



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Paul Edwards

v

Inspired Building Pty Ltd
(U2025/8718)

DEPUTY PRESIDENT LAKE

BRISBANE, 3 OCTOBER 2025

Application for an unfair dismissal remedy – genuine redundancy – consultation requirements under the Award not complied with – dismissal unfair and harsh – compensation ordered

[1] Mr Paul Edwards (the **Applicant**) made an application to the Fair Work Commission (the **Commission**) seeking a remedy pursuant to s.394 of the *Fair Work Act 2009* (the **Act**), stating that he was unfairly dismissed from his employment with Inspired Building Pty Ltd (the **Respondent**) on 20 May 2025.

[2] A conciliation was held on 24 July 2025 and the matter was not resolved. The matter was listed for a hearing on 11 August 2025. The Applicant and Respondent were self-represented. The Respondent was represented by its director, Mr Julian Wall.

[3] Section 396 of the Act requires satisfaction of four matters before considering the merits. I am satisfied that the Applicant made his application within the 21-day period required by s.394(2) of the Act and earned less than the high-income threshold. The Respondent raised a jurisdictional objection that the Applicant was made genuinely redundant. The jurisdictional objection will be considered before determining the merits of the matter.

Background

[4] The Respondent's enterprise is a construction business, dependent on gaining new contracts. The Applicant worked for the Respondent as a Supervisor for 8 years and 7 months.

[5] The Applicant went on leave Fiji in the end of April 2025. The Applicant stated that prior to commencing his leave, he had been working on a major contract which had been running for two years. He knew that that project was coming to an end. The Applicant asked one of the directors of the Respondent company, Mr Josh Macaulay, on 29 April 2025 whether there would be a job for him to return to. Mr Macaulay reportedly advised that there would be.

[6] The Respondent had been expecting to commence a new contract working on a childcare centre. However, in the week when the Applicant was dismissed, the Respondent found out that a new contract had fallen through

[7] On 2 May 2025, the Applicant was informed over the phone, after returning from annual leave, by Mr Macaulay, that the company had gone bankrupt and would be entering into liquidation. He was advised to contact the Fair Entitlements Guarantee (FEG) scheme for payment in lieu of notice. The following week, the Applicant contacted FEG and was advised that he would need a formal notice of his redundancy.

[8] On 14 May 2025, the Applicant received an email from the Respondent as follows:

Dear Team,

It is with great regret that we inform you that Inspired Building will enter liquidation in the coming weeks. As a result, the company will permanently cease trading, and all employment positions will be made redundant.

This means your employment with Inspired will end on the 29/4/2025.

What This Means for You

Due to the liquidation process:

Your employment is being terminated on the grounds of redundancy.

The company is no longer able to continue paying wages or operating as a going concern

An external liquidator will be appointed to manage the affairs, assets, and obligations of the business.

Final Pay and Entitlements

During liquidation, employee entitlements are given priority under the Fair Entitlements Guarantee (FEG) scheme, which may cover:

- Unpaid wages (up to 13 weeks)
- Accrued annual leave
- Long service leave (if applicable)
- Redundancy pay
- Payment in lieu of notice

The liquidator will communicate directly with you regarding your specific entitlements and how to lodge a FEG claim if the company cannot pay them directly.

We understand this news will cause stress and uncertainty, and we want to assure you that we will work with the liquidator to assist in providing any required documentation, references, or support for transition.

What You Should Do

- You are not required to report to work unless otherwise advised.
- You will receive further information from the appointed liquidator, including how to claim any outstanding entitlements.
- If you need a statement of service or assistance in seeking new employment, please contact myself or Josh

We thank you sincerely for your service, loyalty, and hard work. We are truly sorry for the impact this has on you and your families and wish you all the very best for what comes next.

[9] Despite the Respondent's advice that the company would be going into liquidation imminently, it appears from ASIC records, at the time of this decision, the Respondent is not in liquidation. Mr Wall explained in the hearing that the liquidation process has been delayed by negotiations with a client of the business. That client holds a security interest over property owned personally by the company directors. Mr Wall advised during the hearing that the Respondent is insolvent.

