



DECISION

Fair Work Act 2009
s.120—Redundancy pay

HyperLife Pty Ltd T/A Acme Preston

v

Kelly Brennan
(C2020/2797)

DEPUTY PRESIDENT DEAN

SYDNEY, 12 JUNE 2020

Application to vary redundancy pay.

[1] This decision concerns an application made by HyperLife Pty Ltd T/A Acme Preston (Acme Preston or the Company) pursuant to s.120 of the *Fair Work Act 2009* seeking to reduce the amount of redundancy payment to which its former employee, Kelly Brennan, is otherwise entitled to receive, following her position being made redundant on 19 April 2020. The application is made on the ground that Acme Preston lacks the financial capacity to pay.

[2] The application was opposed by Ms Brennan. A hearing was conducted by telephone on 4 May 2020. Mr C Dowson (Director) appeared for Acme Preston and Ms Brennan appeared on her own behalf.

Relevant legislative provisions

[3] Section 119 of the Act is relevant to the application. It provides:

119 Redundancy pay

Entitlement to redundancy pay

- (1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:
 - (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
 - (b) because of the insolvency or bankruptcy of the employer.

Amount of redundancy pay

- (2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	Redundancy pay period
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

[4] Section 120 of the Act provides for a variation of an employer's obligation to make a redundancy payment pursuant to the preceding section in two limited circumstances (s.120(1)(b)). It reads

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

- (1) This section applies if:
- (a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and
 - (b) the employer:
 - (i) obtains other acceptable employment for the employee; or
 - (ii) cannot pay the amount.
- (2) On application by the employer, FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that FWC considers appropriate.
- (3) The amount of redundancy pay to which the employee is entitled under section 119 is the reduced amount specified in the determination.

Background

[5] The redundancy of Mr Brennan's employment arose from the decision of Acme Preston to close its site in Ingleburn. Ms Brennan was one of four employees whose employment were terminated by way of redundancy. I note that similar applications have

been made by the Company in respect of the redundancy payment due to the other three employees.

[6] Prior to commencing employment with Acme Preston, Ms Brennan was employed by Cumberland Manufacturing at the same site until its business was sold to Acme Preston in March 2019. Ms Brennan continued to work for Acme Preston and her service with the prior owner was recognised.

[7] It is common ground that discussions were held between Mr Dowson and Ms Brennan about the proposed redundancy on 15 and 16 April 2020 and this was confirmed by letter to Ms Brennan on 17 April 2020.

[8] Ms Brennan's employment with Acme Preston was covered by the *Graphic Arts, Printing and Publishing Award 2010* (the Award). Clause 16 of the Award provides that redundancy pay is in accordance with the NES. Ms Brennan was employed for over two years and is therefore entitled to six weeks redundancy pay. It is not disputed that the amount of six weeks' pay owed to Ms Brennan equates to \$9,683.16.

[9] Acme Preston's application is to reduce the redundancy pay to one week.

Evidence and Submissions

Acme Preston

[10] Mr Dowson gave evidence that the purchase of the business at the Ingleburn site in March 2019 was funded by vendor finance and a loan from a family company, Dowson Consulting, which is owned by him and three other family members.

[11] The Ingleburn site was on a one year lease. It was submitted that the production site was bigger than what the business operation required and despite the relatively higher rent, it was still considered to be a viable option at the time of the purchase.

[12] Mr Dowson said that the Ingleburn site continued to operate at a loss and a considerable amount of funds has been injected. The Company was initially in the process of looking to move the production to a smaller site to reduce costs. However, after the business was further affected by the Covid-19 pandemic, it was decided this step would not sufficiently reduce costs and the decision was taken to close the site and hence making the employees working there redundant.

[13] In terms of the financial position of the Company, Mr Dowson said that since the outbreak of Coronavirus, he had drawn a further \$200,000 from the family business to maintain financial viability. The Company's position has been exacerbated by trade debtors taking longer to pay their invoices. Mr Dowson said that the Company currently holds \$38,000 cash in the bank, and had wages for its remaining staff due the following week. It

was submitted that the business has insufficient cash flow to fund the redundancy payment.

