



DECISION

Fair Work Act 2009
s.120—Redundancy pay

Hybrid Building Services Pty Ltd (C2024/281)

DEPUTY PRESIDENT BOYCE

SYDNEY, 26 MARCH 2024

Variation of redundancy pay – whether other acceptable employment – whether employer cannot pay redundancy pay – application dismissed.

[1] On 16 January 2024, Hybrid Building Services Pty Ltd (**Hybrid**) filed an Application (under s.120 of the *Fair Work Act 2009* (**Act**)) with the Fair Work Commission (**Commission**) to reduce the amount of redundancy pay due (and payable) to its former award/agreement free employee, Mr Daniel Faludi (**Faludi**).

[2] Hybrid seeks that the redundancy pay to which Mr Faludi is entitled under s.119 of the Act, in the amount of \$39,999.97 (13 weeks' pay)¹, be reduced to 'zero' on the basis that Hybrid:

- a) obtained (and offered) Mr Faludi "other acceptable employment" with an associated entity of Hybrid, Nova Hardware Pty Ltd (**Nova**), which was rejected by Mr Faludi (s.120(1)(b)(i) of the Act); and/or
- b) cannot pay the redundancy pay due to Mr Faludi (s.120(1)(b)(ii) of the Act).

[3] Section 120 of the Act reads:

"120. Variation of redundancy pay for other employment or incapacity to pay

(1) This section applies if:

- (a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and
- (b) the employer:
 - (i) obtains other acceptable employment for the employee; or
 - (ii) cannot pay the amount.

(2) On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.

(3) The amount of redundancy pay to which the employee is entitled under section 119 is the reduced amount specified in the determination.

[4] Mr Faludi opposes the Application (including any reduction to his entitlement to redundancy pay).

[5] Hybrid bears the onus of satisfying the Commission that it meets the requirements of s.120(1)(b)(i) and/or (ii) of the Act.

[6] A hearing was conducted in this matter on 9 and 26 February 2024.² At the hearing, Mr *Luca Saccoccio*, Legal Practitioner Director, and Ms *Paryssa Cookesley*, Senior Adviser – Workplace Relations, Ai Group Workplace Lawyers, appeared for Hybrid. And Mr *Daniel Faludi*, appeared for himself, assisted by his wife, Mrs *Lana Faludi*.

[7] On the undisputed evidence, I make the following preliminary (including relevant jurisdictional) findings:

- a) Hybrid has standing to make the Application. It is a national system employer. It was at all relevant times Mr Faludi’s employer.
- b) Mr Faludi is entitled to be paid an amount of redundancy pay under s.119. Under the terms of s.119 of the Act (National Employment Standards), Mr Faludi became entitled to redundancy pay by Hybrid on and from his date of dismissal (14 December 2023) in the amount of \$39,999.97 (13 weeks) redundancy pay (in addition to any notice of termination provided).³
- c) None of the exclusions or limits set out under ss.121 or 123 of the Act apply.

Section 120 applications ultimately concern the exercise of a discretion

[8] The use of the word “may” in s.120(2) of the Act identifies that even if the requirements of s.120(1)(b)(i) and/or (ii) are satisfied, the Commission has a discretion as to whether an entitlement to redundancy pay is to be reduced, in whole or in part.

[9] In considering a similar provision to s.120 of the Act in the *Clothing Trades Award 1982*, a Full Bench of the Commission, in *Australian Chamber of Manufacturers and Derole Nominees*⁴, found that:

“The provision does no more than provide an avenue by which an employer may apply to the Commission to vary the obligation which otherwise would be imposed by the award. It does not follow from the terms of the clause that an employer coming within its scope will achieve necessarily full or partial relief. The level of relief, if any, to apply in a given case is a matter to be determined as an exercise of discretion in the circumstances of that case.”⁵

Applicable principles – other alternative employment

[10] Whether or not acceptable alternative employment has been obtained in the case of Mr Faludi is to be determined on the basis of the facts and evidence placed before the Commission.⁶

[11] As to the term “other acceptable employment”, Deputy President Sams in *Spotless Services Australia Limited*⁷ (**Spotless**) observed:

“[14] A number of principles may be distilled from these and other relevant authorities as to the principles to be applied by the Commission when considering an application under s 120 of the Act. These include, inter alia:

- a) the determination of what constitutes acceptable alternative employment is an objective exercise;
- b) mere rejection by the employee of alternative employment does not make it objectively unacceptable;
- c) comparable or equivalent pay and conditions, including hours of work and continuity of service are important and relevant considerations;
- d) to be acceptable, the new employment would need to take account of the employees’ skills, seniority, experience and capacity to perform the job;
- e) the location and additional travel times to and from work are a relevant consideration. For example, an offer of reemployment to another State would not ordinarily be found to be ‘acceptable employment’;
- f) ‘acceptable employment’ need not be identical employment and may still be considered acceptable, notwithstanding there might be additional inconvenience or a detrimental alteration to the terms and conditions of employment;
- g) employees should not unreasonably refuse offers of alternative employment merely because they wish to access the benefits of redundancy pay.”⁸

