DECISION

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

Mr Thomas Cioffi

v

Murray Bridge Basketball Association Incorporated
(U2024/8735)

DEPUTY PRESIDENT ANDERSON ADELAIDE, 3 OCTOBER 2024

Application for an unfair dismissal remedy – voluntary association – small employer – administrator and cleaner – whether genuine redundancy – failure to consult – whether harsh, unjust or unreasonable – dismissal unfair – compensation ordered

[1] On 27 July 2024, Thomas Cioffi (Mr Cioffi 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 the Murray Bridge Basketball Association Incorporated (the Association, the employer or the respondent). Mr Cioffi was working in two casual roles; as a stadium manager and as a cleaner, when dismissed on 22 July 2024.

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

[4] The matter was not resolved by conciliation. I issued directions on 2 September 2024.

[5] Materials were filed by the Association and Mr Cioffi. I heard the application by in-person determinative conference at Murray Bridge on 24 September 2024.

[6] Mr Cioffi and the Association were self-represented; the Association by its President (Ms Hartman) assisted by its Treasurer (Ms Turner).

[7] I heard evidence from three persons:

- Mr Thomas Cioffi (applicant);
- Ms Shirley Hartman, President; and
- Ms Lindy Turner, Treasurer.

[8] There are some factual disputes, though largely these concern the conclusions to be drawn from non-contested facts. All witnesses were conscientious and sought, to the best of their recall, to provide an accurate narrative of events.

[9] There are aspects of the evidence before me that include hearsay, argument 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 or not disputed.

[10] I have redacted from the publicly available decision certain financial evidence for which there is no public interest in being published. The parties have received an unredacted version of this decision.

Facts

[11] I make the following findings.

The Association

[12] The Association is an incorporated body which administers basketball competitions in and around the Murray Bridge region of South Australia. Its purposes include the promotion of the sport.

[13] The Association was formed in 1995. It conducts competitions with the support of the local council. It leases a council owned facility (containing three courts) for these purposes.

[14] The Association is a not for profit body governed by its Constitution.[1] It comprises members who annually elect office bearers (forming an executive) and a management committee (which meets monthly). The officers are a President, two Vice Presidents, Secretary and Treasurer.

[15] The officers and committee members are voluntary roles currently occupied by persons who contribute their time and effort to the Association for no remuneration (save that the Secretary has, since Mr Cioffi's departure, received an honorarium).

[16] At an Annual General Meeting held in April 2024, Ms Hartman was re-elected President in an election contested by Mr Cioffi. Ms Hartman has been President since April 2023. Ms Turner was elected in April 2024 for a first term as Treasurer. She had, for the six months prior, been engaged as a contracted external finance officer (bookkeeper).

[17] The Association's accounts are independently audited.

[18] Competitions between teams are conducted during school terms, three days per week, usually commencing late afternoon and continuing into the evening. Outside school terms competitions are not held. A state-wide carnival is hosted by the Association annually (in October).

[19] For a number of years the Association has employed one person on a casual basis to undertake cleaning duties (mainly of the courts), and separately another person to undertake administrative duties associated with organising competitions and liaising with stakeholders.

Mr Cioffi

[20] Mr Cioffi supports the purposes of the Association and is a member. He has been involved in the activities of the Association and the broader community for several years. He is a resident of Murray Bridge. He is a Justice of the Peace. He is a family man with two children with a disability. Prior to working for the Association, he was caring for his children with funding via a carers pension, supplemented by some casual cleaning work elsewhere.

[21] In November 2022 the Association employed Mr Cioffi to take over from an outgoing cleaner. On 21 November 2022 a casual employment contract to work as a "cleaner" was made.[2] It provided "for a maximum of 18 hours per week during the weeks of competition" (with executive committee approval required if more than 18 hours was to be worked). Employment commenced on 28 November 2022.

[22] Mr Cioffi's employment was covered by the Cleaning Services Award.

[23] Mr Cioffi worked as a cleaner until dismissed 20 months later. He was paid fortnightly. He would generally arrange his own roster but as it required court cleaning prior to matches (and associated facility cleaning such as toilets), he would clean on at least three days per week. Initially, he would submit (fortnightly) to the then Treasurer (via MYOB) a time record of daily and weekly hours worked. In early 2024, the Association altered its internal payroll systems (from MYOB to Xero) such that Mr Cioffi was only required to submit fortnightly totals of daily hours worked. Occasionally, Mr Cioffi sought payment, and received payment for more than 18 hours per week of cleaning work, but usually it was for 18 hours. Mr Cioffi usually submitted payment for these hours irrespective of whether it was a week of competition (school terms) or non-competition (school holidays).

[24] The Association's previously employed administration manager left in around November 2023. The Association advertised for the role. Mr Cioffi (who was already the employed cleaner) applied. After interviewing candidates, in December 2023 the Association employed Mr Cioffi to undertake administrative duties as the stadium manager. On 18 December 2023 a casual employment contract to work as a "stadium manager" was entered allowing "for a maximum of 25 hours per week during the weeks of competition" (with executive committee approval required if more than 25 hours was to be worked). Mr Cioffi usually submitted payment for 25 hours per week irrespective of whether it was a week of competition (school terms) or non-competition (school holidays).

