DECISION

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

Robert John Wilson
v
Care Park Pty Ltd
(U2025/10842)

DEPUTY PRESIDENT MASSON MELBOURNE, 2 DECEMBER 2025

Application for an unfair dismissal remedy – whether Applicant abandoned his employment - no valid reason for dismissal - denied procedural fairness - termination found to be harsh, unjust, unreasonable and thereby unfair – reinstatement not appropriate - compensation ordered.

Introduction

[1] This decision concerns an application made by Mr Robert John Wilson (the Applicant) for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009* Cth (the Act). The Applicant was employed by Care Park Pty Ltd (the Respondent) and was found in an earlier decision[1] (the Preliminary Decision) to have been dismissed on 5 June 2025. The unfair dismissal application was lodged by the Applicant on 26 June 2025.

[2] The matter was listed for determinative conference before me on 1 December 2025 to deal with the merits of the application. Both parties filed material in advance of the hearing in accordance with directions issued. The Applicant appeared and gave evidence and was represented by Mr Darien Williams of the Tasmanian Aboriginal Legal Service, who was granted permission to appear pursuant to s 596 (2) of the Act. Ms Victoria Kordalis, Human Resources Director, appeared on behalf of the Respondent.

Background and evidence

[3] The Applicant was born in Wilcannia, NSW in 1955 and has worked consistently since he left school at the age of 15. He moved to Tasmania in 1987 where he continued to work for the Commonwealth Employment Service as an Aboriginal Field Officer before changing his occupation to take up a role as a Disability Support Worker in 2017[2]. The Applicant accepted a Letter of Offer[3] and commenced employment with the Respondent as a Parking Patrol Officer on 15 January 2024. He was engaged to work in Launceston, Tasmania on a permanent full-time basis, received a weekly wage rate of $902.88 and was covered by the *Car Parking Award 2020*[4].

[4] On 15 November 2024, the Applicant was injured at work when hit by a motor vehicle in the carpark at York Town Square in Launceston while issuing a parking ticket. He called the police who attended, before going to hospital. On examination, no fractures were identified although a torn meniscus in his left knee was subsequently found. The Applicant completed an Accident/Incident Report Form[5], made a workers compensation claim[6] and started receiving workers compensation payments shortly after the incident. A number of Certificates of Capacity[7] were submitted by the Applicant between 22 November 2024 and 31 January 2025 which indicated he had no current capacity to perform any work.

[5] Arising from the incident on 15 November 2024 during which he was injured, the Applicant was issued with a Police Infringement Notice[8] for causing a traffic hazard as a pedestrian on 30 December 2024. He elected to have the infringement notice heard in the Launceston Magistrates Court for which he received a Summons[9] dated 16 April 2025 to appear in court on 23 June 2025. The Applicant prepared and submitted a Statutory Declaration[10] through his lawyer to the police prosecution.

[6] The Respondent submits that in early January 2025, Ms Julie Norden-Wilson (the Applicant's wife) contacted Kaidan Gibson for the Respondent and represented that the Applicant was unfit to return to work. The note of the telephone conversation records Ms Norden-Willson as having said that the Applicant was suffering from severe memory loss, had been soiling himself, was regularly forgetting who he is, urinated in the corner of their room thinking it was a toilet, was becoming very aggressive, had dementia and that she didn't feel safe with him driving the car as he forgets what he is doing[11].

[7] Mr Norden-Wilson disputed the comments attributed to her. Her recollection is that she spoke to Sarah Gibson rather than Kaidan Gibson. She rejected having said that the Applicant had been aggressive or soiling himself but did recall saying words to the effect of;

- Robert is forgetting things.
- I am doing the driving as I believe that is safer.
- He urinated in the corner of our room because he couldn't find the toilet.
- He is having mood swings.
- We plan to go to the doctor to see if Robert has dementia.[12]

[8] Ms Norden-Wilson explained that she observed the Applicant's behaviour change following the accident in November 2024, but this improved after 26 February 2025 when he stopped taking medication prescribed to assist with his poor sleeping. She states that his memory and mood subsequently improved, and he resumed driving. She also notes that the Applicant subsequently saw a doctor who did not hold any concerns that he had dementia[13].

