DECISION

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

Kurtis Longmore
v
Platinum Hospitality Group (Aust) Pty Ltd
(U2023/11738)

DEPUTY PRESIDENT WRIGHT SYDNEY, 16 APRIL 2024

Application for relief from unfair dismissal – no valid reason – dismissal found to be unfair – order for compensation appropriate

Introduction and outcome

[1] On 27 November 2023, Mr Kurtis Longmore made an application to the Fair Work Commission (**Commission**) under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy, alleging that he had been unfairly dismissed from his employment with the Platinum Hospitality Group (Aust) Pty Ltd (**Respondent**).

[2] The Respondent owns and operates a Fast Food and Convenience Store business in Queensland called the Loaded Burger. Mr Longmore was employed by the Respondent on a permanent part-time basis from 3 June 2022 until he was dismissed on 17 November 2023. The dismissal occurred after the Respondent ceased trading at the location where Mr Longmore worked.

[3] In summary, I have found that Mr Longmore was dismissed by the Respondent and there was not a valid reason for the dismissal. On this basis of this and other findings, I have determined that Mr Longmore's dismissal was harsh, unjust and unreasonable and that an order for compensation is appropriate.

Directions and determinative conference

[4] The matter was listed for a case management conference before Commissioner Johns on 22 January 2024. Neither party attended the case management conference. Later that day, Commissioner Johns issued directions for the filing and serving of evidence and submissions and listed the matter for hearing via Microsoft Teams on 4 March 2024. On 5 February 2024, Mr Longmore filed a series of text messages between the Respondent and himself. The Respondent did not file any material in accordance with the directions. On 26 February 2024, the Respondent filed a Form F3 Employer response to unfair dismissal application, the termination email and a separation certificate.

[5] The matter was reallocated to me and listed for a further case management conference on 1 March 2024. Mr Longmore appeared at the case management conference however there was no appearance for the Respondent. The matter was listed for determinative conference at 10:00am on 11 March 2024. Mr Longmore represented himself at the conference and there was no appearance by the Respondent.

[6] Following the Conference, my Chambers sent an email to the parties requiring the following to be provided by 25 March 2024:

1. The Respondent to provide payroll records in relation to the gross weekly earnings of Mr Longmore during the period from 23 February 2023 – 23 September 2023 then from 24 September - 17 November 2023;

2. Mr Longmore to provide any payslips which he has in his possession for the period from 23 February 2023 to 17 November 2023 including the final payslip;

3. Mr Longmore to provide the total gross amount earned since the termination including any payslips which show earnings during this period.

[7] Mr Longmore provided payslips in response to the email, however no response was received from the Respondent.

Background facts

[8] The Respondent owns and operates a Fast Food and Convenience Store business called the Loaded Burger in Queensland. During the time that Mr Longmore was employed, the Loaded Burger operated in two locations, namely Caboolture and Morayfield. Mr Longmore was employed by the Respondent on a permanent part-time basis from 3 June 2022 until he was dismissed on 17 November 2023. He worked 28-30 hours per week. He took a period of unpaid leave from 25 September 2022 until 30 December 2022. His duties included serving customers, cooking, cleaning and stocking shelves.

[9] Mr Longmore mainly worked at the Morayfield location but occasionally worked at the Caboolture location. On 22 September 2023, the landlord of the Morayfield premises changed the locks which prevented the Respondent from carrying out its business there.

[10] During the period that Mr Longmore was employed by the Respondent, he did not receive payslips regularly and did not receive any superannuation, although the few payslips issued to Mr Longmore incorrectly stated that superannuation was being paid.

[11] At 7:03am on 23 September 2023, Mr Longmore received a text message from Mr Brett Gorman, Director of the Respondent which stated:

> Hi guys, We've been having issues with the real estate agent over the last few weeks and last night they decided to get nasty with us and change the locks after we closed so the shop is closed. We will catch up with you both tomorrow and explain everything. Your jobs are safe so don't stress…

[12] Mr Longmore was subsequently informed by Mr Gorman that he would be provided with work at the other shop in Caboolture but Mr Longmore worked there on only one occasion on 9 October 2023. Mr Longmore says that he was 'put on annual leave and told to stay on annual leave until further notice'. He was not given the option of whether to go on annual leave or not. Mr Longmore produced a number of text messages and emails between Mr Gorman and himself in which Mr Longmore requested information about when he would next be working but was not provided with direct answers by Mr Gorman.