[25] Mr Cioffi's employment as a casual stadium manager was covered by the Clerks Private Sector Award.

[26] Mr Cioffi was not a member of the committee and did not attend committee meetings unless required.

Association finances

[27] The Association's finances are independently audited annually and presented to the AGM each April. Its financial year runs from 1 February to the following 31 January.

[28] The Treasurer reports to the committee each month on the state of finances against an annual budget approved by the committee at the start of each year.

[29] Audited financial reports (profit and loss statement and balance sheet) for the 2022 and the 2023 year are in evidence.[3]

[30] In 2022 (reported at the 2023 AGM) the Association made an operating loss of [redacted]. In 2023 (reported at the 2024 AGM) the Association made an operating loss of [redacted].

[31] In mid-2023 the Association's Treasurer resigned. Without a Treasurer, the committee lacked regular insight into its finances. In around October 2023, the Association engaged Ms Turner (who operated her own small business) as a contracted finance officer. She was paid a fee for service and reported to the committee monthly. After two or three months of examining the finances, Ms Turner identified that the Association, having operated at a loss the year preceding (2022), would likely run at a loss in 2023. She reported this to the President and committee. Aware of the financial situation, Ms Turner also advised the President and committee that she could not in all conscience continue to charge a fee for her services. She ceased doing so from around the start of 2024.

Concern at hours worked

[32] In the months prior to the April 2024 AGM (between December 2023 and March 2024), and whilst preparing the 2024 budget, Ms Turner had regular discussions with Ms Hartman about the need for the Association to save money to alleviate its operating losses. Amongst Ms Turner's concerns were the number of hours the Association was having to pay Mr Cioffi. He was, at that time, regularly reporting (and being paid for) 18 hours per week as a cleaner and 25 hours per week as a manager during both competition and non-competition weeks, totalling 43 hours per week.

[33] On at least three occasions in this period (December 2023 to March 2024) Ms Turner spoke to Mr Cioffi and told him that the Association could not afford to keep paying for 43 hours per week. She expressed the view that some of the hours being reported were not approved hours or necessary (at least during non-competition periods). Mr Cioffi informed Ms Turner that all hours worked and submitted for payment were necessary to properly perform the cleaning and administrative work of the Association and consistent with his contract. Mr Cioffi also informed Ms Turner that he was somewhat confused as to whether Ms Turner, who was not then a member of the committee, had the authority to suggest he reduce his hours.

[34] Ms Turner reported her frustration at this response to Ms Hartman. Mr Cioffi, for his part, reported to Ms Hartman his concern at being told how he should do his job by a "contracted bookkeeper".

[35] The conflict was discussed at a committee meeting on 3 April 2024. It was decided that Ms Hartman would write to Mr Cioffi expressing concern at unapproved hours and requiring him to only work during competition weeks. A letter dated 5 April 2024 was sent to Mr Cioffi:[4]

> "Hi Tom
>
> The MBBA committee met on Wed 3 April 2024.
>
> At the meeting we had a finance update which highlighted you are exceeding your contracted hours.

We appreciate all the amazing work you are doing and recognize that there is still a lot to do.

However, we are not in a financial position to pay above your contacted hours.

Moving forward please:

- Priorities your workload.
- Work during competition times.
- Seek approval prior from the MBBA committee to working outside of your contracted hours.
- Advise the committee of any duties that we can assist with.

We are hoping you would be available to meet with myself, Mitch and Lindy on Tuesday 16th April so that we can go through the contract together

Kind regards,

Shirley Hartman
MBBA President"

[36] On 8 April 2024, Mr Cioffi responded in writing. Relevantly he stated:[5]

"Firstly, please note it was/is not my intention to work and/or enter hours of work that are not essential or outside the conditions of employment. Regarding cleaning hours, I was always instructed that cleaning hours were to be 18 hours per week during school terms and 9 hours per week during school holidays with a break over Christmas and consideration of public holidays. This was perhaps confirmed under the previous committee so will ask you to confirm your position regarding the expectation of cleaning hours. I was also under the impression that administration hours were 25 hours per week with reduced hours during school holidays pending workload.

For reference, my workload has been above and beyond my capabilities to work at or below 25 hours and for the most part I have been working well and truely above what I have documented on my timesheet. Prioritising my workload in this instance has not been possible as in my opinion the entire workload were tasks essential to complete.

As per your letter, I acknowledge your instructions to not work during non-competition time and will take leave until April 29th 2024 (or as directed should the competition start date differ from the current anticipated start date). Please find below the tasks I have been working on as well as anticipated general work that will be required while I am not rostered to work."

[37] Mr Cioffi and Ms Hartman agreed to meet on 16 April 2024 to discuss the issue. That meeting occurred. Ms Hartman put it to Mr Cioffi that working 43 hours per week in total might present legal problems for the Association given that was more than a full week's work under

the awards. She notified Mr Cioffi that his cleaning hours would be reduced to from 18 to 13 per week. Ms Hartman agreed that, for the time being, his managerial hours would remain at 25 per week (with total weekly hours 38).

