DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Baydon Johnson
v
Faulkner Farming Pty Ltd
(U2024/411)

COMMISSIONER CRAWFORD SYDNEY, 22 APRIL 2024

Application for relief from unfair dismissal – lack of evidence that employee was under the influence of alcohol - no valid reason - dismissal unfair – compensation ordered

Background

[1] Baydon Johnson (**Mr Johnson**) commenced employment with Faulkner Farming Pty Ltd (**Faulkner Farming**) on 17 October 2022 as an Assistant Manager for the Watermark Aggregation property. Faulkner Farming manages over 200,000 hectares of mixed farms in New South Wales and South Australia. This includes the Watermark Aggregation property in Curlewis, which is near Gunnedah in central New South Wales. Mr Johnson worked and resided on the Watermark Aggregation property with his family while he was employed by Faulkner Farming.

[2] Mr Johnson was dismissed by Faulkner Farming on 5 January 2024 for alleged misconduct. The alleged misconduct was associated with Mr Johnson attending work on 4 January 2024 after consuming a considerable amount of alcohol after work in the evening of 3 January 2024. Mr Johnson was paid two weeks of wages in lieu of notice for termination.

[3] On 11 January 2024, Mr Johnson 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 was unfairly dismissed from his employment with Faulkner Farming.

[4] Faulkner Farming filed a Form F3 employer response form on 19 January 2024. The Form F3 did not identify any jurisdictional objections to Mr Johnson's application.

[5] Mr Johnson's application was not resolved via conciliation. Given there are contested facts, the Commission is required to conduct a conference or hold a hearing pursuant to s.397 of the FW Act.

[6] Directions were issued for the filing of material in relation to the application and permission was granted for both parties to be represented at a determinative conference/hearing via video on 17 April 2024. The matter was allocated to me after these steps had been taken.

[7] Mr Johnson was represented by Mason Manwaring from Campbell Paton Taylor Solicitors at the determinative conference/hearing on 17 April 2024. Roland Hassall from Sparke Helmore Lawyers represented Faulkner Farming at the determinative conference/hearing.

[8] At the commencement of the proceeding, I indicated my provisional view was that it was appropriate to conduct a hearing given both parties were legally represented. I sought the views of the parties and there was no opposition. The proceeding was conducted as a hearing.

Material relied upon

Mr Johnson

[9] In addition to his Form F2 unfair dismissal application, Mr Johnson relied on the following evidence in support of his application:

- A witness statement from Mr Johnson dated 18 March 2024. The statement had the following documents attached:
  - "A": A copy of Mr Johnson's Employment Agreement with Faulkner Farming dated 1 September 2022.
  - "B": A copy of screenshots of WhatsApp communications between Faulkner Farming employees, including Mr Johnson.
  - "C": A copy of Mr Johnson's termination letter dated 5 January 2024.
  - "D": A copy of an Employment Agreement between Mr Johnson and Blantyre Farms Pty Limited (**Blantyre Farms**) which was accepted by Mr Johnson on 22 January 2024. A copy of a payslip provided by Blantyre Farms to Mr Johnson for the period of 17 February 2024 to 1 March 2024 was also included.
  - "E": Copies of receipts showing expenses incurred by Mr Johnson when he relocated to Young after being dismissed by Faulkner Farming.

  I marked the statement and its attachments **Exhibit A1**.

- A witness statement in reply from Mr Johnson dated 14 April 2024. The statement had a screenshot of WhatsApp messages attached. I marked the reply statement and attachment **Exhibit A2**.

[10] Mr Johnson was cross-examined on his evidence.

[11] Mr Johnson also relied on a written outline of submissions dated 18 March 2024. Mr Manwaring made oral closing submissions at the end of the hearing.

Faulkner Farming

[12] In addition to its Form F3 employer response, Faulkner Farming relied on a witness statement from Simone McPartland (Human Resources/WHS Manager) dated 10 April 2024. Ms McPartland's statement had the following documents attached:

- "SM-01": A copy of a Faulkner Farming Employee Induction document signed by Mr Johnson on 18 October 2022.
- "SM-02": A copy of emails sent by Tom Redfern (General Manager Operations) about a tool-box meeting held on 17 April 2023.
- "SM-03": A copy of a Performance Agreement Template provided by Faulkner Farming to Mr Johnson for the period of 23 November 2023 to 23 November 2024.
- "SM-04": A copy of an email sent by Steve Filetti (General Manager) to Ms McPartland and others on 4 January 2024 regarding Mr Johnson's conduct.
- "SM-05": A copy of a screenshot of a WhatsApp message sent by Mr Filetti to Mr Johnson and others on 3 January 2024.
- "SM-06": A copy of an email from Mr Filetti to Mr Johnson dated 4 January 2024 which records Mr Filetti asking Mr Johnson to take leave for the day.
- "SM-07": A document prepared by Ms McPartland based on notes she separately took from a meeting held with Mr Johnson on 5 January 2024.