[9] On 11 February 2025, the Applicant received a letter[14] from the Respondent's lawyers in which he was advised that the Respondent disputed liability for his weekly workers compensation payments and had elected to proceed to a hearing under s 81A of the *Workers Compensation and Rehabilitation Act 1998*. Following a hearing before the Tasmanian Civil & Administrative Tribunal (TASCAT), Senior Member L Jack issued an Order[15] (the TASCAT Order) on 26 February 2025, finding there was a reasonably arguable case for the Respondent to dispute liability and ordered that no weekly compensation be paid to the Applicant.

[10] The Applicant states he expected the Respondent to contact him following the cessation of his workers compensation payments on 26 February 2025 to discuss his wellbeing and the 'way forward' but no contact was made. Having received no contact, he sent an email to the Respondent's General Manager SA/Tas, Ms Catherine Foster, on 6 March 2025 seeking clarification on the status of his employment. He specifically requested confirmation in writing on whether he had ceased to be employed. The email stated as follows;

> "Dear Catherine,
>
> I have had no correspondence from you since the tribunal on 26th February 2025 confirming if I am/am not still an employee of Care Park since my claim for compensation has been stopped on the grounds of false claim, which I am still adamantly insisting it was factually correct on my count.
>
> If I am no longer an employee of Care Park P/L I would like confirmation of this in writing and would like also to request that any unpaid annual leave entitlements of 58.28 hours be paid into my account.
>
> Assuming I no longer work for the company, I will return all keys/passes that I have of Care Park at my earliest convenience.
>
> Regards,
>
> Bobby"[16]

[11] Ms Catherine Foster responded in the following terms;

> "Good afternoon Bobby
> Care Park acknowledge the status of the tribunal.
> Concerning your annual leave, please be advised that, should you choose to resign, we are able to arrange for the payout of any unused annual leave upon termination of your employment.
> We are happy to accept your resignation in writing and then arrange for collection all your access cards etc.
> ….."[17]

[12] The Applicant did not respond to Mr Forster's resignation 'invitation'. Having received no further communication from the Respondent, the Applicant was then left with no income and started looking for alternate employment. In that period his wife was also diagnosed with cancer. He states that he had an interview with 'Brook' from Devonfield Enterprises (Devonfield) on 18 March 2025 for a role as a worker in the areas of NDIS and aged care. He says he was informed that he needed to obtain NDIS accreditation in order to work in the area of NDIS.[18]

[13] On 23 June 2025, the Applicant's Infringement Notice was dealt with in the Launceston Magistrate's Court. The Tasmanian Police agreed on 20 May 2025 to not tender evidence and the complaint was dismissed by the Court.

[14] On 23 June 2025, the Applicant states he identified an email from Care Park HR in his junk email folder dated 5 June 2025 and another email dated 18 June 2025. The 5 June 2025 email stated as follows;

> "Dear Bobby
>
> Given your extended absence from the workplace and the outcome of your workers compensation claim, Care Park will proceed with the termination of your employment. This action is being taken on the basis that you have not been able to fulfil your duties throughout the year, and there is no foreseeable return to work.
>
> In accordance with company policy and applicable legislation, we will arrange for the payout of your unused annual leave entitlements upon termination.
>
> Please consider this notice as confirmation of the termination of your employment with Care Park, effective immediately. Kindly return all company property, including access cards, uniforms, and any equipment, to the Tasmanian office so we can release your final pay.
> ……"[19]

[15] The further email from Care Park HR dated 18 June 2025 stated as follows:

> "Hi Bobby
>
> We kindly request that you return all company property, including your uniform, access cards, and any other equipment, to the Tasmanian office as soon as possible so we can process your final pay without delay.
> ……."