[38] There is an evidentiary dispute whether there was also an in-principle agreement reached for a reduction of hours during non-competition weeks. Ms Hartman recalled that she indicated that during non-competition weeks Mr Cioffi's hours should be reduced to 5 per week for cleaning and 10 per week for management. Mr Cioffi disputed that this was stated or agreed. Though I do not need to decide this point, I find that it was more likely than not that Ms Hartman did raise this further proposal on 16 April 2024 and that because it was not agreed and as Mr Cioffi was already on leave in that school holiday fortnight, Ms Hartman did not issue a formal direction concerning hours during non-competition weeks.

[39] Mr Cioffi resumed work on 22 April 2024. This was the start of competition weeks. He resumed on the agreed (reduced) basis of 13 hours per week cleaning and (unchanged) 25 hours per week management.

2024 Annual General Meeting

[40] The 2024 AGM was held on 28 April 2024.

[41] Ms Hartman sought re-election for a second term as President. Prior to the AGM, Ms Hartman asked Mr Cioffi to second her written nomination. Mr Cioffi did so. Mr Cioffi did not disclose to Ms Hartman that he was also considering running for the presidency.

[42] At the AGM, and unknown to Ms Hartman, Mr Cioffi nominated and was seconded for President. After the chairperson adjourned to take advice on whether an employee could nominate to be an office bearer, Mr Cioffi's nomination was allowed to stand. A contested ballot took place. Ms Hartman won the ballot 11 votes to 7.

[43] At the AGM Ms Turner was also elected as Treasurer.

Further reduction in hours and performance warning

[44] Upon the newly elected committee commencing its term (meeting 5 May 2024), Ms Turner continued to be concerned at the number of hours being paid to Mr Cioffi each week, and at what she considered Mr Cioffi's unreasonable push-back at her and Ms Hartman's attempts to have his hours reduced to save costs.

[45] On 1 June 2024, Ms Turner and Mr Cioffi exchanged emails concerning Mr Cioffi's duties (not hours).[6] Mr Cioffi defended the duties performed, expressed the view that he was doing more work than he was being paid for, and questioned why he was having to "take direction from and justify my performance to the Treasurer/accounting consultant".

[46] Ms Turner reported her concern at this response and its tone to the next committee meeting (3 June 2024). She also discussed her concerns privately with Ms Hartman.

[47] On 24 June 2024, Ms Hartman wrote to Mr Cioffi advising that the Association "needed to reduce your hours", directing a reduction of both cleaning and management hours to 10 per week (20 in total), and stating that these reduced hours applied only during school (competition)

weeks. No hours at all were to be worked during non-competition weeks. Ms Hartman indicated that "this will enable us to manage the budget".[7] Ms Hartman proposed a meeting to discuss the changes.

[48] Mr Cioffi responded by email on 25 June agreeing to meet. Ms Hartman suggested, and Mr Cioffi agreed, that a past president Mr Vowels attend as a neutral party. Ms Hartman indicated to Mr Cioffi that he could bring a support person.

[49] A meeting was held on 28 June 2024. The minutes are in evidence.[8] At that meeting:

- Ms Hartman confirmed the direction to work only 10 hours cleaning and 10 hours management per week, and during school weeks only (herein referred to as the 10/10 arrangement);
- Ms Hartman advised that the reason was financial;
- Ms Hartman gave Mr Cioffi two new written contracts of employment (one for cleaning and one for management) each of which reflected the 10 hour per week direction;
- Mr Cioffi expressed concern at how he could do the work required with such restricted hours but agreed to work as directed. However, he wanted time to read the contracts before signing them. Ms Hartman agreed to give him time;
- Ms Hartman then handed Mr Cioffi a letter titled 'First and Final Warning Letter' (dated 27 June).[9] In this letter the Association listed six areas where it considered that Mr Cioffi had acted in breach of his obligations. The letter concluded "please consider this your first warning, however any further breaches will result in instant dismissal"; and
- Ms Hartman and Mr Cioffi agreed to meet again on 26 July 2024 to review progress.

[50] In the weeks that followed, Mr Cioffi worked the further reduced hours. However, Mr Cioffi did not wish to sign the contracts. He decided to write to Ms Hartman setting out his considered views. He did so by lengthy letter dated 9 July 2024 addressed to the committee.[10] In the letter Mr Cioffi:

- Disputed the alleged breaches set out in the warning letter and requested that it be revoked;
- Expressed the view that cleaning could not be completed in 10 hours per week and sought clarification of the cleaning tasks required, whether overtime would be paid if cleaning went beyond 10 hours per week, sought clarity on reporting obligations, and questioned whether he would be reimbursed for cleaning costs privately incurred when he cleaned equipment at his home (water, electricity);
- Expressed the view that management tasks could not be completed in 10 hours per week. He also sought clarification of how he was to manage the work within those hours, assurances that all contact outside 10 hours would cease immediately, clarification as to whether overtime would be paid if management tasks went beyond 10 hours per week and clarity on whether a travel allowance would be paid; and

- Expressed the view that he felt bullied, harassed, removed and excluded from conversations, and was seeking advice from 'fair work', though he also wanted to resume "a strong employment relationship".

