DECISION

Fair Work Act 2009
s.120—Redundancy pay

Job Site Recyclers Pty Ltd T/A Job Site Recyclers Pty Ltd

v

Zo Muan
(C2024/5669)

DEPUTY PRESIDENT MASSON MELBOURNE, 2 OCTOBER 2024

Variation of redundancy pay – whether other acceptable employment offered– alternate role found to constitute other acceptable employment – redundancy entitlement reduced.

Introduction

[1] On 16 August 2024, Job Site Recyclers Pty Ltd T/A Job Site Recyclers Pty Ltd (JSR) made an application pursuant to s.120 of the *Fair Work Act 2009* (the Act) for the variation of its obligation to pay redundancy pay pursuant to s.119 of the Act. The Application is made in relation to a former employee, Mr Zo Muan and seeks to reduce Mr Muan's redundancy entitlement from seven weeks' redundancy pay to zero.

[2] The matter was set down for hearing on 1 October 2024 in advance of which JSR filed material in support of the application. Mr Muan did not file any material in objection to the application. At the hearing, the Managing Director, Mr Daniel Reaper, appeared on behalf of JSR and gave evidence. Mr Muan also appeared and gave evidence.

Background and evidence

[3] Mr Muan commenced full-time employment with JSR on 1 March 2021 in a manual labouring role that required him to clean up domestic construction sites. He was employed under the terms of the *Waste Management Award 2020*[1] (the Award) and, at the time of his termination of employment, was in receipt of an hourly base rate of pay of $29.30. The Applicant lives in Melton, Victoria and while employed by JSR was regularly required to start at JSR's Laverton depot (32km from his residence) and was also required to travel directly from his residence to different work sites, some of which were close to his residence while other sites were as far away as Kilmore (79kms) or Croydon (72km). Mr Reaper estimated that travel to sites of a significant distance such as Kilmore or Croydon occurred on a weekly basis. When required to travel directly from home to the work site, Mr Muan had the use of a company vehicle which he was able to take home, although the vehicle was not a component of his employment conditions. According to Mr Reaper, the incidence of direct site attendance

declined in the final months of Mr Muan's employment due to declining work and an increased cost focus of the company.

[4] Mr Reaper gave evidence that over the past 18 months, JSR has experienced a turbulent period with an 80% reduction in workload and revenue. This was largely due to the liquidation and administration of two of its major customers[2] (Poter Davis and Maher Corp) and the forced closure of JSR's main facility in Dandenong due to a 200% increase in rent[3]. Because of these business pressures, Mr Reaper states that staffing numbers dropped from 140 in February 2023 to the current level of 22. He further states that casual employees were the first employees to be 'let go' but this was then followed by the redeployment or redundancy of permanent staff as well.

[5] Concerned to reduce the estimated redundancy payment liability of up to $700,000 for all staff likely to be made redundant, Mr Reaper said significant efforts were made to secure alternate employment for staff. While successful in redeploying many staff, Mr Reaper states that a small number of employees were unable to be redeployed and were paid out their redundancy entitlements. In the case of Mr Muan, Mr Reaper states that an attempt was initially made to place Mr Muan with a waste management company in Footscray (4 Seasons). Mr Muan confirmed that he went for an interview with 4 Seasons on 8 July 2024, but the role was unacceptable as he did not have a car that he could travel to and from work in. He was in any case unsuccessful at interview according to Mr Reaper.

[6] Mr Reaper stated that as the workload of JSR reduced in North and West Regions of Melbourne, he also approached a representative from the Onsite Group in relation to Mr Muan and another employee (Nramsi Odichio) in July 2024. Mr Reaper stated that after contacting the Onsite Group in mid July 2024 he was subsequently advised by 'Nov' (of the Onsite Group) that they had work for two staff and were happy to take on the two employees based on Mr Reaper's recommendation. Mr Reaper received an email from 'Nov' on 18 July 2024 confirming the employment offers for Mr Muan and Mr Odichio, which relevantly stated as follows;

> "Hi Daniel
> Thank you and apricate all the help and organising the guys
>
> Ill try keep the guys in the same pay bracket as per your msg. I'm sure they will be able to deliver and have the experience to do the job.
>
> The jobs will be full time with all entitlements.
>
> Nramsi position will be truck driver and bobcat operator doing site cleans.
>
> Zo Muan position will be either preparing jobs or go with one of the trucks to assist operators on jobs with general labouring duties doing site cleans.
>
> We are based at 32 export road Craigieburn.
>
> Start 7:00am and finish 3:30.