[12] Similarly, in *CGL-Retail Services v Carmen Chapman*⁹ (**Chapman**), Deputy President Anderson summarised the applicable principles to be applied when determining whether a role offered to a relevant employee is other acceptable employment:

“[48] This question [as to what is other acceptable employment] is to be determined objectively.¹⁰ That the applicant employer considered it so does not make it so, and vice versa. As noted by a full bench in *Australian Chamber of Manufacturers and Derole Nominees Pty Ltd*:¹¹

“What constitutes “acceptable alternative employment” is a matter to be determined, as we have said, on an objective basis. Alternative employment accepted by the employee (and its corollary, alternative employment acceptable

to the employee) cannot be an appropriate application of the words because that meaning would give an employee an unreasonable and uncontrollable opportunity to reject the new employment in order to receive redundancy pay; the exemption provision would be without practical effect.

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

[49] The onus of establishing that the alternative employment was acceptable rests with the applicant employer¹². It is a serious step for the Commission to make an order to limit or remove an employee’s statutory entitlement to redundancy payments.¹³

[50] In order to establish whether alternative employment obtained by the employer is acceptable, regard is to be had to the totality of the circumstances including (non-exhaustively) factors such as pay levels, hours of work, seniority, fringe benefits, workload, job security, location and travelling time.¹⁴ No one matter is determinative.¹⁵

[51] Acceptable employment does not mean identical employment; however, it has been held by the Commission that:

“...the objective test of acceptability appears to be that the alternative work bears a sufficient comparability to the original work and is not unreasonably removed from the employee’s original duties, skills set, qualifications, experience and other terms and conditions of employment. The test is not whether or not the employee is capable of carrying out the new employment as such, it is whether there is sufficient correlation between the relevant indicia of the current work and the alternative employment as proposed.”¹⁶

[52] Further, employees should not unreasonably refuse offers of alternative employment merely because they wish to access the benefits of redundancy pay.¹⁷

[53] If the Commission is satisfied that acceptable alternative employment has been obtained, a discretion then arises (but only then) to reduce all or some of the redundancy pay amount having regard to the relevant circumstances.^{18,19}

[13] In applying the principles set out in *Spotless* and *Chapman* in this decision, I note that they are consistent with the authorities referred to by Hybrid.²⁰

Determination – other alternative employment

[14] Hybrid’s submissions outline the background to the dispute between the parties from Hybrid’s perspective. In replicating these submissions, I underline the matters that give rise to contentions made by Hybrid that are either disputed by Mr Faludi, or warrant closer analysis by reference to the evidence:

- “6. On or about 14 December 2016, Mr Faludi commenced full-time employment with [Hybrid] in the position of Project Manager (**PM Role**).
7. At all material times, Mr Faludi’s employment was subject to the terms of an employment contract dated 28 November 2016 (TF-4 to the Statement of Todd Foster affirmed on 5 February 2024 (Foster Statement)) and the National Employment Standards.
8. Mr Faludi’s employment was not subject to an enterprise agreement or any modern award.
9. On or around 31 January 2023, Mr Foster, Managing Director of [Hybrid], advised Mr Faludi that [Hybrid’s] business was no longer viable, and over time during the period from January 2023 to May 2023 Mr Foster advised Mr Faludi that [Hybrid] would cease trading once all of its existing contracts have been completed. The date [Hybrid] would cease trading was unknown at this time.
10. On 2 June 2023, Mr Foster formally offered Mr Faludi employment with an associated entity, Nova Hardware Pty Ltd (**NH**). Mr Foster is also the Managing Director of NH (TF-2 to the Foster Statement). The position offered to Mr Faludi was Business Development Manager on a full-time basis (**BDM Role**). At this time, the date the Applicant would cease trading was predicted to be in or around July or August 2023. A letter of offer, contract and position description for the BDM Role was provided to Mr Faludi for his consideration (TF-6 to TF-9 to the Foster Statement).
11. In terms of the BDM Role:
- (a) it was a full-time role (identical to the PM Role);
 - (b) the working hours were between 8.30am and 5.00pm, Monday to Friday (identical to the PM Role);
 - (c) the role was based in Sydney, which is the same location as the PM Role or at least, not unreasonably distant given that both roles require attendance at construction sites in metropolitan Sydney and otherwise enable working from home arrangements (virtually identical to the PM Role);
 - (d) Mr Faludi would continue to report directly to Mr Foster (identical to the PM Role), which was an accommodation made to the BDM Role in order to support Mr Faludi and preserve the same level of seniority as the PM Role;
 - (e) the BDM Role was managerial in nature; like the PM Role and at a similar, if not the same level of seniority;
 - (f) NH agreed to recognise Mr Faludi’s years of service with the Applicant as well as all accrued leave entitlements;