[51] Upon reading the response, Ms Hartman decided that the Association needed to take external human resources advice. An adviser was sourced and attended the next executive meeting on 18 July 2024.

Decision to revoke warning

[52] At an 18 July 2024 meeting of the executive (the minutes of which are in evidence[11]) a decision was made, on advice from the human resources adviser, to revoke the performance warning of 27 June 2024.

[53] The following day (19 July) a letter was sent by Ms Hartman to Mr Cioffi. It read:[12]

> "**Re: Email received dated 9th July 2024 raising concerns around process of First and Final Warning issuance**
>
> Dear Thomas,
>
> First and foremost, the MBBA Committee and I acknowledge receipt of your documented concerns dated 9th July 2024 primarily regarding the process of issuing a first and final warning to you. The Committee has now sought advice from both Fair Work and an independent Human Resource professional and we confirm and agree that proper process was not followed. We apologise for not following established required and documented notice periods and did not adequately give you opportunity to address the concerns we raised. We apologise for any inconvenience and concern this has caused you.
>
> As a result of these shortfalls, we are revoking the warning from your records effective immediately. We acknowledge the information that you have supplied in relation to the casual positions that you hold. We also acknowledge your concerns regarding having to complete tasks within shorter time frames and wish to advise you that Committee members will be picking up tasks that are not completed. The MBBA Committee takes very seriously their governance and in particular financial responsibilities of the association and as such does have to at times make decisions to ensure the viability of the Association. Committee members understand with those burdens at times comes requirements of Committee members to 'fill in' to ensure the association continues to run.
>
> We thank you for taking the time to communicate your concerns with us.
>
> Regards
>
> Shirley Hartman
> President
> Murray Bridge Basketball Association".

[54] Mr Cioffi read the letter and was pleased that the warning had been revoked as he had requested on 9 July, and that there had been an acknowledgement "that proper process had not been followed".

Dismissal 22 July

[55] Unknown to Mr Cioffi, at that same executive meeting on 18 July 2024, the Association also decided to terminate his employment as both cleaner and stadium manager for reasons of redundancy, and to terminate his access to the Association's systems once he was so notified. It was determined that committee members would, at least in the short term, cover the management and cleaning duties.

[56] Ms Hartman, with the assistance of the human resources adviser, drafted two letters of termination, one for the cleaning and one for the manager position.

[57] On 22 July, Ms Harman called Mr Cioffi to a meeting. Ms Hartman handed Mr Cioffi the two letters of termination (both dated 22 July) which stated that he had been terminated "as a result of financial pressure" and that both positions "were no longer needed".[13]

[58] Mr Cioffi was surprised but stayed outwardly calm. He wanted the meeting to conclude without conflict. He stated words to the effect "perhaps this is for the best, it's been a tough few months". In his evidence, Mr Cioffi stated that whilst he did not actually believe dismissal was for the best, he was relieved that at least the conflict had come to a head, and he wanted to leave the meeting without further confrontation.

[59] Ms Cioffi did, however, indicate that he believed he was owed two weeks in lieu under his contract. Ms Turner agreed this was so. Ms Hartman and a vice president attending disagreed.

[60] Once the meeting broke up, the members of the executive reconsidered the notice issue and agreed that two weeks would be paid. It was subsequently paid, but only after Mr Cioffi wrote to the Association post-dismissal demanding payment.

[61] On 27 July 2024, five days after the dismissal Mr Cioffi filed unfair dismissal proceedings. He sought reinstatement or compensation. At the hearing, Mr Cioffi indicated that whilst he wanted his former jobs back, he felt that the relationship was so damaged that this might not be practicable.

Post-dismissal

[62] In the two months following dismissal Mr Cioffi applied for three jobs. Two of the three remain active possibilities.

[63] Mr Cioffi did not apply for more jobs because he has decided to revert to caring for his disabled children. He applied for and has had restored a government-funded carers payment. He is currently seeking part time employment (about 25 hours per week) around his caring responsibilities.

[64] In the month following Mr Cioffi's dismissal, the Association's committee members voluntarily assumed some of Mr Cioffi's management duties (especially the Secretary) and cleaning responsibilities, at no cost.

[65] However, in the second month following dismissal the Association decided:

- That it needed to engage an external contractor to perform cleaning as required from week to week. In this second month, about six hours per week on average was performed by the contractor. The contractor charged about $5 per hour more than the hourly rate that had been payable to Mr Cioffi for cleaning work, but the Association does not carry on-costs or ongoing obligations as to regular hours. No consideration was given to offering those hours to Mr Cioffi;

- That a lump sum honorarium of [redacted] would be paid to the Association Secretary for performing management duties;[14] and

- Other budgetary savings were put in place (including a new online court booking system saving management time).

Submissions

Mr Cioffi

[66] Mr Cioffi submits that the dismissal was not a genuine redundancy within the meaning of s 389.

[67] Mr Cioffi submits that the redundancy was not for genuine operational reasons (s 389(1)(a)) because the 2024 budget, which included his employment costs, is projected to break even, and because the dismissal occurred in the wake of, and was tainted by, unfair performance concerns.

