



DECISION

Fair Work Act 2009

s.120 - Application to vary redundancy pay for other employment or incapacity to pay

Application by Job Site Recyclers Pty Ltd (C2024/3033;C2024/3034)

COMMISSIONER PERICA

MELBOURNE, 16 AUGUST 2024

Variation of redundancy pay

Background

[1] Job Site Recyclers Pty Ltd (“JSR”), as its name suggests, is a business that cleans domestic building sites and recycles waste obtained in the course of cleaning those sites.

[2] JSR has experienced a downturn by reason of the bankruptcies in the domestic building industry. JSR had suffered a reduction in “workload and revenue by eighty percent and bad debts accumulating into hundreds of thousands of dollars due to customer bankruptcies. This has caused the close of the main facility of JSR and the laying off of one hundred staff”.¹

[3] Ms. Cheryll Pereira first commenced working with JSR in late 2017. She resigned in “mid 2020” and worked for another employer for around six months. She recommenced employment at JSR in “December 2020” and worked there until her employment terminated by reason of redundancy on 9 May 2024.

[4] When she was first employed, Ms. Pereira was an assistant to the accounts manager and progressed to a new administration role about one year later.² Her second period of employment was for three years and five months. Without more, by operation of s 119, Ms. Pereira would be entitled to seven weeks’ redundancy pay under the National Employment Standards (“NES”).

[5] Mr. Laxman Khatri worked at JSR from 13 March 2019³ until his employment was terminated by reason of redundancy on or around 9 May 2024. When Mr. Khatri was first employed at JSR, he was analysing photos to reduce call-backs to jobs.⁴ In his last year, he was promoted to a “scheduling role where he was in charge of scheduling out jobs”.⁵ Mr. Khatri’s

¹ Digital Court Book (“DCB”) at 11 – Submissions of JSR.

² DCB at 19 – Submissions of Ms. Pereira.

³ PN81.

⁴ DCB at 21 – Submissions of Mr. Khatri.

⁵ Ibid.

employment period was 4 years and two months. Without more, by operation of s 119, Mr. Khatri would be entitled to eight weeks redundancy pay under the NES.

[6] On 15 May 2024, in two separate applications, JSR applied to vary the redundancy pay of Ms. Pereira and Mr. Khatri because JSR obtained “other acceptable employment” for each of them under s 120(1)(b)(ii). JSR seeks that the redundancy pay be reduced to zero on the basis that it obtained employment what it argues is “acceptable employment” at another construction cleaning company, EcoTrans Pty Ltd (EcoTrans) for both Ms. Pereira and Mr. Khatri.

RELEVANT LAW

[7] 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 specified 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.

Case law

[8] The authorities on the meaning of “other acceptable employment” establish:

- The test is *not* whether the employee can perform or carry out the new employment but whether it is an acceptable alternative in all the circumstances;⁶
- It is *not* whether the new employment is subjectively acceptable to the employer or employee;⁷
- The acceptability of alternative employment is an objective question to be answered by reference to objective factors;⁸ and
- Factors relevant to acceptability include nature of the work, pay, working hours, skills, duties, seniority and location.⁹

[9] An employer does not need to place a redundant employee into their dream job to make out “other acceptable employment” under s 120(1)(b)(i). The word “acceptable” is an adjective

⁶ *Re Mantra Hospitality (Admin) Pty. Ltd* [2013] FWC 1063.

⁷ *VicStaff Pty Ltd (t/as Stratco) v. May* (2010) 204IR 233 at [29].

⁸ *Clothing and Allied Trades Union of Australia v. Hot Tuna Pty. Ltd* (1988) 27 IR 226.

⁹ *UXC Connect v. Moore* [2012] FWA 4296.

that is a lower hurdle than “equivalent” or “suitable”. The dictionary definition defines it as “adequate” or “tolerable”.

[10] *Von Bibra Robina Autovillage Pty Ltd*¹⁰ explains the process of applying the test:

“...the objective test of acceptability appears to be that the alternative work bears a sufficient comparability to the original work and is not unreasonably removed from the employee’s original duties, skills set, qualifications, experience and other terms and conditions of employment. The test is not whether or not the employee is capable of carrying out the new employment as such, it is whether there is sufficient correlation between the relevant indicia of the current work and the alternative employment as proposed.”

