DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Rachel Edwards
v
Eastern Guruma Pty Ltd
(U2023/10570)

DEPUTY PRESIDENT O'KEEFFE PERTH, 1 MARCH 2024

Application for an unfair dismissal remedy - Applicant unfairly dismissed – compensation awarded.

[1] On 26 October 2023, Ms Rachel Edwards (**the Applicant**) made an application to the Fair Work Commission (**the FWC**) under s.394 of the *Fair Work Act 2009* (Cth) (**the FW Act**) for a remedy, alleging that she had been unfairly dismissed from her employment with Eastern Guruma Pty Ltd (**the Respondent**).

Background

[2] The Applicant was engaged by the Respondent as a Site Administrator, with her employment commencing on 25 August 2020. In July 2023 the Respondent commenced a process of investigating the Applicant as it had formed the view that at certain times she may have claimed and been paid an allowance to which she was not entitled. As a result of this investigation the Applicant was stood down with pay and investigations were undertaken. From this investigation the Respondent formed the view that on twelve occasions the Applicant had claimed and been paid an allowance to which she was not entitled and the Respondent proceeded to terminate the Applicant's employment.

Permission to appear

[3] Both the Applicant and the Respondent sought to be represented before the Commission and neither party objected to the other being represented. In addressing s596(2)(b) the Applicant noted in her submissions that she was an Administration Officer with no litigation experience and as such would experience some difficulties in representing herself effectively. I accepted that this was the case. In addressing s596(2)(a) the Respondent noted in its submissions that the matter involved significant factual disputes and submitted that the hearing would be conducted more efficiently with experienced counsel. I agreed with this submission and I therefore decided to exercise my discretion to grant permission for the both parties to be represented.

Witnesses

[4] The Applicant gave evidence on her own behalf.

[5] The following witnesses gave evidence on behalf of the Respondent:

- Mr Joseph Autridge (Mr Autridge), Talent Acquisition Specialist and Human Resources Officer for the Respondent; and
- Mr Shane Stephens (Mr Stephens), Deputy Operations Manager for the Respondent

Has the Applicant been dismissed?

[6] A threshold issue to determine is whether the Applicant has been dismissed from their employment.

[7] Section 386(1) of the FW Act provides that the Applicant has been dismissed if:

(a) the Applicant's employment with the Respondent has been terminated on the Respondent's initiative; or

(b) the Applicant has resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by the Respondent.

[8] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[9] There was no dispute and I find that the Applicant was an employee of the Respondent and her employment was terminated at the initiative of the Respondent.

[10] I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

Initial matters

[11] Under section 396 of the FW Act, the Commission is obliged to decide the following matters before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(d) whether the dismissal was a case of genuine redundancy.

Was the application made within the period required?

[12] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[13] It is not disputed and I find that the Applicant was dismissed from her employment on 10 October 2023 and made the application on 26 October 2023. I am therefore satisfied that the application was made within the period required in subsection 394(2).

Was the Applicant protected from unfair dismissal at the time of dismissal?

[14] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;
(ii) an enterprise agreement applies to the person in relation to the employment;
(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

Minimum employment period

[15] It was not in dispute and I find that the Respondent is not a small business employer, having 15 or more employees at the relevant time. The relevant minimum employment period is therefore six months.

[16] It was not in dispute and I find that the Applicant was an employee, who commenced their employment with the Respondent on 25 August 2020 and was dismissed on 10 October 2023, a period in excess of 6 months. I am therefore satisfied that, at the time of dismissal, the Applicant was an employee who had completed the relevant minimum employment period.

Applicant's annual rate of earnings

[17] The Applicant's annual base rate of earnings at the time of dismissal was $104,728. She was also entitled to a 30% "Site Uplift Allowance" in certain circumstances. There were no amounts to be worked out in accordance with regulation 3.05 of the *Fair Work Regulations 2009*. It was not in dispute and I find that, at the time of dismissal, the sum of the Applicant's annual rate of earnings was less than the high income threshold of $167,500.

[18] I am therefore satisfied that, at the time of dismissal, the Applicant was a person protected from unfair dismissal.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[19] Section 388 of the FW Act provides that a person's dismissal was consistent with the Small Business Fair Dismissal Code if:

(a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and

(b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

[20] As found above, the Respondent was a small business employer within the meaning of s.23 of the FW Act at the relevant time.

[21] I am therefore satisfied that the Small Business Fair Dismissal Code does not apply, as the Respondent is not a small business employer within the meaning of the FW Act.