[68] Mr Cioffi further submits that the dismissal was not a genuine redundancy (as defined) because:

- the Association did not comply with its consultation obligations under the relevant awards (s 389(1)(b)); and

- the Association did not make genuine (or any) attempt to redeploy him to the work it subsequently offered to a cleaning contractor.

[69] Mr Cioffi submits that the dismissal was harsh, unjust or unreasonable because there was no valid reason or procedural fairness, the decision was pre-determined and no pay in lieu of notice was made until he demanded it.

[70] Mr Cioffi submits that he should be compensated, though acknowledges that it would not be appropriate to do so at the upper end of the maximum compensation scale of 26 weeks because of the Association's not for profit character.

The Association

[71] The Association submit that the termination was a genuine redundancy within the meaning of s 389 and therefore not an unfair dismissal.

[72] The Association submit that it had an urgent need to reduce costs after material operating losses across the previous two years. Consequently, a genuine operational reason existed for the redundancy from both roles.

[73] The Association acknowledges that it did not consult after the decision to dismiss was made, but points out that it had raised financial concerns with Mr Cioffi on repeated occasions during 2024 when informing and then directing him to reduce his hours. It could not afford to keep paying his existing hours, and Mr Cioffi did not willingly agree to have those reduced to an affordable level.

[74] The Association submits that the consultation requirement in s 389 should be applied flexibly in the context of it being a small not for profit community association comprising volunteer officers.

[75] The Association submits that no redeployment options existed as Mr Cioffi was its only employee.

[76] In the alternative, the Association submits that the dismissal was not harsh, unjust or unreasonable. It submits that valid financial reasons existed for the dismissal. It was not tainted by performance issues because the performance warning was revoked. It submits that whilst it could have better handled the dismissal, Mr Cioffi had pushed-back at attempts to ease cost pressures, and it tried as best it could to ease the impact of the redundancy.

Consideration

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

Genuine redundancy

[78] 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 genuine redundancy.

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

[80] 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."

[81] In applying s 385(d), I note the recent observation of the Full Federal Court that:[15]

> "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".

[82] 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.[16]

[83] I find that the decision by the Association to no longer employ a cleaner or stadium manager was objectively reasonable having regard to financial considerations. I do so for the following reasons.

[84] Firstly, the Association had recorded financial losses in the two preceding years. Those losses had been confirmed by independent audit and presented to members.

[85] Secondly, the losses (in the combined total of [redacted]) were material. According to the balance sheet, the losses had reduced the value of equity (assets) by approximately [redacted] in the two preceding years.[17]

[86] Thirdly, the Association's annual financial position was not improving. The 2023 loss was greater than the 2022 loss.

[87] Fourthly, although the 2024 budget sought to reign in expenditures, a small loss was still budgeted for. The Association has limited pathways available to materially increase income to return to surplus. A prospective grant from the local council to help fund future resurfacing of court two was conditional on the Association itself raising a large sum for that purpose ($50,000), which it had not yet done.

[88] Fifthly, the entirety of the Association's wage costs comprised the positions held by Mr Cioffi. Those wage costs were a material item of expenditure. The potential existed over time to reduce labour costs (including on-costs) by no longer directly employing a stadium manager or a cleaner but utilising a combination of volunteer work, a contract cleaner on an as-required basis, and paying a volunteer committee member a one-off or occasional honorarium for necessary administrative tasks.

[89] Sixthly, the financial pressures were not a recent invention. Aside from two years of losses, the Association's operating finances were of sufficient concern to Ms Turner that she ceased charging a fee for her consultancy services, frequently discussed her concerns with the President and committee, and assumed the position of Treasurer in 2024 in part to assist the Association to stabilise its situation. Mr Cioffi was aware of these concerns because, on each occasion he was spoken to about his hours, it was explained that savings to wage costs were needed.

[90] Mr Cioffi submits that the redundancy was not for genuine operational reasons (s 389(1)(a)) because the 2024 budget, which included his employment costs, was projected to break even. I disagree. Whilst the small loss budgeted for could fairly characterise it as a 'break-even' budget, there was no immediate prospect of recouping the losses of previous years and restoring the lost funds on the balance sheet. In any event, budgeted projections do not necessarily equate to actuals.

[91] Mr Cioffi further submits that the dismissal was not a genuine redundancy because unfair performance concerns tainted the dismissal.

[92] I have carefully considered this submission. If the redundancy was a sham in the sense that it was cover for a plan to get rid of Mr Cioffi for different reasons, then this submission would have force. The different reasons suggested by Mr Cioffi were that he had contested the presidency in April 2024, and had stood his ground against performance allegations and reductions to his working hours.

[93] I do not find that a reason or contributing reason to the dismissal was that Mr Cioffi stood against Ms Hartman for the presidency. I accept Ms Hartman's evidence that whilst she was surprised that this occurred, particularly given that Mr Cioffi had seconded her nomination, both she and Mr Cioffi maintained professionalism throughout and in the three months that followed.

[94] I do however find that an element of the decision to make Mr Cioffi redundant (given its timing) was that he had stood his ground against performance allegations and against reductions to his working hours.

