DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Debbie Chance

v

Archer Operations Pty Ltd (A.C.N.105932634) T/A Hervey Bay Nurseries
(U2016/12981)

COMMISSIONER SIMPSON BRISBANE, 22 MARCH 2017

Application for relief from unfair dismissal – jurisdictional objection – genuine redundancy – where applicant offered employment with related entity – application granted – compensation awarded

[1] This matter concerns an application under s.394 of the *Fair Work Act 2009* (the Act) by Ms Debbie Chance who alleges that the termination of her employment with Archer Operations Pty Ltd T/A Hervey Bay Nurseries (Archer) was unfair. Ms Chance was represented at the hearing of this matter on 13 February 2017 by Mr S Cate of 1Legal appearing by video link in Maryborough. Archer was represented by Ms K Jacklin of McPherson Kelley Lawyers appearing in person in Brisbane. All witnesses gave there evidence by video link from the Maryborough Court House.

[2] It was put for Ms Chance that she did not seek reinstatement but the alternative remedy of compensation on the basis that trust between the parties had been lost.[1]

[3] Ms Chance commenced employment at Archer on 15 June 2015 as an Office Administrator until her employment ended on 7 October 2016, a period approximating 14 months. Ms Chance was employed on a full time basis.

[4] Archer raised a jurisdictional objection to the application on the basis Ms Chance's termination was a case of genuine redundancy in accordance with s.389 of the Act. The jurisdictional objection and substantive matter were heard together. It was submitted that Archer had suffered significant financial hardship, and as a result made the decision to outsource Ms Chance's position, along with its entire workforce to another company.

[5] In the alternative, Archer submitted that the dismissal was not unfair pursuant to s.385 of the Act because it was not harsh, unjust or unreasonable and was a valid redundancy. Archer submitted the consultation requirements of the relevant industrial instrument were met and all reasonable redeployment options were explored.

[6] Ms Chance claims her dismissal was unfair as she received only two days' notice that her employment would be terminated. Further, Ms Chance submitted that the alternative

position offered to her of employment with Duzus Pty Ltd (Duzus) had terms and conditions considerably less favourable to her original position with Archer.

[7] It was not contested that Ms Chance's employment with Archer came to an end at the initiative of Archer on 7 October 2016 in accordance with the termination letter.[2]

[8] Section 389 of the Act reads as follows:

> "**389 Meaning of genuine redundancy**
>
> (1) A person's dismissal was a case of genuine redundancy if:
>
> (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
>
> (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
>
> (2) 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 within:
>
> (a) the employer's enterprise; or
>
> (b) the enterprise of an associated entity of the employer."

Section 389(1)(a) Decision to outsource labour

[9] Mr Cardno for Archer gave evidence in support of the veracity of claims made in correspondence from Archer to its employees on 5 October 2016 that referred to a 20% decrease in actual sales for the July to September period, the close of Masters Stores, no future Aldi contracts and a dramatic change in customer product demand.[3] Ms Chance appeared to accept in her oral evidence that there was a downturn in the business however referred to poor management as a reason for the downturn.[4]

[10] Mr Cardno said that change was necessary to the business because a third party labour provider would significantly reduce the cost and time involved for the business in respect of matters like recruitment and administration, and it was decided to use a company called Duzus Pty Ltd.[5]

[11] It was put to Mr Cardno that he had changed his evidence as he had described the decision to outsource as his decision in his witness statement[6], however in his oral evidence he said the decision to outsource Archer's labour requirements was discussed over a period of time and different options were looked at, and when the decision was made it was his job to implement that decision.[7] He accepted that he had changed his evidence in that regard.[8] He said the decision was discussed with one of the Directors of Archer, Alison Archer and also the accountant for Archer operations.[9] He said the revenue had been confirmed for the month of September and it caused a large amount of concern.[10]

[12] Mr Cardno was asked if a company called Employsure drafted the employment contracts. He responded that he knew Employsure had been used by Hervey Bay Nurseries but he was not sure who drafted the employment contracts in this case.

[13] Mr Cardno said he did not understand any contracts were distributed to anyone up to the finishing time at 4pm on Friday 7 October.[11] Mr Cardno accepted that the logo of Hervey Bay Nurseries appeared on the contracts offered by Duzus.[12]

[14] Mr Cardno accepted that his own last day of employment with Archer was Friday 7 October[13] and he commenced employment as the General Manager for Duzus immediately following his termination by Archer.

[15] Mr Cardno accepted that his role had remained essentially the same with Duzus as had been the case with Archer, although he said Duzus was more involved with recruitment as Duzus is providing services in that regard.[14]

[16] His evidence was that Duzus employed 19 of the 22 Archer employees, and three staff did not accept the offer.[15] He said Duzus offered more full time positions than Archer and only two staff remained as casual.

[17] Mr Kevin Stevens was asked about an entity called Toner On Demand, and whether he was aware that Toner On Demand are now issuing pay slips. He said he was not.[16] Mr Stevens also said his role as Production Supervisor was the same with Duzus as it had been with Archer.[17]

[18] According to an ASIC Company Extract, the directors of Archer are Alison Archer, Janice Archer and Robert Archer.[18] According to correspondence sent to employees of Archer by Duzus Pty Ltd[19] the sole directors of Duzus are Janice Archer and Robert Archer.

[19] It was put for Ms Chance that Archer has managerial integration with Duzus by determining the terms and conditions that Duzus would offer re-employment on a no less favourable basis than had been enjoyed with Archer.[20]

[20] It was put that Archer controls Duzus as contemplated by s.50AAA(3) of the *Corporations Act 2011* (Cth), as its statement of no less favourable terms had the capacity to determine the operating policies of Duzus as set out in s.50AA (1) of the *Corporations Act 2011* (Cth).

[21] According to the schedule of the employment contract attached to the statement of Mr Cardno,[21] the full name of Duzus is Duzus Pty Ltd ATF The Archer Business Trust.