Was the dismissal a case of genuine redundancy?

[22] Under s.389 of the FW Act, a person's dismissal was a case of genuine redundancy if:

(a) the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

[23] It was not in dispute and I find that the Applicant's dismissal was not due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[24] I am therefore satisfied that the dismissal was not a case of genuine redundancy.

[25] Having considered each of the initial matters, I am required to consider the merits of the Applicant's application.

Was the dismissal harsh, unjust or unreasonable?

[26] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account:

(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.

[27] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[1]

[28] I set out my consideration of each below.

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

[29] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[2] and should not be "capricious, fanciful, spiteful or prejudiced."[3] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[4]

[30] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[5] "The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination."[6]

Submissions and Evidence

[31] The Applicant submitted that there was no valid reason for the dismissal related to the Applicant's capacity or conduct. She submitted that the termination was for allegedly falsely claiming payment of the Respondent's Site Uplift Allowance (**the Allowance**) when she was not entitled to receive the Allowance. In response to this, the Applicant submitted that there were no rules in place for the claiming of the Allowance, other than in the individual contract of employment. Further, all time sheets submitted by the Applicant had been approved by her

Project Manager, a fact that she had made known to the Respondent but one that the Applicant claims the Respondent never sought to verify. As such, the Applicant submitted that she had not engaged in any misconduct and thus the Respondent had no valid reason for termination.

[32] In her reply submissions, the Applicant claimed that, in addition to there being no valid reason, the investigation carried out by the Respondent into the allegations against her was procedurally flawed and that, despite lengthy correspondence from the Respondent's lawyers, she was not given a real opportunity to respond to the allegations against her.

[33] The Applicant also made further submissions on the issue of the existence of a valid reason. In doing so, she drew my attention to Northrop J's oft-quoted passage from *Selvanchandran v Peteron Plastics Pty Ltd*[7] as follows:

> *"In its context in subsection 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never bem a valid reason for the purposes of subsection 170DE(1). At the Same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly…"*

[34] The Applicant submitted that, given the serious nature of the allegations, the standard of proof required was as per the *Briginshaw* principles. Those principles were set out in *Barber v Commonwealth*[8] as follows:

> *"The standard of proof remains the balance of probabilities, but the nature of the issue necessarily affects the process by which reasonable satisfaction is attained and such satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences or by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion."*

The Applicant further submitted that the Respondent could not discharge its onus to establish misconduct to a *Briginshaw* standard because:

> *"Despite extensive investigations and correspondence exchanges with the applicant it did not make any findings of time sheet fraud against her and even now can only submit that it "believes" that she was guilty of submitting inaccurate timesheets.*
>
> *…(it) has called no witness able to give direct and admissible evidence as to the time sheets.*
>
> *…(it) has failed to call witnesses who examined the timesheets and the rosters who could give evidence as to what really occurred.*

…(it) has failed to identify who in the respondent's business made the decision to dismiss the applicant, when it was made and on what basis it was made.

…(it) has called only 2 witnesses neither of whom were in a managerial role to the applicant and neither of whom appear to have any admissible evidence about the timesheets."

[35] At the hearing the Applicant further submitted that of the twelve instances where the Respondent was alleging falsification of timesheets, nine of those instances involved a situation where the Applicant did not complete or submit the timesheets. The remaining three involved the application of the Allowance, in circumstances where the Applicant submitted that the interpretation of the rules was "loose".

[36] In her witness evidence, the Applicant noted that the Respondent's allegations about falsifying timesheets fell into two time periods, the first being where she was attached to the Brockman 2 Project, being February to March 2023, and the second being where she was attached to the Tom Price Project, being April to June 2023. In this second period, the Applicant states that she neither prepared, submitted nor sought approval for her own timesheets. She further stated that the payroll processes she had applied had been unchanged over a period of three years during which she had worked across six projects and under eight Project Managers.

[37] The Applicant's further evidence was that she had never submitted any timesheet entries that had not been expressly approved by her Project Manager. Further, in her time with the Respondent, all of her Project Managers had given the same direction with respect to the application of the Allowance. Specifically, her evidence was that she was directed to claim the Allowance on her fly-in or fly-out days when the flights had been changed and also to claim the Allowance when working from home outside of her rostered hours at the Respondent's request.