[13] On 4 October 2023, the Respondent sent a letter to Mr Longmore which provided:

> Dear Kurtis,
>
> EMPLOYMENT UPDATE
>
> Firstly, we would like to thank you for your support and understanding during this difficult time for the company. We are continuing to work with our solicitors, and relevant parties, to bring this current situation to an end. It appears however that this could be long and protracted process.
>
> As such, as per our conversation on Saturday 30 September, to be able to ensure your ongoing PPT employment with us while we work through this process, we will unfortunately be reducing your hours of employment with us in the interim.
>
> We value you as an employee and this is why we are trying to keep you employed on a reduced capacity so that you are still with us on the other side. In saying that we do understand that everyone has to do what they have to do, and we would fully understand that you may choose to find additional or alternative employment and we would support and assist you in any way we can.
>
> We hope that we will have a better understanding of what the situation is and where it all stands by the end of this week and will be able to give you an update at that time.
>
> Once again, we thank you for your support and understanding at this time.
>
> Yours faithfully,
>
> Brett M Gorman
> Managing Director.

[14] Mr Longmore received annual leave from 23 September 2023 until he ceased receiving payments on approximately 17 November 2023. Mr Longmore says that Mr Gorman kept telling him that he still had a job and that Mr Longmore did not know there was a possibility that his employment could be terminated until this actually occurred.

[15] On 17 November 2023, Mr Longmore received the following email from Mr Gorman:

> Hi Kurtis,

> This is to notify you that all your annual leave has now been used.
>
> You have been receiving two payments weekly, one being your normal weekly annual leave pay and the other being an advance on outstanding leave. These two payments have now exhausted all of the leave you had accrued.
>
> The reality is, that whilst the ongoing legal battle continues with Cresthaven, we are not in a position to offer you any employment, and as such unfortunately your employment is terminated.
>
> Attached is your final payslip showing the balance of the annual leave taken up and an additional 67 unworked hours as payment in lieu of notice.
>
> In addition to your payslip, I have also included two additional supporting documents.
>
> The total net payable on the final payslip is $2056.62, as you have been already paid the sum of $2051.70 in advance payments, the balance owed to be transferred today to finalise all your outstanding entitlements in $4.92.
>
> I will complete and email you a separation certificate over the weekend when I won't have any interruptions.
>
> Kind regards,
>
> Brett M Gorman
> Managing Director

[16] Mr Longmore later became aware from the real estate agent who managed the property that the Respondent had been behind in its rent for six months. The real estate agent told Mr Longmore that the 'legal battle' which the Mr Gorman referred to in its email was resolved 2-3 weeks after the locks were changed. Mr Longmore believes that the real reason that his employment was terminated was so Mr Gorman could employ his partner at the Caboolture business rather than Mr Longmore.

[17] Mr Longmore said that the Morayfield business ceased operating after the locks were changed but that he believed the Caboolture business continued to trade, based upon his observations when driving past that it had a full drinks fridge and that it still had active Google and Uber Eats webpages.

[18] Since the dismissal, Mr Longmore has struggled to find work. He worked for an unsavory employer doing garage door installations in January 2024 which ceased as a result of a pay dispute. Mr Longmore is currently working for a labour hire company 2-3 days per week.

When can the Commission order a remedy for unfair dismissal?

[19] Section 390 of the FW Act provides that the Commission may order a remedy if:

(a) the Commission is satisfied that Mr Longmore was protected from unfair dismissal at the time of being dismissed; and

(b) Mr Longmore has been unfairly dismissed.

[20] Both limbs must be satisfied. I am therefore required to consider whether Mr Longmore was protected from unfair dismissal at the time of being dismissed and, if I am satisfied that Mr Longmore was so protected, whether Mr Longmore has been unfairly dismissed.

When has a person been unfairly dismissed?

[21] Section 385 of the FW Act provides that a person has been unfairly dismissed if the Commission is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

Initial matters

[22] A threshold issue to determine is whether Mr Longmore has been dismissed from his employment.