[10] I note the Applicant was not paid his notice in lieu of termination. I am satisfied that the Respondent was a small business less than 15 employees at the time of termination.

[11] The Applicant alleged that two other employees who had also been made redundant were now working for a related entity of the Respondent. I directed Mr Wall to advise of the name of this entity. Mr Wall advised of the existence of a company of which his wife is a director. I have informed myself of the relevant ASIC records under s.590 of the Act showing that the Mr Wall is the sole shareholder of that company. That company is a plastering business, which Mr Wall argued is materially different to the Respondent's enterprise.

Is there a genuine redundancy under s.389(1) of the Act?

[12] Under s.396 of the Act, I am required to consider whether the redundancy was a genuine redundancy before considering the merits of the application.

[13] The requirements of genuine redundancy prescribed under s.389 of the Act are:

1. The role was no longer required to be performed by anyone because of operational requirements of the employer's enterprise.¹
2. Consultation if prescribed under Enterprise Agreement or applicable Award.²
3. Offer of redeployment if it was reasonable in all the circumstances.³

1. Did the Applicant's employer no longer require the Applicant's job to be performed by anyone because of operational requirements of the employer's enterprise?

[14] In *Helensburgh Coal Pty Ltd v Bartley & Ors* [2025] HCA 29 ('*Helensburgh*'), the majority of the High Court held as follows:

[30] Section 389(1) of the FW Act defines "genuine redundancy". Unless that provision is satisfied, s 389(2) is not reached. Although there was no dispute that s 389(1)(a) and (b) was satisfied in this case, it is necessary to say something further about s 389(1)(a). It is a factual inquiry about what happened. The first part of s 389(1)(a) turns on the existence of a decision in fact made by an employer. It is the employer's decision to no longer require a person's job to be performed by anyone. The provision does not look to whether the employee's position, in terms of job title, was no longer required, but whether their "job", in the sense of the nature of the work they performed, was no longer required. Section 389(1) refers to a decision by the employer and no one else.

[31] The second part of s 389(1)(a) provides that the job must have ceased to be needed "because of changes in the operational requirements of the employer's enterprise". An employer determines what those changes might be or if they are needed. There is no reasonableness inquiry in s 389(1).

Therefore, the fact that the employer, due to changes in operational requirements, no longer required the work to be performed by anyone need not have been reasonable.

(citations omitted, emphasis added)

[15] In *Ulan Coal Mines Limited v Howarth and others* [2010] FWAFB 3488 at [17], the Full Bench considered redundancy where the job as a collection of “functions, duties and responsibilities” becomes no longer required.

“It is noted that the reference in the statutory expression is to a person’s “job” no longer being required to be performed. As Ryan J observed in *Jones v Department of Energy and Minerals* (1995) 60 IR 304 a job involves “a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employees’ organisation, to a particular employee” (at p. 308). His Honour in that case considered a set of circumstances where an employer might rearrange the organisational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions. In these circumstances, it was said that:

‘What is critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organisation, any duties left to discharge. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant...’ (at p.308)”

This does not mean that if any aspect of the employee’s duties is still to be performed by somebody, he or she cannot be redundant (see *Dibb v Commissioner of Taxation* (2004) FCR 388 at 404-405). The examples given in the Explanatory Memorandum illustrate circumstances where tasks and duties of a particular employee continue to be performed by other employees but nevertheless the “job” of that employee no longer exists.

[16] I accept Mr Wall’s evidence that the Respondent is insolvent and is no longer performing any construction work. The Applicant’s position is no longer required. The company is, however, still registered as there is an ongoing defects liability period and security interests over the directors’ property.

[17] I appreciate that the decision to make employees redundant, in this case, appears to be out of financial necessity. However, regardless of whether the decision was one made out of financial imperative, it is still a decision which the Respondent made.

[18] I consider that the decision to make the Applicant’s position redundant was one based on operational requirements. It was made on the Respondent’s directors’ assessment of the current financial state of the business, noting there were no new major projects on the horizon. The High Court was clear in *Helensburgh* that s.389(1)(a) is not subject to a reasonableness enquiry. It is not the role of the Commission to determine whether the choice to make the roles redundant was reasonable. Instead, I must be satisfied that operational requirements existed. I am satisfied the redundancy of the Applicant’s position was based on operation requirements.

