DECISION

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

Leigh Wallace
v
Duo Trading Pty. Ltd.
(U2023/10078)

COMMISSIONER LEE MELBOURNE, 4 APRIL 2024

Application for an unfair dismissal remedy – summary dismissal — applicant's performance constitutes valid reason for dismissal — dismissal procedurally unfair-applicant unfairly dismissed – compensation sought-compensation appropriate-order for compensation made.

[1] On 15 October 2023, Mr Leigh Wallace (Applicant) made an application to the Fair Work Commission (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 Duo Trading Pty Ltd. (Respondent). The Applicant seeks compensation as a remedy.

[2] A Hearing to deal with the merits was conducted on 16 January 2024. The Applicant was self represented and provided evidence on his own behalf. The Respondent was also self represented. Mr Ben Fergusson, Managing Director, and Mr Shaun Stopp, State Sales Manager, gave evidence on behalf of the Respondent.

The Evidence

[3] A great deal of the evidence in the matter is not in contest. The Applicant commenced employment on Wednesday 22 March 2023. The Applicants termination took effect on Monday 25 September 2023. There was a dispute about the date the termination took effect. By separate decision I determined the date the termination took effect was Monday 25 September 2023.[1]

[4] The Applicant was employed as an Area Sales Manager. This role was to take care of a full customer list or a customer base that is provided to the Applicant, and to be able to contact those customers on a regular basis. This is to support customers using Duo Trading products, training customers, providing information on the products, demonstrating products and being able to grow the business and the customer list.[2]

[5] In his first two months of employment, the Applicant performed well generating approximately $15,000 and $17,000 sales in these months, and this was recognised by his employer. The Applicant was given a pay increase of $10,000 to a total of $80,000 p.a. in recognition of his performance.

[6] However, in June and July his sales performance slumped to $4,000 and $9,000 per month respectively. This led to Mr Fergusson discussing his concerns with the Applicant about the Applicants performance. The issues raised in the discussion were summarised in a letter to the Applicant written on the 20 July 2023, in summary the letter outlined the following:

- The Respondent was shocked that the Applicants sales territory has changed significantly in such a short amount of time.
- The Respondent noted that the Applicant was experiencing some personal issues of late and have stood by him during this time and applied an appropriate amount of leniency regarding sales budget achievement.
- The NW Coast sales territory expected to run at a loss, due to it being run down over the previous years. And while the Respondent was happy with the Applicants initial 2 months of sales, to see the last 2 months producing some of the lowest sales figures in the last 10 years was very concerning.
- The Respondent has devoted extra resources to help support the Applicant, via infield support.
- The Respondent needed the Applicant to commit 100% to this position and ensure that he complete the mandatory tasks set out in the Conditions of Employment to ensure the Applicant remained in his current position.[3]

[7] On or around the 14 August 2023, Mr Fergusson became concerned about the failure of the Applicant to register his "calling card records" in the manner expected and as outlined in his condition of employment.[4] The Applicant was not completing the number of calling card records expected. While the Applicant was expected to complete 8x5=40 calls per week he had only completed 16 in the week of the 7-11 August 2023. Another letter of concern was sent to the Applicant advising the Applicant that this was his "last warning" about that issue. The letter made clear he was to complete his calling cards daily.[5]

[8] Around the July/August period, it is not in contest that the Respondent provided additional support to the Applicant to assist him to achieve his goals. The Respondent devoted extra resources to help support the Applicant, via infield support, along with multiple trips to Hobart to provide infield training from existing experienced sales managers.[6] Largely this involved Mr Stopp and Mr Fergusson taking time out of their regular roles to travel with the Applicant, including to the West Coast to assist him in his role.

[9] During August, the Applicants performance improved with him slightly exceeding his budget target for the Wynnes products. However, there was ongoing concern about the calling cards. Each area manager is required to report, on a daily basis, each call they do, to help justify what they do throughout the day.[7] There was a strict requirement for the Applicant to completing his daily calling cards as set out in his Conditions of Employment.[8]

[10] While the Applicants sales performance for oil was low against the targets set, this appears to have been of no particular concern to the Respondent. Indeed, his salary increase in June was given despite those low sales for oil.

