



DECISION

Fair Work Act 2009
s.120—Redundancy pay

Application by Ozland Mining Services PTY LTD (C2024/1661)

COMMISSIONER LIM

PERTH, 31 MAY 2024

Variation of redundancy pay – whether other acceptable employment offered – alternate role found to not constitute other acceptable employment – application dismissed

1. Introduction

[1] On 28 February 2024, Ozland Mining Services PTY LTD (**Applicant**) applied pursuant to s 120 of the *Fair Work Act* (**Act**) for the variation of its obligation to pay redundancy pay under s 119 of the Act. The application is in relation to a former employee, Ms Joevelyn Ball. The Applicant seeks to reduce Ms Ball’s entitlement to redundancy pay from four weeks to nil.

[2] Having considered the evidence and materials in this matter, I am not satisfied pursuant to s 120 that the Applicant has obtained other acceptable employment for Ms Ball. The application must be dismissed.

[3] My detailed reasons follow.

2. Background

[4] The procedural history of this matter can be summarised as follows:

- (a) On 21 March 2024, my chambers wrote to Ms Ball seeking her position on the application.
- (b) On 3 April 2024, an additional email was sent to Ms Ball to follow up. No response was received to either email.
- (c) On 5 April 2024, I directed the Applicant to provide a witness statement in support of their application so that I could determine whether I was satisfied that the criteria in s 120 of the Act had been met.
- (d) On 8 April 2024 at 12:41pm, the Applicant filed the witness statement of Stuart Murdoch, Human Resources Officer for the Applicant. The witness statement was provided to Ms Ball that day at 1:44pm for her to provide any comment or objection.

- (e) On 8 April 2024 at 8:16pm, Ms Ball replied to chambers' email with, "Hi how are you? Yeah everything good[.] Thanks"

[5] Ms Ball has not provided any other response despite ample opportunity. I am therefore proceeding to deal with this matter on the papers.

[6] The evidence of Mr Murdoch is as follows:

- (a) Ms Ball commenced employment with the Applicant on 2 January 2023 as a Dump Truck Operator. This was a fly-in-fly-out (**FIFO**) role on an 8 days on, 6 days off roster. Ms Ball was based in Perth and would fly out to site at Miralga Creek mine in Western Australia.
- (b) Ms Ball's role as a Dump Truck Operator at Miralga Creek was made redundant in February 2024.
- (c) On 19 February 2024, the Applicant offered a role as a Dump Truck Operator based in Coolgardie, Western Australia (**Redeployment Offer**). This role was on a two-weeks on, one-week off FIFO basis. Other than the location and roster, this role was identical Ms Ball's original role. There was also increased wages with the changed roster and increased hours of work.
- (d) On 19 February 2024, Ms Ball replied via email with, "Not accepting the offer". No other communication was made between the Applicant and Ms Ball.
- (e) Ms Ball's employment with the Applicant ended on 1 March 2024.

[7] I accept Mr Murdoch's uncontested evidence as outlined above.

3. Legislation

[8] Section 119 of the Act provides for the following redundancy pay entitlements:

"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.

Note: Sections 121, 122 and 123 describe situations in which the employee does not have this entitlement.

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

[9] Section 120 of the Act provides:

“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 specific 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.”

4. Consideration

[10] In this matter, I am satisfied on the evidence from Mr Murdoch that Ms Bell was entitled to be paid four weeks redundancy pay in accordance with s 119 of the Act.

[11] The Applicant does not contend that it cannot pay the amount. In relation to s 120(1)(b)(i) of the Act, the Full Bench in *Australian Commercial Catering Pty Ltd Powell and Togia; Powell v Australian Commercial Catering Pty Ltd*¹ set out that the test in relation to s 120(1)(b)(i) of the Act is an objective one and is not determined by reference to whether the employment is subjectively acceptable to the employee.² Further, that the once the preconditions in s 120(1) are satisfied, the determination of whether to reduce an employee's entitlement to redundancy pay requires the exercise of a broad discretionary power.³

[12] In *Spotless Services Australia Limited t/as Alliance Catering (Spotless)*,⁴ Deputy President Sams helpfully summarised authorities on what "other acceptable employment" means and relevantly stated:

“[65] The above decisions have some common features, including:

- The test of what constitutes 'acceptable employment' is an objective one. It does not mean it must be acceptable to the employee.
- Acceptable employment is not identical employment, as no two jobs could be exactly the same.
- An employee must meaningfully cooperate with the employer in exploring or considering options for alternative positions.
- An employee's prima facie entitlement to redundancy pay may be at risk if the employee refuses a role or position, which is found to be objectively 'acceptable'.
- The acceptance of alternative employment by one or more persons in a group of redundant employees, does not necessarily make the alternative employment 'acceptable' for all of them. Each employee's individual circumstances must be taken into account.
- There are a range of factors of varying weight, according to an employee's particular circumstances, which may be taken into account to assess the acceptability of alternative employment.”

[13] On the evidence, the role in the Redeployment Offer is substantially the same or identical in duties to Ms Ball's role prior to being made redundant. Further, the Redeployment Offer offered more per annum due to the increased hours of work.

[14] I accept the Applicant's evidence and note that Ms Ball did not provide any evidence. However, an uncontested application does not absolve me from being satisfied on the requirements of the Act.

[15] I have placed significant weight on the changed roster. Though a roster is but one factor that can be considered, in the case of FIFO rosters where employees are working away from home, there should be greater weight. Ms Ball was on an 8-days on, 6-days off roster, which is a nearly even time roster. The Redeployment Offer would have increased Ms Ball's time on site by six days per swing, while only increasing her time at home by one day.

[16] There has been considerable coverage and research into the effects of FIFO rosters on mental health and family life.⁵ This includes a Parliamentary Inquiry by the Western Australian Education and Health Standing Committee in 2015 (**Parliamentary Inquiry**)⁶ that recognised that rosters of greater compression pose significant risks to workers' mental health and well-being and should be reduced, and even-time rosters encouraged.⁷ I therefore find that the changed roster in the Redeployment Offer was a substantial change compared to Ms Ball's original role.

[17] I am not satisfied in these circumstances that the Applicant obtained acceptable employment for Ms Ball.

[18] If I had been satisfied that the Redeployment Offer was acceptable employment, I still would not have exercised my discretion pursuant to s 120(2) to reduce Ms Ball's entitlement to redundancy pay. This is because on the evidence, Ms Ball received the Redeployment Offer 11 days before her redundancy took effect. Where an employer wishes to change the roster pattern for an employee, especially a FIFO employee, there must be enough time given for the worker to make suitable arrangements for their personal circumstances. This is especially so where the change of that roster is to reduce the amount of time spent at home.

[19] Accordingly, the application must be dismissed. An order to this effect will issue separately.



COMMISSIONER

Hearing Details:

Determined on the papers

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¹ [2016] FWCFB 5467.

² Ibid, [37].

³ Ibid.

⁴ [2016] FWC 4505.

⁵ See: 'Impact of FIFO work arrangements on the mental health and wellbeing of FIFO workers', Centre for Transformative Work Design, September 2018 < [FIFO Wellbeing & Mental Health – Literature Review \(mhc.wa.gov.au\)](https://www.mhc.wa.gov.au)>, commissioned by the Mental Health Commission (Western Australia) (**Centre for Transformative Work Design Study**); 'The Mental Awareness, Respect and Safety (MARS) Program Landmark Study: Insights from the Worker Survey and Interviews', Centre for Transformative Work Design, October 2023 < [The Mental Awareness Respect and Safety \(MARS\) Program Landmark Study: Insights from the worker survey and interviews \(www.wa.gov.au\)](https://www.wa.gov.au)>.

⁶ 'The impact of FIFO work practices on mental health: Final Report', Education and Health Standing Committee, Legislative Assembly Parliament of Western Australia, Report No. 5, June 2015 < [Microsoft Word - 20150616 - Final Report w signature title pages deleted \(parliament.wa.gov.au\)](https://www.parliament.wa.gov.au)>

⁷ Parliamentary Inquiry, Finding 21, page 69; *Also see*: Centre for Transformative Work Design Study, Recommendation 11, page 33.