# DECISION

*Fair Work Act 2009*
s.394 - Application for unfair dismissal remedy

**Mr Badrin Baharom**

**v**

**Master Butchers Co-operative Limited**

(U2024/6824)

DEPUTY PRESIDENT ANDERSON ADELAIDE, 27 SEPTEMBER 2024

*Application for an unfair dismissal remedy – factory hand – whether genuine redundancy – failure to consult – not a genuine redundancy (as defined) – whether harsh, unjust or unreasonable – dismissal unfair – application granted – compensation ordered*

**[1]** On 13 June 2024, Badrin Baharom (Mr Baharom or the applicant) applied to the Commission under s 394 of the *Fair Work Act 2009* (Cth) (the FW Act) for an unfair dismissal remedy.

**[2]** The respondent is Master Butchers Co-operative Limited (Master Butchers, the employer or the respondent). Mr Baharom worked as a factory hand in regional South Australia until dismissed on 11 June 2024.

**[3]** The respondent contends that the dismissal was not unfair because it was a genuine redundancy. Mr Baharom disagrees. He raises issues of substantive and procedural unfairness.

**[4]** The matter was not resolved by conciliation. I issued directions on 6 August 2024.

**[5]** Materials were filed by Master Butchers and Mr Baharom. Financial records and work rosters were produced by the respondent. I directed that these materials be subject to a confidentiality undertaking by the applicant and the applicant's representative. Those undertakings were given.

**[6]** I heard the application by in-person hearing on 12 September 2024.

**[7]** Mr Baharom was represented by a legally qualified officer of the Australasian Meat Industry Employees' Union (AMIEU), Mr Swan. Master Butchers was represented by its Human Resources and WHS Manager, Ms Whitehouse (who also gave evidence).

**[8]** Mr Baharom's evidence was given through an interpreter who appeared by telephone. By agreement, a family member provided informal simultaneous in-person interpretation to Mr Baharom during the balance of the hearing, with the interpreter available if required.

**[9]** Following Mr Baharom's evidence, his representative informed the Commission that Mr Baharom considered that some aspects of the interpretation may have been inaccurate or confusing. Whilst giving evidence Mr Baharom did not suggest so. I raised the issue with the interpreter, whose interpretation had been given upon a sworn affirmation. I was satisfied with the interpreter's explanations. My assessment of the interpretation was that the process was orthodox and professional. I invited the applicant to provide details at or immediately following the hearing of specific concerns. None were provided. I determine this matter based on the complete body of evidence before me. To the extent possible, as I am satisfied that the applicant's evidence as interpreted into English appears to have reflected what he stated in the Malay language.

**[10]** I heard evidence from four persons:

- Mr Badrin Baharom (applicant);
- Mr Gary Deutrom (General Manager, MBL Proteins);
- Mr Jordan Pickering (Divisional Manager, Keith); and
- Ms Claire Whitehouse (Human Resources and WHS Manager).

**[11]** There are factual disputes. I make some observations on the evidence.

**[12]** Mr Baharom was an honest and conscientious witness. With one caveat, I generally accept his evidence. However, his recall of the detail of the meeting he had with Mr Pickering and Ms Whitehouse on 11 June 2024 was limited. In evidence, he acknowledged that his witness statement did not refer to all matters then discussed. With respect to the meeting on 11 June 2024 I generally prefer the evidence of Ms Whitehouse, to the extent of difference.

**[13]** Mr Deutrom was a straightforward witness, clear in recall. I generally accept his evidence.

**[14]** Mr Pickering had a reasonable general recall of events, but like Mr Baharom not a particularly good recall of specific details. To the extent there are differences, I prefer the evidence of Mr Deutrom and Ms Whitehouse.

**[15]** Ms Whitehouse gave evidence clearly. She had a good recall on matters both generally and in detail. Whilst tending to stray into argument, on factual matters her evidence was plausible and largely reliable.

**[16]** The applicant's representative objected to parts of the respondent's witness statements on grounds that included relevance, opinion, speculation and hearsay. There are aspects of the evidence before me (including some relatively minor aspects of Mr Baharom's evidence) that include hearsay and opinion. I treat opinion evidence as akin to submission, and give it no evidentiary weight. I attribute little weight to hearsay unless it is corroborated by direct evidence.

**Facts**

**[17]** I make the following findings.

*Master Butchers*

**[18]** Master Butchers is a co-operative in the meat and manufacturing industries. A manufacturing division is MBL Proteins. MBL Proteins converts raw meat product (including poultry and ovine) into protein meals, fats (known as tallow) and oils that are then exported. A high percentage of revenue is from exports. Its business model bears a relationship to export volume, demand and price.

**[19]** Relevantly, the MBL Proteins division operates manufacturing sites at Keith in regional South Australia and Wingfield in suburban Adelaide.

**[20]** Master Butchers is not a small business for the purposes of the FW Act. The Keith and Wingfield sites each employ about twenty eight persons, which includes factory hands (about half). Most are employed as casuals. After a probation period the casuals are given the option to convert to permanent. Most elect to remain as casual.

**[21]** It is a condition of employment that factory hands, either at the time of recruitment or during their employment, secure a forklift licence. Using a forklift is a necessary and common element of the job. The evidence of Mr Pickering was that up to 70% of the time of a factory hand involves using a forklift.

**[22]** Persons working at the Keith and Wingfield sites as factory hands are employed under the Manufacturing and Associated Industries and Occupations Award 2020 (Manufacturing Award).

**[23]** From Adelaide, Mr Deutrom has overall responsibility for the operation of the Keith and Wingfield sites. He attends board meetings and is involved in senior management decision-making. Mr Pickering manages the Keith site and reports to Mr Deutrom. Ms Whitehouse commenced in mid-April 2024 (two months before Mr Baharom's dismissal). She has overall responsibility of human resources and work health and safety across all business divisions.

*Mr Baharom*

**[24]** Mr Baharom is a migrant worker from Malaysia. He and his family have been in Australia since at least 2018, living in and around the south-east of South Australia. He speaks and understands English to a modest level only. His primary language is Malay.

**[25]** Mr Baharom is in Australia on a Bridging Visa A (subclass 010) which has no expiry date and allows him working rights.

**[26]** Mr Baharom commenced employment at the Keith site as a casual factory hand on 31 October 2022. Earlier (between 2018 and 2022) Mr Baharom had worked for different employers in the meat industry and the cleaning industry in towns in and around Keith.