2. Did the Respondent comply with any obligations in a modern award or enterprise agreement that applied to the employment to consult about redundancy?

[19] The Applicant was covered by the *Construction Building and Construction Award*. Clause 37 of the Award provides:

37. Consultation about major workplace change

37.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

- (a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and
- (b) discuss with affected employees and their representatives (if any):
 - (i) the introduction of the changes; and
 - (ii) their likely effect on employees; and
 - (iii) measures to avoid or reduce the adverse effects of the changes on employees; and
- (c) commence discussions as soon as practicable after a definite decision has been made.

37.2 For the purposes of the discussion under clause 37.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

- (a) their nature; and
- (b) their expected effect on employees; and
- (c) any other matters likely to affect employees.

37.3 Clause 37.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

37.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 37.1(b).

37.5 In clause 37 significant effects, on employees, includes any of the following:

- (a) termination of employment; or
- (b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or
- (c) loss of, or reduction in, job or promotion opportunities; or
- (d) loss of, or reduction in, job tenure; or
- (e) alteration of hours of work; or
- (f) the need for employees to be retrained or transferred to other work or locations; or
- (g) job restructuring.

37.6 Where this award makes provision for alteration of any of the matters defined at clause 37.5, such alteration is taken not to have significant effect.

[20] In *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511, the Full Court of the Federal Court found that the words “definite decision” in relation to a consultation obligation include both a proactive decision and include a decision made out of financial necessity:

The respondent's works manager informed the appellant "that the respondent would have to let him go because the respondent was experiencing a downturn in trade". In my opinion the respondent had made a "definite decision" that it "no longer [wished] the job ... done by anyone ... ". It is not to the point that, before making that decision, the respondent "wished" that it was not experiencing a downturn in trade and wished that it did not have to let the appellant go because of that downturn in trade. It plainly no longer required the job done and the reason for that decision was that, as a result of the downturn in trade, "we just have not got it to be done".

The "definite decision" to which the subclause refers is a "decision that the employer no longer wishes the job ... done by anyone ... ". In my opinion the words "employer no longer wishes" mean that the employer no longer "wants" or "requires" or "desires" the job done. That wish is formed after considering the matter and making a definite decision as to what it "wishes". The word "wishes" in the subclause is not referring to the "wish" of the employer that it had sufficient orders so that it would not "have to let him [the employee] go".⁴

[21] In this matter, the Respondent made a definite decision to change the composition of its workforce and cease trading as a going concern, as a result of financial difficulties, including a risk of insolvency. Though that may not have been the desired outcome of the Respondent, it is the decision which was made.

[22] Mr Wall advised in his response to the Form F3 that the Applicant did not answer the phone prior to 2 May 2025 and so the Respondent was not able to advise him of the redundancy prior to his dismissal. I note the Applicant was on annual leave, and in Fiji, in the period before 2 May 2025 so I do not consider that he should have answered the phone.

[23] I am not satisfied that the Applicant was consulted about the changes to the business. He was not advised, prior to his position being made redundant, that redundancy was a likely possibility. Further, even if the Applicant was generally aware of the business's financial difficulties, this does not meet the requirements of consultation. “Consultation” was defined by the Full Bench in *Consultation clause in Modern Awards* [\[2013\] FWCFB 10165](#) to mean:

[30] The word “consult” means more than the mere exchange of information. As Young J said in *Dixon v Roy*:

“The word ‘consult’ means more than one party telling another party what it is that he or she is going to do. The word involves at the very least the giving of information by one party, the response to that information by the other party, and the consideration by the first party of that response. [citations omitted]”

[31] The right to be consulted is a substantive right, it is not to be treated perfunctorily or as a mere formality. Inherent in the obligation to consult is the requirement to provide a genuine opportunity for the affected party to express a view about a proposed change in order to seek to persuade the decision maker to adopt a different course of action. As Logan J observed in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited (QR)*:

“ ... A key element of that content [of an obligation to consult] is that the party to be consulted be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon. Another is that while the word always carries with it a consequential requirement for the affording of a meaningful opportunity to that party to present those views. What will constitute such an opportunity will vary according the

nature and circumstances of the case. In other words, what will amount to ‘consultation’ has about it an inherent flexibility. Finally, a right to be consulted, though a valuable right, is not a right of veto.

