DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Emad Nakhla
v
SMYC Pty Ltd
(U2024/4346)

COMMISSIONER HUNT BRISBANE, 7 AUGUST 2024

Application for an unfair dismissal remedy – jurisdictional objection – genuine redundancy – position no longer required to be performed by anyone – consultation obligations not met by respondent – unfair dismissal – compensation ordered.

[1] On 15 April 2024, Mr Emad Nakhla made an application under s.394 of the *Fair Work Act 2009* (the Act) alleging that his dismissal from SMYC Pty Ltd (the Respondent) was harsh, unjust or unreasonable.

[2] Mr Nakhla was informed by the Respondent on 26 March 2024 that his role had been made redundant and there were no other roles to which he could be redeployed. In addition to his accrued annual leave, he was paid five weeks' notice on account of his five completed years of service with the Respondent and being aged 68 years. He was paid ten weeks' severance in accordance with the National Employment Standards within the Act.

[3] His employment concluded on 26 March 2024.

[4] Mr Nakhla asserted that his dismissal was harsh, unjust or unreasonable as the Respondent failed to meet its consultation obligations in respect of redundancy in accordance with the *Clerks – Private Sector Award 2020* (the Award). Further, he asserted that redeployment opportunities were not discussed with him prior to the dismissal. He considered that he was likely dismissed on account of his age and his requirement to work part-time due to having dialysis treatment on Monday, Wednesday and Friday afternoons.

Legislation

[5] Section 385 of the Act provides that a person has been unfairly dismissed if the Fair Work Commission (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.

[6] Section 396 of the Act sets out the following:

"The FWC must decide the following matters relating to an application for an order under Division 4 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."

[7] As set out above in s.396 of the Act, a consideration as to whether the dismissal was harsh, unjust or unreasonable cannot occur if the dismissal was a case of genuine redundancy. If the Commission determines that the dismissal was a case of genuine redundancy, the application will be dismissed.

[8] If the Commission determines that the dismissal was not a case of genuine redundancy, the application will be determined taking into consideration all of the criteria in s.387 of the Act:

"**387 Criteria for considering harshness etc**.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC 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."

[9] In respect of the jurisdictional objection of genuine redundancy, s.389 of the Act provides the meaning of genuine redundancy as follows:

"(1) A person's dismissal was a case of genuine redundancy if:

(a) the person's 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.

(2) 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:

(a) the employer's enterprise; or

(b) the enterprise of an associated entity of the employer."

[10] It is not disputed that Mr Nakhla was employed pursuant to the Award. The Award contains the following consultation clause:

"**38. Consultation about major workplace change**

38.1 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.

38.2 For the purposes of the discussion under clause 38.1(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.

38.3 Clause 38.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

38.4 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 38.1(b).

38.5 In clause 38 **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.

38.6 Where this award makes provision for alteration of any of the matters defined at clause 38.5, such alteration is taken not to have significant effect."

Hearing

[11] On 1 August 2024, I convened a Hearing by video using Microsoft Teams. Mr Nakhla was granted leave to be represented by Mr Anthony Romeo of D'Agostino Solicitors. The Respondent was represented by Mr Jason Morris, General Manager of Human Resources. Mr Nakhla, Mr Morris and Mr Paul Gonzales, General Manager of the Respondent gave evidence and were cross-examined.

Evidence of Mr Nakhla

[12] Mr Nakhla is 68 years old. He commenced employment with the Respondent on 13 August 2018. His role was Domestic Purchasing Officer.

[13] His duties include obtaining quotes into the Visy portal and obtaining a competitive quote from an alternative supplier. Once both quotes were obtained, he would enter them into the Respondent's enquiry system and close out the request. The Respondent employee who had requested the quote would be able to view the quotes. He estimated he would obtain approximately 80 quotes per month.

[14] Once the account manager raises an internal form called 'new product request', Mr Nakhla would enter the technical product details in the system, which he estimated would occur approximately 30-40 times per month.

[15] When Mr Nakhla commenced in 2018, there were four purchasing officers employed by the Respondent, including himself. In 2019, one purchasing officer was made redundant, another went on maternity leave, and then another resigned. Mr Nakhla was the sole purchasing officer until a new hire was made in 2023.