[16] When cross-examined on his evidence the Applicant confirmed that apart from the 7 March 2025 email from the Respondent, he received no other communication or correspondence from the Applicant regarding his medical condition or fitness for work prior to the 5 June 2025 email notifying him of his dismissal. He rejected the Respondent's submission that it had attempted to make contact with him between 7 March and 5 June 2025

[17] The Applicant states that prior to and since his dismissal he has sought employment with Devonfield which operates in the aged care industry. He previously worked for that company and had enjoyed the work. In order to work for Devonfield it is necessary for the Applicant to obtain NDIS endorsement of his Registration to Work with Vulnerable People (RWVP) which is currently valid to 2027. He states he spoke to Scott Hingston of Devonfield on 18 August 2025 about working at Ellison House which is owned by Devonfield and was advised that he needed to contact the NDIS regarding his NDIS accreditation.[20]

[18] On making enquiries with the NDIS, the Applicant was advised that in order to secure NDIS endorsement, it was necessary for his employer to endorse him. This left him in a conundrum as he currently did not have an employer capable of endorsing him. He further states that he remains in contact with Devonfield to see if they are able to provide the necessary NDIS endorsement to overcome the 'catch-22' he finds himself in[21]. While giving evidence, the

Applicant confirmed that he now expects to receive NDIS accreditation in the next few weeks at which point he plans to commence work in that field.

[19] The Applicant states that he has earnt no income since his dismissal beyond receiving $300 for playing two 'gigs' in November 2025 but has been receiving the aged pension since his dismissal in June 2025.

Has the Applicant been dismissed?

[20] A threshold issue to be determined in this matter is whether the Applicant has been dismissed from his employment. The circumstances in which a person is taken to be "dismissed" are set out in s 386 of the Act. Section 386(1) relevantly provides as follows:

> (1) A person has been dismissed if:
>
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
>
> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

[21] Section 386(2) of the Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant. There was no dispute, and I find that the Applicant's employment with the Respondent terminated at the initiative of the Respondent.

Initial matters

[22] Having found that the Applicant was dismissed with the meaning of s 386(1) of the Act, I am now obliged under section 396 of the Act, 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; and
>
> (d) whether the dismissal was a case of genuine redundancy.

[23] Relevant to the determination of the preliminary matters I am satisfied that;

- the Applicant was dismissed on 5 June 2025 and filed his unfair dismissal application on 26 June 2025, that latter date being within 21 days of the date of his dismissal;
- at the time of the Applicant's dismissal, the Respondent employed 200 staff and is therefore not a small business employer within the meaning of s 23 of the Act;

- the Applicant commenced employment with the Respondent on 16 January 2024 and at the time of his dismissal, had been employed for over 12 months, that period being more than the minimum employment period of six months;

- the Applicant was covered in his employment by the *Car Parking Award 2020,* and his weekly wage rate was $902.88; and

- the Applicant was not dismissed due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[24] Having considered each of the initial matters, I am satisfied that the application was made within the required period in s 394(2), the Applicant was a person protected from unfair dismissal, the small business fair dismissal code does not apply, and the dismissal was not a genuine redundancy. I am now required to consider the merits of the application, and it is to that I now turn.

Was the dismissal harsh, unjust, or unreasonable?

[25] Section 387 of the Act provides that, 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.

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

[26] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[22] and should not be "capricious, fanciful, spiteful or prejudiced[23]." However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it were in the employer's position[24].

[27] The Respondent contends that the Applicant abandoned his employment and made no effort to engage with it after 6 March 2025. It also submits that there were *'emails and a lack of responsiveness'* from the Applicant. In making that submission the Respondent accepted that it did not seek to make contact with the Applicant between 7 March 2025 and 5 June 2025 when it sent the Applicant the termination notice by email.

[28] The legal principles associated with abandonment of employment are well established.[25] The test is an objective one: whether the employee's conduct is such as to convey to a reasonable person in the position of the employer, and based on the facts as reasonably known to the employer at the time, that the employee had repudiated their duty to meet their obligations under the contract of employment.

[29] The facts reasonably known to the Respondent at the date of the Applicant's dismissal were as follows.

- First, workers compensation payments to the Applicant ceased on or about the 26 February 2025 as a result of the TASCAT Order.

- Second, in the wake of cessation of workers compensation payments, the Applicant enquired of Ms Foster via email on 6 March 2025 as to the status of his employment and also requested payment of any accrued annual leave.

- Third, Ms Foster responded to the Applicant's email on 7 March 2025 and in doing so failed to answer the Applicant's question regarding his employment status and simply advised that his annual leave would be paid out if he chose to resign.

- Fourth, the Applicant did not take up the 'invitation' to resign, and no action was taken in relation to his accrued annual leave by the Respondent.