To elaborate further on the ordinary meaning and import of a requirement to ‘consult’ may be to create an impression that it admits of difficulties of interpretation and understanding. It does not. Everything that it carries with it might be summed up in this way. There is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, ‘this is what is going to be done’ and saying to that person ‘I’m thinking of doing this; what have you got to say about that?’. Only in the latter case is there ‘consultation. ...’”

[32] We respectfully adopt his Honour's observations. Similar to the obligation to accord a person procedural fairness, the precise content of an obligation to consult will depend on the context. The extent and significance of a proposed change, in terms of its impact on the affected employees, will have a bearing on the extent of the opportunity to be provided. Hence a change of limited duration to meet unexpected circumstances may mean that the opportunity for affected employees to express their views may be more limited than would be the case in circumstances where the proposed change is significant and permanent. It is also relevant to note that while the right to be consulted is a substantive right, it does not confer a power of veto. Consultation does not amount to joint decision making.

(Citations omitted)

[24] As the Applicant was not informed that it was likely that the business would stop trading prior to being made redundant, I consider that the obligations under the Award have not been discharged. Therefore, in accordance with s.389, the Applicant’s redundancy was not a genuine redundancy. Having found that the Applicant was not made genuinely redundant, it is not strictly necessary for me to consider whether it would have been reasonable for the Applicant to be redeployed within the employer’s enterprise. However, for completeness, I will consider it below.

3. Was it reasonable in all the circumstances for the person to be redeployed within, (a) the employer’s enterprise; or (b) the enterprise of an associated entity of the employer?

[25] In *Helensburgh Coal Pty Ltd v Bartley & Ors* [2025] HCA 29, the majority of the High Court held as follows:

[32] Section 389(2) then provides a protection for the dismissed employee and provides that protection by posing a "counter-factual". It provides that notwithstanding that the employer no longer required the dismissed employee's job, namely their work or their duties, to be performed by anyone because of changes in the operational requirements of the employer's enterprise, the person's dismissal was nonetheless not a case of genuine redundancy "if it would have been reasonable in all the circumstances for the person to be redeployed within ... the employer's enterprise" (emphasis added).

[33] Unlike s 389(1), s 389(2) is qualified by a requirement of reasonableness. A person's dismissal was not a case of genuine redundancy "if it would have been reasonable in all the circumstances for the person to be redeployed". The language is broad.

[34] Nonetheless, the range of the inquiry permitted by s 389(2) is limited in the sense that the inquiry is in respect of the employer's (or an associated entity's) "enterprise" and that the redeployment of the person must have been reasonable "in all the circumstances"...

[26] When considering whether it would have been reasonable to redeploy the Applicant within the employer's enterprise, the Commission may consider any associated entities of the Respondent.

[27] Section 50AAA of the *Corporations Act 2001* (Cth) defines "associated entity". An entity, in this case, Mr Wall's wife's company, is an *associate* of another entity, the Respondent, the *principal*, in the following circumstances:

1. The associate and the principal are related bodies corporate.
2. The principal controls the associate
3. The associate controls the principal and the operations, resources or affairs of the principal are material to the associate.
4. The associate has a qualifying investment in the principal, the associate has significant influence over the principal; and the interest is material to the associate.
5. The principal has a qualifying investment in the associate, the principal has significant influence over the associate; and the interest is material to the principal
6. An entity (the third entity) controls both the principal and the associate and the operations, resources or affairs of the principal and the associate are both material to the third entity.

[28] The first through to fifth circumstances are not applicable on the evidence before me. In relation to the sixth circumstance, I note that for the purposes of s.50AAA, an entity can be a natural person such as Mr Wall.⁵ I note that Mr Wall is the sole shareholder of his wife's company. He owns 50% of the shares in the Respondent, with the other 50% being owned by other director, Mr Macaulay. On the evidence before me, it appears that Mr Wall does not have a controlling shareholding in the Respondent. In relation to whether he exerts practical control over the company, there is limited evidence before me. It appears that the decisions are made by both directors, including the decision to make employees redundant. On the evidence before me, I am unable to conclude Mr Wall's wife's company is an associated entity of the Respondent. I am unable to conclude that there was another associated entity into which the Applicant could have redeployed.