[23] The email which Mr Gorman sent to Mr Longmore on 17 November 2023 establishes that Mr Longmore's employment was terminated at the initiative of the Respondent. As such I am satisfied that Mr Longmore has been dismissed within the meaning of s.385 of the FW Act.

[24] Under s.396 of the FW Act, the Commission is obliged 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;

(d) whether the dismissal was a case of genuine redundancy.

[25] I have decided these matters below.

Was the application was made within the period required in subsection 394(2)?

[26] Section 394(2) requires an application to be made within 21 days after the dismissal took effect.

[27] The evidence establishes that Mr Longmore was dismissed from his employment on 17 November 2023 and made the application on on 27 November 2023. I am therefore satisfied that the application was made within the period required in subsection 394(2).

Was Mr Longmore protected from unfair dismissal?

[28] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[29] Under s.383 of the FW Act, 'the minimum employment period' is one year if the employer is a small business employer and 6 months in all other cases. The period ends at the earlier of the time when the person is given notice of the dismissal or immediately before the dismissal. Section 23 of the FW Act defines a small business employer as an employer who employs fewer than 15 employees. The Respondent claimed in the F3 that it was a small business employer and that and that the *Fast Food Industry Award 2020* (the Award) applied to Mr Longmore's employment.

[30] Mr Longmore did not dispute this. Mr Longmore's period of service was approximately 14 months, not including the period of unpaid leave. I therefore find, that at the time of dismissal, Mr Longmore had completed at least the minimum period of employment with the Respondent, and that a Modern Award applied to Mr Longmore's employment.

[31] I am therefore satisfied that, at the time of dismissal, Mr Longmore was a person protected from unfair dismissal.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[32] The Small Business Fair Dismissal Code applied to the Respondent. In the F3 Response, the Respondent indicated that it complied with the Small Business Fair Dismissal Code but did not attach a Small Business Fair Dismissal Code Checklist or any other evidence which established that the Code had been complied with.

[33] The Code provides that in the case of a dismissal which is not a summary dismissal,

> …the small business employer must give the employee a reason why he or she is at risk of being dismissed.

[34] Implicit in this requirement is that the small business employer must advise the employee *before* the dismissal takes effect that there is a risk of dismissal and the reason for this. There is no evidence before me that the Respondent advised Mr Longmore before sending the email on 17 November 2023 that he might be dismissed because of the 'ongoing legal battle….with Cresthaven'. Mr Longmore only became aware of this when he received the email from the Respondent. As the Respondent did not comply with the requirement to give Mr Longmore a reason why he was at risk of being dismissed, I find that the dismissal was not consistent with the Small Business Fair Dismissal Code

Was the dismissal a case of genuine redundancy?

[35] In the F3 Response, the Respondent stated:

> The Business that the employee was employed to work was closed overnight on the 29th November 2023[1] due to actions taken by the landlord and their commercial property managers representing them. The business remained closed as of 17 November 2023 (date of said termination) and as it had no realistic chance of reopening due to ongoing legal dispute at the time the store was permanently closed. Said legal dispute continues as at the time of completing this form.
>
> The employee's position was never refilled nor is there any chance of this occurring due to the permanent closure/shut down of the business operations.

[36] This suggests that Mr Longmore's employment was terminated due to redundancy. Under s.389(1) of the FW Act, a person's dismissal was a case of genuine redundancy if:

> (a) the 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.

[37] Section 389(2) provides that 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 the employer's enterprise or the enterprise of an associated entity of the employer.

[38] If the Respondent's statement in the F3 is accepted, it appears that the requirements of s.389(1)(a) are met. In relation to s.389(1)(b), I note that Clause 28 of the Award provides:

28. Consultation about major workplace change

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

(a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and

(b) discuss with affected employees and their representatives (if any):

(i) the introduction of the changes; and

(ii) their likely effect on employees; and

(iii) measures to avoid or reduce the adverse effects of the changes on employees; and

(c) commence discussions as soon as practicable after a definite decision has been made.

28.2 For the purposes of the discussion under clause 28.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

(a) their nature; and

(b) their expected effect on employees; and

(c) any other matters likely to affect employees.

28.3 Clause 28.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

28.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 28.1(b).