I should be able to get them to start from Monday possible if they like to get in touch with me.

Once again thank you for your help.

Regards

Nov"

[7] While Mr Odichio accepted and remains employed by the Onsite Group, Mr Reaper states that Mr Muan was hesitant to change employer. Mr Muan agreed when giving evidence that the role with the Onsite Group was essentially the same as with JSR and that the only barrier to his acceptance of the role was that he did not have a motor vehicle to get to work. Mr Reaper further stated that when he advised the Onsite Group of Mr Muan's hesitance, they offered Mr Muan the use of a company vehicle to travel to and from work as an incentive. Mr Muan ultimately rejected the alternate employment offered and was dismissed by the Respondent on 23 July 2024 due to redundancy. Based on his length of service on termination, Mr Muan is entitled to seven weeks redundancy pay under the National Employment Standards (NES).

[8] Mr Reaper also advised that during his discussions with the Applicant regarding the Onsite Group role on or about 18 July 2024, Mr Muan advised him that he wanted to take a few weeks off anyway because he was expecting a child. This led Mr Reaper to advise Mr Muan that he should remain in contact with him after the birth as the opportunity for some causal work might arise. No further discussions subsequently took place on this issue.

[9] In giving evidence Mr Reaper spoke of the challenges JSR has confronted over the past 18 months in terms of its deteriorating business and financial position. This has led he says to the dramatic reduction in staffing and has also required the consolidation from three JSR sites to the one remaining site at Laverton. Mr Reaper further stated that he had been required to put a lot of his own money directly into the business to keep it afloat. In these circumstances any cost to the business would be difficult to bear he states. For those reasons he seeks that the Commission exercise its discretion to reduce the above-referred redundancy entitlement to zero.

Statutory Framework

[10] Section 119 of the Act provides for the following redundancy pay entitlements;

"119 Redundancy pay

Entitlement to redundancy pay

(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(b) because of the insolvency or bankruptcy of the employer.

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

Amount of redundancy pay

(2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	**Redundancy pay period**
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

[11] Section 120 of the Act confers on the Commission a discretion to reduce the amount of redundancy pay to which an employee would otherwise have been entitled under s.119. It provides as follows:

"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."

Consideration

[12] The approach I intend to adopt in determining this matter is that set out by the Full Bench in *australian Commercial Catering Pty Ltd v Powell and Togia; Powell v Australian Commercial Catering Pty Ltd*[4] where the following was stated;

> **"[35]** In considering an application made by an employer under s.120, the Commission must first consider whether either of the circumstances set out in paragraphs (a) or (b) of s.120(1) applies. Consideration under s.120 is enlivened upon an application being made by the employer for a reduction in the amount of redundancy pay otherwise payable under s.119. In dealing with such an application, the Commission must first determine whether the pre-conditions for the application of the section set out in s.120(1) are satisfied - that is, that the employee the subject of the application has an entitlement under s.119 to redundancy pay, and that the employer has either obtained other acceptable employment for the employee or cannot pay the redundancy entitlement.
>
> **[36]** As was pointed out in the Full Court decision, "The origin of s 120 lies in the decision of the Full Bench of the Conciliation and Arbitration Commission in *Termination, Change and Redundancy Case* (1984) 8 IR 34 to introduce an entitlement to severance pay for all employees under federal awards whose employment had been terminated because of redundancy". Cases decided in relation to award provisions established pursuant to those test case provisions are therefore relevant in the consideration of s.120.
>
> **[37]** In relation to s.120(1)(b)(i), whether alternative employment obtained by the employer is "acceptable" is to be determined objectively, not by reference to whether the employment is subjectively acceptable to the employee. The determination of whether alternative employment is acceptable requires an assessment and value judgment on the part of the decision-maker. The employer "obtains" other acceptable employment when it acquires or gets the employment by its conscious, intended acts.
>
> **[38]** Once it is concluded that the preconditions in s.120(1) are satisfied so that s.120 is applicable, it will be necessary for the Commission to determine under s.120(2) whether the employee's entitlement to redundancy pay under s.119 should be reduced and, if so, by how much. This requires the exercise of a broad discretionary power. Any determination by the Commission for a reduced amount of redundancy pay then becomes the employee's entitlement under s.119: s.120(3)" (Citations omitted)