**[27]** At the Keith site, a significant number of migrant workers are employed including persons of Malay ethnicity.

**[28]** Mr Baharom was employed to work 37.5 hours per week (including shift work) plus reasonable overtime.[1] Mr Baharom regularly worked overtime and in large amounts.

**[29]** During his employment Mr Baharom was informed of the right to convert from casual to permanent employment. He declined the opportunity.

**[30]** At the time of being employed Mr Baharom did not hold an Australian certified forklift licence. He had Malaysian credentials to operate a forklift, but they were not mutually recognised. Being required to drive a forklift as an integral part of his duties, Mr Baharom was required to sit the relevant licence test. Mr Baharom did so on two occasions. On both occasions he failed the test. During evidence, Mr Pickering stated that Mr Baharom had failed the theory but not the operating components. The most recent failed test was in September 2023.

**[31]** At the Keith site, an employee without a forklift licence is permitted to operate a forklift under general supervision provided they are actively taking steps to secure the licence. Accordingly Mr Baharom drove a forklift when first employed and throughout his employment.

**[32]** Upon failing the test a second time, Mr Baharom was not removed from forklift duties, which occupied up to 70% of his daily work. For nine months, between September 2023 and 11 June 2024, Mr Baharom continued to operate a forklift.

**[33]** Mr Baharom's duties also included work on production. Mr Pickering assessed that Mr Baharom's ability to undertake the various aspects of production work varied and accordingly sought to assign him the tasks where he was most proficient. He was not routinely allocated work across all areas of production. However, he had not received formal performance counselling despite the employer's preference that all factory hands be fully competent across all areas of the factory.

*Operational changes*

**[34]** In the second half of 2023 and into 2024 the international price for tallow and related product produced and exported by MBL Proteins declined.

**[35]** Monthly results for January, February, March and April 2024 recorded a financial loss in part due to international pricing and demand. Financial records in evidence verify these losses and need not be outlined in this publicly available decision. Those losses were material.

**[36]** In April 2024 a management decision involving Mr Deutrom was made, that staff numbers at the Keith site required reduction to lower costs.

**[37]** Mr Deutrom and Mr Pickering had multiple discussions about the issue during May 2024. During May 2024 the trading situation declined further with an outbreak of avain (bird) flu affecting the Australian poultry market. Some of MBL Proteins export shipments were put on hold and the company sustained unexpected increased demurrage charges.

**[38]** It was decided by Mr Deutrom and Mr Pickering in May 2024 that economic circumstances required a reduction of three positions at the Keith site. One of those was Mr Baharom. Of the other two, one person then resigned and the other retired early meaning that neither needed to be dismissed.

**[39]** However, at the same time as making the decision to reduce labour costs at the Keith site, MBL Proteins was in the process of recruiting a new employee who it considered had a flexible skill set and good prospects to become a supervisor in the future (Employee X for the purposes of this decision). Given this, and despite removing three persons from the workforce, MBL Proteins decided to continue recruiting and onboarding Employee X who commenced as a factory hand (not a supervisor) at the Keith site in early June 2024.

*Decision to dismiss Mr Baharom*

**[40]** The decision to select Mr Baharom for redundancy was made by Mr Pickering after consulting Mr Deutrom in late May 2024. It was made by operational management. Ms Whitehouse, who had commenced with the respondent only on 15 April 2024, had no role or knowledge of the decision or the fact that redundancies were being implemented in the business let alone at the Keith site.

**[41]** According to the evidence of Mr Deutrom and Mr Pickering, the decision to select Mr Baharom for redundancy was because he did not have a forklift licence, had twice failed to obtain a forklift licence and because he was considered to not have a fully cross trained skill set in all production areas.

**[42]** Mr Pickering did not immediately inform Mr Baharom of the proposed redundancy. He allowed approximately two weeks to pass.

*Dismissal 11 June 2024*

**[43]** On 11 June 2024 Ms Whitehouse made a scheduled monthly visit to the Keith site. Upon arriving at the site she remained unaware of the decision to make Mr Baharom redundant.

**[44]** Mr Pickering decided to use the opportunity of having the company's Human Resources and WHS Manager on site to implement the redundancy. Upon her arrival, he told Ms Whitehouse that he intended to dismiss Mr Baharom that day to reduce labour costs due to the avian flu outbreak.

**[45]** Ms Whitehouse agreed to assist him.

**[46]** Later that morning, Mr Baharom was called into a meeting with Mr Pickering and Ms Whitehouse. He had not previously met Ms Whitehouse and had no forewarning of the meeting nor notice of what it was about.

**[47]** Upon entering the room he was introduced to Ms Whitehouse. Then immediately Mr Pickering advised Mr Baharom that he was being terminated for business reasons with immediate effect. Mr Baharom was shocked and asked why. Ms Whitehouse stated that it was a business decision made necessary by the avian flu crisis.

**[48]** Mr Baharom again questioned why. He pointed out that Employee X had only just been employed and that he (Mr Baharom) had been working alongside Employee X that very morning and showing him what to do.

**[49]** Mr Pickering responded by stating that Mr Baharom did not have a forklift licence. Mr Pickering also stated that Employee X had multiple skill sets whereas Mr Baharom had more limited skills.

**[50]** Ms Whitehouse then informed Mr Baharom that he was terminated and that he would receive final entitlements. The dismissal meeting concluded.

**[51]** The entire dismissal meeting was conducted in English. Mr Baharom was provided no opportunity for a support person nor for a fellow Malay-speaking employee to interpret or assist him. Mr Baharom did not ask for such assistance or support.

**[52]** Mr Baharom left the meeting. He collected his belongings and, on the way out, spoke to a couple of employees (including a supervisor) who, according to his evidence, appeared surprised that he had been dismissed.

