make a payment directly to the Applicant.

[8] On 4 October 2023 the Respondent wrote to the insurer and said they would not be making any further payments to the Applicant until they had been paid by the insurer. A further payment was made by the insurer directly to the Applicant. Ultimately, the Respondent also paid the Applicant for periods that overlapped with the periods for which the Applicant had been paid by the insurer.

[9] On 11 October 2023 the Respondent wrote to the Applicant to say that they had become aware that he had received multiple payments from the insurer at the same time as he had received wages from the Respondent. The Applicant was terminated without notice for dishonest behaviour and fraud. The Applicant claims that he did nothing wrong and that to the contrary, it was he who brought the double payment to the attention of both the insurer and the Respondent. In that event, the Applicant claimed that there was no valid reason for the termination and that his termination was harsh, unjust or unreasonable within the meaning of s.387 of the Act.

Was the dismissal harsh, unjust or unreasonable?

[10] In considering whether the dismissal was harsh, unjust or unreasonable I am required to take into account the matters listed in s.387.

Section 387(a) - Valid reason relating to capacity or conduct

[11] The evidence as to the reason for the termination was largely uncontested. The Applicant provided a detailed statement setting out the sequence of events and documentary evidence in support of his version of events. I accept the Applicant to be a witness of truth. On the basis of this evidence, I am satisfied of the following in relation to the issue of valid reason:

(i) The Applicant received two payments from the Respondent for the weeks ending 10 and 17 September 2023 which were less than the amount he had been assessed as being entitled to as his pre-injury average weekly earnings under the NSW workers compensation provisions.
(ii) The Applicant challenged the Respondent about the underpayment by email on 18 September 2023.
(iii) The Applicant advised the insurer that he had not been paid the full amount in a telephone conversation on or about 19 September 2023. A representative of the insurer told the Applicant on that date that the insurer would start paying the Applicant directly.
(iv) On 19 September the insurer sent the Respondent on email asking why the Applicant had not been paid his full entitlement.
(v) On or about 20 September the Respondent told the Applicant that back-pay adjustments would not be made because the Respondent had not received any payments in respect of the Applicant's claim from their insurer.
(vi) On or about 21 September the Applicant received a payment from the insurer for the period 12 to 18 September.
(vii) On or about 25 September the Applicant again asked the Respondent about adjustments to his payments for the weeks ending 10 and 17 September and was advised that back-payments would be made when the insurer paid the Respondent.
(viii) The Respondent paid the Applicant correctly for the weeks ending 24 September and 1 October 2023.
(ix) On 4 October 2023 the Respondent sent the insurer an email advising that no further payments would be made by them to the Applicant until the Respondent was paid by the insurer. The Applicant was copied into the correspondence.
(x) On or about 4 October 2023 the insurer sent the Applicant a remittance advice advising him that the insurer had paid the Applicant for the weeks ending 25 September and 2 October 2023.
(xi) On or about 5 October 2023 the Applicant contacted the insurer and told them that the Respondent had already paid him for the weeks ending 25 September and 2 October 2023. The insurer told the Applicant to retain the payment because the Respondent had indicated that they would not pay the Applicant for the week ending 9 October and the remainder could be used to cover the September underpayments.
(xii) On or about 9 October the Applicant contacted the Respondent and advised he had received a double payment because the insurer had paid him for the weeks ending 25 September and 2 October. He advised the Respondent what he had

been told by the insurer in relation to retaining the payment the insurer had sent him.

(xiii) On or about 10 October 2023 the Respondent contacted the Applicant and asked about the double payments. The Applicant explained to the Respondent again what he had been told by the insurer in relation to the retention of the payment.

(xiv) At or about 11.50am on 11 October 2023 that Applicant received a voice message from Mr. Ditchfield, the Respondent's manager as follows:

> *"Yeah Marc, it's Tim. Mate I have been made aware that you have been taking payments from ICare and then still chasing your wages. Based on that your employment with Hewitt Holdings has been terminated immediately. I'll send through some paperwork. Call me if you need anything clarified.*

(xv) Mr. Ditchfield sent a text message to the Applicant shortly thereafter confirming the termination.

(xvi) The Applicant rang Mr. Ditchfield after receiving the voicemail and attempted to explain his version of events. Mr. Ditchfield said the Respondent stood by the termination. A letter of termination followed at 2.20pm on 11 October 2023.