[13] I declined to admit the first three sentences of paragraph [18] of Ms McPartland's statement after objections were raised by Mr Johnson. I did this because the allegation that there were empty beer cans found in Mr Johnson's work vehicle had not been put to Mr Johnson and the person with knowledge of what had allegedly occurred, Mr Redfern, had not been called to give evidence. Mr Johnson also objected to other parts of Ms McPartland's statement concerning communication with Mr Filetti, who had also not been called to give evidence. Mr Johnson ultimately withdrew the objection on the basis that the evidence would not be relied upon to establish the truth of what Mr Filetti had communicated to Ms McPartland. I marked Ms McPartland's statement with the amendment as **Exhibit R1**. Ms McPartland was cross-examined on her evidence.

[14] Faulkner Farming also relied on a witness statement from Melinda Wessling (Assistant Human Resources Manager) dated 10 April 2024. Ms Wessling's statement had the following documents attached:

- "MW-01": A copy of emails exchanged between Ms Wessling and Mr Johnson on 2 September 2022 regarding the commencement of Mr Johnson's employment.
- "MW-02": A copy of an email sent by Mr Johnson to Ms Wessling on 5 September 2022 which had a signed copy of Mr Johnson's employment contract attached.

- "MW-03": A copy of a Faulkner Farming Employee Induction document signed by Mr Johnson on 18 October 2022.

- "MW-04": A copy of an email from Ms Wessling to Mr Johnson dated 8 December 2022 regarding previous criminal convictions disclosed by Mr Johnson.

- "MW-05": A copy of a letter from Mr Redfern to Mr Johnson dated 2 December 2022 which confirms Mr Johnson's employment would be continued despite his disclosure of prior criminal convictions.

- "MW-06": A copy of emails exchanged between Ms Wessling and Mr Johnson on 31 January 2023. The email from Mr Johnson has a signed copy of Faulkner Farming's drug and alcohol policy attached.

- "MW-07": A copy of Faulkner Farming's Alcohol and Drugs Policy signed by Mr Johnson on 31 January 2023.

- "MW-08": A copy of a Performance Agreement Template provided by Faulkner Farming to Mr Johnson for the period of 23 November 2023 to 23 November 2024.

- "MW-09": A copy of an email sent by Mr Filetti to Ms McPartland and others on 4 January 2024 regarding Mr Johnson's conduct.

- "MW-10": A copy of an email sent by Ms Wessling to Mr Johnson on 4 January 2024 which directs Mr Johnson to attend a meeting with Mr Filetti and Ms McPartland at 8:30am on 5 January 2024 via Teams.

- "MW-11": A copy of Faulkner Farming's WHS FFC Policy Statement.

- "MW-12": A copy of an email from Ms Wessling to Mr Johnson sent on 5 January 2024 which had a copy of Mr Johnson's termination letter attached.

- "MW-13": A copy of emails exchanged between Ms Wessling and Mr Johnson on 10 and 12 January 2024 regarding an exit interview and Mr Johnson's final pay.

[15] Mr Johnson also objected to parts of Ms Wessling's statement concerning communication with Mr Filetti, given he had not been called to give evidence. Mr Johnson ultimately withdrew the objection on the basis that the evidence would not be relied upon to establish the truth of what Mr Filetti had communicated to Ms Wessling. I marked Ms Wessling's statement as **Exhibit R2**. Ms Wessling was cross-examined on her evidence.

Statutory provisions – initial matters

When can the Commission order a remedy for unfair dismissal?

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

(a) Mr Johnson was protected from unfair dismissal at the time of being dismissed; and

(b) Mr Johnson has been unfairly dismissed.

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

When is a person protected from unfair dismissal?

[18] 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.

When has a person been unfairly dismissed?

[19] 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;

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

(c) the dismissal was not consistent with the SBFDC; and

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

Was Mr Johnson dismissed?

[20] There was no dispute and I find that Mr Johnson's employment with Faulkner Farming terminated at the initiative of Faulkner Farming effective 5 January 2024.