28.5 In clause 28 **significant effects**, on employees, includes any of the following:

(a) termination of employment; or

(b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or

(c) loss of, or reduction in, job or promotion opportunities; or

(d) loss of, or reduction in, job tenure; or

(e) alteration of hours of work; or

(f) the need for employees to be retrained or transferred to other work or locations; or

(g) job restructuring.

28.6 Where this award makes provision for alteration of any of the matters defined at clause 28.5, such alteration is taken not to have significant effect.

[39] In my view, the 'definite decision' which the Respondent was required to consult Mr Longmore about under clause 28 of the Award was the Respondent's decision to close down one of its stores, because it was this decision which was likely to have a significant effect on Mr Longmore, including termination of employment. There is no evidence that the Respondent complied with any of its obligations under clause 28 of the Award. I therefore find that the requirements of s.389(1)(b) are not met and that the dismissal was therefore not a case of genuine redundancy within the meaning of s. 389(1).

[40] Having considered each of the initial matters, I am required to consider the merits of the application.

Was the dismissal harsh, unjust or unreasonable?

[41] Section 387 of the FW Act provides that, in 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.

[42] I am required to consider each of these criteria, to the extent they are relevant to the factual circumstances before me.[2]

[43] I set out my consideration of each of these criteria below.

Was there a valid reason for the dismissal related to Mr Longmore's capacity or conduct?

[44] There is no evidence that the dismissal related to Mr Longmore's capacity or conduct. I therefore find that there was no valid reason for the dismissal related to Mr Longmore's capacity or conduct.

Was Mr Longmore given an opportunity to respond to any valid reason related to her capacity or conduct?

[45] As I have not found that there was a valid reason related to related to Mr Longmore's capacity or conduct, this factor is not relevant to the present circumstances.[3]

Did the Respondent unreasonably refuse to allow Mr Longmore to have a support person present to assist at discussions relating to the dismissal?

[46] There were no discussions between Mr Longmore and the Respondent relating to the dismissal before it occurred.

Was Mr Longmore warned about unsatisfactory performance before the dismissal?

[47] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances.

To what degree would the size of the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[48] There was no evidence or submissions made by either party in relation to this matter.

To what degree would the absence of dedicated human resource management specialists or expertise in the Respondent's enterprise be likely to impact on the procedures followed in effecting the dismissal?

[49] There was no evidence or submissions made by either party in relation to this matter.

What other matters are relevant?

[50] The dismissal occurred approximately eight weeks after the locks were changed by the landlord at the Loaded Burger store in Morayfield. I accept Mr Longmore's evidence that during this period he was advised by the Respondent that he would be provided with employment at the Caboolture store and that he was not warned that there was a possibility that his employment could be terminated. I also accept that Mr Longmore was only offered one shift at the Caboolture store and that he was placed on annual leave without his consent.

[51] The Respondent chose not to participate in the proceedings so there is no evidence before me about the reasons that the the locks were changed by the landlord at the Loaded Burger store in Morayfield apart from the hearsay evidence provided by Mr Longmore in relation to his conversation with the real estate agent. In these circumstances, I am unable to

make any conclusions about whether the Respondent's conduct contributed to the closure of the Morayfield store. I do however accept that the eight-week period from closure of the store to the termination of Mr Longmore's employment was likely to be a stressful and uncertain time for Mr Longmore.

[52] It is possible that the Respondent was trying to avoid terminating Mr Longmore's employment by placing him on annual leave however it did not communicate this to Mr Longmore. If the Respondent had followed the consultation requirements in clause 28 of the Award, Mr Longmore would have been made aware that the termination of his employment was a possible outcome of the store closure and could have discussed with the Respondent measures to avoid or reduce the adverse effects of the termination. He could have chosen to use his annual leave to maintain his employment or actively looked for alternative employment. The Respondent's failure to comply with clause 28 of the Award resulted in these and other options not being available to Mr Longmore and as such the dismissal created harsh consequences for him. So too did the Respondent's actions in effectively terminating Mr Longmore's employment without notice, contrary to s. 117 of the FW Act. In the email advising of the termination, the Respondent purported to apply two weeks pay in lieu of notice to 'advance payments' resulting in Mr Longmore receiving only $4.92 at termination. This action was not available to the Respondent under s. 117 and resulted in Mr Longmore being deprived of income immediately, undoubtably causing him financial hardship.