[22] When Mr Cardno was asked if Duzus and Archer were closely intertwined companies he said he didn't know what was meant by that. When it was put to him the companies were associated entities he answered that they were separate companies.[22]

[23] When it was put to Mr Cardno that Janice Archer and Robert Archer were directors of both Archer and Duzus he said he believed that was correct.[23] Mr Cardno said all staff were made redundant by Archer and those that those that did not accept a role with Duzus were paid a redundancy entitlement.[24]

[24] Mr Cardno was asked if Toner On Demand was a trading name of Duzus, and he responded that it was his understanding that it probably was but he had not seen any documents.[25] Mr Cardno agreed that Mr Joseph Archer worked for 'Toner On Demand' and was the manager of 'Toner On Demand'.[26] Mr Cardno indicated he believed Joseph Archer was contracted to perform work at the nursery as a maintenance manager associated with new or capital works. Mr Cardno said Mr Joseph Archer did not report to him except in regard to health and safety issues.

[25] Mr Joseph Archer said in his statement he is a contractor to Duzus Pty Ltd.[27] In his oral evidence he described his job title as 'Business Development Manager'.[28] He accepted the reference to the date of 5 October in his statement was an error and it should have said 10 October.[29]

[26] In his oral evidence Mr Joseph Archer said he invoiced Duzus for his work for his business 'Toner On Demand'. He described Toner On Demand as a family business that trades out of Duzus.[30]

[27] Mr Joseph Archer accepted that the job he performed at the Hervey Bay Nursery prior to 7 October of Business Development Manager was the same job he now performed for Duzus on a full time basis. He said he is managing Toner On Demand and that his Toner On Demand role was a full time role and his role at the nursery was part time, with a maximum of 22 hours per week. Joseph Archer said Duzus has placed him with other businesses to perform work.[31]

[28] When Joseph Archer was asked if Duzus had any labour hire contracts with any other business he said he wouldn't have a clue.[32]

[29] The letter sent by Robert and Janice Archer on behalf of Duzus to the staff of Archer on 5 October included the following sentence:

> "Duzus currently supplies labour to other businesses and we are glad Archer Operations Pty Ltd has accepted our services to fulfil the role of labour resourcing."

[30] Submissions were made on behalf of Ms Chance that the legitimacy of the associated entity arrangements was "quite cloudy".[33] Mr Cate said for Ms Chance in submissions he was unable to establish who was paying what, where[34] and there was no evidence to tell us how the money was moving over.[35]

[31] Archer argued that whilst Duzus and Archer are related entities for the purposes of Corporations Law, this has no impact on the legitimacy of the arrangements entered into between Archer and Duzus.[36] Archer relied on the following passage from the decision in *Fair Work Ombudsman v Ramsay Food Processing Pty Ltd*[37]:

> "[76] There may be many reasons why companies, businesses or enterprises associated with each other might wish to organise their affairs in a way where one legal personality employs labour for the ultimate use and benefit of other legal personalities. Such arrangements will often be characterised or accompanied by the apparent profitability or identified reward which might be necessary in order to regard an arms-length arrangement as a genuine one.

> [77] In such intra-group arrangements there may be overlapping, or even common, directorships, interlocking shareholdings (either cross ownership or through ultimate ownership) and there is frequently a system of cross-guarantees in place. Little of this may be apparent to outsiders. The details may not be discoverable through the public records system. Arrangements between or amongst companies related in this way where one company (or more) operates to engage labour where others are concerned with management, operations, marketing or sales are by no means unusual. They are certainly not illegal. Arrangements along these lines may even be indispensable for some forms of business activity e.g. joint ventures. Although more than mere lip service must be paid to the separation of legal personality provided by individual incorporation, the tests applied to other labour arrangements, of independence and separate business, are either not relevant or are much less readily applied in such a circumstance."

[32] Mr Cate for Ms Chance referred to the following paragraph in the same decision which reads as follows:

> "[78] Nevertheless, it must be possible to identify a rational explanation for the arrangement and the explanation must be satisfactorily related to an intelligible business objective. That is so because otherwise, doctrines of agency, at least, may operate to defeat a bare claim of independence and isolated liability, supported only by a bare reference to separate incorporation. This is particularly likely to be the case when: the separate employing company is completely reliant upon a company to which it purportedly supplies labour; it has no assets and no management structure of its own; and exists only as a corporate shell to protect another company, which does have assets, from liabilities to employees. In such a case a court might not hesitate long before pronouncing the arrangement ineffective or, in a more serious case, a sham."

[33] I put a question to Ms Jacklin for Archer as to whether there was anything else that I could be referred to, to explain how Duzus operates and Ms Jacklin was unable to do so.[38]

[34] Whilst it has been asserted for Ms Chance that this was a sham redundancy, it has been accepted for Ms Chance that there was no evidence on the nature of the financial relationship between Archer and Duzus. There was some evidence, limited though it was, to suggest Duzus conducted other activities. On the basis of the available evidence I cannot be satisfied that Duzus exists only as a corporate shell to protect Archer, and am inclined to accept the arrangement is a genuine one.

[35] The reference to 'a job no longer being performed by anyone' refers to anyone employed by the business.[39] Outsourcing of work is a change in an operational requirement. The evidence supports a conclusion s.389(1)(a) has been met.

Section 389(1)(b)

[36] There could be little argument that Archer has failed to demonstrate that it has complied with its obligations to consult as required by the Nursery Award 2010. Clause 8 reads as follows:

> **"8.1 Consultation regarding major workplace change**

(a) Employer to notify

(i) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.

(ii) Significant effects include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.

(b) Employer to discuss change

(i) The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in clause 8.1(a), the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.

(ii) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 8.1(a).

(iii) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests."