[38] With respect to the Respondent's written procedures, the Applicant' evidence was that there was no reference in the Respondent's Human Resources and Policy Setting Manual (the Manual) about the Allowance not being payable when an employee arrives on site and does not work a twelve hour day, nor does the Manual have any guidance to fly-in or fly-out days. As such, the Applicant states that responsibility for dealing with these situations rested with the Project Managers. Further to this, the Applicant's evidence is that the practice regarding the Allowance on fly-in and fly-out days was universally applied across the Respondent's operations and other employees of the Respondent.

[39] Under cross-examination, the Applicant's evidence was, in the main, not upset. She was able to provide explanations for what the Respondent alleged were anomalies in her roster and timesheet and explained those anomalies as being the result of either instructions from her Project Manager or agreements with her Project Manager as to how and where she would work. In response to my question, she stated that she applied the same process for the Allowance – being the process that the Respondent was alleging was improper - to all other employees, including Project Managers and had never varied her application of the Allowance. In response to my further question, she agreed that the Manual makes no reference to the Allowance other than it is not payable when working from home.

[40] The Respondent submitted that there was a valid reason for the dismissal related to the Applicant's conduct because she had completed and submitted timesheets which were inaccurate, in that they did not record and reflect the hours or location that she had actually worked. The Respondent submitted that the Applicant had submitted the inaccurate information knowingly, and with a view to being paid the Allowance to which she would not otherwise have been entitled.

[41] The Respondent submitted that these actions were particularly serious as the Applicant was employed by the respondent as a Site Administrator. This was a position which required the Applicant to manage personnel on site, and to accurately and faithfully record their hours worked, leave periods and flights to and from the project site in the relevant project roster and timesheets. As the person with day to day management of the roster and completing site timesheets, the Respondent submitted that it relied on the Applicant, as it relied on all Site Administrators, to perform her role with honesty and integrity.

[42] In response to the Applicant's contention regarding the rules for the Allowance, the Respondent submitted that it was provided in the Applicant's contracts of employment that the Allowance would be applied to her salary "when on site and allocated to site". The Respondent's submitted that its HR Manual specifically provided that the Allowance did not apply to employees when working from home and that therefore the Applicant knew, or ought to have known, that the Allowance only applied to days where she was on site or allocated to working on site. Notwithstanding this, the Respondent submitted that the Applicant had submitted timesheets for approval which recorded her being on site on days when she was in fact not on site or allocated to site.

[43] In response to the Applicant's contention that her timesheets had all been approved by her Project Manager, the Respondent submitted that whilst there is a process of review and approval, the employees who perform the Site Administrator role are trusted to accurately input the required information into timesheets, which, when paid by the Respondent, represents a significant expenditure of the Respondent's business.

[44] In support of its actions in terminating the Applicant, the Respondent cited the findings in *Newton v Toll Transport*[9] where Deputy President Boyce, citing authorities, found that dishonesty, as a reason for termination, may be of such gravity that termination is an appropriate consequence and not harsh and the entire factual matrix must be considered in determining whether an employee's lie or dishonesty is a valid reason for dismissal.

[45] The Respondent also directed my attention the decisions of Commissioner Cambridge in *Rosser v Toll Transport*[10] and *Tu Noanoa v Linfox Pty Ltd*[11] where in both cases the Commissioner found that deliberate falsification of timesheets represented serious misconduct involving dishonesty which provided a valid reason for termination.

[46] The witness evidence of Mr Joseph Autridge was primarily concerned with the Respondent's policies and procedures. He gave evidence that the Manual states that dishonesty of any kind, including falsification of timesheets or any other document, as well as deceptive or misleading conduct or fraudulent actions and stealing are considered serious misconduct and may result in instant dismissal. It was Mr Autridge's further evidence that he understood the Allowance only to be payable if an employee was on site or allocated to a site and claimed that this understanding was widely held by all Site Administrators and Project Managers. Mr

Autridge's further evidence went to the processes followed by the Respondent in investigating and dealing with its concerns regarding the Applicant and was not relevant to determining the issue of a valid reason.

[47] Under cross-examination it became clear that Mr Autridge was involved only at a very peripheral level with the matter and had not been at all involved in the process of investigating and terminating the Applicant. In response to my question about his assertion that employees widely understood the rules around the Allowance, he stated that he thought this because it was in the employee's contracts, and that Site Administrators came to this knowledge by virtue of being required to prepare timesheets. It was also his evidence that as part of the on-boarding process people were advised of their entitlement to the Allowance. I also asked Mr Autridge about the ability of a Project Manager to sign-off on a timesheet that paid the Allowance in a way that was perhaps not consistent with what the Respondent was asserting was correct practice. It seemed clear that the HR function and the payroll function of the Respondent were not particularly synchronised and as such it would appear that the HR function would only become aware of what it regarded as anomalies if it was directed advised through a change of contract form.