Initial matters

[21] 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 (**SBFDC**);

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

[22] It is not in dispute and I find that Mr Johnson's application was filed within the relevant 21-day period.

[23] It is not in dispute and I find that Mr Johnson had completed the minimum employment period of six months. Mr Johnson's employment with Faulkner Farming was covered by the *Pastoral Award 2020* and his earnings were below the high-income threshold. I find that Mr Johnson was a person protected from unfair dismissal

[24] Faulkner Farming's Form F3 response states that it has 15 employees. That means Faulkner Farming does not fall within the definition of a "small business" in s.23 of the FW Act because it did not employ "fewer than 15 employees" when Mr Johnson was dismissed. As a result, the SBFDC does not need to be considered. This position was not contested by Faulkner Farming.

[25] Faulkner Farming has not argued Mr Johnson's dismissal was a case of genuine redundancy.

[26] Having considered each of the initial matters, I am required to consider the merits of Mr Johnson's application.

Statutory provisions – harsh, unjust or unreasonable

[27] 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.

[28] I am required to consider each of these factors, to the extent they are relevant to the factual circumstances before me.[1]

[29] I set out my consideration of each below but will firstly outline some findings on the evidence.

Findings on the evidence

[30] I have considered all of the evidence and make the following findings on what I consider to be the key factual issues:

i. Mr Johnson was aware of Faulkner Farming's Alcohol and Drugs Policy since at least 31 January 2023, which is when he signed a copy and emailed it to Ms McPartland. The policy makes it clear that: "It is forbidden for any employee to start work or return to work whilst under the influence of alcohol or drugs".

ii. Mr Johnson's Performance Assessment Template for the period of 23 November 2023 to 23 November 2024 identifies a key area for improvement to be: "Demonstrate the right behaviours for the team to see, follow and build the culture of professionalism and achieving the work in a timely manner." In relation to that area, the document records a required outcome to be: "Eg's – Being mindful of not having a big night with alcohol before a workday, not wearing thongs when working even if it was to check in on the team."

iii. Mr Johnson consumed a substantial amount of alcohol during the evening on 3 January 2024. Mr Johnson drank at his local pub and continued drinking on the way home and when at home. I accept Faulkner Farming's submission that Mr Johnson's evidence about the number of drinks he consumed, and at what times, lacked consistency. I consider it is likely Mr Johnson consumed around 12 to 15 standard drinks during the evening.

iv. Mr Johnson went to bed around 11pm on 3 January 2024. Mr Johnson had his last drink prior to 11pm. I do not consider the evidence is clear regarding when Mr Johnson ceased drinking.

v. Mr Johnson was aware he was expected to attend work at 7:00am the next morning from around 7:43pm on 3 January 2024.

vi. Mr Johnson slept through his alarms and was late to work on 4 January 2024. Mr Johnson arrived at the worksite around 7:40am after being contacted by Mr Filetti.

vii. There is insufficient evidence to conclude that Mr Johnson was "under the influence of alcohol" when he started work on 4 January 2024, which would constitute a breach of the Alcohol and Drugs Policy. Mr Johnson denied he was under the influence of alcohol in the meeting held on 5 January 2024 and consistently maintained that evidence under cross-examination in the Commission. I do not consider the email and hearsay evidence regarding Mr Filetti's observations of Mr Johnson's fitness can be fairly relied upon to establish Mr Johnson's impairment. That is particularly the case in circumstances whereby Faulkner Farming elected not to call Mr Filetti as a witness. I also consider it is relevant that Mr Filetti allowed Mr Johnson to drive home from the worksite on the morning of 4 January 2024. It may have been possible for Faulkner Farming to lead expert evidence regarding Mr Johnson's likely blood alcohol level at 7:40am on 4 January 2024, based on the number of drinks he admitted consuming. There is no such evidence before me. I do not consider I can simply assume Mr Johnson must have been impaired based on his evidence about how much alcohol he consumed the previous evening.

viii. The alleged breach of the Alcohol and Drugs Policy and associated breaches of safety obligations were the primary reason that Mr Johnson was dismissed. The other matters raised by Faulkner Farming, namely that Mr Johnson was late to work on 4 January 2024 and that he was disengaged and not wanting to be at work, would not have led to Mr Johnson's dismissal if the alleged policy breach did not occur.

ix. There was significant and increasing tension in the working relationship between Mr Filetti and Mr Johnson in the lead up to Mr Johnson's dismissal.