[37] Mr Cardno accepted that he did not have any discussions with Ms Chance about her options, redundancy or redeployment.[40]

[38] Mr Cardno accepted the proposition that the meetings Janice Archer conducted with staff on behalf of Duzus on 6 October were not meetings for the purpose of consulting Archer staff about the decision to implement the change, but about Duzus assessing staffs' capabilities for employment with Duzus.[41]

[39] Mr Stevens described the meeting with Janice Archer on 6 October as "more like a job interview".[42] He said Janice Archer did not talk about issues like redundancy or any options for redeployment.[43]

[40] The evidence demonstrates there were no discussions between Archer and its employees about the terminations as required by Clause 8.1(b). The evidence is clear the discussions that Ms Janice Archer held with employees on 6 October were conducted on behalf of Duzus with potential future employees, not between Archer and its current employees and cannot be relied upon by Archer to seek to argue it conducted discussions with its workforce. Ms Jacklin on behalf of Archer accepted as much during closing submissions.[44] As it is clear the employer has not satisfied section 389(1)(b), the terminations were not genuine redundancies.

Section 389(2)

[41] It was also argued for Ms Chance that it would have been reasonable in all of the circumstances for Ms Chance to have been redeployed within the enterprise of an associated entity of Archer, being Duzus. Given I have already concluded Ms Chance's termination was not a genuine redundancy it is not strictly necessary to determine whether it would have been reasonable in all of the circumstances for Ms Chance to have been redeployed, however it is of some benefit on the particular facts of this case to have regard to the issue. In *Ulan Coal Mines Ltd v Honeysett*[45] the Full Bench said as follows:

> "[27] Secondly, it is implicit in the terms of s 389(2)(b) that it might be reasonable for an employee dismissed by one employer to be redeployed within the establishment of another employer which is an entity associated to the first employer. It follows that an employer cannot succeed in a submission that redeployment would not have been reasonable merely because it would have involved redeployment to an associated entity. Whether such redeployment would have been reasonable will depend on the circumstances. The degree of managerial integration between the different entities is likely to be a relevant consideration.
>
> [28] Thirdly, the question posed by s 389(2), whether redeployment would have been reasonable, is to be applied at the time of the dismissal. If an employee dismissed for redundancy obtains employment within an associated entity of the employer some time after the termination, that fact may be relevant in deciding whether redeployment would have been reasonable. But it is not determinative. The question remains whether redeployment with the employer's enterprise or the enterprise of an associated entity would have been reasonable at the time of the dismissal. In answering that question a number of matters are capable of being relevant. They include the nature of the available position, the qualifications required to perform the job, the employee's skills, qualifications and experience, the location of the job in relation to the employee's residence and the remuneration which is offered."

[42] At paragraph [34] of the same decision the Full Bench went on to say:

> "[34] It may be appropriate to make some concluding remarks about the operation of s.389(2). It is an essential part of the concept of redeployment under s.389(2)(a) that a redundant employee be placed in another job in the employer's enterprise as an alternative to termination of employment. Of course the job must be suitable, in the sense that the employee should have the skills and competence required to perform it to the required standard either immediately or with a reasonable period of retraining. Other considerations may be relevant such as the location of the job and remuneration attaching to it. Where the employer decides that, rather than fill a vacancy by

> redeploying an employee into a suitable job in its own enterprise, it will advertise the vacancy and require the employee to compete with other applicants, it might subsequently be found that the resulting dismissal is not a case of genuine redundancy. This is because it would have been reasonable to redeploy the employee into the vacancy. In such a case the exception in s.385(d) would not apply and the dismissed employee would have their application for a remedy heard. The outcome of that application would depend upon a number of considerations.
>
> [35] Where an employer is part of a group of associated entities which are all subject to overall managerial control by one member of the group, similar considerations are relevant. This seems to us to be a necessary implication arising from the terms of s.389(2)(b). While each case will depend on what would have been reasonable in the circumstances, subjecting a redundant employee to a competitive process for an advertised vacancy in an associated entity may lead to the conclusion that the employee was not genuinely redundant.

[43] Archer conceded that Archer and Duzus were related entities under the Corporations Act. It was submitted for Ms Chance there was a high degree of managerial integration as Mr Cardno went from managing Archer's business to managing Duzus operations performed for Archer.[46] The witness evidence generally was clear that the position Ms Chance enjoyed with Archer was the same as the position being offered to her with Duzus. There was no change in the level of qualification required and her field of experience met the requirements of the position. The work was to be performed at the same location.

[44] The letter sent to Ms Chance by Archer on 5 October included the following:

> "If you make a successful application to Duzus Pty Ltd for employment you will commence employment with the company on 10 October 2016."

[45] The letter from Duzus of the same date refers to the completion of applications forms for employment with Duzus.

[46] Ms Chance was not being offered redeployment in the true sense as she was being advised of an opportunity by Archer to apply for a position with Duzus, and Duzus advised of the process of how to apply and how applications would be determined. The evidence supports the conclusion that it would have been reasonable in all of the circumstances for Ms Chance to have been redeployed, rather than been invited by Duzus to apply for the role with it.

[47] Ms Chance was offered employment with Duzus on the same day her employment ended with Archer however the offer included the following at clause 3 of the contract of employment attached to the letter of offer:

> **"3. PROBATION**
>
> 3.1 Your employment is probationary for the first six months of employment with the Employer.

> 3.2 Your service with Archer Operations Pty Ltd will not count as service for the purposes of calculating the qualifying period (ie probationary period) for the purposes of the Fair Work Act 2009.
>
> 3.3 During the probationary period, your employment may be terminated with one week's notice by either party, or payment in lieu of notice.
>
> 3.4 The employer may, at its discretion, extend the probation period."

[48] Ms Chance was a transferring employee within the meaning of s.311(2) of the Fair Work Act. The proposed period of probation in the contract offered to Ms Chance does not recognise previous service with Archer.

[49] Section 384(2)(b)(ii) of the Act has the effect that if there is a transfer of employment between associated entities, service with the first employer will count toward service with the second.

[50] Section 22(5) of the Act reads as follows:

> **"Meanings of service and continuous service**
> **…** When service with one employer counts as service with another employer
>
> (5) If there is a transfer of employment (see subsection (7)) in relation to a national system employee:
>
> (a) any period of service of the employee with the first employer counts as service of the employee with the second employer; and
>
> (b) the period between the termination of the employment with the first employer and the start of the employment with the second employer does not break the employee's continuous service with the second employer (taking account of the effect of paragraph (a)), but does not count towards the length of the employee's continuous service with the second employer."