(g) the remuneration was identical plus an incentive scheme available to BDMs being 1% of total sales (with budgets usually being a minimum of \$2.5 million per person, the typical incentive available upon achieving budget is approximately \$25,000);

(h) the vehicle allowance was identical;

(i) he retained the company issued mobile phone and laptop; and

(j) Mr Faludi's skills, qualifications and experience were easily transferrable to the BDM Role with minimal on-the-job training required (see paragraphs 9, 13-15, 29, 30 and 35-38 to the Foster Statement, TF-9 and TF-10).

12. On 6 June 2023, Mr Foster and Mr Faludi had a conversation to the effect that NH had a vacancy in a BDM role, Mr Foster considered Mr Faludi an ideal candidate, as did Mr Faludi. For example, Mr Foster stated words to the effect that he considered Mr Faludi had "*excellent skills for this role*", advised he would personally provide "*training and support for any areas you aren't yet confident on*", and Mr Faludi indicated "*I think I would be good at it too and have the right skills*" (Foster Statement, paragraph 29).

13. 9 June 2023, Mr Faludi declined the BDM Role for the following reasons:

(a) that it was not suitable alternative employment;

(b) that he has never been in sales/business development nor performed a similar role (this is contrary to what was represented in his Curriculum Vitae);

(c) the PM Role has nothing to do with sales and business development; and

(d) that he does not attain the skills and competence to perform the BDM Role (TF-11 to the Foster Statement).

14. On 18 June 2023, Mr Foster wrote to Mr Faludi advising that:

(a) Mr Faludi has the skills qualifications and experience to excel in the BDM Role with appropriate on the job training and guidance;

(b) Mr Faludi's personal attributes, business acumen, industry experience and technical expertise provides him with a sound springboard;

(c) Mr Faludi's experience as Project Manager to Tier 1 and Tier 2 building companies and his accompaniment of other business development managers and overall support of other business development managers served to highlight his skills and appropriateness for the BDM Role;

(d) Mr Faludi acknowledged [on 6 June 2023 in conversation with Mr Foster] that he had the appropriate skills and experience for the BDM Role i.e. that he also considered he "*would be good at it too*" and had "*the right skills*" for the role (Foster Statement, paragraph 29);

(e) NH would not have offered him the BDM Role if it did not think that he could perform the role as required;

(f) the probationary period clause in the BDM employment contract offer is void and has no effect; and

(g) Mr Faludi was put on notice that if he rejected NH's offer of employment his redundancy entitlement would be in jeopardy and accordingly, urged to reconsider his position (Mr Foster also made reference to this in conversation with Mr Faludi as set out by Mr Faludi in the email dated 9 June 2023) (TF-11 to the Foster Statement).

15. Between 5 July 2023 and 14 September 2023, the parties' legal representatives exchanged correspondence reiterating their positions (TF-13.1-13.6 to the Foster Statement). In Mr Faludi's case, the BDM Role was not acceptable employment for the reasons broadly set out in his 9 June 2023 email. In the Applicant's case, the BDM Role was other acceptable employment broadly for the reasons set out in the letter dated 18 June 2023 (Foster Statement, TF-12) and in TF-10 to the Foster Statement.

16. On 15 November 2023, the Applicant provided Mr Faludi with written notice of the termination of his employment due to the redundancy of the PM Role.

17. On 14 December 2023, Mr Faludi's employment ceased, and he was paid out his entitlements save for his NES redundancy entitlement.

18. As at the date of termination, Mr Faludi's notional redundancy entitlement was \$39,999.97, which is 13 weeks' pay based on being employed for seven years."²¹

[15] Hybrid's case is that whilst the BDM Role is different (or not identical) to the PM Role, the two roles are substantially similar, and their respective terms and conditions are no less favourable "overall". In making this contention, Hybrid relies upon:

- a) a table comparison of the two roles prepared by Mr Foster (**Role Comparison Table**)²²; and
- b) the evidence of Mr Foster concerning the types of duties and responsibilities that Mr Faludi was performing in the PM Role, that will continue to be performed in the BDM Role, and according to Mr Foster, combine to make Mr Faludi "the right person for the BDM role".²³

[16] At first blush, the Role Comparison Table appears to provide a neat comparison between the BDM and PM Roles. However, it became apparent during the hearing that the "skills and experience" aspects of the PM Role were not derived from, or based upon, an actual written job or position description for the PM Role.²⁴ Further, the position description for the BDM Role was drafted (or "prepared") on 2 June 2023,²⁵ being the date that Mr Foster first formally offered Mr Faludi the BDM Role.²⁶ In short, the Role Comparison Table is essentially a document put together by Mr Foster for the purposes of these proceedings. It is not a document that was ever provided to Mr Faludi prior to his dismissal on 14 December 2023, for example, for

consultation, input or information purposes. Indeed, to the extent that the Role Comparison Table is said by Mr Foster to reflect the duties, skills and experience of the PM Role, such duties, skills and experience were never discussed with Mr Faludi. Mr Faludi submits that the Role Comparison Table ought to be treated with significant caution, on the basis that it is a document drafted by Mr Foster to suit Hybrid's case to remove his redundancy pay entitlement.