**[53]** The following day Ms Whitehouse drafted a termination letter. It is in evidence.[2] It reads:

> "Dear Mr. Badrim Baharom,
>
> Following our meeting on June 11, 2024, I am writing to formally confirm the conclusion of your casual employment with MBL Keith due to the current reduction in available work.
>
> As discussed, the decrease in workload has led us to this difficult decision, and while it was not an easy choice, it has become necessary given the circumstances. Your last day of work will be June 11, 2024.
>
> We appreciate the dedication and hard work you have contributed during your time with us. Please ensure that all company property is returned.
>
> Should you have any questions regarding your final pay, or other related matters, please do not hesitate to contact Claire Whitehouse HR & WHS Manager on CWhitehouse@makeitwithmbl.com.au or Ph:0419 648 339.
>
> We understand that transitions like these can be challenging, and we are here to support you. If you need any assistance with references or future job searches, please reach out. We would be happy to assist in any way we can.
>
> Thank you once again for your valuable contributions to MBL Keith. We wish you all the best in your future endeavors.
>
> Sincerely,
>
> Claire Whitehouse
> HR & WHS Manager
> MBL"

**[54]** There is a factual dispute as to whether this letter was given to Mr Baharom. Ms Whitehouse's evidence was that it was sent that day by email. Mr Baharom's evidence was that

he did not see the letter until it was produced in these proceedings. Though not determinative of this matter, there is insufficient evidence before me to find that the letter was sent electronically to Mr Baharom or, if so, the reasons why it was not received or opened by Mr Baharom.

**[55]** Final pay was made to Mr Baharom in the next usual payroll. He was paid only up to and including his last shift, 11 June 2024. Ms Whitehouse assessed that Mr Baharom was not entitled to redundancy pay under the FW Act, the Manufacturing Award or his contract because he was a casual employee. He was paid no redundancy pay.

**[56]** Ms Whitehouse also assessed that Mr Baharom was entitled to one week's notice under the FW Act and the Manufacturing Award. Her evidence was that she instructed payroll to make this payment. That payment, for reasons unknown, was not made to Mr Baharom. Ms Whitehouse's further evidence was that she discovered that the payment had not been made when she read the applicant's statement in these proceedings. Despite this, that payment still, at the date of hearing, had not been made.

*Events post-dismissal*

**[57]** On 13 June 2024 Mr Baharom lodged these proceedings. He secured the assistance of the AMIEU. In his application Mr Baharom stated that "I want to work again in another branch MBL, in Adelaide".[3]

**[58]** In the wake of being dismissed. Mr Baharom felt personal shame. He was also concerned at income insecurity and having financial obligations (including private rental costs on a residence in Keith). In the month that followed he applied for six or seven jobs. He had one interview, but received no employment offer.

**[59]** On 29 July 2024, with the knowledge of Ms Whitehouse, the employer's payroll officer issued an Employment Separation Certificate.[4] In it, the reason for separation was marked as "other" and the word "dismissal" entered. The option of marking the reason as "redundancy" or "shortage of work" was not used.

**[60]** On or about 1 August 2024 Mr Baharom commenced working as a casual cook at a local café in Keith for about eight hours per week. That work ceased one month later.

**[61]** In the days that followed conciliation of the application in the Commission, on 23 August 2024 Master Butchers made an open offer of re-employment to Mr Baharom (via the AMIEU). The offer read:[5]

> "Dear Brendan
>
> A position has now become available at our Wingfield site, and we are therefore prepared to offer employment to Badrin at that site. We note that Badrin has previously stated he would accept a position at Winfield.
>
> Accordingly, a further offer is now made on the following terms:
>
> 1. MBL offers to reemploy Mr Baharom to a position of Casual Factory Hand based at out Wingfield site (561 Grand Junction Road, Wingfield) on rotating shifts

(fortnightly rotation). The hours the site are open are 24hours. As a casual he will be rostered to work fortnightly in advance. The employment will commence on Monday 2nd or 9th September 2024 at 8am.

2. Manufacturing and Associated Industries and Occupations Award [MA000010], classification C11 at the casual rate of $34.30 Gross per hour plus shift loading for equivalent shift, and any allowances and penalties applicable.
3. In full and final settlement of all claims against MBL relating to his previous employment and its cessation, MBL will make a payment of $6500 to assist with his move. As this payment is made as a relocation expense, it will not be put through the payroll system and as such is not subject to taxation.
4. Terms of Settlement with the usual terms re confidentiality, all claims and non-disparagement.

This is an open letter which will be relied upon at the hearing if the offer is rejected.

Please take instructions.

Kind Regards

Claire Whitehouse I MBL
Human Resources and WHS Manager"

**[62]** Not having heard back, on 27 August 2024 Master Butchers indicated that it required a response by 5.00pm 28 August. At 4.09pm on 28 August 2024 the AMIU on behalf of Mr Baharom rejected the offer:[6]

"Dear Claire

I note that last Friday you advised that this was an open offer yet have changed your mind. Mr Baharom rejects your offer.

The facts that MBL thinks it can simply offer our member another casual position, pay a relocation expense in circumstances where there does not appear to be any thought to Mr Baharom's accommodation (current or future, or for example a break lease fee), and make some kind of statement that this offer will be used in open hearing (and then put a deadline on it 4 days later) is unacceptable.

Before the hearing, can you please advise me of the following information:

1. Why was Badrin classified under the Manufacturing Award and not the Meat Industry Award 2020?
2. Why was Badrin classified at C11 of the Manufacturing Award?

Thanks,
Brendan Swan
National Industrial Officer
AMIEU"

**[63]** In evidence in chief Mr Baharom stated that he rejected the offer because whilst on 13 June (the date of his application and two days after dismissal) he still thought it viable to work for the employer and relocate to Adelaide, he had since lost trust and confidence in Master Butchers because the re-employment offer was made more than two months later and in circumstances where his application was being opposed.

**[64]** Under further questioning, Mr Baharom then stated that he declined the offer because he had by then agreed to partner his sister in a cafe she was establishing in Bordertown and that this business venture would commence trading in mid to late September 2024. He intended to remain a resident of Keith, commute to Bordertown and did not propose to relocate himself or his family to Adelaide.

**Submissions**

*Master Butchers*

**[65]** Master Butchers submit that the termination was a genuine redundancy within the meaning of s 389 and therefore not an unfair dismissal.

**[66]** Master Butchers submit that it was necessary to reduce labour costs at the Keith plant following months of losses attributable to international factors compounded by the May 2024 outbreak of avian flu. The redundancy was due to genuine operational reasons.

**[67]** Mr Baharom was not singled out. Three persons, including Mr Baharom left the Keith site. Mr Baharom was chosen for redundancy for rational reasons because he had failed to acquire a forklift licence and did not have as broad production skill-set as other factory hands who remained.

