



# DECISION

*Fair Work Act 2009*  
s.120—Redundancy pay

**Kelly Group (Administration) Pty Ltd**  
(C2022/8001)

COMMISSIONER SCHNEIDER

PERTH, 4 SEPTEMBER 2023

## *Variation of redundancy pay*

[1] This decision concerns an application made by Kelly Group (Administration) Pty Ltd (the Applicant) to reduce the amount of redundancy pay to which an employee, Ms Bernita Garbutt (the Respondent) is entitled under section 119 of the *Fair Work Act 2009* (Cth) (the Act).

[2] The Applicant seeks to reduce the Respondent's redundancy pay from ten weeks to nil on the grounds that she was offered *other acceptable employment*.

[3] The parties have provided written materials outlining their respective positions. Having considered the evidence and submissions, I have determined that the application will be dismissed, and there will be no reduction in the redundancy payment to which Mr Passmore is entitled.

[4] My reasons are as follows.

## **Background**

[5] The Respondent commenced employment at the Applicant as a casual on 17 April 2017 and then commenced on a part time contract from 10 July 2017.

[6] The Respondent ceased employment at the Applicant on 12 November 2022.

[7] The Respondent was engaged to work 28 hours across 4 days per week.

[8] The Respondent was employed as a Payroll Officer and the terms and conditions of her employment were governed by the *Clerks-Private Sector Award 2020* (the Award) and her employment contract.

[9] Consistent with the terms and conditions of the Award and the National Employment Standards (NES), the Respondent, being an employee who was employed for more than 5 years but less than 6 years, is entitled to ten weeks redundancy payment.

[10] During the redundancy process, the Applicant claims it offered the Respondent two positions of other acceptable employment. This submission is disputed.

[11] The Applicant seeks to reduce the redundancy payment to nil on the basis that the Respondent refused *other acceptable employment*.

[12] The Respondent objects to the application on the grounds that the roles mentioned in the application were not arranged by the Applicant and were not *other acceptable employment* due to what she claims are differences to her redundant role.

## Submissions

### *Applicant*

[13] The Applicant's submissions regarding other positions offered to the Respondent are brief and read as follows:

“The employee was advised that due to the restructuring of the administration function of the business, her role would become redundant.

The Applicant spoke with another business in the same industry as to whether they had a role for the employee. A role was available. The Applicant negotiated with the potential new employer, and it was agreed that they would recognize the employee's service and transfer all entitlements if she became employed by the business.

The position was a similar role working the same roster on the same money. The employee was familiar with this business as the owners of her current employer were on good terms with her potential future employer. The employee was offered the position. A contract of employment was provided to her.

At the same time the Applicant was also directed to another business which was seeking to employ a bookkeeper. She became aware of this role because her supervisor had rung the business to see if they had any positions and was advised that they were looking for someone but at that time had been unable to fill the position. The employee was interviewed by the business and was offered the position.

The business that made the offer had been advertising for the position for some time but had not been successful in filling the role. The employee was not aware that the business was looking for a person to fill the role and only became aware of it when she was informed by her supervisor.

The role was offered to her as we understand it on better terms than her current role.

The Applicant was therefore in possession of two offers of employment, both of which were facilitated by the actions of her current employer.

The Applicant accepted the second role and as we understand it is currently employed in that position.”

[14] The Applicant contends that it obtained two offers of other acceptable employment for the Respondent. From here on, the positions will be referred to as the First Position, being the Accounts Administrator position, and the Second Position, being Bookkeeping position.

### ***Respondent***

[15] In relation to the First Position, the Respondent submits that she submitted her CV and initiated contact regarding Payroll positions in the relevant company at the suggestion of her supervisor.

[16] The Respondent submits that a role was not available as contended by the Applicant, and that she attended a meet and greet with the relevant company.

[17] The Respondent confirms that she was offered the First Position and that the Applicant had arranged the transfer of service between the positions if successful.

[18] The Respondent disagrees that the Applicant brought the Second Position to her attention. The Respondent submits that she requested her supervisor introduce her to the relevant company as a personal favour. She contends that this contact was informal and done at her initiative to assist in securing a role.

[19] The Respondent submits that the nature work required under the two positions is not similar to her redundant Payroll Officer position. The Respondent submits that both positions are not comparable in hours to her previous position. The First Position was offered on a part time basis of 28 hours over a 5-day week and the Second Position was offered on a part time basis of 30 hours over a 4 day week.

