



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 2 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 pursuant to s 119 of the Act. The application is in relation to a former employee, Mr Spencer Hawkins. The Applicant seeks to reduce Mr Hawkins’ entitlement to redundancy pay from six weeks to nil.

[2] On 6 May 2024, I conducted a determinative conference to hear evidence from the parties. Having considered the evidence and materials in this matter, I am not satisfied that the Applicant obtained other acceptable employment for Mr Hawkins per s 120(2)(b)(ii). In the alternative, if I had been satisfied, I would not have exercised my discretion to reduce Mr Hawkins’ redundancy entitlement.

[3] My detailed reasons follow.

2. Background

[4] Mr Hawkins commenced employment with the Applicant on 1 December 2021 as a dump truck operator. Mr Hawkins was based at Miralga Creek in Western Australia, and he lived in Perth at the time. His employment was covered by the Mining Industry Award 2020 (**Award**).

[5] When Mr Hawkins commenced this role, he was one a two-weeks on, one-week off (2/1) roster. In or around September 2022, Mr Hawkins moved to the Gold Coast. Mr Hawkins’ evidence was that he spoke with his supervisor at the time and indicated that due to the change in location he could not do a 2/1 roster and would have to look at finding a new job. Mr Hawkins’ evidence is that his supervisor made arrangements so that Mr Hawkins was moved to a three-weeks on, two-weeks off roster to keep Mr Hawkins.

[6] In mid-to-late February 2024, Mr Hawkins was informed that his role was being made redundant. Over 19 and 20 February 2024, the Applicant sent Mr Hawkins a redeployment offer

as a Dump Truck/All Rounder Operator based at the Applicant's operations in Coolgardie on a 2/1 roster (**Redeployment Offer**). On 22 February 2024, Mr Hawkins declined the offer. On 1 March 2024, Mr Hawkins' employment with the Applicant came to an end.

[7] Mr Hawkins gave evidence that a 2/1 roster is not suitable for him for the following reasons:

- (a) He lives on the Gold Coast in Queensland but like his prior contract with the Applicant, the point of hire in the Redeployment Offer is Perth. This means that to get to and from a site in Western Australia, he needs to take a shuttle bus to Brisbane and then fly from there to Perth. Due to the time required to travel and flight times, he has to arrive in Perth the day before his mobilisation day, which requires him to hire a motel overnight. The same goes in reverse for when he is demobilised from site.
- (b) On a 3/2 roster he does 10 return flights a year. On a 2/1 roster he does 17 return flights a year. Given the time taken to travel from the Gold Coast to site via Perth, this compounds the amount of time away from his home and family.
- (c) The Applicant only covers the cost of flights between the site and Perth. Mr Hawkins has to cover the cost of the arrangements to get from the Gold Coast to Perth, as well as the overnight accommodation. The 2/1 roster would increase the frequency of these costs.

[8] The Applicant submitted that on the 2/1 roster in the redeployment offer, Mr Hawkins would earn \$16,644 more per annum, which would offset the increased flight costs.

[9] The parties largely did not contest each other's evidence, and I accept the evidence from the parties as outlined above.

3. Legislation

[10] 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

[11] 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

[12] In this matter, I am satisfied on the evidence that Mr Hawkins was entitled to be paid six weeks redundancy pay in accordance with s 119 of the Act.

[13] 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

[14] 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.”

[15] In applying these authorities, I have reached the finding that the Applicant did not obtain other acceptable employment for Mr Hawkins. In reaching this finding, I have considered the following:

- (a) The position in the Redeployment Offer was substantially the same if not identical in duties to Mr Hawkins' role prior to being made redundant.
- (b) The Redeployment Offer would have seen Mr Hawkins earn more per annum due to the increased hours of work, though a portion of that would have been spent on the increased travel and accommodation costs associated with the 2/1 roster.

[16] However, I have placed considerable weight on the impact the change from a 3/2 roster to a 2/1 would have for Mr Hawkins. It would have meant more time spent travelling and more time away from home and family. Mr Hawkins effectively loses two days to travelling each swing, which has far greater impact when you only have one week at home, compared to two weeks. Rosters, and how family friendly they are, are a significant consideration.

[17] For completeness, I address the Applicant's contention that they have other employees who live in another State or Territory who work a 2/1 roster. That may be so, but the task before me is to assess this application in the context of Mr Hawkins' situation.

[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 Mr Hawkins' entitlement to redundancy pay. This is because on the evidence, Mr Hawkins was informed of his redundancy approximately three weeks before it took effect. Mr Hawkins did not receive the contract for the Redeployment Offer until 20 February 2024, 10 days before his redundancy took effect. This was not sufficient time for Mr Hawkins to make suitable arrangements for his home and family life given the impact of going from a 3/2 roster to a 2/1 roster.

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



COMMISSIONER

Appearances:

Stuart Murdoch, HR Officer of the Applicant
Spencer Hawkins, Respondent

Hearing details:

Determinative Conference
2024.
Perth (via Microsoft Teams):
6 May.

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<PR775581>

¹ [\[2016\] FWCFB 5467](#).

² *Ibid*, [37].

³ *Ibid*.

⁴ [\[2016\] FWC 4505](#).