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

[31] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[2] and should not be "capricious, fanciful, spiteful or prejudiced."[3] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[4]

[32] Where a dismissal relates to an employee's conduct, the Commission must be satisfied that the conduct occurred and justified termination.[5] The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of

the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination.[6]

[33] Mr Johnson's termination letter is slightly ambiguous in terms of the reason for dismissal. It is clear the primary focus is Mr Johnson attending work on 4 January 2024 after consuming around 12 beers the previous evening. However, reference is also made to Mr Johnson being late for work and to him being disengaged and not wanting to be at work.

[34] As identified above, I am not satisfied based on the evidence led by Faulkner Farming that Mr Johnson attended work under the influence of alcohol on 4 January 2024. As a result, I am not satisfied that Mr Johnson breached the Alcohol and Drugs Policy, or the WHS policy on 4 January 2024. I am not satisfied that Mr Johnson's admissions about the amount of alcohol he drank the night before constitutes a valid reason for dismissal where there is no reliable evidence to demonstrate he was under the influence of alcohol when he attended work on 4 January 2024.

[35] I do not consider Mr Johnson attending work late on 4 January 2024 or him being disengaged at work, or not wanting to be at work, constitutes a valid reason for dismissal. That is particularly the case given the evidence suggests that Mr Johnson was only notified of the earlier starting time after working hours at around 7:43pm on 3 January 2024.

[36] I find that there was not a valid reason for Mr Johnson's dismissal based on any of the individual reasons raised by Faulkner Farming and do not consider the reasons viewed collectively establish a valid reason for dismissal.

Was Mr Johnson notified of the reason for dismissal?

[37] Proper consideration of s.387(b) requires a finding to be made as to whether Mr Johnson "was notified of that reason". Contextually, the reference to "that reason" is the valid reason found to exist under s.387(a).[7]

[38] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[8] and in explicit[9] and plain and clear terms.[10]

[39] As I am not satisfied that there was a valid reason for dismissal, this factor is not strictly relevant to the present circumstances.[11]

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

[40] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[12]

[41] The opportunity to respond does not require formality and this factor is to be applied in a common-sense way to ensure the employee is treated fairly.[13] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.[14]

[42] As I have not found that there was a valid reason for dismissal, this factor is not strictly relevant to the present circumstances.[15]

Did Faulkner Farming unreasonably refuse to allow Mr Johnson to have a support person present to assist at discussions relating to the dismissal?

[43] Mr Johnson did not argue that Faulkner Farming unreasonably refused to allow him to have a support person present at the meeting on 5 January 2024. I consider this to be a neutral factor.

Was Mr Johnson warned about unsatisfactory performance before the dismissal?

[44] I consider Mr Johnson's dismissal primarily related to alleged misconduct rather than unsatisfactory performance, so this factor is not strictly relevant. Faulkner Farming has also raised concerns with elements of Mr Johnson's performance, but it is clear these concerns would not have triggered the dismissal if not for the events on 3 and 4 January 2024. I consider this is a neutral factor.

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

[45] Faulkner Farming is a reasonably small business based on the number of employees it identified on its Form F3 employer response. However, it does have a HR Manager and an Assistant HR Manager. I consider this is a neutral factor.

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

[46] Faulkner Farming has dedicated human resource managers. I consider this is a neutral factor.

What other matters are relevant?

[47] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant.

[48] The parties did not argue there were any other relevant matters to take into account.

[49] Mr Johnson did not have a lengthy period of employment. There are no striking demographic considerations. I do not consider there are any other relevant matters to take into account.

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

[50] I have made findings in relation to each matter specified in s.387. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[16]

[51] Having considered each of the matters specified in s.387 of the FW Act, I am satisfied that the dismissal of Mr Johnson was unjust and unreasonable because there was no valid reason for his dismissal.

[52] If Faulkner Farming had established that Mr Johnson was under the influence of alcohol when he attended work on 4 January 2024, it is highly unlikely I would have found his dismissal was unfair. The rules in the Alcohol and Drugs Policy are clear and Mr Johnson had viewed and signed the policy. Further, the issue of drinking alcohol in the evening ahead of a workday had been specifically raised with Mr Johnson in his Performance Agreement Template for the period of 23 November 2023 to 23 November 2024. Farms are amongst the most dangerous types of workplaces. It is undoubtedly a very serious matter to attend this type of workplace under the influence of alcohol or drugs.

Conclusion

[53] I am therefore satisfied that Mr Johnson was unfairly dismissed within the meaning of s.385 of the FW Act.