- Fifth, despite the Applicant not resigning, no further contact was made by the Respondent with the Applicant after 7 March 2025 prior to the dismissal email on 5 June 2025.

- Sixth, a representative of the Respondent spoke with Ms Norden-Wilson in late January 2025 during which Ms Norden-Wilson reported that the Applicant was experiencing some health issues.

- Finally, the only relevant medical information the Respondent held regarding the Applicant's fitness for work at the time of the Applicant's dismissal were the

certificates of capacity provided by the Applicant between 15 November 2024 and 31 January 2025 which indicated the Applicant was unfit to perform any duties.

[30] The Applicant asked the legitimate question on 6 March 2025 as to whether he remained an employee of the Respondent and received a non-response in the 7 March 2025 email from Ms Foster. She simply 'invited' his resignation if he wanted to access his accrued annual leave, an 'invitation' to which the Applicant did not respond. At least at that point, it could not in my view be said that the Applicant had evinced an intention to repudiate the duty to meet his contract of employment obligations.

[31] After the 7 March 2025 email from Ms Foster, neither the Applicant nor Respondent engaged at all with each other. There was a troubling and inexcusable disinterest on the part of the Respondent to the welfare of the Applicant and if and when he would be fit to return to work. Contrary to the Respondent's contention at the Hearing, the Applicant did not bare the entire onus of demonstrating he was ready, willing and able to return to work. In the wake of the cessation of workers compensation payments on 26 February 2025 and the Applicant's 6 March 2025 query on his employment, the Respondent ought to have taken steps to confirm the status of said employment and required him to furnish relevant medical information going to his fitness for work. The failure to do so left the Applicant in a state of uncertainty as to where he stood and reflects poorly on the Respondent.

[32] While the Applicant may also be criticised for his inaction after 7 March 2025, it needs to be borne in mind that the Applicant also faced court action over the incident on 15 November 2024 which was ultimately not resolved until the case was dismissed on 23 June 2025. I accept that he was anxious to clear his name of the charge that he had deliberately moved into the path of a motor vehicle, and the attendant claim that his injuries were non-compensable because he had arguably engaged in serious and wilful misconduct. Against that backdrop, it is unsurprising that the Applicant focused on the Court proceedings which were ultimately dismissed on 23 June 2025. The Applicant took no other action in the interim period between 7 March and 5 June 2025 that indicated he no longer intended to be bound by his employment contract. Had he failed to respond to repeated contact from the Applicant seeking updates on his condition and fitness for work I would likely hold a different view. That is not however the case here.

[33] Taking all of the above into account, I am not persuaded that, objectively assessed, the Applicant abandoned his employment. Critical to that finding is the Respondent's failure to properly respond to the Applicant's 6 March 2025 email or take any steps prior to the 5 June 2025 dismissal email to follow up with the Applicant or seek further information on his fitness for work. Having found the Applicant did not abandon his employment, it follows that there was not a valid reason for his dismissal. This weighs in favour of a finding that the dismissal was unfair.

Notification of the valid reason – s.387(b)

[34] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[26] and in explicit,[27] plain and clear terms.[28]

[35] I have already found that there was not a valid reason for the Applicant's dismissal. It is apparent from the evidence that the Applicant was not notified of any reason, let alone a valid reason for his dismissal prior to the decision being made. He was simply notified by email of his dismissal on 5 June 2025 without any prior notice that the Respondent was considering that step. This weighs in favour of a finding that the dismissal was unjust and therefore unfair.

Opportunity to respond to any reason related to capacity or conduct – s 387(c)

[36] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[29]

[37] The Applicant was not provided with an opportunity to respond to the reason for his dismissal, prior to that decision being communicated to him via an unsigned email dated 5 June 2025. He was simply notified of the decision to dismiss him and was not given an opportunity to explain why he should not be dismissed. This denied the Applicant an opportunity to try and persuade the Respondent that he was fit to resume his normal duties and that his dismissal should not proceed. This weighs in favour of a finding that the dismissal was unjust and therefore unfair.

Support person – s 387(d)

[38] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present. No meetings were held with the Applicant prior to his dismissal. This factor is therefore not relevant.