[12] Mr. Ditchfield and Ms. Rodwell from the Respondent's accounts department, gave evidence for the Respondent. Ms. Rodwell was the person the Applicant spoke to on 9 October about the double payments. The Respondent relied on an email from Ms. Rodwell to Mr. Ditchfield dated 10 November 2023 which summarised the events of 9 and 10 October.

[13] Ms. Rodwell did not dispute that the Applicant advised her of payments from the insurer during the telephone conversation on 9 October. However, Ms. Rodwell said that the Applicant mentioned this towards the end of the call and said that the insurer had paid him "a few" times after he had spoken to the insurer directly. Ms Rodwell said the call from the Applicant was a result of the correspondence she had sent to the insurer saying that no further payments would be made to the Applicant until the Respondent received payment from the insurer. She confirmed that she had been instructed to send that correspondence by Mr. Ditchfield.

[14] Ms. Rodwell confirmed that she had spoken to the insurer on 10 October and that she had been told the insurer had paid the Applicant directly because he was not being paid correctly by the Respondent.

[15] Mr. Ditchfield said that the Respondent did not receive any payments from the insurer before 13 October 2023. He said that the error by the insurer was to pay the Applicant directly and that this was "the cause of the entire situation." He said that he believed that the purpose of the Applicant's call on 9 October was not to advise of the overpayment and that he accepted Ms. Rodwell's assessment that the Applicant only advised of the double payment after being questioned by Ms. Rodwell. On this latter point I note that it was not Ms. Rodwell's evidence that the Applicant provided the information about the double-payments upon questioning by her but only that the information from the Applicant came towards the end of the conversation.

[16] The Respondent submitted that the Applicant had been aware that he had received payments from the insurer as early as 21 September, that he had been paid for that same period

by the Respondent and that he did not bring the double payments to the attention of the Respondent until there was a threat to discontinue his payments. The Respondent said that the Applicant had persistently badgered the insurer and the Respondent in an effort to receive multiple payments.

[17] I do not accept that the Applicant set out to obtain multiple payments from different sources for the same period of time. He did no more than speak to both parties in an effort to receive the payments it was ultimately agreed he was entitled to receive.

[18] I am satisfied that the Applicant brought the double payments to the attention of both the insurer and the Respondent voluntarily on 5 and 9 October respectively. Whilst it was not in issue that the Applicant was in receipt of the first double payment on 21September, I do not consider that in circumstances of this matter, the failure of the Applicant to notify the Respondent of the payment at that point constituted a valid reason for the Applicant's termination.

[19] There was a real dispute as to the amount the Applicant should have been receiving from the Respondent. The Applicant was doing no more than approaching both his employer and the insurer to advise that he had received less than he believed he was entitled to receive. The insurer apparently agreed with the Applicant. They took it upon themselves to address the situation by making a payment directly to him. The Applicant was not privy to communications between the insurer and the Respondent. He had made it known to both of them that he believed the payments he had received from the Respondent were less than he was entitled to. It was reasonable for him to assume that communications were occurring between the Respondent and its insurer and that the first payment he received from the insurer would be reconciled as between the insurer and the Respondent. However, by the time he received the second payment from the insurer on 4 October, the issue of the amount he was entitled to receive from the Respondent had been resolved in his favour. It would have been clear to the Applicant at that point that he had been paid the same amount for the same periods from both his employer and the insurer. He promptly brought it to the attention of the insurer. He was told by the insurer to retain the insurer's payment. The Applicant also knew there was an issue between the insurer and the Respondent about delayed reimbursement of the Respondent. He knew that the Respondent was threatening to stop his payments entirely. He nonetheless elected to tell the Respondent about the payments he had received.

[20] There is no basis to conclude that the Applicant was hiding anything from the Respondent. He attempted to explain the situation to Ms. Rodwell on 9 October and again on 10 October 2023. Ms. Rodwell had also spoken to the insurer on 10 October to get their version of events. The termination went ahead nonetheless.

[21] More effective communication between the Respondent and the insurer might have averted the situation, but ultimately it was the Applicant who suffered the consequence even though he brought the double-payment issue to the attention of both parties. In my view there was no valid reason for the termination of the Applicant's employment relating to his capacity or conduct. This weighs in favour of a conclusion that the termination was harsh, unjust or unreasonable.

Section 387(b) and (c) - notice of reason for dismissal and opportunity to respond

[22] The matter that is required to be taken into account under s.387(b) of the Act is whether the Appellant "was notified of that reason". Contextually the reference to "that reason" is the valid reason found to exist under s.387(a).[2] Since I have found that there was no valid reason in this case, there is nothing to weigh under this heading. The same view has been adopted in relation to s.387(c)[3] and the same approach applies.