[17] Of further note (and significance) is the fact that during the hearing it became clear that the Role Comparison Table identifies that the BDM Role requires the incumbent employee (in this case, Mr Faludi) to individually (or personally) meet a "minimum" \$2.5 million dollar budget each year in sales revenue. Mr Foster conceded that the issue of a budget or monetary target for the BDM Role was never brought to Mr Faludi's attention, or otherwise ever discussed with him, prior to his dismissal. Indeed, the requirement to meet a budget (of any amount) is not contained in the Offer of Redeployment made to Mr Faludi on 2 June 2023, the draft Contract of Employment for the BDM Role provided to Mr Faludi on 2 June 2023, or the Position Description for the BDM Role dated 2 June 2023.²⁷ This is in circumstances where Mr Foster makes the offer of the BDM Role to Mr Faludi on 2 June 2023 on the following express terms:

"On behalf of Nova Hardware Pty Ltd, I am pleased to offer you redeployment in the Full-Time position of Business Development Manager, on the terms and conditions set out in the attached offer of employment and position description."²⁸

[18] When I asked various questions of Mr Foster during the hearing as to the budget or monetary target for the BDM Role, his answers were both meandering and inconsistent. In this regard, Mr Foster:

- a) acknowledged that unlike the BDM Role, the PM Role carries no budget or monetary target;
- b) stated that it is the "expectation" that Mr Faludi, in the BDM Role, will meet a minimum \$2.5 million dollar budget each year in sales, but qualified this by stating:

"Well, we work with people and encourage them to get to 2.5. But if you get to 2 or 1.5, and we're on a development plan with you, and we can see growth, that's part of the growth that we need to be able to provide and execute as a business."
- c) accepted that the only mention of the BDM Role having to meet a minimum \$2.5 million dollar budget each year is contained in the Role Comparison Table prepared by him for the purposes of these proceedings (and not previously communicated or otherwise disclosed to Mr Faludi);
- d) does not recall if he ever mentioned to, or discussed with, Mr Faludi, the BDM Role having to meet a dollar budget or target each year, and could not point to any evidence that he did;
- e) suggested that the only outcome to Mr Faludi not meeting his budget or target in the BDM Role was that he would not receive an incentive payment, but

begrudgingly agreed that Mr Faludi would at least need to make sales that would cover his own salary;

- f) was unable to explain with any specificity (or in any meaningful sense) what Mr Faludi's initial or commencement budget in the BDM Role would be, by way of expectation, target, requirement, or otherwise; and
- g) was unclear as to the basis or foundation upon which Mr Faludi's budget or target would be derived from in terms of sales (if Mr Faludi commenced in the BDM Role), and instead of acknowledging that this was a result of his own evidentiary shortcomings, suggested that the reason for this was because Mr Faludi did not show an interest in the BDM Role so as to provide for an environment for relevant discussions in that regard to occur.²⁹

[19] In view of paragraphs [16] to [18] above, I make the following findings:

- a) when the BDM Role was offered to Mr Faludi in June 2023, there was no mention of an individual revenue or sales budget (let alone a minimum \$2.5 million dollar revenue or sales budget) attaching to the BDM Role. Nor was a sales or revenue budget attaching to the BDM Role ever mentioned or drawn to the attention of Mr Faludi by Hybrid's lawyers between June 2023, and his date of dismissal on 14 December 2023;³⁰
- b) the BDM Role offered to Mr Faludi on 2 June 2023, being the offer of alternative employment that is said by Hybrid to have remained open to Mr Faludi prior to his dismissal, was not or did not reflect the true BDM Role in that it omitted an essential term stipulating that Mr Faludi would need to meet an individual minimum revenue or sales budget;
- c) the BDM Role offered to Mr Faludi on 2 June 2023 was not capable of acceptance by Mr Faludi given that:
 - i. Mr Faludi, prior to the date of his dismissal, had no 'knowledge' of an individual revenue or sales budget attaching to the BDM Role; and
 - ii. acceptance by Mr Faludi of the BDM Role prior to his dismissal would not correspond with the terms of the 'actual' BDM Role being offered (containing an individual revenue or sales budget), i.e. the BDM Role offered to Mr Faludi prior to the date of his dismissal was on different terms to the actual BDM Role he would be performing (that required an individual revenue or sales budget be met);
- d) if Mr Faludi had accepted the BDM Role, he would have been misled by Hybrid (be that intentionally or unintentionally), in that the BDM Role offered to him with Nova (up to 14 December 2023) did not contain a term requiring an individual revenue or sales budget; and

- e) there is no basis on the evidence to suggest that the individual revenue or sales budget attaching to the BDM Role was simply an incentive payment arrangement. Rather, it was a core requirement of the BDM Role that the individual in that role meet an annual revenue or sales budget target.