Remedy

[54] Being satisfied that Mr Johnson:

- 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 Johnson's reinstatement, or the payment of compensation to Mr Johnson.

[55] Under s.390(3) of the FW Act, I must not order the payment of compensation to Mr Johnson unless:

(a) I am satisfied that reinstatement of Mr Johnson 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 Johnson inappropriate?

[56] Mr Johnson does not seek reinstatement on the basis that the employment relationship has been irreparably damaged. I agree with this position.

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

[57] 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…".[17]

[58] 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.[18]

[59] Mr Johnson has suffered financial loss in circumstances where I have found there was not a valid reason for dismissal. In all the circumstances, I consider that an order for payment of compensation is appropriate.

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

[60] 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 Johnson in lieu of reinstatement including:

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

(b) the length of Mr Johnson's service;

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

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

(e) the amount of any remuneration earned by Mr Johnson 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 Mr Johnson 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.

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

Effect of the order on the viability of Faulkner Farming's enterprise

[62] Faulkner Farming did not argue that a compensation order would impact on the viability of its enterprise.

Length of Mr Johnson's service

[63] Mr Johnson had only been employed for around 15 months when he was dismissed. I consider this to be a neutral factor.

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

[64] As stated by a majority of the Full Court of the Federal Court, "[i]n determining the remuneration that the employee 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."[19]

[65] Mr Johnson admitted in his witness statement dated 18 March 2024 that he stated "I really don't want to" in response to a question from Mr Filetti about whether he wanted to continue working for Faulkner Farming. Ms McPartland's notes of the meeting she attended via Teams with Mr Johnson on 5 January 2024 also record Mr Johnson stating: "I am only here until I find another job, as soon as I get one, I'm out of here." Although Mr Johnson argued he only had problems with Mr Filetti, and not more broadly in terms of his employment with Faulkner Farming, there is no evidence to suggest there was any prospect of Mr Filetti ceasing to hold his position in the foreseeable future or of the issues between the two being resolved.

[66] Taking all the evidence into account, I find Mr Johnson would likely have remained employed with Faulkner Farming for a further three months while he located alternative work in the local area. Although Mr Johnson did find another job within around two weeks of his dismissal, that job was in Young and accepting the job required him to relocate his family. I consider it would have taken Mr Johnson a significantly longer amount of time to find another job in the local area.

[67] Faulkner Farming's Form F3 employer response states Mr Johnson's salary rate at the time of his dismissal was $102,600.00.

[68] I calculate the remuneration Mr Johnson would have been likely to receive working for Faulkner Farming from 5 January 2024 to 5 April 2024 to be $25,650.00 gross plus superannuation of $2,821.50.

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

[69] Mr Johnson must provide evidence that he has taken reasonable steps to minimise the impact of the dismissal.[20] What is reasonable depends on the circumstances of the case.[21]

[70] Mr Johnson located an alternative job within around two weeks and was prepared to relocate his family to accept the job.

[71] I do not consider any deduction should be made for failure to mitigate loss.

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

[72] Mr Johnson was paid two weeks of wages in lieu of notice for termination when he was dismissed. That equates to a payment of $3,946.15, plus superannuation of $434.08.

[73] Mr Johnson commenced employment with Blantyre Farms on 5 February 2024. Mr Johnson has been paid a full-time rate of $1,400.00 gross per week since 5 February 2024. However, the payslip Mr Johnson provided for the period of 17 February 2024 to 1 March 2024 indicates he also received overtime payments totalling $1,855 gross for that fortnight. I do not have evidence about any other overtime payments received by Mr Johnson.

[74] Given this evidence, based on a compensation order being made on 22 April 2024, I calculate Mr Johnson has earned the following amounts from his employment with Blantyre Farms since his dismissal:

> 11 weeks x $1,400.00 gross per week = $15,400.00 plus overtime payments of $1,855.00 = $17,255.00.

[75] Mr Johnson has also been receiving superannuation on his ordinary weekly earnings, which would equate to $1,694.00.

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

[76] I intend to order that the compensation payable to Mr Johnson is to be paid within 14 days. I estimate that Mr Johnson will earn $2,800.00 gross during that period, plus superannuation. However, this period is outside of the anticipated period of employment.

Other relevant matters

[77] Neither party submitted that there were any other relevant matters.

Compensation – how is the amount to be calculated?

[78] 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***).[22] This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*.[23]

[79] The approach in *Sprigg* is as follows:

Step 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).

Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure to mitigate loss may lead to a reduction in the amount of compensation ordered.