**[68]** Master Butchers submit that, at the time, there were no other positions available at the Keith or Wingfield sites or elsewhere to redeploy Mr Baharom.

**[69]** Master Butchers submit that whilst it could have consulted more extensively, it did discuss with Mr Baharom on 11 June 2024 the reason and that there were no redeployment options, and that it would look out for other positions if they became available or if the company heard of other roles.

**[70]** In the alternative, Master Butchers submit that the dismissal was not harsh, unjust or unreasonable. It submits that a valid reason existed for the redundancy based on business and operational grounds. It submits that whilst it could have better handled the dismissal, it was sensitive to Mr Baharom's circumstances and tried as best it could to ease the impact of the redundancy. It submits that it did not describe the dismissal as a "redundancy" in the termination letter or certificate simply because no redundancy pay needed to be made, not because the operational reasons were not genuine.

**[71]** Master Butchers acknowledges that it owes Mr Baharom one week's pay, but submits that he should not be otherwise compensated because he later rejected a genuine offer of re-employment in circumstances where he had earlier indicated a willingness to be redeployed.

*Mr Baharom*

**[72]** Mr Baharom submits that the redundancy was not a genuine redundancy within the meaning of s 389.

**[73]** Mr Baharom submits that the redundancy was not for genuine operational reasons (s 289(1)(a)) because at the same time as dismissing Mr Baharom a new factory hand was recruited.

**[74]** Mr Baharom submits that the redundancy was also not a genuine redundancy (as defined) because Master Butchers did not comply with its consultation obligations under the Manufacturing Award (s 389(1)(b)).

**[75]** Mr Baharom submits that the redundancy was not a genuine redundancy (as defined) because Master Butchers did not make genuine (or any) attempt to redeploy him to other divisions within its operations, and only made a re-employment offer more than two months later. A re-employment offer months after dismissal does not meet the requirement of s 389(2) to make reasonable attempts to redeploy prior to dismissal.

**[76]** Mr Baharom further submits that the dismissal was harsh, unjust or unreasonable because there was no valid reason, no procedural fairness, the decision was pre-determined, no consideration was given to Mr Baharom's vulnerability as a migrant worker in regional Australia, a support person was not offered, there was no opportunity to take advice from other persons or his union, and Mr Baharom was humiliated by being dismissed and by the employer certifying to a government agency that he had been dismissed rather than stating that he was made redundant, and no pay in lieu of notice was made despite it being owed, and it remains unpaid.

**[77]** Mr Baharom submits that he should be compensated rather than re-employed because he has lost trust and confidence in Master Butchers. The compensation should be at the higher end of the maximum compensation scale of 26 weeks because of the egregious nature of the unfairness, because Mr Baharom was a vulnerable worker, and because Mr Baharom is located in regional South Australia where job opportunities are scarce.

**Consideration**

**[78]** Mr Baharom is eligible to make the claim. He was a person protected from unfair dismissal (s 382) and he was dismissed (s 386). The application is within time (s 394(2)).

**[79]** Section 385(d) of the FW Act provides that a dismissal is not unfair if it is a "genuine redundancy". An employer bears the legal onus of establishing that a dismissal was a case of genuine redundancy.

**[80]** Only if Mr Baharom's dismissal was not a genuine redundancy (as defined) am I required to consider whether the dismissal was, in an overall sense, unfair.

**[81]** Section 389 provides:

> **"389 Meaning of genuine redundancy**
>
> (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."

**[82]** In applying s 385(d), I note the recent observation of the Full Federal Court that:[7]

"The formation under s 385(d) of the FW Act of a state of satisfaction that a particular dismissal was or was not a "case of genuine redundancy" involves an evaluative determination that rests upon value judgments or opinions that are untethered from fixed standards".

**[83]** Section 389(1)(a) does not permit an inquiry into the reasonableness of changes in operational requirements if they objectively existed and were a material reason for the redundancy.[8]

**[84]** Having regard to my finding (below) concerning s 389(1)(b), I need not deal extensively with s 389(1)(a). However, I observe that my further finding below (when considering valid reason) is that there were genuine operational reasons to reduce labour costs at the Keith site but not to make Mr Baharom redundant at the time he was dismissed. I do not find that Master Butchers, at the time of dismissal, did not require Mr Baharom's job to be performed by anyone. It required the job (of factory hand) to be performed by newly recruited Employee X.

**[85]** I now turn to s 389(1)(b). It is not in dispute, as I have found, that Mr Baharom was employed under the Manufacturing Award. Clause 41 provides:

**41. Consultation**

41.1 Consultation regarding major workplace change

(a) **Employers to notify**

(i) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.

(ii) **Significant effects** include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the

skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.

(b) **Employers to discuss change**

(i) The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in clause 41.1(a), the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.

(ii) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 41.1(a).

(iii) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests

**41.2 Consultation about changes to rosters or hours of work**

(a) Where an employer proposes to change an employee's regular roster or ordinary hours of work, the employer must consult with the employee or employees affected and their representatives, if any, about the proposed change.

(b) **The employer must:**

(i) provide to the employee or employees affected and their representatives, if any, information about the proposed change (for example, information about the nature of the change to the employee's regular roster or ordinary hours of work and when that change is proposed to commence);

(ii) invite the employee or employees affected and their representatives, if any, to give their views about the impact of the proposed change (including any impact in relation to their family or caring responsibilities); and

(iii) give consideration to any views about the impact of the proposed change that are given by the employee or employees concerned and/or their representatives.

(c) The requirement to consult under clause 41.2 does not apply where an employee has irregular, sporadic or unpredictable working hours.

(d) These provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements.

**[86]** Accordingly, Master Butchers had a legal obligation to consult Mr Baharom about the intended redundancy prior to dismissing him. A definite decision had been made to reduce labour costs. This was likely to have a significant effect on factory hands because three persons were identified during May 2024 as needing to leave.

**[87]** Patently, the evidence before me establishes that Master Butchers did not meet its consultation obligation in substance or form.

**[88]** On matters of substance:

- the decision was pre-determined. The 11 June 2024 meeting was a termination meeting, not a consultation meeting;
- the reason for dismissal was advised at the outset and before Mr Baharom was given the opportunity to speak. No forewarning of its purpose nor the need for redundancies generally at the site or of his position in particular, was provided;
- prior to the decision being communicated, there was no discussion or opportunity to discuss mitigation options short of redundancy (such as the feasibility of reducing hours, or reducing overtime worked by all factory hands to avoid the redundancy);
- prior to the decision being communicated, there was no discussion or opportunity to discuss why Mr Baharom was selected for redundancy and not others; and
- prior to the decision being communicated, there was no discussion or opportunity to discuss what redeployment options might exist in the Master Butchers operations (including in divisions other than MBL Proteins).