[16] Mr Nakhla stated he was working very large hours while he was the sole purchasing officer.

[17] On 8 February 2023, Mr Nakhla supplied a medical certificate confirming that he had commenced dialysis treatment and would require his working hours to be as follows:

Monday:	8:00am to 1:00pm
Tuesday:	Full time
Wednesday:	8:00am to 1:00pm
Thursday:	Full time
Friday:	8:00am to 1:00pm

[18] The request for part-time hours was accommodated by the Respondent, resulting in him working 30.2 hours per week. On Tuesdays and Thursdays, Mr Nakhla worked from the Respondent's Willawong location between 8:30am and 4:30pm. On Mondays, Wednesdays and Fridays he worked from home before commencing his dialysis treatment in the afternoon.

[19] Mr Nakhla hoped to receive a kidney transplant and return to full-time work.

[20] Mr Nakhla stated that around lunchtime on 26 March 2024, he was called into a meeting with Mr Gonzales and Ms Amelia Adam, who informed him that his employment was terminated due to redundancy. He noted that the termination took effect immediately. He was issued with a termination letter dated 25 March 2024.

[21] He stated that he had no opportunity to discuss, contest or seek clarification of the decision, nor to say goodbye to his colleagues. He was informed that the Respondent could not redeploy him as there was nothing suitable. None of the Respondent's vacant roles was discussed with him. He considered that he was 'marched' off the premises.

[22] Mr Nakhla considered that he ought to have been placed in the vacant Warehouse Storeperson role in Queensland. Alternatively, he would have been willing to relocate to Sydney.

[23] Mr Nakhla has found it difficult to find other roles on account of his age and medical condition.

[24] In evidence given during the Hearing, Mr Nakhla agreed that he worked well with Ms Glenda Coghlan, Domestic Purchasing Manager. She would often enquire about his health and was flexible and accommodating of his requests.

[25] In cross-examination, Mr Nakhla agreed that Mr Gonzales and Ms Adam remained in the boardroom where the meeting had been conducted. They did not ask him to immediately leave the premises. They said that he could leave as soon as he wanted. Mr Nakhla collected his keys and lunch and then left. He did not wish to return to the boardroom. He conceded that he was not given a deadline to leave the site.

[26] Mr Nakhla agreed that post-termination, a lunch was celebrated in his honour, with Ms Coghlan and Mr Jonathon Evans travelling from Sydney to attend, together with some local colleagues.

[27] In respect of possible redeployment into the warehousing role, Mr Nakhla stated that he last performed warehousing duties around 2005-2008 and he experienced good health in that period. In cross-examination, he was informed that the current role required a minimum of 38 hours per week and reasonable overtime. He conceded that due to his medical condition, he would not be able to work those hours.

[28] In respect of other roles located in Sydney which required CA or CPA qualifications, Mr Nakhla confirmed that he does not have a degree in any discipline.

Evidence of the Respondent

Evidence of Mr Gonzales

[29] Mr Gonzales has been with the Respondent since 2018 and is located in Melbourne. The pricing portal used by the Respondent had been in place when Mr Gonzales commenced employment.

[30] A review of operations commenced in late 2023, with the review concluded in mid-February 2024. A decision was made to make Mr Nakhla's role redundant, with his duties to be distributed across multiple team members nationally.

[31] Mr Gonzales stated that the role Mr Nakhla had been performing is no longer being performed by anyone. Mr Nakhla's medical condition never played any part in the Respondent's decision to make his role redundant.

[32] Mr Gonzales discussed with Mr Morris any possible redeployment opportunities for Mr Nakhla across the country, however they determined that there was nothing appropriate. Mr Gonzales accepted that it is best practice to speak with affected employees about any redeployment opportunities. Mr Gonzales conceded that the Respondent did not consult with Mr Nakhla about its decision to make him redundant.

[33] Mr Nakhla had been paid his March monthly salary earlier in the month and accordingly, he was paid wages up until and including 29 March 2024. In addition, he was paid the required notice and severance payment per the Act.