[51] Mr Cardno indicated that a short period after the date of termination all permanent staff was paid out entitlements such as annual leave, although he said he was unsure about long service leave.[47]

[52] Mr Stevens' evidence was that at a meeting with Ms Janice Archer he requested that his accrued leave entitlements not be paid out but follow him, because he didn't want the entitlements paid out. Mr Stevens said Ms Archer agreed to this request.[48] It was submitted for Ms Chance that this was never offered to her.[49]

[53] The issue of a probation period and the carry over of entitlements may well have not arisen had Ms Chance simply been offered redeployment with Archer's associated entity Duzus. On the evidence I am satisfied it would have been reasonable in all of the circumstances for Ms Chance to have been redeployed within Archer's related entity Duzus, and the requirements of s.389(2) were not met in this case.

WAS THE DISMISSAL UNFAIR?

[54] Having determined that this is not a case of a genuine redundancy I must now determine whether the termination as unfair.

Wednesday 5 October 2016

According to Ms Chance's witness statement[50] on 5 October 2016 Ms Chance attended a meeting held by the General Manager of Archer, Mr Cardno, where she received a letter (the first letter) signed by Alison Archer one of the Directors of Archer, written on behalf of Archer advising her that due to a number of factors beyond Archer's control, a decision had been made to outsource the supply of labour.[51] This is consistent with Mr Cardno's evidence that he read out the letter, and gave Ms Chance a copy of the letter.[52]

[55] The first letter advised that a decision had been made to outsource labour and that as of 10 October 2016, labour would be supplied by Duzus, and that Duzus may be in contact with employees to offer employment and that any offers made would be no less favourable to their current terms and conditions of employment. The first letter further advised that as of 7 October 2016, Ms Chance's employment with Archer would be terminated, and if a successful application is made to Duzus for employment then her employment would commence with that company on 10 October 2016.

[56] On Wednesday 5 October 2016, Ms Chance received a second letter from Robert and Janice Archer, written on behalf of Duzus Pty Ltd. Ms Chance confirmed in oral evidence she received the letter.[53]

[57] The second letter advised that Duzus would supply labour to Hervey Bay Nurseries (Archer) from 10 October 2016, and outlined the process for employees to submit their applications for a position with Duzus.

Thursday 6 October 2016

[58] Ms Chance said that on Thursday 6 October 2016, Mr Cardno informed there would be a meeting with all staff outside the 'smoko room'. Ms Chance said that at the meeting Mr Cardno introduced Ms Janice Archer to employees and advised that if staff had any questions they were able to chat with Ms Archer that day. Ms Chance submitted Mr Cardno advised this meeting was "not compulsory". Ms Chance said she did not attend that meeting.[54]

[59] Ms Chance gave evidence that after reading the letter from Archer of 5 October[55] she did not feel as though she needed to attend the meeting, as the first letter stipulated that the new offers of employment with Duzus would contain terms and conditions "no less favourable" to those she currently enjoyed at Archer.

[60] Ms Chance claims she submitted her application with Duzus at approximately 4pm on 6 October 2016.[56]

[61] Mr Cardno described the opportunity for staff to have input in regard to the decision as by registering a letter. He said he believed Janice Archer, on behalf of Duzus had an opportunity to speak to staff about their role.[57] He said he did not attend those meetings. Mr

Cardno attached to his statement a document headed 'Staff Interview Form – Duzus Pty Ltd'[58]

Friday 7 October 2016

[62] Ms Chance submitted that at approximately 5:30pm on Friday 7 October 2016 she received an email from Duzus advising her that her application had been successful, and that she would receive a formal contract later.[59]

[63] Ms Chance submitted that she received her formal offer of employment and contract from Duzus at 11:18am on Saturday 8 October 2016.[60] Ms Chance submitted that after reading the contract, she saw that the conditions were less favourable than what she was receiving with her employment at Archer. These included:

> "a) Wages dropped by $11,000.00 as the employment grade classification was basically back to my original starting salary;
> b) Hours of employment did not include my rostered day off that had been offered and agreed on by the Respondent in June 2016; and
> c) A probation period of 6 months which could be extended at the discretion of the employer. "[61]

[64] Mr Cardno agreed that his new contract with Duzus also included a probation period.[62]

[65] Mr Cardno said Duzus had expressed its preference that its staff be engaged on an hourly basis rather than a weekly salary.[63]

[66] Mr Cardno claimed that the contract offered to Ms Chance was for 38 standard hours whereas with Archer Ms Chance worked an average of 40 ordinary hours. He said it was anticipated Ms Chance would continue to work the same number of hours and receive overtime for the additional hours.

[67] Mr Cardno claimed that the intention had been that the hourly rate would be set at a rate that, with the addition of overtime payment would mean Ms Chance would still receive $55,000 per annum. Mr Cardno claimed that after Ms Chance rejected the offer and after her employment ended it came to his attention that the hourly rate had been mistakenly calculated, and the rate should have been $25.50.[64]

Weekend of 8 and 9 October 2016

[68] Ms Chance said when she noticed the changes she did not send an email back querying the changes as it was not within her character to do so, especially on a weekend. She said she wanted to discuss it with the appropriate people face to face.[65] Ms Chance conceded she could have raised her concerns via an email.[66] Ms Chance did not accept the proposition put to her that issues with her new contract could have been a mistake.[67] Ms Chance accepted that she had raised issues about her level of pay in the past and received a pay increase.