Warnings regarding unsatisfactory performance – s 387(e)

[39] The dismissal did not relate to unsatisfactory performance. This factor is therefore not relevant in the circumstances.

Impact of the size of the Respondent on procedures followed – s 387(f)

[40] The Respondent's Form F3 indicates that at the time of the Applicant's dismissal it employed 200 employees. The Respondent does not contend that its size adversely impacted on the processes it followed in dismissing the Applicant. This factor weighs neutrally in my consideration.

Impact of absence of dedicated human resources management specialist/expertise on procedures followed – s 387(g)

[41] The evidence in this matter indicates that the Respondent did have access to the services of an in-house human resources specialist. This factor weighs neutrally in my consideration.

Other relevant matters – s 387(h)

[42] In addition to the procedural fairness deficiencies I have identified above, the Applicant has also raised a number of other matters going to the harshness of the dismissal. This includes that the dismissal was communicated via an unsigned email and not by letter, the dismissal purported to be a summary dismissal but provided no justification for summary dismissal, there was no offer to discuss the termination email and there was no reference to any support available to the Applicant if he was distressed by the dismissal. While there is some overlap in the matters raised by the Applicant with the procedural fairness failures I have previously dealt with above, I am satisfied that the dismissal was carried out in a manifestly inadequate manner which leads me to find the dismissal was also harsh. This weighs in favour of a finding that the dismissal was unfair.

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

[43] I have made findings in relation to each matter specified in s 387 of the Act 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.[30]

[44] As set out above, I am satisfied that a valid reason for the Applicant's dismissal related to his capacity or conduct has not been established. I am also satisfied that the Applicant was not notified of a valid reason for his dismissal prior to a decision being made to terminate his employment, he was not given an opportunity to respond to the alleged conduct and the manner of the dismissal was harsh in its delivery. The dismissal was not related to the Applicant's performance, and the size and capacity of the Respondent did not impact on the procedures that it followed and as such these matters weigh neutrally in my consideration of whether the dismissal was unfair. No matters weigh in favour of a finding that the dismissal was not unfair.

[45] It follows from the above that having considered each of the matters specified in s.387 of the Act, I am satisfied that the dismissal of the Applicant was harsh, unjust, unreasonable and thereby unfair because there was not a valid reason for the dismissal, the process followed by the Respondent was procedurally unfair and no other factors weigh against a finding that the dismissal was unfair.

Remedy

[46] Having found that the Applicant was unfairly dismissed I now turn to consider the question of remedy pursuant to section 390 of the Act. Significantly, under s 390(3) of the Act, I must not order the payment of compensation to the Applicant unless:

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

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

[47] Dealing firstly with whether reinstatement is inappropriate, both the Applicant and Respondent agree that reinstatement is inappropriate. In these circumstances I consider that reinstatement is inappropriate.

[48] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one…"[31].

[49] The Applicant submits that payment of compensation is appropriate because he remains unemployed; while the Respondent argues that no compensation is appropriate in circumstances where it believes the Applicant's conduct was inconsistent with his employment obligations.

[50] Having found that the Applicant was unfairly dismissed and noting that the Applicant remains unemployed, I consider that an order for payment of compensation is appropriate. There is nothing in the material filed by the Respondent in the substantive proceedings that persuades me that a payment of compensation would be inappropriate.

[51] Turning now to the question of compensation, s 392(2) of the Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant in lieu of reinstatement including:

(a) the effect of the order on the viability of the Respondent's enterprise;

(b) the length of the Applicant's service;

(c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;

(d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;

(e) the amount of any remuneration earned by the Applicant from employment or other work during the period between the dismissal and the making of the order for compensation;

(f) the amount of any income reasonably likely to be so earned by the Applicant during the period between the making of the order for compensation and the actual compensation; and

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

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

[53] The Respondent did not contend or file any material that would support a finding that an order for compensation would have an effect on the viability of its enterprise. I consequently find that an order for compensation is unlikely to have an effect on the viability of the employer's enterprise (s 392(2)(a) of the Act).

[54] The Applicant commenced employment with the Respondent on 16 January 2024 and was terminated on 26 June 2025, being a period of 17 months. I note however that the Applicant did not return to work after the incident in which he was injured on 15 November 2024. I consider that while the Applicant's length of service is relatively short, it does not favour an adjustment to the compensation otherwise calculated (s 392(2)(b) of the Act).