**[89]** On matters of form:

- Master Butchers did not give Mr Baharom notice of the proposed operational changes nor provide in writing "all relevant information about the changes" as required by cl 41.1 and 41.2 of the Manufacturing Award; and
- Master Butchers did not promptly consider any matters raised as required by cl 41.4 because it failed to consult in advance of making Mr Baharom redundant. To the extent Mr Bahrom raised a concern during the termination meeting as to why he was selected when a new factory hand had been employed at the same time, the employer's response was relevant but perfunctory.

**[90]** Section 389(2), which operates as an exclusion to the meaning of genuine redundancy, requires consideration as to whether "it would have been reasonable in all the circumstances for the person to be redeployed". The exclusion poses a hypothetical question which must be answered by reference to all relevant circumstances.[9]

**[91]** Whilst it is not necessary, given my finding on the consultation obligation, to deal with s 389(2) at length, I observe that there is insufficient evidence before me to find that it would have been reasonable in all the circumstances for Master Butchers to redeploy Mr Baharom elsewhere in its operations.

**[92]** This is not to say that redeployment at the time of dismissal was not possible or practicable beyond the Keith site; simply that the evidence before me is insufficient to conclude one way or the other. Aside from rosters at the Wingfield site, Master Butchers led no evidence on that issue other than assertions by Mr Deutrom. Mr Baharom led no contrary evidence. As noted, I have found that Mr Baharom was provided no opportunity to explore redeployment due to the employer's failure to consult and the dismissal being presented as a *fait accompli*. I agree with Mr Baharom's submission, which is self-evident, that a re-employment offer months after dismissal does not meet the requirement of s 389(2) to make reasonable attempts to redeploy prior to a person being dismissed.

**[93]** I find that Master Butchers failed to comply with its obligation under the Manufacturing Award to consult about the redundancy. Accordingly, for at least that reason, the dismissal was not a "genuine redundancy" within the meaning of the FW Act.

*Was the dismissal unfair?*

**[94]** I now turn to whether the dismissal was harsh, unjust or unreasonable.

**[95]** Section 387 provides:

> **"387 Criteria for considering harshness etc.**
>
> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA 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 FWA considers relevant."

**[96]** I now consider these matters.

Valid reason s 387(a)

**[97]** A valid reason for dismissal is one that is sound, rational or defensible.[10]

**[98]** The evidence before me, including the confidential financial evidence concerning the Keith and Wingfield sites, leads me to conclude that, by May 2024, genuine operational reasons existed to reduce costs, including labour costs at the Keith plant, following months of losses attributable to international factors. Those factors were compounded by the May 2024 outbreak of avian flu. I do not find, as suggested by Mr Baharom, that the redundancies were a sham or that the avian flu outbreak was an opportunistic cover for dismissal.

**[99]** However, in an unfair dismissal proceeding, the issue is not simply whether redundancies in the abstract were sound, rational or defensible but whether Mr Baharom's dismissal, at the time he was dismissed, was of that character.

**[100]** The evidence before me is that during May 2024 Mr Deutrom and Mr Pickering considered that a labour cost saving equivalent to three factory hand positions needed to be made at the Keith site. Two were removed (neither of which required dismissal by redundancy because one person retired early and one resigned).

**[101]** However, by late May 2024 and early June 2024 Master Butchers decided to continue the recruitment and onboarding of Employee X as a factory hand. In other words, Master Butchers decided to add a new labour cost (equivalent to one factory hand) at the same time as it decided to proceed with making Mr Baharom (a factory hand) redundant.

**[102]** Consequently, I do not find that labour cost savings of three factory hand positions was required to meet the operational reason for Mr Baharom's redundancy. By its own conduct in proceeding with the employment of Employee X, Master Butchers was by then content to have reduced its labour costs at the Keith site by two, not three positions. By then, those two positions had been removed.

**[103]** Therefore while there were genuine operational reasons for redundancies, by the time of Mr Baharom's dismissal that operational reason no longer existed. What occurred in fact was that Mr Barhaom was dismissed to reduce labour costs because an additional labour cost of one factory hand had, by choice, been brought into the business at the Keith site at that very time.

**[104]** I therefore do not find that the redundancy of Mr Baharom was sound, rational or defensible having regard to the need to reduce labour costs at the Keith site.

**[105]** The absence of a sound, rational or defensible operational reason for dismissal by redundancy weighs against a finding of valid reason.

**[106]** What then are the other reasons advanced by Master Butchers?

**[107]** Master Butchers submit that Mr Baharom was selected for redundancy despite Employee X being recruited because Mr Baharom did not have, and had twice failed the test to secure, a forklift licence. It was said that Employee X had such a licence.

**[108]** Whilst, in general terms, a redundancy based on an employer's assessment of a person not having a qualification to undertake a necessary or essential component of a job in circumstances where others have such a qualification is sound, rational or defensible, in this matter that consideration carries less weight than would otherwise apply. This is because Master Butchers had willingly and knowingly employed Mr Baharom for the entirely of his service (nearly two years) without an Australian recognised forklift licence. Whilst I take into account that for the first twelve months Master Butchers was requiring Mr Bahrom to obtain the licence, after he had failed to do so for the second time in September 2023 it continued to employ him and still permitted him to drive forklifts as part of his duties.

**[109]** Accordingly, a decision to select Mr Baharom for redundancy because he was unlicensed compared to others (including Employee X) carries some weight but not overwhelmingly so.

**[110]** Master Butchers submit that Mr Baharom was selected for redundancy despite Employee X being recruited because Mr Baharom was not as adept at all areas of production as other factory hands (including Employee X) and that Employee X had prior experience as a leading hand and had the potential to become a supervisor at the Keith plant.