How alternative employment with EcoTrans was organised by JSR

[11] Mr. Daniel Reaper, the Managing Director of JSR gave the evidence of how he organised the new jobs for the redundant employees at EcoTrans including Ms. Pereira and Mr. Khatri.

[12] JSR had arranged for EcoTrans to “take over” the work from Metricon homes that was previously performed by JSR.¹¹ Mr. Reaper stated that “because our staff are so well trained and know what they’re doing and (EcoTrans) is almost identical to ours, we basically transitioned most of our staff over the EcoTrans during the process, that being, you know field workers and even fleet and plant”.¹²

[13] Following the decision to make workers redundant, Mr. Reaper commenced discussions with EcoTrans. He would have a chat to the “boss” at EcoTrans every two or three weeks. JSR was winding down its workload and EcoTrans was ramping up.¹³ Mr. Reaper would say, “What do you need? What holes do you need filled and let me see if I’ve got staff that can help you fill them.”¹⁴ He explained, “It was the full-time staff that we wanted to look after the most”.¹⁵ He went on:¹⁶

“Daniel Reaper

So we did what we could for everyone that we could. It hasn't worked every time. We haven't been able to match several guys, like, you know, our former supervisors and those more senior sort of roles, so we've - you know, we've sort of scraped up redundancies for those guys where we just couldn't find suitable employment.

Daniel Reaper

But, yes, wherever we possibly could, we have.”

¹⁰ *Von Bibra Robina Autovillage Pty Ltd* [2007] ARC 397 at [26].

¹¹ PN120.

¹² PN122.

¹³ PN132.

¹⁴ PN134.

¹⁵ PN136.

¹⁶ PN131 to 140.

Evidence and submissions of the work of Ms. Pereira at JSR and then EcoTrans

[14] Mr. Reaper described Ms. Pereira's role at JSR as a full-time job performing "predominantly administration and reception work". She was paid at the rate of \$31.25 hours for a 40 hour week, or \$65,000 per year.

[15] Most of her work at JSR was performed at the Dandenong South facility around 18 kilometres from Ms. Pereira's home. At the Dandenong site, Ms. Pereira worked "out of a portable office in a pretty dusty yard where we crushed and sorted building materials for recycling". Over the last two years, they moved to a nicer, cleaner office at Carrum Downs described as 9.5 kilometres from Ms. Pereira's home.¹⁷

[16] The 10 May 2023 letter of offer from EcoTrans to Ms. Pereira was tendered into evidence and it was an offer for a full-time position as part of the administration team at EcoTrans "working alongside coordinator's, schedulers, and administration personnel reporting directly to the General Manager".¹⁸

[17] Mr. Reaper argued the job he had obtained for Ms. Pereira was other acceptable employment. He argued the work site at EcoTrans at Hallam is 11 kilometres from Ms. Pereira's home. The full-time job at EcoTrans was for "very similar duties in the same industry" with remuneration of \$31 dollars per hour or \$64,480 per year, slightly less than her redundant job at JSR.

[18] Ms. Pereira completed two shifts on 20 May 2024 and 21 May 2024 and then resigned because working at EcoTrans "was making her feel mentally unstable" and she did not think she "could continue working there long term".¹⁹

[19] Her evidence was her working conditions at EcoTrans were "significantly different". She elaborated on this point in her submissions of fact which she adopted in her oral evidence.

Worksite is loud and dusty

[20] Ms. Pereira gave evidence that the EcoTrans worksite was a large industrial warehouse that was "very loud and disruptive". A lot of dust and residue from the recycled timber and bricks/rock was "contaminating the air and heavy machinery such as loaders and bobcats operating directly outside the office building." Surrounding the office building were large trucks and no proper Hi Vis provided when leaving or approaching the building.²⁰

Culture was overwhelming and unprofessional

¹⁷ DCB at 11.

¹⁸ DCB at 13.

¹⁹ PN245.

²⁰ DCB at 19.