[53] I note that Mr Longmore appears to dispute that his dismissal arose from the closure of the Morayfield store and believes that the real reason is because Mr Gorman wished to employ his partner. Although I accept that Mr Longmore's belief about this is genuine, there is no evidence before me to support this belief. Given that there is no dispute that the Morayfield store has ceased trading, I find that it is more likely than not that the dismissal was caused by the closure of the Morayfield store.

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

[54] I have made findings in relation to each matter specified in section 387 as relevant.

[55] I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[4]

[56] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of Mr Longmore was harsh, unjust and unreasonable because of the following matters:

- Mr Longmore was not advised by the Respondent of the possibility that he would be dismissed;
- The Respondent did not follow the consultation provisions of the Award;
- The Respondent required Mr Longmore to take annual leave and did not advise Mr Longmore that his employment would be terminated when the annual leave was exhausted;
- The Respondent terminated Mr Longmore's employment without notice;
- The actions of the Respondent caused Mr Longmore financial hardship.

[57] I am therefore satisfied that Mr Longmore was unfairly dismissed within the meaning of section 385 of the FW Act.

Remedy

[58] Being satisfied that Mr Longmore made an application for an order granting a remedy under s.394, was a person protected from unfair dismissal, and was unfairly dismissed within the meaning of s.385 of the FW Act, I may, subject to the FW Act, order Mr Longmore's reinstatement, or the payment of compensation to Mr Longmore.

[59] Under section 390(3) of the FW Act, I must not order the payment of compensation to Mr Longmore unless:

(a) I am satisfied that reinstatement of Mr Longmore is inappropriate; and

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

Is reinstatement of Mr Longmore inappropriate?

[60] Mr Longmore has not sought reinstatement and the Respondent has not made any submissions in relation to this matter. On this basis I consider that reinstatement is inappropriate.

Is an order for payment of compensation appropriate in all the circumstances of the case?

[61] 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…'[5]

[62] Where an applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.[6]

Compensation – what must be taken into account in determining an amount?

[63] Section 392(2) of the FW Act requires all of the circumstances of the case to be taken into account when determining an amount to be paid as compensation to Mr Longmore 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.

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

Effect of the order on the viability the Respondent's enterprise

[65] There was no evidence adduced by either party as to whether an order for compensation would have an effect on the viability of the employer's enterprise so I make no findings in relation to this matter.

Length of Mr Longmore's service

[66] Mr Longmore's length of service was approximately 14 months. I consider that Mr Longmore's length of service does not support reducing or increasing the amount of compensation ordered.

Remuneration that Mr Longmore would have received, or would have been likely to receive, if Mr Longmore had not been dismissed

[67] As stated by a majority of the Full Court of the Federal Court:

> [i]n 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.[7]

[68] I have found that it is more likely than not that the dismissal was caused by the closure of the Morayfield store. In the circumstances I believe that it is unlikely that Mr Longmore's employment would have continued longer than the consultation period required under the Award. In my view, the consultation period would have taken approximately two weeks. Following the consultation period, the Respondent was required to provide Mr Longmore with two weeks notice of termination. Mr Longmore gave evidence that the Respondent provided him with payslips on a sporadic basis. The payslips that Mr Longmore was able to produce

showed that his gross earnings for the 2024/2025 financial year immediately before being required to take annual leave was $9,561.75 as at 6 September 2023, This is a period of approximately 10 weeks so I find that the average weekly amount earned by Mr Longmore prior to the dismissal was $956.18. I find that the remuneration that Mr Longmore would have received, or would have been likely to receive, if Mr Longmore had not been dismissed is $3,824.72 reflecting an expected employment period of 4 weeks.

Efforts of Mr Longmore to mitigate the loss suffered by Mr Longmore because of the dismissal

[69] Mr Longmore must provide evidence that he has taken reasonable steps to minimise the impact of the dismissal.[8] What is reasonable depends on the circumstances of the case.[9]

[70] Mr Longmore gave evidence that after the dismissal, he worked for an unsavory employer doing garage door installations which ceased as a result of a pay dispute. Mr Longmore is currently working for a labour hire company 2-3 days per week. Mr Longmore provided payslips which showed his earnings since the dismissal.