[13] Central to the present matter is whether the alternate employment offered by the Onsite Group to Mr Muan constituted 'other acceptable employment' for the purpose of s.120 of the Act and whether that employment was obtained through the 'conscious and intended acts'[5] of JSR. The Commission has considered the meaning of the words 'other acceptable employment' in numerous authorities which were helpfully summarised and considered at length by Deputy President Sams in *Spotless Services Australia Limited t/as Alliance Catering*[6] (Spotless). The Deputy President also summarised the key considerations in one of his earlier decisions in *DRW Investments t/as Wettenhalls v Timothy Richards & Others*[7] where the following was said;

> **"[183]** Notwithstanding the above general principles, whether the alternative employment is acceptable, will likely include consideration of the following matters:
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> - rate of pay;
> - hours of work;
> - work location;
> - seniority;
> - fringe benefits;
> - workload;
> - job security;
> - continuity of service;
> - accrual of benefits;
> - probationary periods;
> - carer's responsibilities; and
> - family circumstances."

Section 119(1)(a) of the Act

[14] I am satisfied that Mr Muan's employment with JSR ended by way of redundancy on 23 July 2024. It follows therefore that Mr Muan was entitled pursuant to s.119(1)(a) of the Act to a redundancy payment. Having regard to Mr Muan's length of service with JSR of over three years, he is entitled to a payment of seven weeks pay under s 119(2) of the Act. Based on his hourly rate of pay of $29.30 and his ordinary hours of 38 hours per week, this would result in a redundancy entitlement of $29.30/hour x 38 hours per week x 7 weeks which equates to $7,793.80 gross.

Section 120(1)(b)(i)

[15] With respect to whether JSR obtained 'other acceptable employment', I am satisfied that JSR secured the employment of Mr Muan with the Onsite Group through its intended acts. That is because Mr Reaper approached the Onsite Group with a proposal that it employ Mr Muan and Mr Odichio, to which proposal the Onsite Group agreed, subsequently employing Mr Odichio. Mr Muan declined the offer of employment because he did not have a private motor vehicle that enabled him to travel to and from the Craigieburn site of the Onsite Group.

[16] Turning to consider whether the proposed role with the Onsite Group constituted 'other acceptable employment', the following may be said. The role offered to Mr Muan with the Onsite Group was substantially the same as the role he undertook for JSR in that it involved industrial cleaning on construction sites. The same base hourly rate of pay was also proposed. Mr Muan conceded that the role and conditions for the role with the Onsite Group were essentially the same as the role he performed with JSR. The new work location was based at the Onsite Group's Craigieburn depot which would have required daily commuting of a similar length that Mr Muan was routinely required to undertake in his former role with JSR. There was however no evidence before me that the proposed role with the Onsite Group would result in 'continuity of service' for Mr Muan. Absent such evidence I proceed on the reasonable assumption that Mr Muan's service with JSR would not be recognised for the purpose of accrued service and entitlements.