Evidence of Mr Morris

[34] Mr Morris stated that the duties previously performed by Mr Nakhla are now being performed by multiple team members across the country who complete the price requests on the portal based on their location requirements.

[35] Mr Morris stated that there were no current or future positions in which Mr Nakhla had the skills or experience to perform, and any lesser roles would have been 'insulting' to offer to Mr Nakhla. Mr Morris stated that the decision not to hold discussions with Mr Nakhla in respect of other roles was out of consideration for his skills, experience and service to the business and not one of malice or deceit.

[36] In cross-examination, Mr Morris conceded that it would have been respectful to discuss with Mr Nakhla redeployment opportunities. The Respondent has discussed redeployment opportunities with other employees it had made redundant. He stated that none of the available roles in other states could be performed remotely.

[37] When asked how long consultation might have taken if the Respondent had met its consultation obligations, Mr Morris considered that it would have occurred up to 29 March 2024.

Consideration

Genuine Redundancy

[38] I turn now to a consideration of the criteria set out in s.389 of the Act. For Mr Nakhla's dismissal to be a case of genuine redundancy, the Respondent must meet each of the criteria set out in s.389 of the Act, where relevant.

s.389(1)(a) – the person's 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

[39] The test to be considered where there has been a reorganisation or redistribution of duties is whether the employee has any duties left to discharge.[1]

[40] Where there is no longer any function or duty to be performed by an employee, his or her position becomes redundant even where aspects of that employee's duties are still being performed by other employees.[2]

[41] The decision in *Kekeris v A. Hartrodt Australia Pty Ltd T/A a.hartrodt*[3] considered this point and established the test of whether the previous job has survived the restructure or downsizing, rather than a question as to whether the duties have survived in some form. The Full Bench in *Ulan Coal Mines Limited v Howarth and others*[4] considered and applied the decision of Ryan J in *Jones v Department of Energy and Minerals*,[5] and said:

> "**[17]** It is noted that the reference in the statutory expression is to a person's 'job' no longer being required to be performed. As Ryan J observed in *Jones v Department of Energy and Minerals* (1995) 60 IR 304 a job involves 'a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employees' organisation, to a particular employee' (at p. 308). His Honour in that case considered a set of circumstances where an employer might rearrange the organisational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions. In these circumstances, it was said that:
>
> > 'What is critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organisation, any duties left to discharge. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant… (at p.308)'
>
> This does not mean that if any aspect of the employee's duties is still to be performed by somebody, he or she cannot be redundant (see ***Dibb v Commissioner of Taxation*** (2004) FCR 388 at 404-405). The examples given in the Explanatory Memorandum illustrate circumstances where tasks and duties of a particular employee continue to be performed by other employees but nevertheless the 'job' of that employee no longer exists."

[42] In late 2023 and by mid-February 2024, the Respondent had concluded that it could do without Mr Nakhla performing a central pricing function, and it would require employees in their respective locations to obtain their own pricing. This constitutes changes in the operational requirements of the Respondent's enterprise. Nobody is doing the role that Mr Nakhla performed; simply, existing employees are now performing, as a part of their duties, the task that Mr Nakhla had been performing.

[43] I am satisfied that following the changes in the operational requirements of the Respondent's enterprise, the Respondent no longer required Mr Nakhla's job to be performed by anyone else. The criterion in s.389(1)(a) of the Act is satisfied.

s.389(1)(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

[44] The obligation on an employer to consult about redundancy only arises when a modern award or enterprise agreement applies to an employee and that modern award or enterprise agreement contains requirements to consult about redundancy.

[45] It is not disputed that Mr Nakhla was employed under the Award; the consultation clause is produced at [10].

[46] In *Port Kembla Coal Terminal Ltd v CFMEU (Port Kembla)*,[6] Jessup J observed that "the forced redundancy of three employees out of a workforce of about 98 did not of itself constitute a major change within the meaning of cl 7.1."[7] However, as White J noted in *Port Kembla*, a simple comparison between the number of employees to be dismissed and the number of employees in the workforce overall is not conclusive of whether there are major changes.[8] Much depends upon the circumstances of a case.