[71] On the basis of the evidence before me, I am satisfied that Mr Longmore took reasonable steps to mitigate his loss.

Amount of remuneration earned by Mr Longmore from employment or other work during the period between the dismissal and the making of the order for compensation

[72] The evidence shows that Mr Longmore has earned a gross amount of $3,452.67 since the dismissal. However this amount was earned from 8 January 2024, which is after the period of expected employment if the dismissal had not occurred. As such I have not made any deductions in respect of this amount.

Amount of income reasonably likely to be so earned by Mr Longmore during the period between the making of the order for compensation and the actual compensation

[73] There was no evidence adduced by Mr Longmore as in relation to the amount of income reasonably likely to be earned by Mr Longmore during the period between the making of the order for compensation and the actual compensation, so I make no findings in relation to this matter.

Other relevant matters

[74] I have taken into account that Mr Longmore was left without income after his employment was terminated as a result of the Respondent requiring him to exhaust his annual leave (while not advising Mr Longmore that his dismissal was imminent) and failing to provide Mr Longmore of notice of termination.

Compensation – how is the amount to be calculated?

[75] As noted by the Full Bench, '[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***).[10] This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*[11]'.[12]

[76] Applying the Sprigg formula, I find that Mr Longmore would receive compensation equivalent to the four-week expected period of employment. 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.'[13] In my view, the Respondent's actions in requiring Mr Longmore to exhaust his annual leave entitlement without advising Mr Longmore that his employment was likely to be terminated put Mr Longmore at considerable disadvantage. If Mr Longmore had been aware that his employment was going to be terminated, he could have been actively looking for alternative employment. Further if Mr Longmore's employment had been terminated without requiring him to exhaust his annual leave, Mr Longmore would have had approximately five weeks annual leave to live off while he sought other employment. Instead, Mr Longmore received only $4.92 at termination.

[77] Taking these matters into account, I believe that it is appropriate that the Respondent pay Mr Longmore the amount that he would have earned from the date of termination until he found alternative employment, namely from 17 November 2023 until 7 January 2024 which is a period of approximately 7 weeks. This is a gross amount of $6,693.26 plus superannuation.

[78] I am satisfied that the amount of compensation that I have determined takes into account all the circumstances of the case as required by s.392(2) of the FW Act and that the amount does not include a component compensating for shock, distress or humiliation.

Compensation – is the amount to be reduced on account of misconduct?

[79] I am satisfied that Mr Longmore did not engage in misconduct. Therefore, the amount of the order for compensation is not to be reduced on account of misconduct.

Compensation – how does the compensation cap apply?

[80] Section 392(5) of the FW Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

(a) the amount worked out under section 392(6); and

(b) half the amount of the high income threshold immediately before the dismissal.

[81] The amount worked out under section 392(6) is the total of the following amounts:

(a) the total amount of the remuneration:

(i) received by Mr Longmore; or

(ii) to which Mr Longmore was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if Mr Longmore was on leave without pay or without full pay while so employed during any part of that period – the amount of remuneration taken to have been received by Mr Longmore for the period of leave in accordance with the regulations.

[82] I have determined the amount of compensation as $6,693.26 gross plus superannuation which is below the amount in s. 392(5).

Conclusion

[83] I have found that Mr Longmore was protected from unfair dismissal at the time of being dismissed and that the dismissal was harsh, unjust and unreasonable. I have determined that that an order for compensation is appropriate and the Respondent should pay compensation to Mr Longmore in the sum of $6,693.26 gross plus superannuation less taxation as required by law in lieu of reinstatement within 7 days of the date of this decision.

[84] An order giving effect to this decision is published with this decision.

DEPUTY PRESIDENT

Mr K. Longmore for the Applicant.
No appearance for the Respondent.

Hearing details:

2024
March 11
Sydney

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<PR773574>

[1] This appears to be a typographical error as the text message sent by the Respondent to Mr Longmore indicates the locks were changed on 22 September 2023.

[2] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498, [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [69].

[3] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFB, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000), [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762, [46]-[49].

[4] *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].

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

[6] *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550, [20]; *Jeffrey v IBM Australia Ltd* [2015] FWCFB 4171, [5]-[7].

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

[8] *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].

[9] *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.

[10] (1998) 88 IR 21.

[11] [2013] FWCFB 431.

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

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