[95] In respect of the performance allegations, the timing of the redundancy (less than one month after the performance allegations were made via a formal warning and three days after that warning was revoked) coupled with the fact that it was the same executive meeting which decided to revoke the warning yet implement the redundancies, leads me to draw the inference that dismissal by redundancy was considered a preferred path to dismissal by a potentially drawn out and contested conflict over performance.

[96] Nor do I find that Mr Cioffi's response to the performance allegations and seeking revocation of the warning to have been unreasonable. I find that Mr Cioffi's push-back at the performance allegations somewhat infected the decision to make him redundant, at least in its timing. In this respect, but in this respect only, the dismissal included an unreasonable element. However it did so to a minor extent only. The operational reasons for the redundancies were valid and those operational reasons were not only material but were the primary reason for the dismissal. The redundancies were not a sham.

[97] Also relevant to the decision to make Mr Cioffi redundant at that time was that he had pushed-back over the preceding three months (and in earlier discussions with Ms Turner) at suggestions and then requests that he reduce his hours of work to save costs. The push-back twice required formal written direction to work reduced hours. Whilst it was understandable that Mr Cioffi did not want to reduce hours (and income), particularly given that he felt unable to do all tasks in the reduced hours, had Mr Cioffi not been so resistant it is possible that the 10/10 arrangement may have continued for a longer period rather than employment ending by redundancy a month after it started.

[98] I do not consider that Mr Cioffi acted reasonably in relying on his contracts to stand his ground against reductions in hours. He was a casual employee whose hours could vary. The contracts provided for maximum hours of 18 and 25 per week, not for guaranteed hours. The contracts only provided for hours to be worked during competition periods, and were silent on hours outside of competition periods. To the extent Mr Cioffi considered that he exercised workplace rights to resist weekly hour reductions, the contracts were not the source of any such rights.

[99] Accordingly, whilst I have found that the timing of the redundancies was tainted in part by an unreasonably held view of the employer that Mr Cioffi was underperforming, they were not a sham. I am well satisfied that the operational reasons, which were objectively reasonable, were a material (and in fact primary) reason for the redundancies.

[100] Section 386(1)(a) is made out.

[101] I now turn to s 389(1)(b). It is not in dispute that Mr Cioffi was employed under both the Cleaning Services Award and the Clerks Private Sector Award (the awards).

[102] Although the Association was a small business, both awards[18] impose consultation obligations on an employer in cases of major changes including proposed redundancies. These obligations extend to major changes affecting casual employees, particularly regularly employed casuals such as Mr Cioffi. The awards do not exclude small business employers from the consultation requirement. The awards require consultation once a definite decision is made and prior to redundancies being implemented. A purpose of the consultation is to explore mitigation options including but not limited to potential redeployment.

[103] It is not in dispute that the Association did not consult Mr Cioffi once it decided to make both positions redundant. I find that the Association did not meet its consultation obligations under the awards in substance or form.

[104] On matters of substance:

- the decision was pre-determined. The 22 July 2024 meeting was a termination meeting, not a consultation meeting;

- the reason for dismissal was advised at the outset of the meeting before Mr Cioffi was given the opportunity to speak. No forewarning of the purpose of the meeting was provided; and

- 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 trialling the 10/10 arrangement for a longer in-competition period). However, in the months preceding there had been discussions about reducing hours, and twice hours were reduced despite degrees of resistance by Mr Cioffi. On both of those occasions (April 2024 and June 2024) Mr Cioffi was informed that the reason was to reduce operating costs.

[105] On matters of form:

- The Association did not give Mr Cioffi notice of the proposed operational changes nor provide in writing "all relevant information about the changes" as required by the awards; and

- The Association did not promptly consider any matters raised as required by the awards because it failed to consult in advance of making Mr Cioffi redundant.

[106] Section 389(2), which operates as an exclusion to the meaning of genuine redundancy, requires consideration 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.[19]

[107] Whilst it is not necessary, given my finding on the consultation obligation, to deal with s 389(2) at length, I do not consider that it would have been reasonable to redeploy Mr Cioffi. He was the Association's only employee. No redeployment option existed at the time or in the immediate wake of the dismissal.

[108] I find that whilst there were reasonable operating reasons for the Association deciding to no longer directly employ a cleaner or manager, it failed to comply with its obligation under the awards to consult about the redundancy. Accordingly, for that reason the dismissal was not a "genuine redundancy" within the meaning of the FW Act.

Was the dismissal unfair?

[109] The Association was a small business for the purposes of the FW Act. The Small Business Fair Dismissal Code is prescribed by s 388. Dismissals consistent with the Code, when it applies, are not unfair dismissals.

[110] Considered as a whole, this was not a dismissal for cause. It was an economic dismissal (redundancy). The Code regulates dismissals by a small business employer for misconduct or performance, but not economic dismissals.[20]

[111] Accordingly the Code does not apply to this matter. Had it done so (because the timing of the dismissals were in part infected by a performance consideration) the Code would not have been complied with as the 28 June 2024 warning had been revoked three days prior to dismissal.