[48] I questioned Mr Autridge about an assertion in one of the letters from HLS Legal sent to the Applicant, which was in evidence. In that letter[12], it was asserted that the Allowance was not payable in the following circumstances:

(a) "(when) an employee arrives on site on a particular day and does not work a 12-hour shift;
(b) (when) an employee works from home;
(c) (when) an employee works from the Perth office."

I asked Mr Autridge where item (a) was to be found in the Manual or otherwise and how people became aware of it. Mr Autridge suggested that this was a question for payroll as it was not within his area of knowledge. I then asked him to confirm that he was suggesting that this was a rule imposed by payroll, but his answer meandered somewhat before ultimately he repeated that he did not really know.

[49] I then questioned Mr Autridge about a concession made in that same letter, where it was said that a Mr Glenn Monaghan, the Respondent's Operations Manager, had granted some exemptions to the rules of the Allowance and allowed it to be paid to employees working from home or in the Perth office. Mr Autridge stated that he would only become aware of this happening if the HR function was officially advised, and he had no knowledge of such advice. I further questioned Mr Autridge as to whether he had conducted any inquiries to see if other employees of the Respondent had been paid the Allowance on days when they were travelling. His evidence was that he had not done so but that he would not have been privy to that information if it had been done.

[50] The witness evidence of Mr Shane Stephens went mainly to internal processes of the Respondent. It was his evidence that the Allowance was payable when an employee was on-site or allocated to site. He stated that the Allowance was not payable for a day where an employee, for example, flies to site in the afternoon in circumstances which are within their control and does not work a full day, or when an employee is working from home. Mr Stephens gave some other evidence regarding conversations he had with a Rebecca Smith. At hearing,

the Applicant challenged the admissibility of those statements on the basis that they were hearsay. Having heard from both parties on the matter I resolved not to admit those parts of Mr Stephens' evidence that was essentially hearsay evidence about issues Ms Smith had raised with him.

[51] Under cross-examination, Mr Stephens confirmed that an employee would not be able to work twelve hours on a day when they flew into site and further confirmed that he himself had been paid the Allowance on days when he had flown into site. He also confirmed that it was practice to record a full day on work for white collar workers on days when they were flying in and out of site, albeit that these records reflected, as was the Respondent's practice, 7.6 hours rather than the actual twelve hours worked. Mr Stephens also confirmed that he was paid the Allowance for travel days. In response to my question, Mr Stephens stated that the Allowance was not payable if an employee flew to site in the afternoon, as they would not be performing any work.

Consideration

[52] In the first instance I should state that I found the Applicant to be a particularly credible witness who was forthright in her answers and was consistent in her position. The witnesses for the Respondent were credible witnesses within the scope of their knowledge of the relevant matters, however, that knowledge was somewhat limited and, particularly in Mr Autridge's case, were unable to answer some relevant questions regarding the actual practices applying on site.

[53] On balance of probability, I find that what the Applicant did with respect to the Allowance was consistent with her understanding of the Respondent's processes, albeit that those processes may have been more a case of custom and practice than firm policy. However, this is not particularly surprising, as the Respondent's own documentation – and implementation – of the rules applying to the Allowance were somewhat inconsistent and unclear. On my examination of the evidence submitted, there are only two places where the Allowance is mentioned in the Respondent's paperwork. The first is on people's contracts, where it states it is payable when an employee is "on site and allocated to site". This statement itself seems to be somewhat imprecise, and I note that in their witness evidence, the Respondent's own witnesses say that it is payable when on site ***or*** allocated to site (my emphasis). As such, it would appear that in practice the "and" in the actual written version in contracts should be taken to be "or". The only other mention of the Allowance is in the Manual at page 147, where it states – in effect - that the Allowance will not apply to work performed at home under any circumstances irrespective of whether the activities undertaken at home apply to a site.