**[111]** In this matter, this consideration also only carries limited weight. Firstly, the evidence about Employee X was general in nature only. Secondly, Employee X was not employed as a supervisor or leading hand. He was employed as a factory hand and remained in that role at the date of dismissal. Even at the date of hearing (three months later) he remained a factory hand. Thirdly, no evidence was led of a comparison of skill sets between factory hands. I am unable to find that, from amongst all factory hands at the Keith site, Mr Baharom's skills were the least adaptable across all areas of production. Further, whilst I accept Mr Pickering's general evidence that Mr Baharom was more adept at some parts of production than others, such a proposition does not sit comfortably with the fact that Mr Baharom was, on the employer's case, not dismissed for performance reasons nor had a record of unsatisfactory performance.

**[112]** Accordingly, whilst there were genuine operational reasons to reduce labour costs at the Keith site, and whilst some elements of the selection of Mr Baharom were rational, I do not find that, at the time of Mr Baharom's dismissal on 11 June 2024, there was a valid reason for dismissal given that Employee X had been recruited as a factory hand at that very time.

**[113]** This weighs in favour of a finding that the dismissal was unfair.

Whether notified s 387(b)

**[114]** Mr Baharom was notified of the reason for dismissal on the day he was dismissed. He was informed that it was a business decision to reduce costs because of the avian flu outbreak.

**[115]** However, I have found that:

- there was no prior consultation; the decision was pre-determined; and the 11 June 2024 meeting was a termination, not consultation, meeting.

- the reason for dismissal was advised at the outset before Mr Baharom was given the opportunity to speak. No forewarning of its purpose nor the need for redundancies generally at the site or of his specific redundancy was provided;

- prior to the decision being communicated, there was no discussion or opportunity to discuss mitigation options short of redundancy (such as the feasibility of reducing hours, or reducing overtime worked by all factory hands to avoid the redundancy);

- prior to the decision being communicated, there was no discussion or opportunity to discuss why Mr Baharom was selected for redundancy and not others. When Mr Baharom raised a concern during the termination meeting as to why he was selected when Employee X had been employed at the same time, the employer's response was relevant but perfunctory; and

- prior to the decision being communicated, there was no discussion or opportunity to discuss what redeployment options might exist within Master Butchers operations (including in divisions other than MBL Proteins).

**[116]** These considerations collectively constitute a denial of procedural fairness. They weigh materially in favour of a finding that the dismissal was unfair.

Opportunity to respond s 387(c)

**[117]** Given the absence of prior notification or consultation, Mr Baharom had no opportunity to meaningfully discuss the decision with his employer, let alone steps that could mitigate its adverse effects. His only opportunity was to respond in the aftermath of having been told he was dismissed. His push-back at the decision (pointing out that Employee X had been employed at the same time and had that morning been shown how to work on the production side of the business) was responded to but only briefly and with no desire by the employer to reconsider its decision.

**[118]** The absence of a meaningful opportunity to respond weighs materially in favour of a finding that the dismissal was unfair.

Support person s 387(d)

**[119]** Mr Baharom was not denied access to a support person on 11 June 2024 because he did not request one. However, he had no capacity to arrange for one even if he had wished to do so given the lack of prior consultation or notification of the meeting's purpose.

**[120]** Given this, s 387(d) is a neutral factor.

Performance s 387(e)

**[121]** According to Master Butchers, the dismissal was not performance related. To the extent that I have found the dismissal to be based on an underlying business reason, this is correct.

**[122]** However, I have also found that despite indicating that the dismissal was not performance related, the selection of Mr Baharom for redundancy was in part based on qualitative grounds – that he did not hold a forklift licence, had twice failed the licence test, and, in the employer's view, he was not proficient across all areas of production. To this extent the employer considered his attributes.

**[123]** I have found that in doing so the employer acted rationally but only in part given the context and circumstance. I have taken those factors into account in considering valid reason.

**[124]** Given this, s 387(e) is a neutral factor.

Size of business and human resource capacity (s 387(f) and (g)

**[125]** Master Butchers was not a small business employer. It had human resource capacity. I take into account that Ms Whitehouse only commenced in a human resources role in mid-April 2024. However, she was on board at the time relevant decisions were made, could have been (but wasn't) brought into the decision-making, and participated fully in giving effect to the dismissal even though she had no more than a couple of hours' notice.

**[126]** A lack of human resource capacity does not explain the substantive or procedural failings in this matter.

Other matters s 387(h)

**[127]** It is appropriate to consider three further factors.

**[128]** Firstly, Mr Baharom was a migrant worker in regional Australia, on a visa, with limited command of English. Whilst Mr Baharom has some command of English, his vulnerability as a migrant worker weighs somewhat in favour of a finding of harshness because Master Butchers took no steps to mitigate those vulnerabilities despite there being readily available and simple means to do so. For example, the employer could have asked Mr Baharom if he wanted or needed a support person. A fellow Malay speaking employee could have attended the meeting and interpreted into English for Mr Baharom. Master Butchers could have provided prior notice of the meeting and its purpose to allow Mr Baharom to bring a support person of his choice, or obtain prior advice of his rights.

**[129]** All of these would have been reasonable steps having regard to both Mr Baharom's vulnerability and the fact that this was a meeting of consequence; dismissal no less. Master Butchers failed to do so. This failure was not because Master Butchers wanted to be unfair to Mr Baharom but because it simply did not give enough thought to fairness.

**[130]** Secondly, Mr Baharom felt shame at being dismissed. This was compounded by the fact that the employer certified to a government agency that he had been dismissed rather than stating that he was made redundant. With a little more thought, Master Butchers could have made it clear in the paperwork that this was a no-fault redundancy. Doing so would have minimised, to a degree, the stigma of having been "dismissed" and would have made the certificate useful not just for Centrelink purposes but when seeking alternate employment.

**[131]** Thirdly, no pay in lieu of notice was made despite it being owed. Even after this became known to the employer in the wake of these proceedings, it remains unpaid.

**[132]** Each of these considerations were capable of being mitigated had the employer taken care to manage the dismissal in a respectful manner. It did not do so.

**[133]** These additional factors collectively weigh in favour of a finding of harshness.

**[134]** There are no other matters for consideration.

*Conclusion on unfairness*

**[135]** The dismissal was accompanied by shortcomings in substance and process. Its underpinning reason (cost reduction) was genuine but even then, by the time Mr Baharom was dismissed, the employer had acted inconsistently by electing to proceed with employing a new factory hand. There was also an abject lack of procedural fairness and no attention given to legal obligations to consult or pay notice.