[112] The Association cannot rely on the Code to contend that the dismissal was not unfair.

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

[114] 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."

[115] I now consider these matters.

Valid reason s 387(a)

[116] A valid reason for dismissal is one that is sound, rational or defensible.[21]

[117] I have found that the redundancies were not a sham. The operational reasons for the redundancies, based as they were on the Association's financial circumstances, were objectively reasonable and were a material and primary reason for the redundancies.

[118] Such operational considerations are sound, rational and defensible reasons for dismissal.

[119] However, I have also found that the timing of the redundancies was tainted in part by the employer's view that Mr Cioffi was being difficult and underperforming. This view was generally unreasonable, though Mr Cioffi to an extent, but only a limited extent, brought the issue to a head by his failure to read the room and agree to reductions in hours without unduly straining the relationship. His push-back against questions about his duties and the employer's need for reductions in working hours was understandable but contributed somewhat to the breakdown in the relationship.

[120] Considered overall, there was a valid reason for dismissal except to the extent that its timing was unreasonably influenced by performance and conduct concerns.

[121] This weighs somewhat, but only somewhat, against a finding that the dismissal was unfair.

Whether notified s 387(b)

[122] Mr Cioffi was notified of the reason for dismissal on the day he was dismissed. He was informed that it was a financial decision to save costs.

[123] This is a neutral consideration.

Opportunity to respond s 387(c)

[124] I have found that:

- the decision was pre-determined. The 22 July 2024 meeting was a termination meeting, not a consultation meeting;

- the reason for dismissal was advised at the outset of the meeting before Mr Cioffi was given the opportunity to speak. No forewarning of the purpose of the meeting 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 trialling the 10/10 arrangement for a longer in-competition period); and

- whilst, in the months preceding, there had been discussions about reducing hours and twice hours had been reduced despite degrees of protest by Mr Cioffi, on both occasions (April 2024 and June 2024) Mr Cioffi was informed that the reason for reducing hours was to reduce operating costs.

[125] I observe that whilst Mr Cioffi stated during the termination meeting that he felt that dismissal may be the best result, this was not in any sense an acceptance of the dismissal. In the intensity of the moment, he was seeking to de-escalate the months of tension and to end the meeting without conflict.

[126] These considerations collectively constitute a denial of procedural fairness. Consultation about the need to save costs had occurred prior. However, the absence of a meaningful opportunity to respond to the subsequent decision to make the positions redundant weighs materially in favour of a finding that the dismissal was unfair.

Support person s 387(d)

[127] Mr Cioffi was not denied access to a support person on 22 July 2024 because he did not request one. However, unlike the 28 June 2024 meeting, 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.

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

Performance s 387(e)

[129] According to the Association, the dismissal was not performance related. However, I have found that whilst the redundancies were not a sham, their timing was infected by a concern at Mr Cioffi's performance, including his tone and conduct in pushing back against questions about his duties and the employer's need to reduce wage costs.

[130] I have found that in allowing these factors to impact the decision, the employer acted unfairly in part (but in part only).

[131] A performance warning had been revoked only three days prior to dismissal.

[132] Given this, s 387(e) weighs somewhat (but only somewhat) in favour of a finding that the dismissal was unfair.

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

[133] The Association was a small business employer comprised of volunteers (other than Mr Cioffi). It had no human resource capacity. Only in the shadows of dismissal, and only once the relationship had become close to terminal, did Ms Hartman consider that external human resources advice was required.

[134] I take into account that this advice arrived late in the piece. Whilst the advice given sought to undo a procedurally unfair performance warning, advice was also available and given in respect of the redundancies and their timing as the human resources consultant attended the executive meeting on 18 July 2024.

[135] The size and character of the employer, that it was an association of volunteers, and the late input of external human resource advice materially explains some of the procedural and substantive failures in this matter, but not entirely.

[136] I take this into account. Sections 387(f) and (g) weigh somewhat against a finding of unfairness, but only somewhat.

Other matters s 387(h)

[137] There are no other matters for consideration.

Conclusion on unfairness

[138] The dismissals were accompanied by shortcomings in process. Their underpinning and primary reason (cost reduction) was genuine and for a number of months Mr Cioffi had not been particularly co-operative in attempts to secure his agreement to reduce hours and thereby the Association's wage costs.

[139] However, the Association failed to provide a reasonable period for the 10/10 arrangement to operate, and it allowed its general unhappiness with Mr Cioffi to unreasonably affect the timing of the redundancies. Even taking into account the very small size and

unsophisticated character of the employer, there was a lack of procedural fairness and no attention given to its legal obligations to consult once it decided to make the positions redundant.

[140] Considered overall, the dismissals were unfair. I so find.

Remedy

[141] I now consider remedy.

[142] 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).

[143] Whether to order a remedy is discretionary.

[144] Re-employment, given all that has occurred, is inappropriate. Mr Cioffi has lost trust and confidence in the Association, and it in him. A relationship that had once been strong and mutually productive has fallen apart. In light of my findings, that loss of trust and confidence is objectively reasonable on both sides.

[145] I turn to compensation.

[146] 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."