[69] Mr Cardno said Ms Chance had previously been forthcoming to him when she had concerns about issues regarding pay, and gave the example of the time she had sought a pay increase. He said she did not reply to the email in which she was sent the contract with any

questions or concerns.[68] Mr Cardno claimed Ms Chance had contacted him on weekends or after hours before by email on a number of occasions.[69]

Monday 10 October 2016

[70] On Monday 10 October 2016 Ms Chance submitted that she attended a meeting at the 'smoko room' at approximately 7:00am. Ms Chance accepted that she was late for the start of the meeting, she estimated by two or three minutes.[70] That she was late is consistent with Mr Cardno's evidence that she was a few minutes late,[71] and Mr Joseph Archer's evidence that she was five minutes late.[72] She accepted that she was not wearing a uniform. She said she was no longer an employee of Archer, and did not know her job title. I am not inclined to accept this as a basis to explain why she would not have dressed as she had previously in her employment with Archer. Whilst it is true the contract that she had been offered the previous Friday did not expressly state her job title, the contract described her position as being Nursery Award – Grade 5 which covers duties of the nature she had previously performed. In the circumstances it would have been reasonable for her to have assumed the nature of the duties she would be performing would be similar to her previous Office Administrator role with Archer.

[71] Ms Chance accepted that she did not clock in on a timesheet but said she had not been advised to do so.

[72] Ms Chance submitted that during the meeting she recalled Mr Cardno saying words to the effect of "I know you have all done an induction with Archer Operations, but you all need to do one with Duzus for legal reasons".[73]

[73] Ms Chance submitted that Mr Cardno then began the Duzus induction and handed out induction forms to the employees. Ms Chance submitted she recalled asking Mr Cardno "are we doing the induction now" and he replied with words to the effect of "yes Debbie we are". Ms Chance submitted she recalled she then asked Mr Cardno words to the effect of "so what about the people that were offered a contract that was far less favourable and want to talk about that?" Ms Chance submitted there was silence, and she then recalled saying "What you did not think there would be anyone?" to which Mr Cardno said "yes".[74]

[74] Ms Chance submitted she recalled at this point other staff also had concerns about their contract offers and wanted to talk about it. She submitted Mr Cardno and Ms Archer both remained silent, and didn't respond. She submitted she recalled Mr Cardno then saying words to the effect "I'm busy." Ms Chance submitted Mr Cardno then carried on with the meeting as if nothing had happened.

[75] Ms Chance submitted she left the meeting with two others at the same time. She submitted Ms Shelley Walsh followed her up to the office and they both cleaned out their desks. Ms Chance submitted she then walked to her car, signed a letter of non-acceptance and gave it to Mr Mark Fairfull, a maintenance employee of Archer, with instructions to hand it to Mr Cardno.

[76] Mr Cardno said that the induction meeting had already started when she arrived.[75] Ms Chance did not accept that she interrupted the meeting as the induction had not commenced when she arrived. Ms Chance said Mr Cardno was talking at that time about how stressful it was to receive the information over the weekend and that three employees were not

continuing and he believed some employees would not as time went on remain employed. It was at this point Ms Chance claimed that she asked if the induction was commencing.[76] However Ms Chance accepted she asked the question once the meeting had commenced.[77] I am inclined to the view having considered the evidence that the meeting had already commenced when Ms Chance sought to raise the issue concerning the contracts.

[77] Mr Cardno said in his first statement that Ms Chance asked him if she could have a meeting with him and he claimed he answered yes, but that he was just doing the induction. Mr Cardno claimed Ms Chance left shortly after arriving at the induction.[78]

[78] Ms Chance accepted that she requested a conversation with Mr Cardno[79] however rejected the proposition that Mr Cardno informed her that he would be able to have a meeting with her after the meeting had finished. Ms Chance's version was that after raising her concern about the contract there was silence, and when another employee Mr Graham then stated he wanted to talk about the contract as well Mr Cardno said he was busy and carried on with his head down.[80] Mr Joseph Archer said he did not recall any other employee asking the same question.[81]

[79] Ms Chance accepted Mr Cardno did not deny the request for a meeting, he just said he was busy and dismissed it.[82] Ms Chance said she asked if the induction was to be held at that time because she had not signed a contract with Duzus and did not want to waste anybody's time sitting in an induction.[83]

[80] Mr Joseph Archer said that Mr Cardno replied to Ms Chance that because the induction had already commenced he will discuss it with them after the meeting.[84] In his oral evidence he said Mr Cardno responded that it would have to be attended to afterwards.[85] Mr Stevens said he didn't recall if Ms Chance asked about the contracts that were offered being less pay. He said he did recall "them" asking if they're going to talk about the contracts. He said "one of the guys said they wanted to talk about the contract." Mr Stevens' version was that Mr Cardno said "Everybody's here. We're going to have induction first and then if we want to talk about the contracts, we'll do that after."[86] Mr Stevens rejected the proposition that Mr Cardno said "I'm busy" as had been said by Ms Chance.

[81] Mr Cardno said staff arrived from 6:30am that day, clocking in their time cards to the time machine when they arrived as per normal and sitting around the smoko room ready for induction. Mr Cardno said at 7:00am the "start work" bell range and Ms Chance and two others had not arrived so he made a decision to commence the induction. He said after 7:00am Ms Chance and two others arrived but did not clock in. Mr Cardno said induction documents were handed to them and Ms Chance asked "so what about the people offered a contract that was far less favourable and want to talk about it;" to which Mr Cardno claimed he replied "we have commenced the induction and will discuss it with them after." Mr Cardno said that at that point Ms Chance then left the meeting. He noted that Ms Chance did not present that day in conforming work wear.[87]

[82] Having considered the competing versions of Ms Chance on the one hand, and Mr Cardno, Mr Joseph Archer and Mr Stevens on the other, I am inclined to accept the version that Mr Cardno did offer to discuss the matter raised by Ms Chance after the meeting. Cardno, Archer and Stevens were fairly consistent in there evidence on this issue and on balance it is the more likely of the two versions.