[47] Paragraph 1548 of the *Fair Work Bill 2008* (Cth) Explanatory Memorandum to the Act sets out as follows:

> "The following are possible examples of a change in the operational requirements of an enterprise: a machine is now available to do the job performed by the employee; the employer's business is experiencing a downturn and therefore the employer only needs three people to do a particular task instead of five; or the employer is restructuring their business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists."

[48] The Respondent made a definite decision to make a major change to the business, removing the role of Domestic Purchasing Officer and requiring existing employees to procure their own pricing. The Respondent's decision had a significant effect on employees, including by the elimination of a position.

[49] It follows that the Respondent was required to comply with the consultation obligations in clause 38 of the Award. The Respondent concedes that it did not consult with Mr Nakhla at all.

[50] I am not satisfied that the Respondent complied with the consultation obligations prescribed by the Award. Accordingly, I am not satisfied that the cessation of Mr Nakhla's employment was a genuine redundancy within the meaning of s.389 of the Act.

[51] In light of the conclusion reached, it is unnecessary to consider s.389(2), being whether it would have been reasonable in all the circumstances for Mr Nakhla to have been redeployed within the Respondent, or an associated entity. However, for completeness, I have determined the issue below.

s.389(2) – 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: (a) the employer's enterprise; or (b) the enterprise of an associated entity of the employer.

[52] Whether redeployment of an employee is considered reasonable will depend on the circumstances that exist at the time of the dismissal.[9]

[53] In *Hallam v Sodexo Remotes Site Australia Pty Ltd*,[10] a Full Bench of the Commission stated the following:

> "…Subsection 389(2) states 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. Subsection 389(2) places no obligation on an employer to redeploy, or to do everything possible to achieve a redeployment outcome. The exception is applied at the time of dismissal. It operates so that a dismissal that would otherwise be a case of genuine redundancy under subsection 389(1) will not be so if it would have been reasonable in all the circumstances for the person to be redeployed within the employer's enterprise, or with an enterprise of an associated entity of the employer."

[54] As the Full Bench observed in *TAFE NSW v Pykett*,[11] to show that it would have been reasonable for the Respondent to redeploy Mr Nakhla, it is not necessary to identify a particular job or position in which Mr Nakhla could have been redeployed. However, the Commission must be satisfied on the balance of probabilities, and based on the evidence, that there was a "job or a position or other work" to which it would have been reasonable to redeploy Mr Nakhla.

[55] The material before the Commission does not support any contention that redeployment would have been reasonable in all the circumstances. The only role available in Queensland was as a Warehouse Storeperson. It has been more than 15 years since Mr Nakhla worked as a Storeperson, and on his evidence held a forklift licence. He is now aged 68 with a significant medical condition, requiring part-time hours of work and dialysis treatment three times during the work week. He is unable to work the hours required of the role.

[56] Mr Nakhla does not have the qualifications to be redeployed into any other roles available in Sydney, the only other interstate location he would have been prepared to move to.

[57] On the evidence before the Commission, I am satisfied that it would not have been reasonable in all the circumstances for Mr Nakhla to have been redeployed within the Respondent's business or associated entities.

Was the dismissal harsh, unjust or unreasonable?

[58] A dismissal may be unfair, when examining if it is 'harsh, unjust or unreasonable' by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:[12]

> "It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because

> the employee was not guilty of the misconduct on which the employer act, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

[59] I am duty-bound to consider each of the criteria set out in s.387 of the Act in determining this matter.[13]

s.387(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)

[60] When considering whether there is a valid reason for termination, the decision of North J in *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373 provides guidance as to what the Commission must consider:

> "In its context in s.170DE(1), the adjective 'valid' should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1) At the same time the reasons must be valid in the context of the employee's capacity or conduct or based on upon the operational requirements of the employer's business. Further, in consideration whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must 'be applied in a practical, common-sense way to ensure that the employer and employee are treated fairly'."