[20] Putting aside the revenue or sales budget attaching to the BDM Role, I also make the following findings in response to Hybrid's contentions that the BDM Role was other acceptable employment in respect of Mr Faludi:

- a) unlike the BDM Role at Nova, Mr Faludi's position in the PM Role with Hybrid does not involve:
 - developing and growing Hybrid's overall business, with accountabilities for the expansion of overall business revenue and gross profits;
 - assisting with the development of marketing and sales policies;
 - developing reports for monthly sales meetings; or
 - managing and developing new project/distributor opportunities.³¹
- b) Mr Faludi's PM Role concerns the project management of glass and glazing projects for or on behalf of Hybrid on individual building, refurbishment or construction sites. The Nova business concerns the selling of door hardware products in a commercial or retail environment. There is no evidence that Mr Faludi holds any relevant experience in:
 - writing door hardware specifications;
 - dealing with door hardware suppliers or distributors;
 - selling door hardware products to anyone, let alone builders and developers; or
 - using Excel spreadsheets.³²
- c) Hybrid's position that:
 - i. Mr Faludi's skills and experience in the PM Role at Hybrid (on glass and glazing projects) readily transfer into the BDM Role at Nova (selling door hardware products in a commercial or retail environment); and
 - ii. to the extent that Mr Faludi has any skills and experience shortcomings, he can learn on the job, or he can be provided with appropriate support or training (or a development plan)³³ to overcome them,

is wholly unsupported on the evidence. Indeed, there is no evidence that Mr Faludi's asserted skills and experience shortcomings in respect of the BDM Role have ever been

the subject of assessment by Hybrid or Nova, and no evidence of the specific type of support or training (structured or unstructured) to be provided to Mr Faludi in the BDM Role, or the timeframe/s over which such support or training was to be provided.³⁴ In the facts and circumstances of this case, these matters are essential underpinnings to the BDM Role meeting the test of other acceptable employment, yet they are not set out or otherwise contained in Hybrid's evidence.³⁵

[21] In my view, the highest Hybrid's case gets is that Mr Faludi might theoretically be capable of undertaking the BDM Role, subject to undisclosed and unidentified on the job learning, and support and training. But this finding does no more than highlight that the PM Role and the BDM Role are substantially different roles. The reality, based upon the evidence before me, is that the BDM Role holds no genuine "*connection with the [Mr Faludi's] demonstrated skill and experience.*"³⁶ This is exemplified by:

- a) Hybrid's upfront acknowledgement that Mr Faludi will need support and training in the BDM Role (from the very beginning), and otherwise learn on the job;³⁷
- b) the requirement for Mr Faludi, in the BDM Role, to meet a "minimum" \$2.5 million dollar budget each year in sales revenue (being a requirement not applicable to the PM Role); and
- c) the findings that I have already made in paragraphs [19] and [20] of this decision.

[22] In the facts and circumstances of this case, I find that Mr Faludi was under no obligation to accept the BDM Role when it was offered to him in June 2023, or at any time prior to his last day of employment with Hybrid on 14 December 2023. This is not a case in which Hybrid has sought to redeploy Mr Faludi in accordance with its obligations under s.389(2) of the Act. Indeed, from the very beginning, this has never been a case where it can be said that it would have been "reasonable in all the circumstances" for Mr Faludi to have been redeployed into the BDM Role at Nova (being an associated enterprise to Hybrid). The fact that Hybrid has sought to characterise Mr Faludi's redeployment into the BDM Role as merely an expression of Hybrid's obligations under s.389(2) of the Act ought be condemned.³⁸

[23] Mr Foster's attempts to aggrandise Mr Faludi's skills and experience,³⁹ and essentially have Mr Faludi shoe-horned from the PM Role at Hybrid, into the BDM Role at Nova, are not supported by, or otherwise sustainable on, the objective facts in this case as they concern the issue of "other acceptable employment". Further, Hybrid's contention that any failure by it to fully appraise Mr Faludi of the complete terms of the BDM Role prior to his dismissal arises from Mr Faludi's failure to cooperate (or engage in further discussions) with Hybrid (including Mr Foster) must be rejected. This is especially so in circumstances where Hybrid had every opportunity, including through its lawyers, between June and December 2023, to appraise Mr Faludi of the complete terms of the BDM Role, but completely failed to do so. The requirement to fully appraise Mr Faludi of the complete terms of the BDM Role (including the meeting of an individual "minimum" \$2.5 million dollar budget each year in sales revenue) at all times rested with Hybrid. This requirement did not change simply because Mr Faludi rejected the BDM Role in June/July 2023 (or thereafter), and communications thereafter went "legal".⁴⁰