### **Legislation**

[20] The relevant provision of the Act is set out below:

#### **“120 Variation of redundancy pay for other employment or incapacity to pay**

(1) This section applies if:

(a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and

(b) the employer:

(i) obtains other acceptable employment for the employee; or

(ii) cannot pay the amount.

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

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

### **Key issue in dispute**

[21] The key issues in dispute between the parties are summarised as follows:

- Did the Applicant *obtain* other acceptable employment for the Respondent?

And, if it is found that it did:

- Did the role(s) obtained and offered to the Respondent constitute other *acceptable* employment?

[22] I must first be satisfied that the opportunities offered to the Respondent were obtained by the Applicant, as required by the Act. Only after determining that one or both the positions were obtained will I then determine whether the position(s) is acceptable. If either position is found to be obtained and acceptable, I must then consider whether to reduce the amount owing to the Respondent.

[23] In relation to the question of whether the Applicant obtained the positions, the Full Bench has clarified that “*an employer “obtains” other acceptable employment when it acquires or gets the employment by its conscious, intended acts.*”<sup>1</sup> Mere facilitation of employment opportunities falls short of the *obtain* requirement.<sup>2</sup>

### **Consideration**

[24] On assessment of the materials before the Commission, it is clear and uncontested that the contact and efforts to pursue the First Position were generally driven by both parties. The Respondent submits that her supervisor requested she provide her CV and reach out to the relevant company to enquire about payroll positions. The Respondent did so and attended a meet a great with the relevant company. The company had no available payroll positions and offered the Respondent an accounts administrator role. The Applicant arranged a transfer of service of leave entitlement between the positions if the Respondent were to accept the employment.

[25] In regard to the Second Position, it is clear that the Respondent was the driving force in obtaining an offer of employment. The parties disagree regarding how the Respondent became aware of the position; the Respondent claims she requested the Applicant contact the relevant company as a favour and the Applicant contends it contacted the company to enquire about relevant opportunities. Despite this contention, it is clear that the Respondent, at the most, merely notified her of the position or merely assisted the Respondent’s own efforts after contacting the relevant company.

[26] I am satisfied that the Second Position, regardless of how the Respondent became aware of it, was not obtained by the Applicant. Similarly, on the materials before the Commission, I

am not satisfied that the Applicant has substantiated that the First Position offered to the Respondent was obtained in the manner required by the Act and discussed earlier.

[27] However, if I have erred in my conclusion regarding the First Position, I will briefly entertain the conclusion that this position was obtained by the Applicant as required.

[28] It has generally been accepted by the Commission that the following factors should be considered in relation to section 120(b)(i) of the Act:

- The nature of the work;
- The comparability of the work with that performed in the current role;
- Pay levels;
- Hours of work;
- Seniority;
- Fringe benefits;
- Workload and speed;
- Job security;
- Whether the employee will have continuity of service in the new role;
- Location and/or the need to relocate;
- Travel and/or the cost of travel that is additional to that relevant to the original employment;
- Carer's responsibilities; and
- Family circumstances.<sup>3</sup>

[29] The Respondent disputes that the hours of the First Position are comparable to the redundant position. The First Position was offered to the Respondent on a part time basis, offering 28 hours to be worked over a 5-day week.

[30] I am not satisfied that the addition of a day over which the 28 hours is spread constitutes any notable difference. However, it is clear that the position offered, being Accounts Administrator, likely differs from the redundant role of Payroll Officer.

[31] I am not satisfied the Applicant has established that there is adequate similarity between the comparability of the work to be performed.

[32] In the circumstances, noting that my conclusion above is that the Applicant has not established that either position was *obtained* as required, I would not be satisfied that the First Position is *other acceptable employment* due to the change in the nature of the work.

### Conclusion

[33] Having considered all the factors outlined above, and the submissions provided by the parties, I have determined that the positions mentioned in the application were not *obtained* for the purposes of section 120(1)(b)(i) of the Act.

[34] Accordingly, as I am not satisfied the roles were *obtained as other acceptable employment* for the purposes of the Act, there will be no reduction in the amount of redundancy pay owed to the Respondent.

[35] The application is dismissed and an Order to that effect has been issued.<sup>4</sup>



COMMISSIONER

Printed by authority of the Commonwealth Government Printer

<PR765772>

---

<sup>1</sup> [2022] FWCFB 173, [49].

<sup>2</sup> [2022] FWCFB 173, [47].

<sup>3</sup> [2019] FWC 756, [24]; [2016] FWC 2880, [11].

<sup>4</sup> [PR765810].