[61] 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.[14]

[62] I am satisfied that the Respondent no longer required Mr Nakhla's job to be performed by anyone because of changes in the operational requirements of the enterprise. The reason for Mr Nakhla's dismissal was not related to his capacity or conduct. As such, this is a neutral factor with respect to whether Mr Nakhla's dismissal was harsh, unjust or unreasonable.

s.387(b) - Whether the person was notified of that reason

[63] As Mr Nakhla's termination of employment did not relate to capacity or conduct, this is a neutral factor. I note, however, Mr Nakhla was notified of the reasons for the dismissal in the termination letter issued to him on 26 March 2024.

s.387(c) - Whether there was an opportunity to respond to any reason related to the capacity or conduct of the person

[64] This criterion deals with procedural fairness in respect of a reason for dismissal related to an employee's capacity or conduct. As Mr Nakhla's employment ended by way of redundancy this is a neutral factor.

s.387(d) - Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal

[65] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[66] There is no positive obligation on an employer to offer an employee the opportunity to have a support person. The Explanatory Memorandum, *Fair Work Bill 2008* (Cth) at [1542] states the following:

> "This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."

[67] In the circumstances, I find that the Respondent did not unreasonably refuse to allow Mr Nakhla to have a support person present at discussions relating to the dismissal on 26 March 2024. However, I note that Mr Nakhla was not on notice of the meeting's purpose such that he was not afforded the opportunity to request a support person. This matter is appropriately considered under s.387(h).

s.387(e) - Was there a warning of unsatisfactory work performance before dismissal

[68] Mr Nakhla's dismissal did not relate to unsatisfactory performance. This is a neutral factor.

s.387(f) - Whether the respondent's size impacted on the procedures followed and s.387(g) - Whether the absence of a dedicated human resource management specialist impacted on the procedures followed

[69] The Respondent is not a small business. It employs a dedicated human resource management specialist. The Respondent ought to have known of its obligations to consult with an affected employee and to discuss redeployment opportunities with the affected employee.

s.387(h) – Other matters

[70] I am satisfied that the Respondent had a valid reason to dismiss Mr Nakhla having regard to its operational requirements. The valid reason was not related to Mr Nakhla's capacity or conduct; it was nonetheless a bona fide reason. It is a consideration that tells against a finding that the dismissal was unfair.

[71] The Respondent knew of its definite decision since mid-February 2024 to make Mr Nakhla's role redundant, yet didn't consult with Mr Nakhla during this time, or at all. It is noted that whilst Mr Nakhla was not informed of the Respondent's decision, we he was in receipt of wages for this period of approximately six weeks.

[72] The appropriate course of action would have been for the Respondent to inform Mr Nakhla of his required attendance at a meeting on 26 March 2024, where he could bring a support person, if he wished to. It would have been appropriate for him to have been informed of the Respondent's definite decision to make operational changes and invited to provide his views over the coming days in respect of making his role redundant.

[73] It would have been appropriate for Mr Nakhla to have been provided with a list of all available roles, nationwide, and his views sought as to any potential redeployment opportunities. Despite my concluded view that Mr Nakhla would not have been redeployed into any of the available roles given his location, qualifications and requirement to work part-time hours and undertake regular medical treatment, it would have been appropriate for the Respondent to have had this conversation with Mr Nakhla. Where it concluded that it was disrespectful to Mr Nakhla to have the conversation with him, I find that it was disrespectful to not have had the conversation with Mr Nakhla.

[74] I have also had regard for the fact that the dismissal was conducted in breach of the consultation provisions of the Award and that issue weighs heavily for a finding that the dismissal was harsh, unjust or unreasonable.

Conclusion

[75] The jurisdictional objection that the dismissal was a case of genuine redundancy requires two affirmative elements and one negatory element which must be satisfied so as to establish whether a dismissal was or was not a case of genuine redundancy.

[76] I have determined that the second affirmative element was not satisfied in this case. Specifically, the Respondent has not complied with an obligation in the Award that applied to Mr Nakhla's employment to consult about his redundancy. Therefore, the dismissal did not satisfy the meaning of genuine redundancy as contained within s.389(1)(b) of the Act.