[54] There is no mention of how to treat circumstances where an employee is flying in or out of site in either of these two documents. It is clear that the practice is that where an employee flies to site in the morning and performs part of a day of work then they receive the allowance. However, this interpretation contradicts the "rules" of the Allowance that were stated in the HSL Legal letter to the Applicant dated 6 September 2023. The source of this interpretation is not clear but it appears that is has been common practice for some time. It also is unclear why the rule does not apply to situations where the employee flies into site later in the day. While it appears the logic may be that no work is performed, again there appears to be no record of

this practice and in any case the implementation seems to be somewhat inconsistent in that the Applicant's evidence is that it would be paid in such circumstances if the afternoon arrival was beyond the employee's control. As to the notion of the Allowance being paid while working at home, the Applicant's Manual says this can not happen in any circumstances, yet the Respondent's own evidence is that it did happen when approved by senior management. The evidence of the Applicant, which I accept, was that she did sometimes change her rosters to suit the Respondent and did some work from home to help the Respondent out. In those circumstances she was advised by her Project Manager that the Allowance was payable.

[55] My final comment on the Allowance is that the HR function, who seemed to be most involved in the investigation, albeit as the liaison between the Respondent and HSL Legal, have no real way of knowing what is being applied on site unless they are officially advised via the appropriate internal form. Further, it was not within the knowledge of the HR employee who gave evidence to the FWC as to whether an investigation into how many other employees had received the Allowance in similar circumstances to the Applicant had been carried out.

[56] At the hearing, I suggested to the Respondent's representatives that its rules for, and application of, the Allowance were somewhat loose. I confirm that is my finding after reviewing all of the evidence. My finding is that the Applicant applied the Allowance as she understood it to be, with her understanding confirmed by directions from her managers, and her actions in full view of those managers. I find that her claiming of the Allowance for times when she worked at home is consistent with the advice given to her by her managers, and while perhaps contrary to the stated policy, nevertheless not the first time that management had directed that stated policy be breached.

[57] As such, in all the circumstances, I find that there was no valid reason for termination related to the Applicant's conduct.

Was the Applicant notified of the valid reason?

[58] Proper consideration of s.387(b) requires a finding to be made as to whether the applicant "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).[13]

[59] As I am not satisfied that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[14]

Was the Applicant given an opportunity to respond to any valid reason related to their capacity or conduct?

[60] As I have not found that there was a valid reason related to dismissal, this factor is not relevant to the present circumstances.[15]

Did the Respondent unreasonably refuse to allow the Applicant to have a support person present to assist at discussions relating to the dismissal?

[61] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[62] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."[16]

Submissions

[63] The Applicant conceded in its submissions that the Respondent did not refuse a support person. The Respondent submitted that this matter is not relevant to my considerations.

Findings

[64] I find that there was no refusal to allow a support person and this matter is not relevant to my considerations.

Was the Applicant warned about unsatisfactory performance before the dismissal?

[65] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

Submissions

[66] The Applicant submitted that the Respondent was a large organisation with its own HR staff and that this factor should be regarded as neutral. The Respondent submitted that this matter is not relevant to my considerations.

Findings

[67] I find that the size of the Respondent's enterprise was not likely to impact on the procedures followed in effecting the dismissal and thus this matter is not relevant to my considerations.

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?

Submissions

[68] The Applicant submitted that the Respondent had its own HR staff and that this factor should be regarded as neutral. The Respondent submitted that this matter is not relevant to my considerations.

Findings

[69] I find that the Respondent's enterprise did not lack dedicated human resource management specialists and expertise and thus this matter is not relevant to my considerations.

What other matters are relevant?

[70] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

Submissions

[71] The Applicant submitted that one of the Directors of the Respondent had a pre-conceived notion that the Allowance should not be paid to administrative employees and had determined that the Applicant should be terminated.

[72] The Respondent submitted that there were no other matters that the FWC should consider.
Findings

[73] I can find no evidence to support the contention that a particular member of the Respondent's Board had particular and pre-conceived ideas about the investigation and its outcome and so I am not prepared to give the Applicant's assertion any weight in my consideration.

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

[74] I have made findings in relation to each matter specified in section 387 as relevant.

[75] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[17]

[76] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of the Applicant was unreasonable. The Applicant had been following processes both advised and condoned by her managers to herself and all other employees in situations where the Respondent's policy on the matter did not comprehensively

deal with the issue, was unclear, and applied in an inconsistent manner. Termination for breaching a policy that finds itself in such a state cannot be a fair outcome.

Conclusion

[77] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of section 385 of the FW Act.

Remedy

[78] Being satisfied that the Applicant:

- 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, subject to the FW Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[79] Under section 390(3) of the FW Act, I must not order the payment of compensation to the Applicant unless:

(a) I am satisfied that reinstatement of the Applicant is inappropriate; and

(b) I consider an order for payment of compensation is appropriate in all the circumstances of the case.

Is reinstatement of the Applicant inappropriate?