[11] Mr Fergusson faced some personal difficulties in August. His father had suffered a stroke, so he took a step back from the business.[9] Mr Stopp was promoted to a State Sales

Manager role and he sought an opportunity to take full management control of the Applicant and try and improve him.[10]

[12] Mr Stopp had a conversation with the Applicant during the morning of 20 September 2023, again, about his non compliance with completing a sufficient number of calling cards and not completing them to the required standard. Mr Stopps concern was that the Applicant had travelled to the West Coast the previous week and had little to show for it. The Applicant agrees that he had some progress to make with the calling card requirements.[11] Mr Stopp complained that inadequate information had been recorded on the cards by the Applicant.

[13] Mr Stopp contacted the Applicant to talk to him about "what would happen in the future" and tell him they were changing his remuneration package back to base salary $60,000 plus Commission depending on sales. The Applicant complained to Mr Stopp that it was not financially viable for him to have his remuneration altered to a base salary plus commission.

[14] Mr Stopps evidence on this point is inconsistent with this statement. In his statement Mr Stopp said that he discussed the conversation he had with the Applicant with Mr Fergusson and it was only then that he decided to proceed to change the Applicants remuneration to a base salary and Commission as a response to the Applicants poor performance.

[15] Mr Stopp then contacted the Applicant on 20 September 2023 at 5:30pm. In his statement he says he recommended the Applicant leave his position. However, in the hearing he agreed that he actually gave the Applicant the option to either resign or be terminated.[12]

[16] In response, The Applicant told Mr Stopp during that phone call that he would pursue other employment options. The Applicant advised Mr. Stopp that he recently had a company contact him who wanted the Applicant to return to the company. The Applicant states that Mr Stopp told him that 'maybe that's your best option is to go back to working there'.[13] The Applicant then contacted the company, however, it was not an option to return to them. The next day the Applicant advised the Respondent that he was unable to secure other employment and would not be resigning.[14]

[17] A letter dated 20 September 2023 was then sent to the Applicant by Mr Stopp confirming the "guaranteed salary period would end effective end of September 2023".

[18] On Thursday 21 September 2023, the Applicant was sent an email by Ms Sward, the Office Manager, advising the Applicant to return various items including the motor vehicle, on the dates nominated. This email also asks the Applicant to supply a letter of resignation. The Applicant did not supply a letter of resignation. The Applicant was then sent a letter by Mr Stopp dated 22 September 2023 which commences with "As per our conversation earlier today over the phone, we have decided to terminate your employment with Duo Trading Pty Ltd effective 25th September".[15]

[19] The termination took effect on Monday 25 September 2023. The Applicant states that he was paid one week in lieu of notice.[16]

[20] Mr Fergusson conceded during the hearing that the termination was "messy". Mr Stopp agreed with that assessment.[17] For reasons made clear later in the decision, this is an obvious understatement.

Consideration

When can the Commission order a remedy for unfair dismissal?

[21] Section 390 of the FW Act provides that the Commission may order a remedy if:

(a) the Commission is satisfied that the Applicant was protected from unfair dismissal at the time of being dismissed; and

(b) the Applicant has been unfairly dismissed.

[22] Both limbs must be satisfied. I am therefore required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that the Applicant was so protected, whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

[23] 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.

Has the Applicant been dismissed?

[24] A threshold issue to determine is whether the Applicant has been dismissed from their employment. There was no dispute and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent. I am therefore satisfied that the Applicant has been dismissed within the meaning of s.385 of the FW Act.

Initial matters

[25] 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?

[26] Section 394(2) requires an application to be made within 21 days after the dismissal took effect. I have determined that the Applicant was dismissed from his employment on 25 September 2023.[18] The application was made on 15 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?

[27] I have set out above when a person is protected from unfair dismissal. The Applicant worked for the Respondent for a period of 6 months. I am satisfied that at the time of dismissal, the Applicant was an employee who had completed a period of employment with the Respondent of at least the minimum employment period. Furthermore, it was not in dispute, and I find that, at the time of dismissal, the Applicant earnt less than the high income threshold. It is also not in dispute that the Applicant was covered by the Commercial Sales Award. 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?