[14] In support of the application, Mr Dowson provided a letter from his Chartered Accountants indicating that the Company as at 31 March 2020 has current assets of \$1,219,837 as against current liabilities of \$827,351.

[15] The letter from his accountant also stated that:

- a. Mr Dowson had been negotiating with his bank for a small business loan and overdraft facility but this has not been forthcoming;
- b. Trade Debtors are taking longer to collect as customers are not currently paying their outstanding invoices;
- c. Stock on hand is not being converted to sales as customers are not placing new orders to the same extent as pre COVID-19; and
- d. Shareholders loans to the company have increased by \$967,661 over the past 9 months.

[16] In answering my question as to whether the business is eligible for the JobKeeper Payment, Mr Dowson explained that it was his understanding the Company was not eligible because it had acquired another business in November 2019, the result of which was that they did not meet the reduction in turnover requirements to be eligible for JobKeeper.

Kelly Brennan

[17] Ms Brennan was employed as a sales executive. She said that she was not given an alternative to avoid the potential redundancy and she felt she had no option but to accept the redundancy. On 16 April 2020 she communicated her acceptance of the redundancy.

[18] Ms Brennan said that Mr Dowson had never mentioned in any prior conversations with respect to her potential redundancy that he was not in a position to pay. Her views are succinctly summed up by her statement that: "I feel his actions have been dishonest and deceitful knowing his financial position and his inability to pay out our redundancies. If his financial position was so impacted then he should have registered for the Job Keeper Scheme which was announced in March and this could have been offered. I believe the company will continue to operate post Covid-19 and as such he had an obligation to assist all staff members to retain their positions with Government assistance offered, even if it mean reducing work hours."

[19] Ms Brennan said that she has three dependents and her partner suffers from a medical illness which affects his capacity to work full time and as such it impacts their finances substantially. She felt misled by Acme Preston and as a result her family has been placed in severe financial stress.

Consideration

[20] The general approach taken by the Commission for a variation in relation to an employer's obligation for redundancy pay due to incapacity to pay is summarised by Hampton C in *Mildren Automotive Pty Ltd*¹ as follows:

- “• The provision means that the Commission “may” determine to reduce the amount of redundancy pay up to an amount of nil, indicating that the granting of full or partial relief from the obligation is an exercise of discretion in the circumstances of the case. The employer bears the onus of establishing that there are grounds justifying the exercise of the discretion.
- The employer must satisfy the FWC that it is not financially competent or possessed of the necessary funds to make the payment, and has no reasonable source of funds.
- The assessment of financial competence will include consideration of the financial standing of the business including its cash position and the assets of the business.
- The effect upon the employees immediately concerned will be considered including whether making an order prevents the employee from recovering the entitlement through other means should the company be liquidated; the effect that any order may have on the status of employees as potential creditors should the company become insolvent; and the impact of any order on the employee's rights under the General Employee Entitlements and Redundancy Scheme (GEERS) or similar schemes.
- The effect upon the continuation of the business, including whether reducing the entitlement of dismissed employees may have a beneficial effect on other employees, thereby enhancing their prospects of being able to remain in employment, are also relevant considerations.” (citations omitted)

[21] Taking the approach outlined above, I have concluded that Acme Preston has made out a case justifying the exercise of the discretion pursuant to s.120. To this end, I am satisfied that the Company is under significant financial strain and that it cannot afford to pay Ms Brennan's full entitlement to redundancy pay. This is evident given the financial position of the Company, and in particular the evidence that the Company currently held only \$38,000 cash in the bank, and had wages for its remaining staff due the following week. I am satisfied it does not have a reasonable source of other funds, having already borrowed from Mr Dowson's family business to the amount of \$200,000.

[22] Accordingly, I consider it appropriate to reduce the amount of redundancy pay to which Ms Brennan is entitled to two (2) weeks' pay.

[23] A determination to this effect will be issued separately.



DEPUTY PRESIDENT

Appearances:

C Dowson for HyperLife Pty Ltd T/A Acme Preston.

Kelly Brennan on her own behalf.

Hearing details:

2020.

Sydney (by telephone):

May 4.

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¹ [2013] FWC 2113.