Submissions

[80] The Applicant in the first instance sought reinstatement. However, after considering the position of the Respondent as put at the hearing, she advised the FWC that she was no longer seeking reinstatement but rather compensation.

[81] The Respondent submitted that reinstatement was not appropriate. It submitted that there had been a significant loss of trust and confidence in the Applicant, and this trust and confidence was vital for an ongoing employment relationship, particularly given the sensitive nature of the duties to which the Applicant would be returned.

Findings

[82] While I am not persuaded that on the evidence before the Commission the Applicant has issues with her honesty and integrity, I am nonetheless of the view that where an employee does not seek reinstatement and the employer opposes such reinstatement in any case, it would not be a sensible outcome for the FWC to force the parties to recommence an employment relationship that would have little chance of being comfortable for either. As such, I consider that reinstatement is inappropriate.

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

[83] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one…"[18]

[84] Where an applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.[19]

Submissions

[85] The Applicant submitted that payment of compensation is appropriate given the termination was unfair and the Applicant has lost a job that suited her needs and that she intended to remain in for some time.

[86] The Respondent submitted that payment of compensation is the appropriate remedy if the dismissal was found to be unfair.

[87] In all the circumstances, I consider that an order for payment of compensation is appropriate because in the first instance the Respondent acknowledges that compensation is an appropriate remedy if the dismissal is found to be unfair. In addition, it is clear that the Applicant had intentions of staying in what was a well-paid job that suited her studies for some time. Although the Respondent submits that the suitability of the hours was as a result of the largesse of one particular manager, and that manager has now departed, I find that the Applicant has nonetheless suffered a reduction in her circumstances as a result of unfair dismissal and this warrants some redress.

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

[88] 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.

[89] I consider all the circumstances of the case below.

Effect of the order on the viability of the Respondent's enterprise

[90] There is no dispute between the parties and I am satisfied that an order for compensation would not have an effect on the viability of the employer's enterprise.

Length of the Applicant's service

[91] The Applicant's length of service was three years and one and a half months, albeit that two and a half months of this was spent on stand-down as a result of the investigation that led to her termination. The Respondent noted this length of service but did not make any submission as to how it might impact the size of a compensation order. The Applicant likewise noted the length of service and proposed that her employment had been characterised by excellent performance.

[92] I consider that the Applicant's length of service does not support reducing or increasing the amount of compensation ordered.

Remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed

[93] As stated by a majority of the Full Court of the Federal Court, "[i]n determining the remuneration that the Applicant would have received, or would have been likely to receive… the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."[20]

Submissions

[94] The Applicant submitted that the Applicant's employment would have been likely to continue for a further period of 18 months and the amount of remuneration that the Applicant would have received or would have been likely to receive, including base salary and site uplift allowance, during that period is $204,204.

[95] The Respondent submitted that the effective date of the ending of the Applicant's employment was 31 October 2023 as she had been paid three weeks' pay in lieu of notice including the site uplift allowance. The Respondent submitted that the Applicant's choice to accept a new role that was not fly-in / fly-out indicated that she had a preference to work in

Perth. The Respondent also submitted that the Project Manager with whom the Applicant worked and with whom the Applicant had a good working a personal relationship had left the business in October 2023. As such, the Respondent submitted that the Applicant would likely only have continued for a further period of 2 months and the amount of remuneration that the Applicant would have received or would have been likely to receive during that period is $22,254.70.

Evidence

[96] I should firstly note that the Respondent's calculation of the salary lost appears to proceed on the basis of a lower salary than is stated both in its own Form F3 and also in the Applicant's most recent contract of employment which was in evidence. As a result, I am resolving to use a combined salary of $136,146.40, being a base salary of $104,728 per annum plus a thirty percent site uplift allowance, consistent with both the contract of employment dated 1 July 2023 and the figures stated in the Form F3.

[97] As regards the period of employment, I cannot accept the proposition for which the Respondent has argued. I note the evidence of Mr Autridge regarding the plethora of FIFO jobs available, and the Respondent's assertion that the Applicant would have secured a comparable fly-in / fly-out role within three to four weeks. However, this does tend to somewhat overlook the fact that the Applicant would have been doing so dreading the questions "why did you leave you last job" and "who can we speak to at Eastern Guruma about your employment?" The Applicant submitted that, needing a job, she had simply accepted the first job that was offered. I do not find this to be a fanciful scenario and suspect that for those employees with financial commitments who are terminated, finding a new job to maintain continuity of income is a priority. Such employees do not have the luxury of a person who is in a job and contemplating a career change who can undertake a leisurely job search from the security of paid employment and only apply for and accept those jobs that represent a step forward.