[28] The Respondent submitted that the number of employees at the time the Applicant was dismissed was 17. As such, I find that the Respondent was not a small business employer within the meaning of s.23 of the FW Act at the relevant time, having more than 15 employees (including casual employees employed on a regular and systematic basis).

[29] 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?

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

[31] 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.

[32] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[19] I set out my consideration of each below.

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

[33] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[20] and should not be "capricious, fanciful, spiteful or prejudiced."[21] 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.[22]

[34] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[23] "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.".[24]

Valid Reason

[35] The reasons for dismissal relied on were both conduct and performance related. The conduct element is the failure to complete the calling cards correctly and within the relevant time frames. As to the time frame the Applicant had been clearly told in writing to complete them daily.[25] The requirement to do this is a reasonable one. The calling cards are an important

tool to facilitate the development of future sales and provide a training measure for management.[26] The Applicant does not challenge that claim.

[36] There was also no real contest to the evidence of Mr Stopp that the Applicant was not completing the calling cards correctly. The Applicant conceded that he "had some progress to make with my calling card requirements".[27] The Applicant accepted that he didn't comply with the employers requirements to complete the calling cards.[28] The employers requirement that the cards be completed "after hours" was not reasonable.[29] However, it was reasonable to expect the Applicant to complete the calling cards within a timeframe that was close in time to when the Applicant was meeting or speaking with customers. The Applicant was failing to do so.

[37] I am satisfied that the Applicant's failure to complete the calling cards in the timeframe required, to the required standard and not completing sufficient numbers of them, was a failure to comply with a reasonable management direction and is a valid reason for dismissal.

[38] The reason for dismissal that is performance related was the Applicants poor sales towards the latter period of his short period of employment in respect to the sales of Wynnes and related products. While his first two months were excellent, the following two months were very poor. The month of August was satisfactory with him slightly exceeding budget. In September, the budget was $15,000. While the Applicant only worked the 3 weeks or 75% of the month, he achieved $9,346.80 in sales. It is not fair to compare this figure against the target for the whole of September. However, 75% of the September target, is a fairer comparison and is $11,250. Hence for the 3 weeks worked in September, the Applicant was below expectations by around 17% on a pro rata basis.

[39] While the Applicant hypothetically may have (if not terminated) performed better in the last week of September, he already had considerable ground to make up. There was no particular challenge to the targets set. Indeed, the Applicant was clearly able to achieve and exceed them when he commenced employment. The Applicant did advance that he had a concern that it would be difficult to maintain the level of sales required in the longer term.[30] However Mr Fergussons evidence that the targets were realistic was credible., Overall, I am satisfied The Wynnes sales targets were realistic.

[40] The poor sales performance of the Applicant combined with the failures associated with completing the calling cards are both valid reasons for dismissal.

[41] A further matter was raised during the hearing. Firstly, that the Applicant had failed a drug test on the first day of employment. There is no dispute that this occurred. Nor is there any dispute that the Respondent never brought up the issue again with the Applicant and the Applicant was never tested again. His employment continued without consequence. There may have been a right for summary dismissal at the time that conduct was discovered, however that right was clearly waived. At common law, an employer is not entitled to summarily dismiss an employee for an earlier instance of misconduct if the employer with full knowledge of that misconduct had decided to retain the employee in employment.[31] In any event, it is apparent that the employer did not rely at all on that matter at the time of the termination. The failure of the drug test on the first day of employment is not a valid reason for dismissal.

[42] In all the circumstances, I find that there was a valid reason related to the Applicant's conduct in terms of his failure to follow direction on the completion of the calling cards. I am also satisfied that his sales performance was poor in the latter months of his employment. This weighs against a finding the dismissal was unfair.

Section 387(b) – Was the Applicant notified of the valid reason?