[24] In the ultimate sense, I find that Hybrid has not obtained, or did not obtain, other acceptable employment for Mr Faludi within the meaning of s.120(1)(b)(i) of the Act. I therefore dismiss Hybrid's case to the extent that it relies upon s.120(1)(b)(i) of the Act.

[25] I point out that even if I am wrong about the BDM Role not being other acceptable employment, based upon my findings at paragraph [19] of this decision, as a matter of discretion, I would not reduce (by any amount) the redundancy amount to which Mr Faludi is entitled to under s.119 of the Act. The BDM Role offered to Mr Faludi prior to his dismissal was not the same BDM Role that Mr Faludi would have been actually employed at Nova to undertake.

Applicable principles – employer cannot pay the redundancy pay amount

[26] In *Company P v DS*⁴¹, Commissioner Hampton (as he then was) helpfully summarised the following principles applicable to s.120 applications (which I apply in this case) based upon a “cannot pay” employer application:

“The provision means that the Commission “may” determine to reduce the amount of redundancy pay up to an amount of nil, indicating that the granting of full or partial relief from the obligation is an exercise of discretion in the circumstances of the case. The employer bears the onus of establishing that there are grounds justifying the exercise of the discretion.

The employer must satisfy the FWC that it is not financially competent or possessed of the necessary funds to make the payment, and has no reasonable source of funds.

The assessment of financial competence will include consideration of the financial standing of the business including its cash position and the assets of the business.

The effect upon the employees immediately concerned will be considered including whether making an order prevents the employee from recovering the entitlement through other means should the company be liquidated; the effect that any order may have on the status of employees as potential creditors should the company become insolvent; and the impact of any order on the employee's rights under the General Employee Entitlements and Redundancy Scheme (GEERS) or similar schemes.

The effect upon the continuation of the business, including whether reducing the entitlement of dismissed employees may have a beneficial effect on other employees, thereby enhancing their prospects of being able to remain in employment, are also relevant considerations.”⁴²

Determination – employer cannot pay the redundancy pay amount

[27] Hybrid and Nova are associated entities within the meaning of s.50AAA of the *Corporations Act 2001*. Mr Foster is the Director and Secretary of Hybrid. He is also the Managing Director and Secretary of Nova. As Managing Director of Nova, he also exercises functions as Managing Director of Hybrid.⁴³

[28] Mr Foster's evidence discloses that:

- a) in late 2022, or early 2023, he made the decision that Hybrid would gradually wind down and cease trading on a future date, i.e. cease trading between June and December 2023; and
- b) as part of this wind down, Hybrid would cease taking on new projects, and move to complete existing projects.

[29] Despite holding the positions of Managing Director and Secretary of Nova, and Director and Secretary of Hybrid, Mr Foster was unable to answer various financial questions in respect of both Hybrid and Nova that I put to him.⁴⁴

[30] Ms Nicola Ismail gave evidence on behalf of Hybrid, arising from her role of Chief Financial Officer for both Nova and Hybrid.⁴⁵ Her evidence was that:

- a) as at 31 December 2023, Hybrid still has around \$182,000 in outstanding receivable accounts;⁴⁶
- b) there is a practice of Nova providing loans (inter-company loans) to Hybrid without interest, without formal loan documentation (i.e. textbook transactions), and for such loans to be written off by Nova;⁴⁷
- c) if Hybrid is unable to pay for Mr Faludi's redundancy entitlements, Nova will pay such entitlements;⁴⁸
- d) despite the decision being made for Hybrid to wind down in late 2022 or early 2023, and Mr Faludi rejecting the offer of the BDM Role in June/July 2023, no provision has yet been made in Hybrid's accounts for Mr Faludi's redundancy entitlements, but that will occur;⁴⁹
- e) Hybrid does not currently have any employees, and there will thus be no impact upon any other employees if Mr Faludi's redundancy pay is reduced, or reduced to nil;⁵⁰ and
- f) the only impact upon Hybrid in having Mr Faludi's redundancy pay reduced, or reduced to nil, would be to free up money to pay other creditors of Hybrid, including the ATO and Nova.⁵¹

[31] On the basis of the evidence of Mr Foster and Ms Ishmail, I am not satisfied that:

- a) Hybrid is financially incompetent or unpossessed of the necessary funds to make payment to Mr Faludi of his redundancy entitlements (by reference to its outstanding accounts receivable);
- b) Hybrid has no reasonable source of funds to make payment to Mr Faludi of his redundancy entitlements, e.g. via a loan from Nova;

- c) any reduction of Mr Faludi’s redundancy entitlement would have a beneficial effect on other employees of Hybrid; and
- d) any reduction of Mr Faludi’s redundancy entitlement would have a beneficial effect upon the continuation of Hybrid’s business, i.e. given that it has intentionally chosen to wind down and cease trading over an extended time period.