[98] I am also not persuaded by the assertions about the Applicant's manager. The Applicant's relationship with the manager in question seemed to be the subject of some innuendo but zero supporting evidence. As such, I am not prepared to take into consideration any submissions with regard to that relationship. It appears to me that, based on the actual evidence, the Applicant has worked with eight different managers over her period of employment and happily carried on each time a manager left or she was re-allocated.

[99] However, I am not persuaded that the Applicant would have necessarily remained in her employment for a full period of eighteen months as submitted. Although the exercise of determining a period of employment is somewhat imprecise, I do note that the Applicant's evidence was that she had been given some leeway by her manager to work around her studies. While it is unclear whether a subsequent manager or indeed the Respondent would have allowed this to continue, it is clearly a practice that had some importance to her and indicated that she saw her future in psychology rather than administration. While it is difficult to tell how the rigours of her studies may have impacted the Applicant's thinking as she neared the completion of her degree, I think that it is important to be mindful of this issue when determining an employment period.

Findings

[100] For the reasons set out above I find that the Applicant would have remained in her employment for a period of some nine months, a period that broadly corresponds with the commencement of teaching for semester two 2024 at Curtin University, being 24 July 2024.

Efforts of the Applicant to mitigate the loss suffered by the Applicant because of the dismissal

[101] The Applicant must provide evidence that they have taken reasonable steps to minimise the impact of the dismissal.[21] What is reasonable depends on the circumstances of the case.[22]

Submissions

[102] The Applicant submitted that the Applicant had taken reasonable steps to minimise the impact of the dismissal by securing full time paid employment with four weeks of her dismissal and as such no discount should be applied to her compensation.

[103] The Respondent submitted that while the Applicant had taken steps to minimise the impact of the dismissal, there should be a discount to acknowledge that the Applicant had made what it described as a "lifestyle" decision, based on her studies, to accept a Perth-based role rather than a more lucrative fly-in / fly-out role that she would have been able to secure given her experience.

Findings

[104] I am satisfied that the Applicant took reasonable steps to mitigate her loss. I am not persuaded by the Respondent's submission that a discount should be applied. As I found above, I accept that the Applicant needed a job and took the first job she was offered, being also mindful again of her issues regarding the ending of her employment with the Respondent.

Amount of remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation

[105] On the basis that the Applicant is now earning a base salary of $87,464 per annum and she commenced employment on 6 November 2023, the Applicant will have earned seventeen weeks' pay at $1,682 per week being a total of $28,594 between dismissal and the making of this order.

Amount of 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

[106] As the order will require payment within two weeks, the Applicant will have earned a further $3,364 at the point where the actual compensation is paid.

Other relevant matters

[107] Neither party made submissions on any other relevant matters.

Compensation – how is the amount to be calculated?

[108] As noted by the Full Bench, "[t]he 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* (***Sprigg***).[23] This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*[24]."[25]

[109] 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 1

[110] I have estimated the remuneration the Applicant would have received, or would have been likely to have received, if the Respondent had not terminated the employment to be $102,109.79 on the basis of my finding that the Applicant would likely have remained in employment for a further period of nine months. This estimate of how long the Applicant would have remained in employment is the "anticipated period of employment".[26]

Step 2

[111] I have found that the amount of remuneration earned by the Applicant from the date of dismissal was $28,594 and that the amount of income reasonably likely to be earned by the Applicant between the making of the order for compensation and the payment of compensation is $3,364.

[112] In *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries (note also referenced at bottom of this page)*[27], a Full Bench of the FWC stated as follows:

> *"Remuneration earned from the date of dismissal to the date of any compensation order is required to be taken into account under s.392(2)(e). Remuneration reasonably likely to be earned from the date of any compensation order to the date the compensation is*

> *paid is to be taken into account under s.392(2)(f). Any remuneration likely to be earned after that date to the end of the period of anticipated employment determined for the purpose of s.392(2)(c) is, we consider, a relevant amount to be taken into account under s.392(2)(g) in accordance with the Sprigg formula."*

Consistent with this finding, I need to calculate the amounts likely to be earned between the payment of compensation and the end of the anticipated period of employment. This amount is equal to twenty weeks' pay at $1682 per week, being a total of $33,640.

[113] The monies earned since termination to the payment of the compensation order and then for the balance of the anticipated period of employment are to be deducted.[28] I therefore deduct the sum of $65,598, being the balance derived at Step 2 from $102,109.79, being the amount derived at Step 1. The resulting figure is $36,511.79.