[29] I note that even if I were satisfied that Mr Wall's wife's company is an associated entity, it may not have been reasonable to redeploy the Applicant into a role in that company given the roles available in that business as it would involve essentially a demotion for the Applicant, who had been in the role of Supervisor for many years.

[30] As I have found that the Applicant's dismissal was not a case of genuine redundancy, it is therefore necessary for me to consider the merits of the application and determine whether the dismissal was harsh, unjust or unreasonable.

Was the dismissal harsh, unjust or unreasonable?

[31] Section 387 of the Act provides the criteria and considerations the Commission must take into account when deciding if the dismissal was harsh, unjust or unreasonable. As required by the Act, I consider the following:

(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);

[32] A valid reason for dismissal should be “sound, defensible or well founded” and should not be “capricious, fanciful, spiteful or prejudiced.”⁶ As summarised by Deputy President Asbury in *Smith v Bank of Queensland Ltd* a “dismissal must be a justifiable response to the relevant conduct or issue of capacity”.⁷ The Commission must consider the entire factual matrix in determining whether an employee’s termination was for a valid reason.⁸

[33] The Applicant states that prior to being terminated, he was offered work on a different job site, with a different employer, for cash, as there was no other work available. The Applicant was not comfortable with that arrangement and did not accept the other work. The Applicant submits that the dismissal was unfair primarily because of the manner in which he was informed of the dismissal. He notes that he had no disciplinary record prior to being terminated.

[34] I find that the reason for the Applicant’s dismissal was because the Respondent no longer required the Applicant’s role to be performed by anyone. I find this to be a neutral factor, as the reason for dismissal did not relate to any issue of conduct or capacity.

(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

[35] There was no reason for the dismissal which related to the Applicant’s capacity or conduct and therefore the Applicant was not notified of any such reason. Accordingly, I find this to be a neutral factor. I have considered the lack of consultation about the redundancy as a relevant factor under s.387(h).

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal; and

[36] There was no unreasonable refusal by the employer to allow the Applicant to have a support person.

[37] This factor is a neutral consideration.

(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

[38] The Applicant was not terminated for unsatisfactory performance.

[39] This weighs neutrally.

(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

[40] Although the Respondent is a small business, no submissions were made to suggest this impacted on the procedures which were followed in effecting the dismissal. This is a neutral factor.

(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

[41] The Respondent did not submit that the absence of dedicated human resources staff had an impact on the procedures followed. This is a neutral factor.

(h) any other matters that the FWC considers relevant.

[42] Further, while a failure to consult in accordance with the relevant Award does not automatically lead to a finding that the dismissal was unfair, it is a factor which may weigh in favour of a finding of unfairness.⁹ The sudden nature of the dismissal, with the Applicant having no notice that his job may have been at risk, weighs in favour of a finding of unfairness. I note the Applicant had been employed with the Respondent for many years. The decision not to at least inform the Applicant that his job may no longer be required prior to dismissing him, weighs in favour of a finding of harshness.

[43] I note the Applicant was also not paid his statutory notice entitlement and was advised to make a claim with FEG for those amounts.

[44] In these circumstances, had the consultation requirements been complied with, including a notice of the change and consultation, I find that the Applicant would have remained employed with the Respondent for no more than two weeks. Given the lack of new projects, it is unlikely that consultation would have changed the outcome.

Conclusion on merits

[45] I find that the dismissal was harsh and unfair. Although I am satisfied that the business was experiencing financial difficulty which led to the decision to make the Applicant's position redundant, the manner in which dismissal was effected was very flawed. The Applicant was provided with no notice of the impending change, despite his many years of service with the company, his dismissal was sudden, and he was not paid his statutory entitlement to notice under s.117 of the Act.

Remedy

[46] Given that I have found that the Applicant's dismissal was unfair, it is necessary to consider the question of remedy.

[47] The Applicant has requested that compensation be granted. Given the Respondent is no longer trading, I am satisfied that reinstatement would not be appropriate.