[21] The culture of the workplace was “overwhelming and unprofessional”. Workers were “screaming out to each other from opposite sides of the office, behaving in a confrontational manner and some mild bullying”. The staff were “unapproachable, dismissive and inconsiderate”. Ms Pereira describes one occasion where, while trying to work, two of the male staff were “play fighting” and purposely bashing into her chair.²¹

Not given adequate training and supervision

[22] The office staff were “unable to provide sufficient training by not explaining how to use the software in detail and did not help me to understand the scope of works and process of their services, which were completely different to Job Site Recyclers”. As a result of this, she “was unable to carry a good amount knowledge from my previous role and implement it in my new position. Both company's provide construction cleaning services, however the scope of works, process, software, and booking system were all different.” She explained, “Although I had expressed that I was not confident to do so, I was still expected to work autonomously on my second day. I found this to be all the more unprofessional and it made me very anxious.”²²

No advice on break time

[23] Ms. Pereira explained, “the staff were unable to advise me of my break time duration, and on my second afternoon I was dismissed half an hour early because the woman training me said "I can't think right now" due to the disruptive, immature environment in the office”.²³

Evidence and submissions on Mr. Khatri’s work at JSR and EcoTrans

[24] Mr. Reaper’s evidence was Mr. Khatri had a full time job at JSR predominately performing “overviews, booking and scheduling work”. His remuneration was \$36.73 per hour based on a 40-hour week equated to an annual wage of \$76,400.²⁴

[25] According to Mr. Reaper, “the majority of Mr. Khatri’s employment was served at the Dandenong South Facility which was 20 kilometres from Mr. Khatri’s residence. At the Dandenong facility, Mr. Khatri worked out of a portable office in a pretty dusty yard where we crushed and sorted building materials, for recycling”. In 2022, Mr. Khatri moved to a “nicer, cleaner office at Carrum Downs” which Mr. Reaper says was 9 kilometres from Mr. Khatri’s home.²⁵

[26] The 10 May 2023 letter of offer from EcoTrans to Mr. Khatri was tendered into evidence. It was an offer for a full-time position as part of “co-ordination and quality assurance administration team working alongside booking co-ordinators, schedulers, and administration personnel reporting directly to the General Manager”.²⁶

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ DCB at 11.

²⁵ Ibid.

²⁶ DCB at 14.

[27] Mr. Reaper argued the job he had obtained for Mr. Khatri was other acceptable employment. It was a full time job with similar duties in the same industry. The wages were slightly higher, which at \$37 per hour for a forty hour week which equated to an annual wage of \$76,960.²⁷

[28] Mr. Khatri argues his new employment is not “other acceptable employment”.

New workplace is further away than his last place of work at JSR

[29] The new work site is 16 kilometres from his home which means he is required to travel 160 kilometres per week. He estimates that when he was working for JSR, he only had to travel 11 kilometres a week. He argues that he is at “considerable loss just in terms of my weekly petrol usage...with the petrol prices as they are”.²⁸

The EcoTrans workplace is dusty, the trucks inside the facility produce fumes and it is noisy

[30] The EcoTrans office is connected to a recycling facility. Trucks enter and unload several tonnes of rubbish and other contaminated materials multiple times a day. Since he started working at the new office, he is “in constant stress and fear of inhaling fumes and dust particles on a daily basis. There are constant truck horns and excessive noises from the recycling facility which he says hinders his ability to focus on his work”.²⁹ Mr. Khatri tendered photos of the work site which show the office area attached to a recycling facility, which is dusty in some areas. It has recycling materials, trucks entering and other machinery.³⁰

New job has less responsibility than the last job he held at JSR

[31] His new job is like the previous job he did at JSR. In his last year at JSR, he had been promoted to a scheduling role, where he oversaw scheduling out jobs for the following day which (in his view) was “integral in the company”. In that later role, he was “held accountable for the performance of the workers output and the jobs being completed each day”.³¹

Reports to schedulers

[32] At EcoTrans, Mr. Khatri is responsible for reviewing photographs and subcontractor invoices who complete rubbish bag collections at job sites by cranes mounted on trucks. His evidence was he had to be trained for his first couple of weeks starting at the new company. He reports to a team of two schedulers and my seniors in terms of experience in the company. He explains, “My current new role in the new company has just been created.”³²

Photograph review system is less advanced than at JSR

²⁷ DCB at 11.

²⁸ DCB at 21.

²⁹ DCB at 21 to 22.

³⁰ DCB at 23 to 31.

³¹ DCB at 21.

³² Ibid.