Section 387(d) - any unreasonable refusal to allow a support person to assist in discussions relating to the dismissal

[23] There is no evidence of any refusal to allow a support person to participate in discussions relating to the dismissal. This is a neutral consideration in this case.

Section 387(e) – unsatisfactory performance – warnings

[24] The dismissal did not relate to unsatisfactory performance, but rather alleged misconduct on the part of the Applicant. This factor is not relevant to the present circumstances.

Section 387(f) and (g) - size of the employer's business and absence of dedicated human resources management specialists or expertise

[25] The Respondent is a small employer. It had four employees at the time of the termination. It is part of a larger corporate group of companies which employs approximately 35 employees in total. I regard the small scale of the Respondent's operations and its lack of specialist resources as having an impact on the processes that were followed. Nonetheless the processes that were followed were poor by any objective measure, even taking into account the size and resources of the Respondent. This weighs in favour of a conclusion that the dismissal was harsh, unjust or unreasonable.

Section 387(h) - other relevant matters

[26] There are other relevant factors to take into account. First, the Applicant was dismissed summarily by text message. The dismissal was not conveyed to him in person. He was given no notice of his dismissal. When he was notified, he contacted Mr Ditchfield from the Respondent by telephone and explained the situation. On the same day he emailed the Respondent with his version of events. Despite the plausibility of the explanation, there was no request for documentation and no face-to-face meeting with the Applicant. The Respondent provided a cursory reply saying they stood by the original decision. Mr. Ditchfield said that the decision to terminate was made "probably harshly, but swiftly." There was, in my view, no serious re-examination of the situation by the Respondent. The Applicant responded again in writing on the same day. He received no response and his efforts made no difference to the Respondent's decision.

[27] Second, on 13 October 2023, after the Applicant advised the insurer that his employment had been terminated, the insurer notified the Respondent that the Applicant had been paid by them in error. They indicated that they were seeking reimbursement from the Applicant. The correspondence also shows that payments were made by the insurer to the Respondent on that day in relation to the Applicant's workers compensation claim. The payment for the period

ending 11 September was retained by the insurer as an excess payment because the claim was notified more than 5 days after the injury. In all other respects the Respondent was fully reimbursed by the insurer by 13 October 2023. The Respondent accepted that they were fully reimbursed by the insurer by this date and were not out-of-pocket as a result of the payments made to the Applicant by the insurer. On the other hand, the Applicant has not been paid by the Respondent for the period ending 8 October 2023 even though the insurer has paid the Respondent for this amount.

[28] I also take into account the fact that the Applicant had approximately 21 months service with the Respondent. The Applicant said that he was not aware of any performance or other issues being raised by the Respondent prior to his injury in June 2023. There was evidence of the Applicant being involved in an alleged safety incident on or about 30 August 2023. The Applicant was issued with a written warning as a result of the incident. The Applicant did not accept the warning. He gave detailed evidence about the incident and was not cross-examined on his version of events. I accept his evidence and do not propose to take the incident into account. I conclude that the Applicant had a good work record over the course of the 21 months of his employment.

[29] Finally, I note that the Applicant was on workers' compensation and was unfit for normal duties when he was terminated. He has lost the security of a full-time position in circumstances where he is also trying to recover from a workplace injury to be able to return to work.

[30] Each of these matters weighs in favour of a conclusion that the dismissal was harsh and unreasonable.

[31] Having regard to my conclusions above in relation to the matters listed in s.387, I am satisfied that the termination of the Applicant's employment was harsh and unreasonable.

Remedy

[32] The Applicant did not seek reinstatement. I do not regard reinstatement as appropriate in the circumstances. The Applicant sought compensation. I am satisfied that it is appropriate in the circumstances to make an order for compensation in lieu of reinstatement. In doing so, I am required by s.392 to take account of all of the circumstances of the case, including the matters listed in subsections (2)(a) to (g) of that section.

[33] The parties were given an opportunity to put written submissions on the question of compensation at the conclusion of the hearing. I note that the Respondent is a small business, albeit one that is part of a larger corporate group of companies. The Respondent did not provide any evidence as to the effect that an order for compensation would have on the viability of the Respondent's enterprise. I make no deduction on account of the effects on the viability of the enterprise.

[34] I also take into account the fact that the Applicant had approximately 21 months service with the company. I do not regard this period of service to provide any basis for reducing the amount of the proposed order.