[77] The jurisdictional objection has been determined and rejected, and consideration has turned to the substantive merits of the application. Having appropriate regard for the various factors contained within s.387 of the Act, I determine that Mr Nakhla's dismissal on 26 March 2024 was harsh in respect of the timeliness of the dismissal. The primary reason for this is the failure to consult with Mr Nakhla regarding a proposed dismissal as required by the terms of the Award.

[78] I have formed a view that had the Respondent consulted with Mr Nakhla over the next week and a half, noting that Good Friday was on 29 March 2024 and work would not have resumed until Tuesday, 2 April 2024, the decision to dismiss him on the grounds of redundancy would have been made, and in those circumstances the dismissal would not have been harsh, unjust or unreasonable, and therefore not unfair.

[79] Having dismissed Mr Nakhla on 26 March 2024, without consulting with him, was harsh. Having satisfied myself that the dismissal was harsh, pursuant to s.385(b) of the Act, I find that Mr Nakhla was unfairly dismissed.

Remedy

[80] Section 390 of the Act reads as follows:

> "**390 When the FWC may order remedy for unfair dismissal**
>
> (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
>
> (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
>
> (b) the person has been unfairly dismissed (see Division 3).
>
> (2) The FWC may make the order only if the person has made an application under section 394.
>
> (3) The FWC must not order the payment of compensation to the person unless:
>
> (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
>
> (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.
>
> Note: Division 5 deals with procedural matters such as applications for remedies."

[81] Mr Nakhla is a person protected from unfair dismissal for the Act's purposes and is a person who has been unfairly dismissed. Accordingly, I am empowered to exercise discretion as to whether he can be reinstated.

[82] I am satisfied that it is inappropriate to order reinstatement due to the Respondent genuinely not requiring his role to be performed, and there being no suitable role in which to reinstate Mr Nakhla.

[83] I now turn to consideration of compensation.

Compensation

[84] Section 392 of the Act provides:

> "**392 Remedy—compensation**
>
> *Compensation*
>
> (1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

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

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

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

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

(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; and

(b) if the employee 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 the employee for the period of leave in accordance with the regulations."

Authorities

[85] The approach to the calculation of compensation is set out in a decision of a Full Bench of Australian Industrial Relations Commission in *Sprigg v Paul's Licensed Festival Supermarket*.[15] That approach, with some refinement, has subsequently been endorsed and adopted by Full Benches of the Commission in *Bowden v Ottrey Homes Cobram and District Retirement Villages inc T/A Ottrey*;[16] *Jetstar Airways Pty Ltd v Neetson-Lemkes*;[17] and *McCulloch v Calvary Health Care* (*McCulloch*).[18]

[86] I have had regard to the above authorities, and I have considered the submission of each party.

The effect of the order on the viability of the respondent

[87] No submissions were made relevant to this issue. There is no evidence to suggest that an award of compensation would affect the viability of the Respondent's enterprise.

The length of Mr Nakhla's service

[88] Mr Nakhla had approximately 5.5 years' service, a reasonable period of time.

The remuneration that Mr Nakhla would have received, or would have been likely to receive, if he had not been dismissed

[89] I am satisfied that had the Respondent consulted with Mr Nakhla as required by the Award, it would have determined to dismiss Mr Nakhla. I have already stated that I consider that this would have been fair.

[90] In all of the circumstances and taking into account the flying visit by the Respondent and then the period of Easter, I am satisfied that it would have been reasonable for the decision to dismiss Mr Nakhla to have been made by Friday, 5 April 2024. Consultation and

consideration of redeployment could have occurred over the additional week, not the 2.5 working days that the Respondent had already paid Mr Nakhla for, plus the Good Friday public holiday.

[91] The amount of remuneration Mr Nakhla would have received for the period 1 to 5 April 2024 would have been 30.2 hours x $37.5824 per hour = $1,134.99. He would then have been paid his five weeks' notice on termination, plus his statutory severance payment.