[33] He had no previous experience of invoicing review before he commenced at EcoTrans. Mr. Khatri has had to “learn how to navigate a brand new software interface to review photographs daily, which has been challenging as the company does not have a designated system to review the photographs more directly like my previous workplace which had an email outlook system where each job's photographs would be obtained via an email containing all the photographs and information related to the job”. He observes, “I am prone to making more mistakes at this company and my role is under constant scrutiny.”

Some interactions with field workers have been intimidating

[34] Due to the nature of Mr. Khatri’s new job he has to “to advise, correct and ensure all of the workers are adhering to the company's standard and scope of works on site”. Mr. Khatri considers the “majority of the workers are not used to being micromanaged and due to the office being connected to the to the recycling facility, the workers that I have to follow up on have come right into the office to confront me about what I have rectify or remind of for that day”.

[35] Mr. Khatri relates an incident where he “reminded a worker of his duties on site”. According to Mr. Khatri, the worker reacted adversely to being told what to do by a new employee. He “responded with intimidation and asked Mr. Khatri to meet him at the office/yard so he could see him in person and sort out the issue”. Mr. Khatri produced a series of text messages he had with one of the workers which he says was “intimidating”. In his evidence, Mr. Khatri indicated that when he got to the yard, the field worker in question was carrying a hammer.

[36] Mr. Khatri makes a complaint about having to work “in close proximity to field workers”. This is unlike his job at JSR where he was stationed at the office in Carrum Downs where he had “no issue when he was looking at photographs during the day prior to my scheduling”.

His new job is not “secure”

[37] Mr. Khatri seeks to make a point that “he has not received his official probationary period” and “does not know if his job is secure”. There is uncontested evidence before me that he was sent a letter of offer from EcoTrans which was for a “full time position”. The letter did note it was on an “at will” basis as it was not “for a definite amount of time”. In so far as he commenced working with EcoTrans, he accepted this offer. As a matter of contract, he is a full time employee and not under a probation period. Further, I take the meaning of “at will” being that it was not for a specified period but must be terminated on notice.

Response evidence of Reaper on the “dirty environment” and different processes claims

[38] Mr. Reaper made oral submissions in response to the claims of Ms. Pereira and Mr. Khatri on the “dirty environment” at EcoTrans and the different work processes at EcoTrans compared to JSR.

Response on the different systems of work at EcoTrans and JSR

[39] In his evidence in reply, he stated that JSR has been developing systems for 13 years and EcoTrans have been going for about five years.³³ He noted that “you have knowledge to improve those systems and put things in place and change programs to make them easier”.

Response on the “dirty environment”

[40] In relation to the evidence of Mr. Khatri and Ms. Pereira about the “dirty environment” at EcoTrans compared to the office at JSR, Mr. Reaper stated that “we work in the waste management industry and it’s a dirty environment”, and “that’s where we operate day in day out”.³⁴ He said further “toxic waste is not handled by either of our companies. It’s construction waste, it’s all inert. There may be some odor but it’s certainly not putrescible waste, which would be part of general waste collections which have a stench. It’s all-inert material non-compostable”.³⁵

[41] He also made the point that before Ms. Pereira and Mr. Khatri worked at the Carrum Downs office for two years they worked at the Dandenong South facility that involved interacting with field staff. It was also dusty and close to the recycling facility over the road. His evidence was:

“Again, just for clarity, the facility that we had at Dandenong, the original facility where we worked was - we had two yards, one - we were on one acre where the office was - the crusher op base - you know, we did a lot of the lightweight waste handling in that side of the yard, and on the other side of the road was the crushing and mulching facility. So each of them were as dusty as each other, and there's - I mean, I've just had a look at [Mr. Khatri's] photos as well with - and it doesn't look all that far different to what we were dealing with at Dandenong, to be honest, apart from the fact that it's under cover, where we were working out in the open more - the field workers were working out in the open more.

...Every field worker had to come through that yard as well and come into that office every day. It was exactly the same sort of, you know - the discussions are around, you know, clarity on what we expect from the field guys when they come in, and that's, you know - so it was very similar in that space. Every field worker came into the office.”³⁶

CONSIDERATION

JSR “obtained” the other employment for Ms. Pereira and Mr. Khatri

[42] Mr. Reaper “obtained” the alternative work as required by s 120(1)(b)(i). I accept Mr. Reaper essentially negotiated with EcoTrans to take on some of JSR’s employees and he made every effort to have EcoTrans take on his redundant employees including Ms. Pereira and Mr. Khatri. It follows that Mr. Reaper “obtained” the work for them as required by s 120(1)(b)(i).