[35] In determining the remuneration that the Applicant would have received or would have been likely to receive if he had not been dismissed, I take into account the fact that the Applicant is presently on workers compensation as a result of his injury and the evidence as to his future medical treatment and return to work prospects. I am of the view that it is likely that the Applicant would have remained in the employment of the Respondent for a further twelve months had his employment not been terminated. In the current circumstances, the Applicant has a limited capacity to mitigate his loss arising from the termination. I do not consider it appropriate to reduce the proposed amount of the order on account of any lack of mitigation efforts.

[36] I propose to take into account the amount that the Applicant has earned by way of workers compensation payments from the date of dismissal until the making of the order for compensation. I also take these projected payments into account as income reasonably likely to be earned by the Applicant between the making of the order and the actual compensation. I think it is also appropriate to have regard to the projected workers compensation payments that the Applicant is likely to receive from the date of the actual compensation until his anticipated return to normal duties. I take that into account as a relevant matter under s392(2)(g).

[37] Aside from the usual contingencies such as illness and accidents, there is a significant contingency associated with the Applicant's situation that needs to be taken into account. The Applicant's existing work-related injury brings with it an element of uncertainty as to its impact on the Applicant's potential earnings. The Applicant says his medical advice is that further surgery is required and that there is a potential long recovery time. Assuming the Applicant can fully recover and return to his normal duties, his workers compensation payments would be discontinued. On the other hand, the Applicant may not fully recover or may not recover until some later time. These are matters which must be factored into the quantum of any compensation order.

[38] The well-established approach to the assessment of the quantum of compensation under s.392 of the Act is to apply the "Sprigg formula". That formula is derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket*.[4]

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 or her 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.

Step 5: Assess the figure against the compensation cap.

[39] Applying the above formula to this case I calculate the order for compensation as follows:

(i) The Applicant would have received or been likely to receive remuneration by way of workers' compensation payments in the period since his termination until 15 August 2024 if he had not been dismissed in accordance with the following:

(a) 11 October 2023 to 31 October 2023 – 3 weeks at $1,900 per week - $5,700
(b) 1 November 2023 to 16 May 2024 (being estimated date of second surgery) - 28 weeks at $1,640 per week - $45,920
(c) 16 May to 15 August 2024 (being estimated period of post-surgery recovery) – 13 weeks at $1,640 per week - $21,320
(d) 16 August 2024 – 10 October 2024 – (8-week period after Applicant is fully recovered from surgeries and fit for full pre-injury duties and therefore not entitled to receive weekly workers compensation payments) – 8 weeks at $1,900 being pre-injury average weekly earnings - $15,200

Total - $88,140

(ii) Deduct remuneration earned between the date of dismissal and the date of the making of an order for compensation – 11 October 2023 to 31 October 2024 (3 weeks at $1,900 per week - $5,700) and 1 November 2023 to 5 February 2024 (14 weeks at $1,640 - $22,960) and between the making of the order for compensation and the actual payment (3 weeks at $1,640) - $4,920.

Total - $33,580

Less further deduction for remuneration likely to be earned as workers compensation payments from 26 February until 15 August 2024 (24 weeks at $1,640) - $39,360

(iii) Balance - $15,200 less discount for contingencies at 25% - $3,800.

(iv) Amount of order $11,400 (gross).

[40] The amount proposed does not exceed the compensation cap. Having regard to the circumstances as a whole, I do not consider an order in this amount to be clearly inadequate or clearly excessive. The gross amount should be adjusted for taxation purposes in accordance with the principles described in *Shorten & Ors v. Australian Meat Holdings Pty Ltd*.[5]

[41] For the reasons outlined above, I consider that the Applicant was unfairly dismissed and a payment of $11,400 (gross) should be paid by the Respondent to the Applicant as compensation in lieu of reinstatement as an appropriate remedy.

[42] An order requiring payment of this amount will issue separately.

DEPUTY PRESIDENT

Appearances:

Mr Angus Edwards for the Applicant.
Mr Timothy Ditchfield for the Respondent.

Hearing details:

By video using Microsoft Teams at 10:00am AEDT on Thursday, 21 December 2023.

Final written submissions:

Respondent filed a response to the Applicant's submissions and calculations on compensation on 22 December 2023.

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[1] s 394(2).

[2] See *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Reseigh v. Stegbar Pty Ltd* [2020] FWCFB 533 at [55].

[3] *Read v Gordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[4] (1998) 88 IR 21.

[5] (1996) 70 IR 360.