[83] Ms Chance accepted that she left shortly after the meeting had commenced. It was her oral evidence that upon feeling, or being disrespected again and belittled in front of the entire staff, not one of the three 'Archer' people present, offered to have a conversation with her or even come to her when she was cleaning out her desk.[88] Ms Chance accepted she did not wait to speak to anyone after the meeting had finished.[89] Mr Joseph Archer said Ms Chance and two other employees left the meeting abruptly.[90] Mr Stevens also said Mr Chance and two other staff members left shortly after a set of induction documents were distributed.[91]

[84] Ms Chance accepted that she had written a non-acceptance letter[92] on the night before Monday 10 October 2016.[93] Ms Chance clarified it was not non-acceptance of a role, it was non-acceptance of that contract, and she would have accepted a contract on the same terms (as her previous contract).[94] When it was put to Ms Chance that she did not request any changes to the contract she said that had she had the opportunity to have a conversation she would have.[95]

[85] It is clear from the letter Ms Chance wrote on the Sunday evening of 9 October, the night before the meeting at 7am on 10 October, that Ms Chance believed that Archer had not been honest with her and other employees, and was attempting to conceal that Duzus was an Archer family company. Further the letter indicates that Ms Chance believed the organisational change was deceptive because employees had been advised orally that employees would receive offers and contracts on the Friday during business hours, however the letter did not state this and staff ultimately did not receive offers and contracts until it was too late to seek legal advice about them. Ms Chance described the handling of the whole matter as dishonest and cowardly.[96]

[86] Importantly the last three paragraphs of the letter drafted on the night of 9 October read as follows:

> "I am not accepting the new contract and wish Archer Operations to pay my full entitlements that I am lawfully entitled to within the laws of fair work for my whole period of employment. And any past monies that may be owed due to any mistakes made with pays that should have reflected the fair work awards.
>
> I would have had more respect for a company that had chosen morally to tell the truth and to do the right thing by their employees. I wish Archer/Dazus(sic) all the best in the future business/businesses.
>
> I have and will always believe it does not matter what is on my resume, what skills or pieces of paper you have, it is who you are that matters most to me. My character, my morals, dignity and self respect is what makes me who I am most proud of."

[87] Ms Chance said after leaving the meeting on the morning of 10 October she went to the office and cleaned out her desk, and walked to her car and signed the letter referred to above of non-acceptance and gave it to Mr Mark Fairfull, a maintenance employee with instructions to hand it to Mr Cardno.[97]

[88] Mr Cardno said that late in the afternoon on 10 October it came to his attention that the OH&S contractor that was using one of the spare offices found a letter on his desk from Ms Chance stating that she was not going to accept the role with Duzus.[98]

[89] Mr Cardno said in his second statement at paragraph 14 that Ms Chance never raised any concerns about the payment under the proposed contract, nor did she mention anything about deficiencies in her pay. He said had she done so he would have discovered the error at this time and immediately corrected it. However Mr Cardno said on his own evidence in the very paragraph preceding paragraph 14 that Ms Chance had said "so what about the people offered a contract that was far less favourable and want to talk about it".

[90] If Mr Cardno's evidence is to be accepted that the contract sent to Ms Chance contained errors and the intention had always been that she would be receiving an overall wage as set out at paragraph 12 of his statement, this would have been an opportunity to at least restate that commitment in the face of a claim that "people" had been offered a contract that was far less favourable and wanted to talk about it. Particularly in circumstances where the contracts were issued after termination by Archer and there had been no opportunity to discuss before the proposed commencement of employment with the new employer.

[91] Mr Cardno confirmed Ms Chance would have been performing the same job with the same roster had she accepted the role offered.[99]

Email at 11:46am

[92] Ms Chance said she then drove home and decided to call the Fair Work Ombudsman. Ms Chance said she read the Fair Work Commission website and identified some entitlements she could request. At 11:46am on 10 October Ms Chance sent an email[100] to Archer requesting all of her entitlements she was legally entitled to including back pay, notice, leave and redundancy entitlements. The email sent at 11:46am makes clear Ms Chance was seeking payment on the basis of redundancy.

[93] Mr Cardno said that he did not have an exhaustive look at the contract at that stage. He said operationally Monday is a very busy day. He said it was noted what the issue was.[101] On the basis of that evidence it does not appear the matter of a potential error was identified on that day.

Tuesday 11 October 2016

[94] Ms Chance said the following day her bank balance had an unusually high amount deposited from Archer.[102]

Wednesday 12 October 2016

[95] At 6:49am on Wednesday 12 October Ms Chance sent an email to Mr Cardno to an email address of Alison Archer at 'Toner On Demand' saying thank you for the payment of her entitlements, and requesting a complete breakdown of the payment she had received. The email included the following:

> "If I have not heard from you by COB today I will lodge a case with the fair work commissioner as advised to. Although I have 21 days to lodge once I cease employment for any unfair act I would appreciate prompt finalization of this matter so I can move on."

[96] Mr Cardno sent an email to Ms Chance at 12:16pm on Wednesday 12 October[103] setting out a breakdown of the amounts paid to her as requested. He indicated it was not until January 2017 he became aware that the contract offered did not contain a rate of pay intended to be offered.[104]

Criteria for considering whether dismissal harsh, unjust or unreasonable

[97] My approach to consideration of the matters in s.387 of the Act is guided by the approach in *UES (Int'l) Pty Ltd v Leevan Harvey*[105] where it was found that the criteria in s.389 which have not been met (in this case s.389(1)(b) and s.389(2)) can be taken into account by the Fair Work Commission's (FWC) consideration as to whether the dismissal was harsh, unjust or unreasonable as part of s.387(h) being "any other matters that FWC considers relevant".

[98] Archer argues that even if it was the case that it did not meet the requirements of s.389 Ms Chance's employment would have come to an end from 10 October 2016 when the outsourcing of labour from Duzus came into effect. Importantly, Archer says it has not employed anyone since that date. As has been addressed above, Ms Chance's employment ended on 7 October 2016.

[99] Ms Chance's dismissal was not related to her capacity or conduct and it is therefore a neutral matter with respect to whether Ms Chance's dismissal was harsh, unjust or unreasonable. Again given the reasons for dismissal in this case s.387(b),(c),(d) and (e) are neutral.

[100] Whilst the employer was not a small business within the meaning of the Act, employing 22 employees as at 7 October 2017,[106]Archer did not have an internal human resource management specialist and it would seem this impacted on the procedures it followed in effecting the dismissal.