³³ PN537.

³⁴ PN555.

³⁵ PN575.

³⁶ PN397 and 399.

Was the job offered to Ms. Pereira acceptable alternative employment?

Pay

[43] Ms. Pereira was paid \$31.25 per hour for a 40 hour week or \$65,000 per year. In her new job she was paid \$31.50 per hour for a 30-hour week which Ms. Pereira says was “a deduction of approximately \$2,756 per year”.

[44] At her new job, she was paid at a higher rate but for fewer hours. The reduction in hours from a forty to thirty-eight-hour week does not render the alternative employment objectively unacceptable. It is roughly equivalent pay.

Location

[45] Ms. Pereira worked at two locations during her employment at JSR. The first location was at Dandenong South which according to Mr. Reaper’s uncontested evidence is 18 kilometres from Ms. Pereira’s home. For the last two years she worked out of the office at Carrum Downs which was 9.5 kilometres from her home. The EcoTrans Hallam facility is, according to Mr. Reaper, 11 kilometres from her home.

Work and role

[46] Throughout her employment at JSR, she worked in administration firstly as an assistant to an accounts manager and then in administration. Her new role at EcoTrans was also in administration.

[47] Ms. Pereira indicates that at her new work she was not trained to use the software and to understand the scope of works which were completely different from JSR. She says she was “unable to carry a good amount of knowledge from my previous role and implement it in her new position”.

[48] There is no requirement for the employer to obtain identical employment. It is logical that at a new place of work an employee may have to learn new or different systems. Objectively acceptable employment does not require it be acceptable to the employee. The fact that she resigned after two shifts may not be relevant to an objective assessment as to whether the job is acceptable under s 120.

Culture at EcoTrans

[49] It is hard to assess the culture issue raised by Ms. Pereira from an objective standpoint. Ms. Pereira says the staff were “unapproachable, dismissive and inconsiderate.” She relates one incident where two field workers were “play fighting and bumping into her chair”. Ms. Pereira preferred the office environment at the office of JSR at Carrum Downs. I accept Mr. Reaper’s evidence that at the JSR Dandenong South site, administrative staff did have to interact with field workers. Given the Carrum Downs office was separated from the recycling plant it can be inferred the administrative workers had less interaction with field workers than at either the JSR Dandenong South workplace of JSR or the EcoTrans Hallam worksite.

[50] On the evidence, I cannot make an objective assessment of the culture at EcoTrans. The adjectives Ms. Pereira uses to describe the behaviour “immature, unapproachable and inconsiderate” connote her subjective assessment of the culture. It is not possible to make an objective assessment of whether the different culture she describes is “unacceptable” in the relevant sense.

Dirty Environment

[51] I take Mr. Reaper’s point that Ms. Pereira moved from one administration job in the waste management industry to another. In a general sense, I accept Mr. Reaper’s statement that it is in the nature of that industry that “it’s a dirty environment” and “that’s where we operate day in day out”. That statement does not detract from the marked difference between the EcoTrans workplace compared to the office environment she worked in for the last two years at JSR. At Carrum Downs, she worked in an office environment which was removed from the recycling facility and the field workers.

Assessment of Ms. Pereira’s employment at EcoTrans

[52] In making the objective assessment of “other acceptable employment”, I am required to make an “assessment and value judgement”.³⁷ I accept that Mr. Reaper made every effort to match the job that Ms. Pereira performed at JSR to her new job at EcoTrans.

[53] Her new role was an administrative one, in the same industry on close to equivalent pay. The location was not inordinately far from her home. She complains of being inadequately trained and that the culture of the new workplace was not conducive to her staying. The major difference between the JSR Carrum Downs site and the EcoTrans Hallam site was the proximity of the office at EcoTrans to the actual recycling process and the dusty, noisy and malodorous activities associated with it. The so called “dirty environment” and the culture of which she complains may have made the job unattractive to her, but on my value judgement, it did not make the job objectively unacceptable.