[55] As stated by a majority of the Full Court of the Federal Court, "in determining the remuneration that the Applicant would have received, or would have been likely to receive… the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."[32]

[56] The Applicant contends that had he not been dismissed, he expected to remain employed by the Respondent for the foreseeable future although he significantly discounts the amount he seeks because of the possibility of him needing to support his wife who has received a cancer diagnosis. There is considerable uncertainty about how much longer the Applicant would have remained employed but for his dismissal. Relevantly, the Applicant was medically certified as unfit to undertake any of his normal duties from 15 November 2025 up to 31 January 2025 and was at no stage medically cleared to return to work. There is also no medical evidence before me that establishes that the Applicant would have been medically capable of continuing to work but for his dismissal. The Commission is not assisted by fact the Respondent did not seek such evidence prior to dismissal, and nor has the Applicant furnished such evidence in support of this application.

[57] There are a number of significant factors that tell against a finding that the Applicant would have continued to work for the Respondent for any reasonable period of time but for his dismissal. Those factors are the Applicant's age (70), his wife's cancer diagnosis that may have required the Applicant to provide care, the injuries that prevented the Applicant from working for some months, the absence of a medical clearance following the Applicant's prolonged absence from work, the evidence from Ms Julie Norden-Wilson regarding the Applicant's physical and mental condition in early 2025 and there being no other contemporary medical evidence that sheds light on the Applicant's current medical condition or work capacity. In these circumstances I am unable to conclude the Applicant would have remained employed beyond a period of 12 weeks. I have assessed that as a reasonable period having regard to the time within which an independent medical assessment (IME) could have been arranged for the Applicant and conducted. The Applicant's weekly earnings prior to his dismissal were $902.88 excluding superannuation, meaning that his anticipated earnings for the twelve-week period are $10,834.56 (s 392(2)(c) of the Act).

[58] Turning to the Applicant's efforts to mitigate his losses, the Applicant must provide evidence that he has taken reasonable steps to minimise the impact of his dismissal[33] and what is reasonable depends on the circumstances of the case.[34] The Applicant states he has made some attempts to obtain employment in aged care with Devonfield but these efforts have been unsuccessful so far because he does not have NDIS accreditation. He has also sourced limited

work playing 'gigs' as a musician. It is not apparent that the Applicant has been particularly assiduous in attempting to mitigate his losses. He refers to the difficulty of obtaining work in the NDIS area because of the need for accreditation. It is however only recently that the Applicant has taken substantive steps to secure the required accreditation. There is no evidence that beyond engaging with contacts at Devonfield, that the Applicant has taken any other steps to secure alternate employment. I am not satisfied that the Applicant has taken reasonable steps to mitigate his loss. In these circumstances I intend to apply a 25% reduction to the compensation otherwise calculated above (s 392(2)(d) of the Act).

[59] I accept that the Applicant did not receive income in the 12-week period following his dismissal. In these circumstances it is not appropriate to make any deduction from the compensation otherwise calculated above (s 392(2)(e) the Act). Nor is it likely that he will receive any income in the period between the making of the order for compensation and the payment of compensation (s 392(2)(f) of the Act). No other relevant matters were raised by the parties going to an order for compensation under s 392(2)(g) of the Act.

[60] As noted by the Full Bench in *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries*, "[t]he well-established approach to the assessment of compensation under s.392 of the FW Act… is to apply the "Sprigg formula" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket* (*Sprigg*).[35] This approach was articulated in the context of the Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*[36]."[37]

[61] The approach to calculating compensation per *Sprigg* is as follows:

> Step 1: Estimate the remuneration the Applicant would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).
>
> Step 2: Deduct monies earned since termination.
>
> Step 3: Discount the remaining amount for contingencies.
>
> Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

[62] I have estimated the remuneration the Applicant would have received, or would have been likely to have received, if the Respondent had not terminated his employment to be $10,834.56. This is on the basis of my finding that it is likely the Applicant would have remained in employment for a further period of twelve weeks. This estimate of how long the Applicant would have remained in employment is the "anticipated period of employment".[38]

[63] I have found that the Applicant has not earned remuneration since the date of his dismissal and nor is he likely to earn remuneration between the making of the order for compensation and the payment of compensation. It is therefore not appropriate to make a deduction for income received since dismissal. I have however found that the Applicant has not taken reasonable steps to mitigate his losses, and that a deduction of 25% is appropriate in these circumstances. The amount of compensation calculated is reduced to $8,125.92.