Other matters s.387(h)

[101] As earlier indicated Archer no longer required Ms Chance to perform her job for Archer due to the decision to outsource to Duzus. Ms Chance appears to have made a decision somewhere between the evening of 9 October when she drafted the letter and when she decided to sign it the next day, that the pay rate and other terms offered to her by Duzus in the contract was not a mistake, was an insult to her and part of an attempt to deceive her. It was on that basis Ms Chance concluded not to explore the matter any further and concluded she did not wish to be employed with Duzus.

[102] There is little doubt that Archer's extreme haste in moving to terminate its workforce with little notice, and failing to consult as required or to offer redeployment with continuity to Ms Chance, precipitated the subsequent events on 10 October 2016. Had it not failed to consult properly, it is likely the matter of the conditions in the contract would have been ventilated properly before Ms Chance was required to make a decision concerning her acceptance or rejection of an offer from Duzus. I am confident this is so because the evidence concerning the extent of integration between Archer and Duzus indicates the two related entities could have cooperated about the timing of consultation and subsequent provision of the specific terms of contracts offered before termination, and not after.

[103] It is also the case that regardless of whether the monetary reductions in the contract were a mistake or not, the offer was not consistent with what Ms Chance had been advised on 5 October, that offers would be 'no less favourable'. It is also relevant that whilst Ms Chance was offered employment by Duzus, it was not on the basis that Archer arranged for redeployment with its related entity Duzus. Ms Chance was required to apply to Duzus for the role with Duzus.

[104] For the reasons discussed above I am satisfied that under all of the circumstances the dismissal was harsh, unjust or unreasonable.

REMEDY

[105] Ms Chance does not seek reinstatement and I am satisfied that an order for reinstatement is inappropriate.

[106] Having observed Mr Cardno give his evidence I am inclined to accept his evidence that the issue of the overall monetary benefit in the package being offered to Ms Chance on terms no less favourable, would have probably been addressed had it been identified earlier, and the fact of the contract provided to Ms Chance in the early evening of Friday 7 October not conforming with what she had been earlier advised was probably a mistake, at least in regard to the monetary element. However certain non-monetary elements were not unintentional including the proposition that she would be on probation (even thought this term is inconsistent with the Act. In the event I am wrong about the lower monetary rate in the offer being a mistake, it has not had a significant impact on my ultimate conclusion.

[107] Had Ms Chance wanted to remain working at the nursery with the new employer Duzus then she would have gone further than she did before signing the letter she drafted on the evening of 9 October on the morning of 10 October, and sending a subsequent email later that day requesting the payout of all of her accrued entitlements.

[108] Having found that Mr Cardno had indicated he was prepared to discuss issues concerning the contract after the meeting at 7:00am on Monday 10 October, Ms Chance could have at least waited to the conclusion of the meeting to have that conversation. She decided not to. Ms Chance had penned the highly critical letter the evening before and on the morning of 10 October came to the meeting not dressed for work. It appears to me Ms Chance was already a fair way toward concluding she would not be accepting employment with Duzus. I have made a finding above that Mr Cardno did offer to discuss the matter raised by Ms Chance concerning her contract after the meeting on the morning of 7 October. In my view by Ms Chance deciding not to have that discussion about the contract she effectively missed an opportunity to achieve a resolution to issues concerning the contract offered to her.

Remuneration that would have been received

[109] I consider an order for the payment of compensation is appropriate. I am of the view that the remuneration that Ms Chance would have received, or would have been likely to receive would have been no more than another 12 weeks had she been redeployed to work at Duzus on the basis of an arrangement consistent with what Archer said was the intention of employment with its related entity on terms no less favourable.

[110] I have not estimated a period longer than 12 weeks because I am satisfied from the evidence it is likely Ms Chance had lost trust in both Archer and Duzus, firstly because the contract she would have been required to accepted contained other non-monetary detrimental terms compared to her employment arrangements at Archer, and secondly because even had the contract offer not contained the lower hourly rate of pay, the evidence indicates Ms Chance believed Archer and Duzus had been dishonest with the workforce about the true nature of their relationship. Ms Chance's conduct on the morning of 10 October in choosing to not even enter discussions about her concerns leads me to conclude that had the relationship continued with Duzus, it would have been a tenuous one. The monetary value of 12 weeks at the time of termination is $12,696 based on a weekly rate of $1,058.

Remuneration earned

[111] Ms Chance has earned income since termination.[107] Ms Chance was terminated on 7 October 2016. Had she remained in employment for a further 12 weeks her last day of employment would have been 30 December 2016. According to Ms Chance's witness statement, she earned a total of $2,466 in the months November and December 2016. $2,466 deducted from $12,696 equates to $10,230. No deductions will be made for after 30 December 2016.

[112] Ms Chance was also paid $6,348 in notice and redundancy pay which must be deducted. $6,348 deducted from $10,230 equates to $3,882.

Income reasonably likely to be earned

[113] Under the circumstances of this case it is unnecessary to consider this element under s.392.

Viability

[114] There is no evidence that an order for $3,882 gross plus 9.5% superannuation payable to Ms Chance by Archer would affect the viability of Archer.

Length of Service

[115] Ms Chance was employed by Archer from 15 June 2015 to 7 October 2016. Whilst the length of employment was not particularly lengthy I do not intend to reduce the amount of compensation on account of this length of service.

Mitigation

[116] Ms Chance made efforts to mitigate her loss and this does not provide a basis to reduce the amount of compensation to be ordered.

Misconduct

[117] Misconduct did not contribute to the decision to dismiss Ms Chance.

Conclusion

[118] The amount of $3,882 gross plus 9.5% superannuation does not exceed the compensation cap. The payment of $3,882 gross plus 9.5% superannuation, less tax as required by law by Archer to Ms Chance is appropriate in all of the circumstances of this case. An order to this effect will be issued with this decision.

COMMISSIONER

Appearances:

Mr S.P. Cate of 1Legal for the Applicant

Ms K. Jacklin of McPherson Kelley Lawyers for the Respondent

Hearing details:

2017.
Brisbane:
February 13

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[1] Transcript PN 144.