The efforts of Mr Nakhla (if any) to mitigate the loss suffered because of the dismissal

[92] Having decided Mr Nakhla's employment would have continued for an additional one week beyond the period of 29 March 2024 to which he had been paid up to in his monthly pay, I need only consider the efforts of Mr Nakhla to mitigate his loss in that week. It being a short week, and noting Mr Nakhla's medical requirements, I do not consider it necessary for him to have immediately sought employment in those four working days.

The amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation

[93] Mr Nakhla did not earn any remuneration from employment or other work in the period 1 to 5 April 2024.

The amount of any income reasonably likely to be so earned by Mr Nakhla during the period between the making of the order for compensation and the actual compensation

[94] This factor is not relevant in the circumstances of this matter.

Other relevant matters

[95] I do not consider that there are any other relevant matters to consider that I have not already addressed above.

Misconduct reduces amount

[96] Section 392(3) of the Act requires that if the Commission is satisfied that the misconduct of a person contributed to the employer's decision to dismiss the person then the Commission must reduce the amount it would otherwise order by an appropriate amount on account of the misconduct.

[97] The section requires that consideration be given by the Commission, amongst other things, as to whether a person's misconduct contributed to the decision to dismiss an employee even if the Commission has found that there was no valid reason for the person's dismissal. However, if there was no valid reason for the dismissal that may be relevant to the Commission's decision as to the appropriate amount by which the amount of compensation should be reduced.

[98] I do not find that Mr Nakhla engaged in any misconduct that would reduce the amount to be awarded to him.

Shock, distress etc. disregarded

[99] I confirm that any amount ordered does not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt caused to Mr Nakhla by the manner of the dismissal.

Compensation Cap

[100] I must reduce the amount of compensation to be ordered if it exceeds the lesser of the total amount of remuneration received by the applicant, or to which the applicant was entitled, for any period of employment with the employer during the 26 weeks immediately before the dismissal, or the high income threshold immediately prior to the dismissal.

[101] The high income threshold immediately prior to the dismissal was $167,500, and the amount for 26 weeks was $83,750. The amount of compensation the Commission will order does not exceed the compensation cap.

Payment by instalments

[102] This is not a relevant consideration.

Order of compensation

[103] I have determined that Mr Nakhla would have earned remuneration in the amount of $1,134.99 in wages and an amount of $124.85 in superannuation at the rate of 11% as it was in the 2023/2024 financial year.

[104] The Respondent is to pay to Mr Nakhla the following amounts within 14 days:

(a) $1,134.99 taxed as required by law; and

(b) $124.85 into Mr Nakhla's superannuation account.

[105] An order [PR777962] giving effect to this decision will be published.

COMMISSIONER

Appearances:

A Romeo of D'Agostino Solicitors for the Applicant.
J Morris and *P Gonzales* for the Respondent.

Hearing details:

2024.
Brisbane.
Video using Microsoft Teams.
1 August.

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[1] *Jones v Department of Energy and Minerals* [1995] IRCA 292 (16 June 1995), [(1995) 60 IR 304 at p.308 (Ryan J)]; cited with approval in *Ulan Coal Mines Limited v Howarth and others* [2010] FWAFB 3488 (Boulton J, Drake SDP, McKenna C, 10 May 2010) at para. 17, [(2010) 196 IR 32].

[2] Ibid.

[3] [2010] FWA 674.

[4] [2010] FWAFB 3488

[5] (1995) 60 IR 304.

[6] [2016] FCAFC 99

[7] Ibid at [186]. See also *Australian Nursing and Midwifery Federation v Bupa Aged Care Australia Pty Ltd* [2017] FCA 1246 at [22]-[31]

[8] Ibid at [499].

[9] *Ulan Coal Mines Limited v Honeysett* (2010) 199 IR 363 at [28].

[10] [2017] FWCFB 6847 at [20].

[11] [2014] FWCFB 714, (2014) 240 IR 130 at [36].

[12] (1995) 185 CLR 410, [465].

[13] *Sayer v Melsteel* [2011] FWAFB 7498 at [20].

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

[15] (1998) 88 IR 21.

[16] [2013] FWCFB 431.

[17] [2013] FWCFB 9075.

[18] [2015] FWCFB 2267.