[43] 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).[32] Notification of the valid reason to terminate must be given to the employee before the decision to terminate is made.[33] It is apparent from the evidence of Mr Stopp that the Applicant was not notified of the valid reason before the decision was made. Essentially, he was told to resign or be dismissed.[34] The decision to dismiss had already been made. This factor weighs in favour of a finding that the dismissal was unfair.

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

[44] For the Commission to have regard to whether an employee has been given an opportunity to respond to the reason for dismissal, there needs to be a finding that there is a valid reason for dismissal.[35] An employee must be notified of the reason for termination and must also be given an opportunity to respond to that reason before the decision to terminate is made. In this matter, the Applicant was told by Mr Stopp on 20 September 2023 to resign or be terminated. There was no opportunity to respond. This factor weighs in favour of a finding that the dismissal was unfair.

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

[45] I find that the Respondent did not unreasonably refuse to allow the Applicant to have a support person present at discussions relating to the dismissal. This is also a neutral consideration. There was no unreasonable refusal of a support person. The procedure to effect the dismissal did not actually involve any discussions where there would have been an opportunity to even consider securing a support person.

Section 387(e) – Was the Applicant warned about unsatisfactory performance before the dismissal?

[46] Warnings become relevant when an employee is dismissed for unsatisfactory performance. Unsatisfactory performance is more likely to relate to the employee's capacity to do the job than their conduct.[36] Performance includes 'factors such as diligence, quality, care taken and so on'.[37]

[47] The Commission must take into account whether there was a period of time between:

- an employee being warned about unsatisfactory performance, and
- a subsequent dismissal.[38]

[48] This period of time gives the employee the opportunity to understand their employment is at risk and to try and improve their performance.

[49] The Applicant was warned about his performance and was on notice his employment was at risk due to his performance issues. On 20 July 2023 the Applicant was issued with a letter regarding his performance. This letter stated that the Respondent was happy with the Applicants initial 2 months of sales and thought he was doing well, however, the Applicant was then producing some of the lowest sales figures in the last 10 years which was very concerning to the Respondent.[39] The Respondent wrote that they needed the Applicant to commit 100% to his position and ensure that he completed the mandatory tasks set out in the Conditions of Employment to ensure he remained in his current position.[40] On 14 August 2023, a further letter was issued to the Applicant where the Respondent outlined that a strict requirement for the Applicant to hold his position with Duo Trading was completing the daily calling cards as set out in the Conditions of Employment.[41] The Applicant was warned that this was his last warning regarding this, and they asked that the Applicant begin doing his calling card entries daily, consistent with what is required.[42]

[50] I am satisfied the Applicant was warned his employment was at risk as a result of his poor performance and this weighs against a finding that the dismissal was unfair. However, I am not satisfied that there was a sufficient period of time between that warning and the subsequent dismissal to allow the employee sufficient time to potentially improve his performance. This weighs in favour of a finding that the dismissal was unfair.

Section 387(f) and (g) – To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal and 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?

[51] In the circumstances these matters can be dealt with together. The Respondent made no submissions that the size of its enterprise or absence of human resource specialists or expertise was likely to impact on the procedures followed in effecting the dismissal.

[52] While there is acknowledgement that small businesses are genuinely different in nature both organisationally and operationally, the procedures followed in dismissing a person cannot be 'devoid of any fairness'.[43]

[53] The Commission has commented that '[c]ommon sense courtesies of conduct ought to exist in any workplace, whatever the size'.[44]

[54] While this is a relatively small business, the evidence shows that the dismissal of the Applicant lacked procedural fairness. Mr Fergusson did not think the small size of the business had an impact on his procedure for effecting the dismissal. The only concession from Mr Fergusson was that "…we need to use a lot stronger wording in our letters".[45] These factors are in the circumstances neutral considerations.

Section 387(h) – What other matters are relevant?