[2] Transcript PN 839- 840; Exhibit 2, Statement of Brent Cardno dated 28 December 2016 attachment "BC-1".

[3] Exhibit1, Statement of Debbie Chance dated 3 January 2017 attachment "DLC-6".

[4] Transcript PN 66.

[5] Exhibit 2, Statement of Brent Cardno dated 28 December 2016 at [4].

[6] Ibid.

[7] Transcript PN 210.

[8] Transcript PN 459.

[9] Ibid.

[10] Transcript PN 463.

[11] Transcript PN 386.

[12] Transcript PN 387.

[13] Transcript PN 239.

[14] Transcript PN 294.

[15] Exhibit 3, Statement of Brent Cardno dated 13 January 2017 at [5].

[16] Transcript PN 655.

[17] Transcript PN 771.

[18] Exhibit 1, Statement of Debbie Chance dated 3 January 2017 attachment "DLC-1"

[19] Exhibit 1, Statement of Debbie Chance dated 3 January 2017 attachment "DLC-7"

[20] Exhibit 1, Statement of Debbie Chance dated 3 January 2017 at [7], attachment "DLC-5".
[21] Exhibit 2, Statement of Brent Cardno dated 28 December 2016 attachment "BC-5".
[22] Transcript PN 505.
[23] Transcript PN 508.
[24] Transcript PN 535.
[25] Transcript PN 265.
[26] Transcript PN 268-269.
[27] Exhibit 4, Statement of Joseph Archer dated 17 January 2017 at [1].
[28] Transcript PN 555.
[29] Transcript PN 592.
[30] Transcript PN 573.
[31] Transcript PN 586.
[32] Transcript PN 591.
[33] Transcript PN 856.
[34] Transcript PN 859.
[35] Transcript PN 861.
[36] Transcript PN 894.
[37] [2011] FCA 1176.
[38] Transcript PN 880.
[39] *Suridge v Boral Windows Systems Pty Ltd T/A Dowell Windows* [2012] FWA 3126 at [73]-[75].
[40] Transcript PN 481-483.
[41] Transcript PN 479-480.
[42] Transcript PN 762.
[43] Transcript PN 767.
[44] Transcript PN 911-922.
[45] [2010] FWAFB 7578.
[46] Transcript PN 837.
[47] Transcript PN 490-491.
[48] Transcript PN 784.
[49] Transcript PN 847.
[50] Exhibit 1, Statement of Debbie Chance dated 3 January 2017.
[51] Transcript PN 62.
[52] Exhibit 2, Statement of Brent Cardno dated 28 December 2016 at [7].
[53] Transcript PN 67.
[54] Transcript PN 70.
[55] Exhibit1, Statement of Debbie Chance dated 3 January 2017 attachment "DLC-6".
[56] Exhibit1, Statement of Debbie Chance dated 3 January 2017 at [11].
[57] Transcript PN 465-466.
[58] Exhibit 2, Statement of Brent Cardno dated 28 December 2016 attachment "BC-3".
[59] Exhibit 2, Statement of Brent Cardno dated 28 December 2016 at [12]; Transcript PN 71.
[60] Exhibit1, Statement of Debbie Chance dated 3 January 2017 attachment "DLC-11".
[61] Exhibit1, Statement of Debbie Chance dated 3 January 2017 at [14].
[62] Transcript PN 356.
[63] Exhibit 3, Statement of Brent Cardno dated 13 January 2017 at [7].
[64] Exhibit 3, Statement of Brent Cardno dated 13 January 2017 at [12].
[65] Transcript PN 76.
[66] Transcript PN 77.

[67] Transcript PN 78.
[68] Exhibit 3, Statement of Brent Cardno dated 13 January 2017 at [14].
[69] Transcript PN 404-416.
[70] Transcript PN 83.
[71] Exhibit 2, Statement of Brent Cardno dated 28 December 2016 at [13].
[72] Transcript PN 602.
[73] Exhibit1, Statement of Debbie Chance dated 3 January 2017 at [15].
[74] Exhibit1, Statement of Debbie Chance dated 3 January 2017 at [16]-[17].
[75] Exhibit 2, Statement of Brent Cardno dated 28 December 2016 at [13].
[76] Transcript PN 86.
[77] Transcript PN 89.
[78] Exhibit 2, Statement of Brent Cardno dated 28 December 2016 at [13].
[79] Transcript PN 94.
[80] Transcript PN 95.
[81] Transcript PN 606.
[82] Transcript PN 96.
[83] Transcript PN 125.
[84] Exhibit 4, Statement of Joseph Archer dated 17 January 2017 at [9].
[85] Transcript PN 609.
[86] Transcript PN 678.
[87] Exhibit 3, Statement of Brent Cardno dated 13 January 2017 at [13].
[88] Transcript PN 97.
[89] Transcript PN 99.
[90] Exhibit 4, Statement of Joseph Archer dated 17 January 2017 at [10].
[91] Exhibit 5, Statement of Kevin Stevens dated 17 January 2017 at [6].
[92] Exhibit1, Statement of Debbie Chance dated 3 January 2017 attachment “DLC-13”.
[93] Transcript PN 102.
[94] Transcript PN 103.
[95] Transcript PN 104.
[96] Exhibit1, Statement of Debbie Chance dated 3 January 2017 attachment “DLC-13”.
[97] Exhibit1, Statement of Debbie Chance dated 3 January 2017 at [19].
[98] Exhibit 2, Statement of Brent Cardno dated 28 December 2016 at [14].
[99] Transcript PN 500.
[100] Exhibit1, Statement of Debbie Chance dated 3 January 2017 attachment “DLC-14”.
[101] Transcript PN 441.
[102] Exhibit1, Statement of Debbie Chance dated 3 January 2017 at [22].
[103] Exhibit1, Statement of Debbie Chance dated 3 January 2017 attachment “DLC-17”.
[104] Transcript PN 456.
[105] [2012] FWAFB 5241.
[106] Exhibit 3, Statement of Brent Cardno dated 13 January 2017 at [5].
[107] Transcript PN 150-168.