[32] I find that Hybrid has not satisfied me that it “cannot pay” Mr Faludi’s redundancy entitlements. I dismiss Hybrid’s case to the extent that it relies upon s.120(1)(b)(ii) of the Act.

Conclusion

[33] I dismiss the Application filed by Hybrid in these proceedings on 16 January 2024 under s.120 of the Act. An order to this effect will be published contemporaneously with this decision.

[34] Given that I have dismissed Hybrid’s application, Mr Faludi’s entitlement to the sum of \$39,999.97 in redundancy pay became immediately due and payable on and from the date of his termination, i.e. 14 December 2023. An application made under s.120 of the Act does not stay (automatically or otherwise) an obligation to pay an amount to which an employee is entitled to under s.119 of the Act (as at the date of an employee’s termination, in this case, 14 December 2023). Nor does an application under s.120 of the Act somehow make an entitlement to redundancy pay under s.119 of the Act a “notional” entitlement pending the outcome of a s.120 application before the Commission. Whilst I am not aware that the Commission even has the power to stay an obligation to pay an amount to which an award/agreement free employee is entitled to under s.119 of the Act, no stay has ever been sought by Hybrid. It is equally unnecessary that I make an order for Hybrid to pay Mr Faludi his redundancy pay. Again, whilst I am not aware that the Commission even has the power to make an order for an employer to pay an amount to which an employee is entitled to under s.119 of the Act, an order is unnecessary in that Mr Faludi’s entitlement to redundancy pay arises automatically by force of statute (the Act), not by order of the Commission, with the enforcement of that entitlement (including as to interest and pecuniary penalties) a matter for a court of competent jurisdiction.



DEPUTY PRESIDENT

Appearances:

Mr Luca Saccoccio, Legal Practitioner Director, and *Ms Paryssa Cookesley*, Senior Adviser – Workplace Relations, Ai Group Workplace Lawyers, appeared for Hybrid Building Services Pty Ltd (Applicant).

Mr Daniel Faludi (Respondent), appeared for himself, supported by his wife, *Mrs Lana Faludi*.