[54] Relevant to that assessment is the fact that for a period of her employment, she worked at the Dandenong South site at JSR which involved greater interaction with field staff. The recycling facility was over the road; I accept that it would be less noisy and dusty than the warehouse at EcoTrans. Nonetheless, it was in close proximity to the recycling facility and therefore would have had at least some truck noise and dust.

[55] Applying the *Von Bibra* test, the other employment obtained for Ms. Pereira bears a sufficient comparability to the original work she performed at JSR. It was not unreasonably removed from her original duties, skills set, qualifications, experience and other terms and conditions of employment at JSR. It follows I find that JSR did obtain other acceptable employment for Ms. Pereira as required by s 120(1)(b).

Was the job offered to Mr. Khatri other acceptable employment?

Pay

³⁷ *ACC Pty. Ltd v. Fair Work Commission* [2015] FCAC 189 at [45].

[56] The uncontested evidence of Mr. Reaper was that Mr. Khatri's remuneration at JSR was \$36.73 per hour based on a 40-hour week which equated to an annual wage of \$76,400. The pay for his new job is slightly more per hour which is \$37.

Location

[57] Mr. Khatri argues the new job is not acceptable because he is required to travel 16 kilometres to get to and from home to work. He contrasts this with the Carrum Downs site of JSR which was very close to his home. It should be noted however the Dandenong South location of JSR where he previously worked was, according to Mr. Reaper, 20 kilometres from his home.

Role

[58] I accept Mr. Khatri's evidence that his new employment had less responsibility than the last role he had at JSR where "he was in charge of scheduling out jobs for the following day". His new job is similar to his earlier role at JSR in reviewing photographs and identifying issues to reduce calls backs. At his new role he reports to the schedulers.

[59] Mr. Khatri complains the system for the review of the photographs at EcoTrans is different as "it does not have a designated system to review photographs" and he "had to learn how to navigate a new software interface" to review the photographs.

Dirty Environment

[60] Mr. Khatri argues that the work environment at EcoTrans is inferior to the office environment he worked at in Carrum Downs. The office at EcoTrans "is connected to our recycling facility, in which there are trucks that enter and unload several tonnes of rubbish and other contaminated materials multiple times a day. I have started working at the new office, I am in constant stress and fear of inhaling possibly toxic fumes and dust particles on a daily basis".

[61] Relevant to an assessment of the acceptability of work at EcoTrans is the fact that Mr. Khatri worked at the Dandenong South facility of JSR which was across the road from a recycling plant of a similar nature. At that workplace he would have been exposed, to a lesser degree, to exhaust fumes, truck noise and dust. I take the point that there is less amenity at the EcoTrans workplace compared to the office at Carrum Downs.

Interactions with field workers

[62] Mr. Khatri's evidence is that in his role at EcoTrans, he is required to advise, correct and ensure all of the workers are adhering to the company's standard and scope of works on site. As a result of the colocation of the facility and the office, the field workers can "come right into the office to confront me about what I have rectify or remind of for that day".

[63] In his submissions and oral evidence, he gave an example of an interaction with a field worker and provided a series of text messages from one of the field workers which Mr. Khatri

described as “intimidating”. He had no such issues at the JSR office in Carrum Downs when he was performing his scheduling role.

Assessment of the Mr. Khatri’s employment at EcoTrans

[64] Mr. Reaper had attempted to place Mr. Khatri in the same industry, in a similar job on equivalent pay. The pay Mr. Khatri receives is slightly more per hour than he was getting at JSR. I accept the location of his job is further away than when he was working for JSR where his workplace and home were in the same suburb, Carrum Downs. I do not regard a 16 kilometre commute to and from work is so different as to make the new job objectively unacceptable.

[65] I accept that his new job was a kind of demotion in that he is no longer scheduling at EcoTrans. It should be noted however, he is now performing a job which was very similar to his earlier role at JSR. The difference in the systems of work is unsurprising and is experienced by everyone who moves from one employment to another.

[66] I accept that the office within a warehouse in which trucks enter and leave and materials are recycled is more noisy, dusty and malodorous. It should be noted that, at least to a lesser degree, he would have experienced those issues at the Dandenong South JSR site.