Step 3: Discount the remaining amount for contingencies.

Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

Step 1

[80] I have estimated that Mr Johnson would have remained employed by Faulkner Farming until 5 April 2024. This is the "anticipated period of employment".[24]

[81] The remuneration Mr Johnson would have received, or would have been likely to have received, from his dismissal on 5 January 2024 until 5 April 2024 is $25,650 gross plus superannuation of $2,821.50.

Step 2

[82] Only monies earned since termination for the anticipated period of employment are to be deducted.[25]

[83] I have calculated that Mr Johnson's total earnings during the anticipated period of employment are:

- $3,946.15 in notice paid by Faulkner Farming
- $17,255.00 in wages from Blantyre Farms

TOTAL = $21,201.15

Plus $434.08 in superannuation payments from Faulkner Farming
Plus $1,694.00 in superannuation payments from Blantyre Farms

[84] For the reasons outlined above, I have not applied a deduction for failure to mitigate loss because Mr Johnson has taken significant steps to mitigate his loss.

[85] A figure of $4,448.85 plus superannuation of $693.42 is left after the remuneration earned is deducted from the remuneration Mr Johnson would have received during the anticipated period of employment.

Step 3

[86] I now need to consider the impact of contingencies on the amounts likely to be earned by Mr Johnson for the remainder of the anticipated period of employment.[26]

[87] Mr Johnson's anticipated period of employment has ended prior to the hearing of his unfair dismissal application. I therefore do not need to make a deduction for contingencies.

Step 4

[88] I have considered the impact of taxation but have elected to settle a gross amount of $4,448.85 plus superannuation of $693.42 and leave taxation for determination.

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

[89] If I am satisfied that misconduct of Mr Johnson contributed to the employer's decision to dismiss, I am obliged by s.392(3) of the FW Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct.

[90] Given I have not found that Mr Johnson committed the misconduct that he was primarily dismissed for, I am not required to make a deduction. I do not consider it would be appropriate for a deduction to be applied.

Compensation – how does the compensation cap apply?

[91] 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 s.392(6); and

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

[92] Section 392(6) of the FW Act provides:

(6) The amount is the total of the following amounts:

(a) the total amount of remuneration:

(i) received by the person; or

(ii) to which the person was entitled;

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

[93] Given Mr Johnson's annual salary rate of $102,600, a compensation cap of $51,300 plus superannuation applies in accordance with s.392(6) of the FW Act.

Is the level of compensation appropriate?

[94] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case."[27]

[95] The application of the *Sprigg* formula has resulted in an outcome where Mr Johnson would be awarded compensation of $4,448.85 plus superannuation of $693.42.

[96] Mr Johnson has provided evidence of relocation expenses he incurred after being dismissed and moving to Young to take another job. Faulkner Farming has referred to Mr Johnson being provided with free rent on the Watermark Aggregation property for around one month after he was dismissed. There are also additional allowances that were paid to Mr Johnson in relation to his employment with Faulkner Farming and in his new job with Blantyre Farms. I consider these matters broadly balance out between the parties and do not consider I need to make an adjustment to the compensation order on their account.

[97] I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by s.392(2) of the FW Act.

Compensation order

[98] Given my findings above, I will make an order that Faulkner Farming must pay Mr Johnson $4,448.85 less taxation as required by law, plus superannuation of $693.42 to be paid into Mr Johnson's nominated fund, with both payments to be made within 14 days of the date of this decision.

COMMISSIONER

Appearances:

Mason Manwaring from Campbell Paton and Taylor Solicitors representing *Baydon Johnson.*

Roland Hassall from Sparke Helmore Lawyers on behalf of *Faulkner Farming*.

Hearing details:

2024.
Via video.

17 April 2024.

Printed by authority of the Commonwealth Government Printer

<PR773824>

---

[1] *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].

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

[3] Ibid.

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

[5] *Edwards v Justice Giudice* [1999] FCA 1836, [7].

[6] *King v Freshmore (Vic) Pty Ltd* Print S4213 (AIRCFB, Ross VP, Williams SDP, Hingley C, 17 March 2000), [23]-[24].

[7] *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429, [19]; *Reseigh v Stegbar Pty Ltd* [2020] FWCFB 533, [55].

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

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

[10] Ibid.

[11] *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].

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

[13] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[14] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

[15] *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].

[16] *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].

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

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

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

[20] *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].

[21] *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.

[22] (1998) 88 IR 21.

[23] [2013] FWCFB 431.

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

[25] Ibid.

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

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