[48] Pursuant to section 390 of the Act, this Commission may order:

“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."

[49] Section 392 sets out the considerations for awarding 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.”

[50] The established approach to assessing compensation in unfair dismissal cases was set out in *Sprigg v Paul Licensed Festival Supermarket*,¹⁰ and has been applied and developed by Full Benches of the Commission.¹¹

[51] The assessment of compensation involves a four-step process. however, this is not a substitute for the words in the Act:

“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). I am also required to consider the length of service with the employer¹² and the ability to find a new role as a relevant factor in calculating compensation per s392(2).

Step 2: Deduct monies earned since termination.¹³

Step 3: Discount the remaining amount for contingencies.¹⁴

Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount they would have received if they had continued in their employment.”

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).

[52] The Applicant was employed with the Respondent for 8 years and 7 months.

[53] However, as I have found above, had the consultation requirements been complied with, the Applicant would have remained employed with the Respondent for no more than two further weeks.

[54] I find that the Applicant would have earned two further weeks' pay at \$2,859.61 per week¹⁵ had he remained employed with the Respondent for another week.

Step 2: Deduct monies earned since termination.

[55] I make no deductions for any failure by the Applicant to mitigate his losses in the two weeks following his termination.

Step 3: Discount the remaining amount for contingencies.

[56] The Applicant was not dismissed as a result of any conduct he engaged in and I make no deduction 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.”

[57] In *Bowden v Ottrey Homes Cobram and District Retirement Villages*,¹⁶ the Full Bench noted that in relation to the fourth step, the usual practice is to settle a gross amount and leave taxation for determination. I will leave the issue of taxation for determination by the Respondent.

Viability

[58] I note there is a live issue of the Respondent's financial viability. However, the Respondent is not yet wound up. To address the issue of viability, I will hear an application from the Respondent for the amount to be paid in instalments.

[59] In addition to the Applicant's compensation for unfair dismissal, I am also concerned that his notice in lieu of termination has not been paid, and the company has still not been wound up. The Respondent has chosen to rely on FEG to pay employees' notice. However, FEG cannot pay the Applicant until the company is wound up. Notice of termination is a statutory entitlement under s.117 of the National Employment Standards (NES). Breach of an NES provision can attract pecuniary penalties for an employer. In addition to payment of the compensation awarded in this decision, the Respondent should immediately attend to payment of the notice owing to the Applicant. If that amount is not paid, the Applicant may have a claim for civil penalties.

[60] The Respondent is ordered to pay the sum of two weeks' pay at \$2,859.61 per week plus superannuation within 21 days upon issuing this Order to the Applicant's nominated bank account that was on payroll.

[61] I Order accordingly.



Appearances:

P Edwards for himself as the Applicant

J Wall for Inspired Building Pty Ltd

Hearing details:

11 August 2025

Hearing via Microsoft Teams

Brisbane

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¹ *Fair Work Act 2009* (Cth) s 389(1)(a).

² *Ibid* s389(1)(b)

³ *Ibid* s389(2)(a)-(b).

⁴ *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 515

⁵ See s 64A *Corporations Act 2001* (Cth)

⁶ *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.

⁷ [\[2021\] FWC 4](#) at 118.

⁸ *Commonwealth of Australia (Australian Taxation Office) t/a Australian Taxation Office v Shamir* [\[2016\] FWCFCB 4185](#), [46], citing *Allied Express Transport Pty Ltd v Anderson* (1998) 81 IR 410, 413.

⁹ *English v Tee Ink Pty Ltd* [\[2023\] FWC 2805](#) at [72], citing *Gomes v OE & DR Pope Pty Ltd T/A Pope Packaging* at [58].
¹⁰ (1998) 88 IR 21.

¹¹ *Bank of Sydney Ltd T/A Bank of Sydney v Repici* [\[2015\] FWCFCB 7939](#).

¹² *Fair Work Act 2009* (Cth) s392(2)(b) -(c) and s392(2)(g).

¹³ *Ibid* s392(2)(e).

¹⁴ *Ibid* s392(2)(a), (d) and (f).

¹⁵ Form F3 item 1.5

¹⁶ [\[2013\] FWCFCB 431](#)