**[136]** Considered overall, the dismissal was unfair. I so find.

**Remedy**

**[137]** I now consider remedy.

**[138]** Remedies available to the Commission under s 390 of the FW Act are reinstatement (in the same or other position) or (but only if reinstatement is inappropriate) compensation (within statutory limits).

**[139]** Whether to order a remedy is discretionary.

**[140]** It is clear that re-employment, given all that has occurred, is inappropriate. Mr Baharom's evidence was that he has lost trust and confidence in Master Butchers. In light of my findings, that loss is objectively reasonable. Further, there is no evidence of any suitable position currently being available.

**[141]** I turn to compensation.

**[142]** Section 392 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."

**[143]** I now consider each of the criteria in s 392.

*Viability: s 392(2)(a)*

**[144]** There is no evidence to suggest that a compensation order of the sum determined will adversely affect the viability of Master Butchers.

*Length of service: s 392(2)(b)*

**[145]** Mr Baharom worked for Master Butchers for approximately twenty months.

*Remuneration that would have been received: s 392(2)(c)*

**[146]** Had I found that Mr Baharom's dismissal was unfair only on the ground of procedural fairness, the amount of compensation would have been limited to a period that would have been necessary to allow for meaningful consultation, considered decision-making and notification.

**[147]** However, that is not the case. I have found that the dismissal was unfair for substantive reasons in that, absent meaningful performance concerns and processes being put in place to address such concerns, the dismissal on the ostensible ground of labour cost reduction was inconsistent with the employer's contemporaneous decision to add costs by employing Employee X as a factory hand at the same time as making Mr Baharom redundant.

**[148]** Accordingly, given that:

- the cost of Mr Baharom's employment as a factory hand was, in practice, substituted by the employment of Employee X, with the effect that the labour cost reductions implemented at the Keith site concerned only two and not three positions;

- Employee X remained in employment in the weeks and months following dismissal (including at the date of hearing which was three months after the dismissal); and

- Mr Baharom had twenty months of continuous service without formal performance counselling or warning;

it is reasonable to conclude that Mr Baharom would have remained in employment for the foreseeable future had he not been dismissed.

**[149]** The maximum compensation period under the FW Act is six-months (26 weeks). However, given my finding that genuine operational reasons existed to reduce labour costs at the Keith plant, some contingency needs to be made for the potential that a genuine redundancy on account of these factors may have led to the loss of employment during the following six months.

**[150]** Accordingly, I will make an allowance of six weeks from the maximum compensation period for this contingency. The compensation period will be twenty weeks (11 June 2024 to 29 October 2024) less appropriate discounts (below).

**[151]** Over this period Mr Baharom would have received at least the base rate of pay applicable to a casual employee working 37.5 hours per week ($1,235[11]). However, Mr Baharom's actual average weekly remuneration was considerably higher ($1,707[12]) because it included shift penalties and a large amount of overtime.

**[152]** I do not consider it reasonable to assess the compensation sum simply by reference to the base rate, nor past average earnings. Given that genuine operational reasons existed to reduce labour costs, I cannot be reasonably satisfied that the same shifts or the same significant quantities of overtime would have been worked during the compensation period. A mid-point between the two weekly figures is an appropriate projection of future weekly earnings. That is a notional figure of $1,471 per week.

**[153]** Further, the award minimum wage applicable to Mr Baharom increased by 3.75% from 1 July 2024. It is appropriate to make this adjustment to the notional figure. Accordingly, the rate of remuneration on which I will calculate the compensation sum is $1,522 per week.[13]

*Mitigating efforts: s 392(2)(d)*

**[154]** Mr Baharom took active steps in the immediate wake of being dismissed to mitigate his loss by promptly applying for alternative positions. He was unemployed for seven weeks (until 1 August 2024) before commencing employment in a non-comparable role as a casual cook for eight hours per week.

**[155]** A relevant issue relating to mitigation is the offer of re-employment as a factory hand at Adelaide made by Master Butchers on 23 August 2024. That offer was rejected by Mr Baharom. In the circumstances, I consider its rejection was reasonable.

**[156]** Firstly, objectively considered, relocation to Adelaide to take up the offer, at least during the balance of 2024, was impractical. Mr Baharom had a family. Relocating family, including school-aged children mid-year, could not be reasonably required, at least not in the short term. Ms Whitehouse in her evidence accepted as much. Further, Mr Baharom had a binding residential lease on a home in Keith that committed him until December 2024. Nor could Mr Baharom reasonably commute daily to and from Adelaide. Keith is 230 kilometres from Adelaide. He would also have had to fund, at his expense, accommodation and essentially finance his family in Keith and himself in Adelaide. He would have also incurred the cost of travel to and from Adelaide to see his family, if he was to return on weekends. Being away from his wife and family also carried its own non-financial burdens.

**[157]** Secondly, the offer was not made at the time of dismissal but more than ten weeks later. By then, Mr Baharom's trust and confidence had been reasonably eroded evidenced by the unfair dismissal claim, the non-payment of monies owed and a thoughtlessly worded separation certificate.

**[158]** I take into account that Mr Baharom rejected the offer because of a plan to go into business with his sister. I deal with this below.

**[159]** I do not make any discount to the compensation period under s 392(2)(d) until Mr Baharom's work as a cook finished.

**[160]** However, a period of approximately four weeks then elapsed (from late August 2024 until late September 2024) before a business venture commenced. I am not satisfied that in this period Mr Baharom continued to mitigate his loss by looking for external employment. Based on the evidence, it is more likely than not that from the time Mr Baharom ceased work at the local café he had turned his mind to going into business with his sister.

**[161]** I will discount this four-week period from the compensation sum.

*Remuneration earned or likely to be earned: ss 392(2)(e) and (f)*

**[162]** In the period between dismissal (11 June) and the hearing (12 September) Mr Baharom's sole income was the earnings as a cook (about eight hours per week for four weeks). This approximates to one week's work. For the purposes of the compensation sum, I will treat the base earnings of a casual cook to be broadly equivalent to the base earnings of a factory hand.

**[163]** I will discount one week from the compensation sum on account of remuneration earned.

**[164]** What then is the remuneration likely to have been earned in the balance of the remaining twenty week compensation period (from approximately 25 September to 29 October)? Account needs to be taken of the fact that Mr Baharom intends to go into business (and earn income) from a venture with his sister to open and operate a café in Bordertown from mid to late September 2024.