[67] On the question of the “intimidating” interactions with field workers at his new job, other than a general statement in his material that “workers that I have to follow up on have come right into the office to confront me”, the only evidence is one text exchange where he was invited to come into the warehouse and the field worker in question was holding a hammer.

[68] On this evidence, I cannot assess whether this exchange was intimidating. The fact Mr. Khatri found it intimidating is a subjective assessment. I do not have enough evidence to make an objective assessment of whether the interactions he has with field workers make the job “unacceptable”. Mr. Khatri appears to have enjoyed the more white collar environment at JSR at Carrum Downs where he was separated from the field workers.

[69] There are aspects of the new job Mr. Khatri has at EcoTrans that make it less appealing than the job he had JSR. They are the more distant location, his “demotion”, the “dirty” work environment and his interactions with field workers. Those less satisfactory elements must be balanced against the objectively acceptable factors such as: he is working at a task that was “of the same nature” to his role examining photographs at JSR, for the slightly better pay in the same industry.

[70] Applying the *Von Bibra* test, the other employment obtained for Mr. Khatri bears a sufficient comparability to the original work he performed at JSR. It was not unreasonably removed from his original duties, skills set, qualifications, experience and other terms and conditions of employment at JSR. I find that the new job meets the objective test of acceptability under s 120(1)(b)(ii).

JSR obtained other acceptable employment for Ms. Pereira and Mr. Khatri

[71] It follows that s 120 applies to the new employment of both Ms. Pereira and Mr. Khatri as JSR has obtained other acceptable employment for both employees.

Section 120(2) of the Act

[72] Having concluded that s 120 applies, I must consider whether it is appropriate to reduce the redundancy pay that is payable to Ms. Pereira and Mr. Khatri under s 120(2).

[73] I consider I should reduce the redundancy pay of Ms. Pereira and Mr. Khatri. Mr. Reaper made significant effort to place both these workers into similar positions. That is an important factor in exercising my broad discretion under s 120(2).

[74] In taking up the new employment, both employees moved from what might be described as a white collar environment to a blue collar one. For the last two years of their employment at JSR, they worked in the JSR Carrum Down office separated from the recycling facility. The subjective complaints each of them makes about their interactions with field workers can be said to derive from that change.

[75] I accept the office attached to a warehouse at EcoTrans is dusty, noisy and malodorous with trucks entering and leaving. I understand Mr. Reaper's evidence that construction site cleaning is a dusty, dirty business that requires exposure to inert waste. That observation does not detract from the marked difference between performing administrative work in an office attached to a warehouse where recycling takes place, compared to working in an office removed from the actual process of recycling.

[76] Having regard to these matters, I have decided to reduce the redundancy entitlements of both Ms. Pereira and Mr. Khatri by seventy percent. That reduction takes into account the lengths Mr. Reaper took to obtain the new employment against the disadvantage of the quite different work environment at EcoTrans.

[77] Ms. Pereira's full entitlement is for seven weeks' pay. Her wage at JSR was \$31.25 per hour for a forty hour week, which is a weekly wage of \$1,250. Her redundancy entitlement was for seven weeks' pay or \$8,750. A seventy percent reduction of that amount equates to a sum of \$2,625.

[78] Mr. Khatri's full entitlement is for eight weeks' pay. As his wage was for \$36.73 per hour for a forty hour week, his weekly wage was \$1,469.20. His redundancy entitlement for eight weeks' pay is for the sum of \$11,753.60. A seventy percent reduction of that amount equates to the sum of \$3,526.08.

Conclusion:

[79] The amount of redundancy pay to which Ms. Pereira is entitled is reduced to \$2,625.00.³⁸

³⁸ PR778405.

[80] The amount of redundancy pay to which Mr. Khatri is entitled is reduced to \$3,526.08.³⁹

[81] Orders to that effect will be issued with this decision. To be clear, these orders are for the payment of redundancy pay and are therefore subject to the payment of tax.



COMMISSIONER

Appearances:

Mr. Daniel Reaper for the Applicant.

Ms. Cheryll Pereira, the Respondent in C2024/3033, for herself.

Mr. Laxman Khatri, the Respondent in C2024/3034, for himself.

Hearing details:

2 July 2024

Microsoft Teams

Printed by authority of the Commonwealth Government Printer

<PR778404>

³⁹ PR778406.