[55] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. The Applicant was told that he needed to either resign or be dismissed in a phone call on 20 September 2023. The only step that proceeded that phone call was to tell the Applicant that his remuneration would be altered with effect from the end of September, effectively as a sanction for his poor performance. The Applicant was not happy about that change but not unreasonably expected his employment would continue and he would have an opportunity to improve. However soon after he was told to either resign or be terminated. Two days later he was advised his employment was to terminate on 25 September 2023. The explanation advanced for this rather botched process was not coherent.[46] The most likely explanation for the haste in effecting the dismissal is the submission of Mr Ferguson that he was conscious of the approaching 6 months of the Applicant being employed.[47] There was a near total lack of procedural fairness in effecting the dismissal. This weighs towards a finding the dismissal was unfair.

[56] A further matter is the Applicant failed a drug test on the first day of employment. Traces of THC from using cannabis were detected. While this was not a valid reason for dismissal for reasons set out earlier, it is not necessarily irrelevant to the consideration of whether the dismissal was unfair, where for example that earlier conduct which was condoned nevertheless was just the first instance of repeated similar behaviour. However, there is no suggestion that is the case here. The failed drug test is a neutral consideration in the circumstances.

[57] There was also a suggestion from Mr Fergusson that the Applicant had falsified his resume.[48] There is no evidence to support that claim. What is concerning is that the claim of Mr Fergusson that the resume was not accurate appeared to relate to the manner in which the Applicant described the personal relationship he was in at the time of employment.[49] Mr Fergussons evidence was "As a company policy, we just look for people in so-called relationships and have certain backgrounds".[50]

[58] Two things need to be said about that evidence. Firstly, it is irrelevant as to what the Applicant included on his resume as to his relationship status as it should have formed no part of a decision to employ or not employ him. Secondly, to the extent that Mr Fergusson is making decisions to employ or not employ persons people in particular relationships or backgrounds then there is a real possibility he is in engaging in conduct that is in breach of anti-discrimination legislation and the Fair Work Act. In any event, this matter has no bearing on the fairness or otherwise of the decision to dismiss the Applicant.

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

[59] I have made findings in relation to each matter specified in s.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.[51]

[60] There were two valid reasons for the dismissal. This weighs against a finding the dismissal was unfair. However, the dismissal lacked any procedural fairness. This weighs in favour of a finding the dismissal was unfair. The Applicant had been warned about his performance and his employment was at risk. This weighs against a finding the dismissal was unfair. However, the failure to afford sufficient time to the Applicant to improve his

performance weighs in favour of a finding of unfairness. Other factors are neutral. Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of the Applicant was unreasonable, as a result of the failure to accord procedural fairness and allow some time for the applicant to potentially improve his performance.

Conclusion on whether the dismissal of the Applicant was unfair.

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

Remedy

[62] The relevant provisions of the FW Act pertaining to remedy are contained in s.390:

> "**390 When the FWC may order remedy for unfair dismissal**
>
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
>
> (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
>
> (b) the person has been unfairly dismissed (see Division 3).
>
> (2) The FWC may make the order only if the person has made an application under section 394.
>
> (3) The FWC must not order the payment of compensation to the person unless:
>
> (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
>
> (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.
>
> Note: Division 5 deals with procedural matters such as applications for remedies."

[63] It is also necessary to consider the objects of Part 3-2 of the Act, especially s.381(c) of the Act which provides that an object of that Part of the Act is to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement. The presumption in the legislation is that should a dismissal be found to be unfair, that reinstatement is the primary remedy, and that compensation is a secondary consideration if reinstatement is not appropriate.

[64] In this matter, the Applicant does not seek reinstatement. The remedy the Applicant is seeking is "financial compensation".[52] The Applicant has indicated that he does not wish to be reinstated as he does not feel that he will "have a supportive work environment to return to".[53] Further, the Applicant has successfully obtained other employment.[54]

[65] The Respondent has indicated that they do not think that reinstatement is appropriate as:

> "The applicant to this day continually provided false information throughout his employment with Duo Trading Pty Ltd highlighted by falsifying his resume, failing a compulsory drug & alcohol test from having illegal drugs in his system, and continually making false accusations through this FWC process with no proof to justify his claims. All trust has been lost with the applicant and we would never consider reemploying him again as his values to (sic) not align with our staff's or our companies"[55]

[66] Having taken that evidence into account, I agree that reinstatement is not an appropriate remedy in the circumstances of this case. Having determined that reinstatement is not appropriate I must consider what compensation, if any, is payable, in lieu of reinstatement.