**[165]** Although future income from this venture is unknown, what is known is that it is a new venture. Judicial notice can be taken of the fact that new small business ventures do not statistically have a high degree of success (up to 80% fail in the first year) and even when they succeed it commonly takes months if not years to secure a rate of return on investment and a steady and reliable income stream.

**[166]** Accordingly, of this five week period, I will add three weeks to the compensation sum and discount two, on the basis that at least for most of the first month of the venture it is not likely that Mr Baharom would earn income but thereafter he is more likely to do so.

*Other matters: s 392(2)(g)*

**[167]** I have already taken contingencies into account, including the likelihood of further redundancies at the Keith site, whether overtime was likely to be worked, and the potential for future earnings from the proposed business venture.

**[168]** There are no other matters or contingencies that need be provided for.

*Misconduct: s 392(3)*

**[169]** No issue of misconduct arises. I will make no deduction on this account.

*Shock, Distress: s 392(4)*

**[170]** I have found that Mr Baharom was blindsided by the redundancy and felt personal shame as a result.

**[171]** Whilst Mr Baharom sustained material impacts to his well-being, the unfair dismissal jurisdiction is unable to compensate for shock and distress. I do not do so.

*Compensation cap: s 392(5)*

**[172]** The amount of compensation I will order does not exceed the six month compensation cap.

*Conclusion on compensation*

**[173]** A decision to order a remedy is discretionary. The quantum of compensation ordered must take into account the circumstances set out in s 392(2) and apply those considerations as a whole and consistent with the 'fair go all round' principle.

**[174]** Whilst an orderly process of quantification is to be conducted in accordance with well-established Commission authority,[14] the quantum (if any) ultimately needs to be a sum that reflects the overall exercise of discretionary considerations.

**[175]** Based upon the above considerations the compensation payable would be:

> Compensation period 20 weeks
> Less
> 1 week on account of actual earnings since dismissal;
> 4 weeks on account of not having mitigated loss after alternate employment ceased; and
> 2 weeks of likely future earnings from the business venture.

**[176]** This represents a compensation sum of thirteen weeks.

**[177]** This is an amount I consider appropriate in the circumstances. Although I have not calculated it by reference to the period of unemployment incurred by Mr Baharom, it broadly represents the period(s) he was unemployed following dismissal. It is half of the maximum compensation sum under the FW Act.

**[178]** The total compensation I will order in favour of Mr Baharom is therefore $19,786[15] plus superannuation.

**Conclusion**

**[179]** Whilst there was a genuine need for Master Butchers to reduce labour costs at the Keith site, the dismissal of Mr Baharom was not a genuine redundancy as defined.

**[180]** The dismissal of Mr Baharom was harsh, unjust or unreasonable.

**[181]** Reinstatement is inappropriate.

**[182]** Compensation will be ordered in the sum of $19,786 to be taxed according to law. As I have found that an underlying case for reducing labour costs existed despite substantive and procedural unfairness, it should be taxed as a redundancy.

**[183]** I order that superannuation be paid on this sum, at the rate and into the account applicable to Mr Baharom whilst he was employed by Master Butchers.

**[184]** These sums are payable within seven days of the date of this decision. Given the size of the business, the lapse of time since dismissal and that fact that monies known to be owed have not yet been paid, no further time is appropriate.

**[185]** I observe that the compensation sum includes the one week notice period that Mr Baharom should have been paid but was not.

**[186]** I issue an order to this effect.[16]

**Concluding observations**

**[187]** I have noted that the unfairness visited on Mr Baharom was a lack of attention by Master Butchers to its legal and industrial obligations and not an intention to impose hardship on him.

**[188]** This was apparent from the evidence and disposition of the employer's witnesses. It is noteworthy that the employer, in its closing submission, acknowledged that lessons are to be learnt from this matter. I summarise some of those:

- casual employees, and in particular regular and systematic casuals, have the right to be treated fairly and the right to challenge dismissals if treated unfairly;

- in cases of redundancy, mandatory consultation obligations apply not just to permanent employees but also casuals;

- even where an underlying genuine business reason for redundancies exist, consistency in conduct and fairness in selection is important;

- reasonable attempts need to be made to accommodate employees with vulnerabilities such as those with migrant backgrounds or limited English;

- on important matters concerning a person's employment or job security, fairness may require that persons be given the opportunity to have a support person present or take advice on matters impacting their interests; and

- where a business has specialist internal human resources or industrial expertise, operational management are well advised to utilise that resource before deciding upon or giving effect to dismissals or redundancies.

**[189]** For the sake of completeness I also observe that it may be appropriate for policy makers to give fresh attention to the potential for mutual recognition of industrial qualifications between Australian jurisdictions and nations from where Australia sources labour.

**[190]** Where qualifications such as licences gained overseas are not recognised, attention could be given to assisting a migrant with limited English to be able to sit and complete the theory elements of a local licence qualification in a language they can understand. Whilst recognising that a base level of English may well be appropriate to secure industrial qualifications, it would appear to make little policy sense for a person with overseas recognised skills to be unable to secure a local licence simply because test materials are not produced or understood in a language they can readily understand.


DEPUTY PRESIDENT

*Appearances*:

B. Swan, *of the Australasian Meat Industry Employees' Union*, on behalf of Mr Baharom.

C. Whitehouse, *of and on behalf of* Master Butchers Co-operative Limited.

*Hearing details:*

2024.
Adelaide;
12 September.

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[1] A2 Attachment BB2 Schedule Item 6

[2] R10 Attachment 1

[3] F2 Item 3.1 point 6

[4] A1

[5] A3

[6] A3

[7] *Helensburgh Coal Pty Ltd v Bartley* [2024] FCAFC 45 at 80 per Katzman and Snaden JJ (noting this judgement is subject to a special leave application before the High Court)

[8] Ibid at 58 per Katzman and Snaden JJ

[9] *Ulan Coal Mines Ltd v Honeysett* [2010] FWAFB 7578, [26]

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

[11] $32.93 per hour x 37.5 hours per week (A2 BB1)

[12] Submission, paragraph 27

[13] $1,471 + 3.75%

[14] *Ellawala v Australian Postal Corporation* [2000] AIRC 1151, Print S5109; *Sprigg v Paul's Licensed Festival Supermarket* [1998] AIRC 989, Print R0235

[15] 13 weeks at $1,522 per week

[16] PR779745