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- ¹ See Item 7 (7 years but less than 8 years) of the Table under s.119(2) of the *Fair Work Act 2009*. Mr Daniel Faludi commenced employment with Hybrid Building Services Pty Ltd on 12 December 2016, and his employment ended on 14 December 2023, being a period of employment of 7 years and 2 days: Form F45A, dated 16 January 2024, at Items 1.1 and 1.3.
- ² An extended case management hearing was also conducted on 31 January 2024, to which transcript has been provided to the parties.
- ³ Hybrid's Submissions, 5 February 2024, at [42].
- ⁴ AIRC, Print J4144 (12 September 1990).
- ⁵ *Ibid*, page 2.
- ⁶ *UXC Connect v Moore* [2012] FWC 4296.
- ⁷ [2013] FWC 4484.
- ⁸ See also *Man to Man Pty Ltd T/A Man to Man v Dib Mekkaoui* [2016] FWC 97, at [24]; *The Australian Chamber of Manufacturers v Derole Nominees Pty Ltd* (1990) 140 IR 123, at 124; *Feltex Australia Pty Ltd v Textile, Clothing and Footwear Union of Australia* PR974699 (C2006/3262); *Clothing and Allied Trade Union of Australia v Hot Tuna Pty Ltd* (1988) 27 IR 226; *DRW Investments t/as Wettenhalls v Timothy Richards & Others* [2016] FWC 461.
- ⁹ [2023] FWC 1651.
- ¹⁰ *Oscar Group Services Pty Ltd v Lees* [2012] FWA 3901, at [18].
- ¹¹ (1990) 140 IR 123, [128] cited in *Spotless Services Australia Limited t/as Alliance Catering* [2016] FWC 4505.
- ¹² *Re Target Retail Agreement 2001*, PR916204, 4 April 2002, at 6.
- ¹³ *Clothing and Allied Trades Union v Hot Tuna* (1988) 27 IR 226.
- ¹⁴ *Re Clerks Salaried Staffs (Agriculture Award) 1999*, Print S1216, 24 November 1999.
- ¹⁵ *GCo Electrical Pty Ltd* [2018] FWC 4342.
- ¹⁶ *Von Bibra Robina Autovillage Pty Ltd* [2007] AIRC 397 (16 May 2007), at [26].
- ¹⁷ *UW v Tontine Fibres* [2007] AIRCFB 1016; *Spotless Services Australia Limited* [2013] FWC 4484.
- ¹⁸ *Re Clerks Salaried Staffs (Agriculture Award) 1999*, Print S1216.
- ¹⁹ *CGL-Retail Services v Carmen Chapman* [2023] FWC 1651, at [48]-[53]. See also *Sodexo Remote Sites Australia Pty Ltd* [2019] FWC 756, at [25]-[26], citing *Feltex Australia Pty Ltd v Textile, Clothing and Footwear Union of Australia* PR974699, at [89], and *Von Bibra Robina Autovillage Pty Ltd* [2007] AIRC 397 (16 May 2007), at [26].
- ²⁰ Hybrid's Submissions, 5 February 2024, at [38].
- ²¹ Hybrid's Submissions, 5 February 2024, at [6]-[18].
- ²² Foster Statement, 5 February 2024, at [39] and Annexure "TF-10".
- ²³ Hybrid's Submissions, 5 February 2024, at [53] and [56]. Foster Statement, 5 February 2024, at [10]-[17], [31]-[39].
- ²⁴ Transcript, PN248-PN256, and PN294-PN308.
- ²⁵ Foster Statement, 5 February 2024, Annexure "TF-9" (p.54 of the Foster Statement).
- ²⁶ *Ibid*, Annexure "TF-7" (p.47 of the Foster Statement).
- ²⁷ *Ibid*, Annexures "TF-7", "TF-8" and "TF-9" (pp.47-56 of the Foster Statement).
- ²⁸ *Ibid*, Annexures "TF-7" (p.47 of the Foster Statement).
- ²⁹ Transcript, PN571-PN599, PN783-PN784, PN788-PN815. The requirement for Mr Faludi to meet a minimum budget requirement appears nowhere in Annexures TF-6 to TF-9 to the Foster Statement.
- ³⁰ Foster Statement, 5 February 2024, Annexures "TF-11" to "TF-13.6" (pp.61-88 of the Foster Statement).
- ³¹ *Ibid*, Annexure "TF-9" (p.55 of the Foster Statement).
- ³² Transcript, PN1309.
- ³³ *Ibid*, PN588.
- ³⁴ Mr Foster is based in Melbourne, whilst Mr Faludi lives and works in Sydney. I do not accept that Mr Foster suggesting that he would fly from Melbourne to Sydney from time to time to support Mr Faludi in the BDM Role to be of any substance (or assistance) to Hybrid's case. (Transcript, PN599).

³⁵ Transcript, PN783-PN784, PN788-PN815.

³⁶ *Von Bibra Robina Autovillage Pty Ltd* [2007] AIRC 397 (16 May 2007). Transcript, PN919, PN925-PN928, PN932-PN941, PN954-PN955, PN1045-PN1049, PN1080, PN1007-PN1137, PN1141-PN1143, PN1214, PN1217, PN1226, PN1232, PN1236, PN1240, PN1245, PN1258, PN1311, PN1323, PN1332-PN1333, PN1339.

³⁷ I note that Mr Muscat had worked at Novas, and as a business development manager in the “door hardware selling industry”, prior to again rejoining Novas (second stint) in a BDM Role: Transcript: PN947-PN948.

³⁸ Foster Statement, 5 February 2024, Annexures “TF-11” to “TF-13.6” (pp.61-88 of the Foster Statement).

³⁹ Transcript, PN521, PN605, PN611, PN882.

⁴⁰ Foster Statement, 5 February 2024, Annexures “TF-11” to “TF-13.6” (pp.61-88 of the Foster Statement).

⁴¹ [\[2014\] FWC 4673](#).

⁴² *Ibid*, at [33]. As stated by Cirkovic C in *Coal River Farm Investments Pty Ltd T/A Coal River Farm* [\[2020\] FWC 3558](#) (at footnote 27), “although collated in this decision, these principles have been referred to and relied on in a variety of decisions before the Commission”.

⁴³ Foster Statement, 5 February 2024, at [1]-[4] and [6].

⁴⁴ Transcript, PN523-PN539.

⁴⁵ Ismail Statement, 5 February 2024, at [1]-[14], Transcript, PN697.

⁴⁶ Transcript, PN674. Note “aged payables summary” document tendered into evidence shows aged invoice payables at \$141,896.49.

⁴⁷ Transcript, PN687-PN688, and PN710-PN711.

⁴⁸ *Ibid*, PN689.

⁴⁹ *Ibid*, PN707-PN708.

⁵⁰ *Ibid*, PN713-PN714.

⁵¹ *Ibid*, PN714-PN715.