[17] The only barrier to Mr Muan's acceptance of the Onsite Group role was that he did not have a private motor vehicle although the evidence indicates that the Onsite Group offered him the use of one of its company vehicles as an incentive. It is unclear however whether that offer was made on the basis of temporary or ongoing use. In any case, the use of a company vehicle to get to and from work was not a condition of the Applicant's employment with JSR although they made a vehicle available for his use if he was required to travel directly from home to a work site rather than starting work at a JSR depot. I do not regard the issue of the Applicant not having a private motor vehicle as relevant to the comparison between his previous role with JSR and the proposed role at the Onsite Group. That is for the simple reason that it was not a condition of his employment with JSR that he be provided with the use of a company vehicle to get to and from work.

[18] Notwithstanding that Mr Muan's service with JSR is unlikely to have been recognised on transfer to the Onsite Group, I find that the proposed role with the Onsite Group was substantially the same as the former role held by him with JSR. It would have resulted in him receiving comparable earnings and would have required similar travel. This is sufficient for me to conclude that the proposed role with the Onsite Group did constitute 'other acceptable employment' within the meaning of s 120(1)(b)(i) of the Act. I will however take the absence of service recognition into account when considering whether to exercise my discretion pursuant to s 120(2).

Section 120(2)

[19] Having concluded that Mr Maun was entitled to a redundancy payment (s.119(1)(a)) and that the Applicant obtained 'acceptable alternate employment' for Mr Muan (s.120(1)(b)(i)), I must now consider whether it is appropriate to reduce the amount of redundancy pay that is payable to Mr Muan. It is to that I now turn.

[20] It is readily apparent after hearing from the parties that Mr Reaper made significant efforts to secure alternate roles for his staff as business conditions and JSR's financial performance deteriorated. It is to JSR's credit, and of course to its financial advantage, to have secured redeployment opportunities for the vast majority of its permanent staff as work declined. Those active steps taken by Mr Reaper was reflected in his efforts to obtain alternate employment for Mr Muan with the Onsite Group. That Mr Muan was unwilling to take up the offer of employment may be explained by his lack of a private motor vehicle, but that was not a matter within Mr Reaper's control and nor was it an element of Mr Muan's employment conditions with JSR.

[21] In the above circumstances I am persuaded that it is appropriate that I exercise my discretion to reduce the redundancy entitlement of Mr Muan. The 'other acceptable employment' obtained for Mr Muan by JSR weighs strongly in favour of a significant reduction, if not to zero, in the redundancy payment Mr Muan should receive. However, in this case I have also taken into account the loss of service recognition that would have flowed from Mr Muan taking up employment with the Onsite Group. That service of three years is not insignificant in terms of foregone leave accruals not otherwise paid out by JSR on termination of Mr Muan's employment. In these circumstances I believe it is appropriate to recognise that foregone service accrual by reducing the redundancy entitlement by 5 weeks rather than 7 weeks as sought by JSR. This will result in Mr Muan's redundancy entitlement being reduced to 2 weeks' pay which equates to $2,226.80 gross.

Conclusion

[22] Having found that Mr Muan's proposed role with the Onsite Group constituted 'other acceptable employment' for the purpose of 120(1)(b)(i) of the Act, s 120(2) applies and provides a basis for me to reduce the redundancy obligation Mr Muan is entitled to receive under s 119 of the Act.

[23] I have determined to exercise my discretion pursuant to s 120(2) of the Act to reduce the redundancy pay to which Mr Muan is entitled to $2,226.80. An order to that effect will be issued with this decision.

DEPUTY PRESIDENT

Appearances:
K Ryan for the Applicant.
B McLaughlin, Respondent.

Hearing details:
2024,
Melbourne (via Microsoft Teams):

February 13.

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[1] MA000044

[2] Exhibit A1, Letter dated 31 March 2024, titled 'PDH Group Pty Ltd & Associated Entities (In Liquidation), Exhibit A2, Email dated 21 April 2023 re 'Important update regarding Mahercorp'

[3] Exhibit A3, Correspondence dated 19 October 2023 re JSR's tenancy of Area A & B of property at 33-57 Thomas Murrell Crescent, Dandenong South

[4] [2016] FWCFB 5467.

[5] Ibid.

[6] [2016] FWC 4505.

[7] [2016] FWC 461.