Compensation

[67] The FW Act provides for compensation as a remedy for unfair dismissal:

> "**392 Remedy—compensation**
>
> *Compensation*
>
> (1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.
>
> *Criteria for deciding amounts*
>
> (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
>
> (a) the effect of the order on the viability of the employer's enterprise; and
>
> (b) the length of the person's service with the employer; and
>
> (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
>
> (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
>
> (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
>
> (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

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

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

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

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

393 Monetary orders may be in instalments

To avoid doubt, an order by FWA under subsection 391(3) or 392(1) may permit the employer concerned to pay the amount required in instalments specified in the order."

[68] The Applicant has lost remuneration as a result of the dismissal. There is no reason apparent that compensation should not be awarded. In all of the circumstances, I consider that the award of some amount of compensation is appropriate in this matter.

[69] In determining the amount of compensation, I must have regard to "all the circumstances of the case" including each of the paragraphs in s.392(2) of the Act as set out above. No one matter is paramount, but regard must still be had to each of them.[56] The general approach to the calculation of compensation was well set out by the Full Bench in *Tabro Meat Pty Ltd v Kevin Heffernan*[57] and I will follow that approach in determining this matter.

Section 392(2)(c) - the remuneration that the person would have received or would have been likely to receive, if the person had not been dismissed

[70] The Applicant sought 8 weeks pay as it was implied that he would have been given time to fix the issue.[58] During the hearing I asked the Applicant "you thought that you would have been there another eight weeks, or so, is that what you're telling me there?".[59] His response was as follows:

> "At a minimum I would have seen myself another four weeks, the month of October, where the commission structure was changing, or my remuneration was changing and then, you know, I'd go from there.
>
> What were the prospects for you to improve your performance?---So there were a number of things that were in the pipelines for customers that I was working with. So there was an agreement put together with a company that needed hydraulic oil that was coming up. I'd been talking to (indistinct) they were looking at getting products in there. There were things that were - were happening slowly and it was just waiting for it to all come together."[60]

[71] The evidence of the Respondent as to how much longer the Applicant would have been employed was mixed. Mr Fergusson stated that if the Applicant had of "…put a case forward that we thought was genuine and substantial enough to really turn things around, we would have most likely given him some flexibility in regards to that…but there was nothing there that we thought would be workable moving forward."[61] Also, "..if the person puts a good enough case forward then we apply flexibility while that termination may be".[62] This suggests that the Respondent was open to the possibility of continued employment. However, it is evident that given the lack of process followed to effect the dismissal of the Applicant there was no opportunity for the Applicant to put a case forward. Mr Fergusson was convinced that there was no evidence of the Applicant showing the relevant sales skills being applied to suggest there would be a turnaround in his performance.

[72] I am satisfied having considered the evidence that the Applicants employment would have continued, were it not for the dismissal, for a further four week period which would have provided a reasonable opportunity for him to react to the changed remuneration structure and potentially improve his performance. However, I think it unlikely that the Applicants performance would have substantially changed and that his employment would have come to an end in any event at the end of a further four week period, either by way of dismissal or with

the Applicant securing other employment and resigning given his evident lack of satisfaction with the change to the remuneration structure.

[73] In the circumstances, I am satisfied that the Applicant would have remained employed for a further four weeks. His termination date was 25 September 2023 and therefore the period would be until 23 October 2023. and that this is the appropriate date to use for the purpose of calculating the amount of income he would likely have earned had he not been dismissed. The evidence supports a finding that the Applicant would have remained employed, but for the dismissal, until 23 October 2023. I agree that this is the appropriate period to use for the purposes of the calculation.