[64] I now need to consider the impact of contingencies on the amounts likely to be earned by the Applicant for the remainder of the anticipated period of employment.[39] I do not consider it appropriate to deduct an amount for contingencies.

[65] I have considered the impact of taxation but have elected to settle a gross amount of $8,125.92 which is to be subject to normal taxation. Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case."[40] I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by s 392(2) of the Act.

[66] I am further satisfied that there was no misconduct that contributed to the dismissal therefore no reduction on account of misconduct is appropriate (392(3)). Finally, ss 392(5) & (6) of the Act requires that the amount of compensation ordered by the Commission must not exceed the lesser of 6 months' pay calculated at the high-income threshold (HIT) or the total amount of remuneration the Applicant received or was entitled to receive during the 26-week period prior to his dismissal. The amount of compensation falls below the lesser of 6 month's pay and the HIT.

[67] In light of the above, I will make an order that the Respondent pay $8,125.92 gross less taxation as required by law to the Applicant in lieu of reinstatement within 14 days of the date of this decision.

Conclusion

[68] I am satisfied that the Applicant was dismissed at the initiative of the Respondent. Having been satisfied in respect of the other initial matters, I have considered and determined that the Applicant's dismissal was harsh, unjust, unreasonable and thereby unfair. I am further satisfied that reinstatement would be inappropriate and that an award of compensation is appropriate.

[69] Finally, I have determined to make an order that the Respondent pay $8,125.92 gross less taxation as required by law to the Applicant in lieu of reinstatement within 14 days of the date of this decision. An order giving effect to this decision will be issued separately in conjunction with this decision.

DEPUTY PRESIDENT

Appearances:

D Williams for the Applicant.
V Kordalis for the Respondent.

Hearing details:
2025.
Melbourne:
December 1.

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<PR794397>

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[1] [2025] FWC 2996

[2] Exhibit A1, Witness Statemen t of Robert Wilson, at [2]-[7]

[3] Exhibit A1, Annexure A, Letter of Offer dated 15 January 2024

[4] MA0000095

[5] Exhibit R3, Accident/Incident Report Form, dated 15 November 2024

[6] Exhibit R4, Workers Compensation Claim Form, dated 20 November 2025

[7] Exhibits R11, R12, R13, R14, Certificate of Capacity for period 22 November 2024 – 31 January 2025

[8] Exhibit A1, Annexure B, Tasmanian Police Infringement Notice,

[9] Exhibit A1, Annexure C, Summons, dated 16 April 2025

[10] Exhibit A1, Annexure D, Statutory Declaration, dated 3 April 2025

[11] Exhibit R1, Email from Kaidan Gibson (undated)

[12] Exhibit A2, Witness Statement of Julie Norden-Wilson, at [42]

[13] Ibid, at [29]-[34]

[14] Exhibit A1, Annexure E, Letter to Applicant from Page Seager, dated 11 February 2025

[15] Exhibit A1, Annexure F, TASCAT Order, dated 26 February 2025

[16] Exhibit A1, Annexure G, Email from Applicant to Catherine Foster, dated 6 March 2025

[17] Exhibit A1, Annexure G, Email from Catherine Foster to Applicant, dated 7 March 2025

[18] Exhibit A1, at [45]-[47]

[19] Exhibit A1, Annexure G, Email from Care Park HR to Applicant, dated 5 June 2025

[20] Exhibit A1, at [73]

[21] Exhibit A1, at [77]

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

[23] Ibid.

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

[25] For example, Re Manufacturing and Associated Industries and Occupations Award 2010 [2018] FWCFB 139, at [21], [24]

[26] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

[27] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[28] Ibid.

[29] *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

[30] *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].

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

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

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

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

[35] (1998) 88 IR 21.

[36] [2013] FWCFB 431.

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

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

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

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