Step 3

[114] I now need to consider the impact of contingencies on the amounts likely to be earned by the Applicant for the remainder of the anticipated period of employment.[29]

Submissions

[115] Neither the Applicant nor the Respondent made submissions on the issue of contingencies.

[116] In the circumstances I consider that it is not necessary to make a deduction for contingencies. Although there are five months left in the anticipated employment period, I am not aware of any relevant contingencies that may arise in that time.

Step 4

[117] I have considered the impact of taxation but have elected to settle a gross amount of $36,511.79 and leave taxation for determination.

[118] Having applied the formula in *Sprigg*, 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."[30] I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by s.392(2) of the FW Act.

Compensation – is the amount to be reduced on account of misconduct?

[119] If I am satisfied that misconduct of the Applicant contributed to the employer's decision to dismiss, I am obliged by section 392(3) of the FW Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct.

[120] I am satisfied that misconduct of the Applicant did not contribute to the employer's decision to dismiss. Therefore, the amount of the order for compensation is not to be reduced on account of misconduct.

Compensation – how does the compensation cap apply?

[121] Section 392(5) of the FW Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

(a) the amount worked out under section 392(6); and

(b) half the amount of the high income threshold immediately before the dismissal.

[122] The amount worked out under section 392(6) is the total of the following amounts:

(a) the total amount of the remuneration:

(i) received by the Applicant; or

(ii) to which the Applicant was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(a) if the Applicant was on leave without pay or without full pay while so employed during any part of that period – the amount of remuneration taken to have been received by the Applicant for the period of leave in accordance with the regulations.

[123] The Applicant was not on leave without pay or without full pay during the 26 weeks immediately before the dismissal.

[124] As I found above, the Applicant was in receipt of annual salary of $104,728 plus a 30% site uplift allowance. However, as per the employment contract in evidence, this rate only applied from 1 July 2023. Prior to this time, the Applicant's salary was, as per the contract dated 12 April 2023, $99,274.24 per annum plus a 30% site uplift allowance. As such, the total amount of the remuneration to which the Applicant was entitled during the 26 weeks immediately before the dismissal was as follows:

1 July to 10 October	= 14.7 weeks @ $2,618.20	=	$38,487.54
12 April to 1 July	= 11.3 weeks @ $2,481.86	=	$28,045.02
	TOTAL	**=**	**$66,532.56**

[125] The high income threshold immediately before the dismissal was $167,500. Half of that amount is $83,750.

[126] The amount of compensation ordered by the Commission must therefore not exceed $66,532.56.

In light of the above, I will make an order that the Respondent pay $36,511.79 plus 11% superannuation for a total of $40,528.09 gross less taxation as required by law to the Applicant in lieu of reinstatement within 14 days of the date of this decision.

DEPUTY PRESIDENT

Appearances:
P Mullally of WorkClaims Australia for the Applicant.
V Bennett of Counsel for the Respondent.

Hearing details:
2024.
Perth:
February 19.

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[1] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

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

[3] Ibid.

[4] *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.

[5] *Edwards v Justice Giudice* [1999] FCA 1836, [7].

[6] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

[7] *Selvanchandran v Peteron Plastics Pty Ltd* [1995] 62 IR 371 at [373].

[8] *Barber v Commonwealth* (2011) 212 IR 1 [93].

[9] *Newton v Toll Transport Pty Ltd* [2020] FWC 5960 at [146].

[10] *Rosser v Toll Transport* [2021] FWC 1881 at [51].

[11] *Tu Noanoa v Linfox Pty Ltd* [2011] FWA 306 at [29].

[12] Letter to Rachel Edwards from HLS Legal dated 6 September 2023 at paragraph 9.

[13] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].

[14] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[15] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[16] Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

[17] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]–[7].

[18] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198, [9].

[19] *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550, [20]; *Jeffrey v IBM Australia Ltd* [2015] FWCFB 4171, [5]-[7].

[20] *He v Lewin* [2004] FCAFC 161, [58].

[21] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* PR908053 (AIRCFB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

[22] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

[23] (1998) 88 IR 21.

[24] [2013] FWCFB 431.

[25] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [16].

[26] *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000), [34].

[27] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206 at [31].

[28] Ibid.

[29] *Enhance Systems Pty Ltd v Cox* PR910779 (AIRCFB, Williams SDP, Acton SDP, Gay C, 31 October 2001), [39].

[30] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [17].