[74] The period from the Applicant's dismissal until the end of the expected period of employment is four weeks. For the first week of that four week period the Applicant was entitled to be paid $1538.46 for that week. For the remaining three week period the Applicant was to be paid on the base salary plus commission structure. As set out earlier I do not think the Applicants performance was likely to greatly improve and have assumed that the Applicant would have simply earnt the base salary amount that would have applied to him from 2 October 2023. That amount was to be $60,000 pa. or $1,153.84 per week.[63] three weeks' pay at $1,153.84 amounts to $3,461.52. Adding that amount to the $1,538.46 for the last week of September yields a total amount of $4,999.98.

[75] Accordingly, I calculate the remuneration that the Applicant would have received or would have been likely to receive if his employment had not been terminated as $4,999.98, plus 11% superannuation.

[76] The amount of $4,999.98 will be used as the basis for the calculation of the amount the Applicant would have received or would likely to have received had it not been for the dismissal.

Section 392(2)(e) - the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation and s.392(2)(f) - the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation

[77] In the circumstances of this matter, ss.392(2)(e) and 392(2)(f) of the Act can be dealt with together. The Applicant was paid one week in lieu of notice in the amount of $1,538.46. This amount should be deducted from the amount of remuneration that the Applicant would have been likely to receive.

[78] This leaves an amount of $4,999.98 less $1,538.46 which is $3,461.52.

[79] The Applicant has secured employment. His engagement is as a casual worker. A number of payslips were provided by the Applicant. Since his engagement with his new employer on 16 October 2023 and up until the end of the expected employment period of 23 October, the Applicant has earned $1,643.34. It is appropriate that this is deducted from the amount of remuneration the Applicant was likely to receive. This leaves an amount of $3,461.52 less $1,643.34 which is $1,818.18.

[80] This deduction results in an amount of compensation of $1,818.18, plus 11% superannuation.

Section 392(2)(g) – any other matter that the FWC considers relevant

[81] The impact of contingencies needs to be considered at this point. Contingencies only apply to the anticipated period of employment.[64] In this case the anticipated period of employment has passed and it is known what has occurred in that period and it is not appropriate to deduct for contingencies

[82] There is no reduction in the provisional amount of compensation of $1,818.18 plus 11% superannuation. There are no other matters that are relevant to the determination of compensation other than ss.392(2)(a), (b) and (d), 392(3) and 392(5) of the Act. I will turn to those factors now.

Section 392(2)(a) - the effect of the order on the viability of the employer's enterprise

[83] With respect to s.392(2)(a) of the Act, there has been no evidence led to suggest that any award of compensation will affect the viability of the Respondent. There is no evidence demonstrating a likely effect that an order for compensation will have on the business. There is no basis to alter the amount of compensation taking into account this factor.

Section 392(2)(b) - the length of the persons service with the employer

[84] Addressing s.392(2)(b) of the Act, the Applicant was employed by the Respondent for a relatively short period of time, being approximately 6 months. However, I don't consider a reduction is appropriate as there is nothing to indicate that the employment period should reduce the amount sought by way of remedy, no submissions were made to that effect and no further deduction is warranted in these circumstances.

Section 392(2)(d) - the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal

[85] In respect of s.392(2)(d), the Applicant has provided some evidence though not of a satisfactory standard of various job applications. However, the Applicant has secured further employment within a rapid period of time which demonstrates that he has been active in seeking to mitigate his loss through further employment. He has immediately looked for and secured further employment. This is sufficient to exclude any further deduction from the quantum of compensation calculated.

Section 392(3) - misconduct

[86] I have found that the Applicant was dismissed for a valid reason that was largely performance related. The element of conduct relates to the failure to properly complete the calling cards. I am not satisfied there is a basis to make a further deduction for that element of the Applicants conduct. Therefore, there is no basis to make a further deduction for misconduct.

Section 392(5) - compensation cap

[87] As the amount of $1,818.18 plus 11% superannuation is less than the legislative compensation cap. No further deduction for that reason is required.

[88] There are no other considerations to be taken into account. I consider the amount calculated of $1,818.18 to be appropriate in all the circumstances of the case.

Conclusion and order as to remedy

[89] I find that reinstatement is not an appropriate remedy in this case. I find that compensation is appropriate.

[90] I am satisfied that an order for payment of compensation by the Respondent of $1,818.18 gross plus 11% superannuation, less taxation as required by law, to the Applicant in lieu of reinstatement is appropriate in all the circumstances of the case. It accords a fair go all round to both the Respondent and the Applicant.

[91] The compensation payment, less any required deduction in taxation, is to be made within 14 days of this decision. An order to that effect will be issued concurrently with this decision.[65]

COMMISSIONER

Appearances:
L Wallace on his own behalf.
B Fergusson on behalf of Duo Trading Pty. Ltd.

Hearing details:
2024.
Hobart:
January 16

Final written submissions:
Applicant, 23 January 2024.
Respondent, 30 January 2024.

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[1] [2024] FWC 28.

[2] PN347.

[3] Digital Court Book at page 130.

[4] Ibid at page 66 [section 3].

[5] Ibid at page 65.

[6] Ibid at page 9, PN505.

[7] PN208.

[8] Digital Court Book at page 10.

[9] PN227.

[10] Ibid.

[11] Applicants outline of Submissions at question 5c.

[12] PN360-PN361.

[13] PN89.

[14] Witness statement of Shaun Stopp, PN92.

[15] Digital Court Book at page 139.

[16] Ibid at page 143.

[17] PN371-PN372.

[18] [2024] FWC 28.

[19] *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].

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

[21] Ibid.

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

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

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

[25] Form F3 – Attachment 6.

[26] PN208.

[27] Applicants outline of Submissions at 5c.

[28] PN60.

[29] PN269-PN270.

[30] PN160-PN161.

[31] *Giang Son Tra v Prodigy Holding Pty Ltd* [2023] FWC 1514 at [79].

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

[33] Crozier v Palazzo Corporation Pty Limited t/as Noble Park Storage and Transport Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000) at paras 70–73, [(2000) 98 IR 137].
See for example Gooch v Proware Pty Ltd T/A TSM (The Service Manager) [2012] FWA 10626 (Cargill C, 20 December 2012).

[34] PN360-PN361.

[35] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41].

[36] Annetta v Ansett Australia Ltd Print S6824 (AIRCFB, Giudice J, Williams SDP, Cribb C, 7 June 2000) at para. 16, [(2000) 98 IR 233]. See also Davis v Collinsville Coal Operations PR953370 (AIRCFB, Harrison SDP, McCarthy SDP, Redmond C, 19 November 2004) at para. 49; Fischer v Telstra Corporation Limited Print R2558 (AIRCFB, Ross VP, Duncan DP, Redmond C, 1 March 1999) at para. 29.

[37] Annetta v Ansett Australia Ltd Print S6824 (AIRCFB, Giudice J, Williams SDP, Cribb C, 7 June 2000) at para. 16, [(2000) 98 IR 233].

[38] Johnston v Woodpile Investments T/A Hog's Breath Café - Mindarie [2012] FWA 2 (Williams C, 6 January 2012) at para. 58.

[39] Digital Court Book at page 9.

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] Williams v The Chuang Family Trust t/a Top Hair Design [2012] FWA 9517 (Cloghan C, 12 November 2012) at para. 40.

[44] Ibid.

[45] PN245.

[46] PN261.

[47] Respondents outline of submissions at question 5d.

[48] Ibid at question 6, PN98.

[49] PN249.

[50] PN250.

[51] *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].

[52] Applicants outline of submissions at question 7a.

[53] Ibid at question 7b.

[54] PN126.

[55] Respondents outline of submissions at question 6a.

[56] *Tempo Services Limited v Klooger and Others* PR953337 at [22].

[57] [2011] FWAFB 1080.

[58] Applicants outline of submissions at question 7c.

[59] PN124.

[60] PN124-PN125.

[61] PN228.

[62] PN511.

[63] PN207.

[64] *Enhance Systems Pty Ltd v Cox* PR910779 (AIRCFB, Williams SDP, Acton SDP, Gay C, 31 October 2001) at para. 39; citing *Ellawala v Australian Postal Corporation* Print S5109 (AIRCFB, Ross VP, Williams SDP, Gay C, 17 April 2000) at para. 43.

[65] PR773095.