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

Viability: s 392(2)(a)

[148] The Association faces financial challenges to restore an operating surplus. Further challenges exist to raise funds to resurface court two. It has a positive balance sheet, but these financial challenges are real. Any sizeable compensation order will have an adverse impact. As the Association is again budgeting for an operating loss in 2024 (smaller though than 2022 and 2023), there is no likely operating surplus from which a compensation order would be paid. A compensation sum would need to be paid from diminishing reserves.

[149] I take this into account. The sum I will order will impact the financial results in the short term but not be so large as to impact viability.

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

[150] Mr Cioffi worked for the Association for approximately twenty months as a cleaner and nine months as a stadium manager.

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

[151] By the time the dismissals occurred, the relationship was in free-fall.

[152] Dismissal occurred on the first day of the resumption of an eight week competition period (school term).

[153] Consultation on the redundancies, had it occurred, would not have required more than a week. However, that consultation had the prospect, if Mr Cioffi had better read the room and if the Association's judgement had not been affected by the largely unfair performance allegations, to have the 10/10 arrangement operate for a little longer than it had. I consider that it would have been reasonable to operate for the next (eight week) competition period given that it had only previously operated for one week (week of 1 July given that the weeks of 8 and 15 July were school holidays during which Mr Cioffi took leave).

[154] This would have been reasonable. It would have allowed a better line of sight by both parties into what a 20 hour per week working arrangement meant for the operating budget. It would have also allowed some distance in time between the revocation of the performance warning and the redundancies. This may have aided the relationship, though largely I have concluded that it was in free fall.

[155] Overall, I consider that no more than eight weeks remuneration would have been received. This includes the one week consultation period.

Mitigating efforts: s 392(2)(d)

[156] Mr Cioffi took some, but only limited, steps in the wake of being dismissed to mitigate his loss by seeking fresh employment. He decided to resume funded caring of his disabled children, supplemented by part time or casual work.

[157] I will deduct two weeks on account of this limited mitigation.

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

[158] Two week's pay in lieu of notice was made. This amount will be deducted from the compensation sum.

[159] Other than this sum, no earnings were received following dismissal. The eight-week compensation period does not extend into a period of possible but unknown future earnings.

[160] No further deduction is made on this account.

Other matters: s 392(2)(g)

[161] I have taken several contingencies into account, including whether a continuation of the 10/10 arrangement during the next competition period may have somewhat averted the need for the redundancies or mitigated their effects.

[162] However, I have found that Mr Cioffi to an extent, but only a limited extent, brought the issue to a head by his failure to read the room and agree to reductions in hours without unduly straining the relationship. This notwithstanding, ham-fisted conduct by the employer (such as issuing a performance warning and then revoking it yet dismissing three days later) also contributed materially to the loss of trust and confidence.

[163] I will make a deduction of two weeks on this account as it is possible that Mr Cioffi's resistance to further changes may have continued causing the relationship to become entirely unworkable even if the 10/10 arrangement had been extended into the next competition period, resulting in the eight-week hypothecated future employment period finishing earlier.

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

Misconduct: s 392(3)

[165] No issue of misconduct arises. I make no deduction on this account.

Shock, Distress: s 392(4)

[166] Mr Cioffi had no notice of the redundancies but knew that the relationship with his employer was under significant strain. This caused he, and the Association's office bearers, considerable stress and upset. Mr Cioffi also feels that his standing in the community has been adversely impacted.

[167] Whilst recognising these impacts, the unfair dismissal jurisdiction is unable to compensate for shock and distress, and I do not do so.

[168] To the extent that the findings in this decision are relevant (that the dismissal was unfair because it denied Mr Cioffi procedural fairness, that the dismissal was for a valid reason based on the Association's financial situation, and that any performance criticisms of Mr Cioffi were withdrawn) these findings may, in some measure, address some of the perceived reputational concerns.

Compensation cap: s 392(5)

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

Conclusion on compensation

[170] A decision to order a remedy is discretionary. The quantum of compensation 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.

[171] Whilst an orderly process of quantification is to be conducted in accordance with well-established Commission authority,[22] the quantum (if any) ultimately needs to be a sum that reflects the overall exercise of discretionary considerations.

[172] Based upon the above considerations, the compensation payable would be:

> Compensation period 8 weeks (20 hours per week)
> Less
> Limited mitigation (2 week deduction)
> Payment in lieu of notice (2 week deduction)
> Contingency for the eight-week hypothecated 10/10 period of work ending earlier (2 week deduction).

[173] This represents a compensation sum of two weeks.

[174] This is an amount I consider appropriate in the circumstances including having regard to the employer's size and financial circumstances.

[175] The total compensation I will order in favour of Mr Cioffi is $2,509.46 to be taxed according to law plus superannuation of $278.17.[23]

Conclusion

[176] Whilst there was a genuine need for the Association to reduce labour costs, the dismissal of Mr Cioffi was not a genuine redundancy as defined due to consultation failures.

[177] The dismissal of Mr Cioffi was harsh, unjust or unreasonable.

[178] Reinstatement is inappropriate.

[179] Compensation will be ordered in the sum of $2,509.46 to be taxed according to law plus superannuation of $278.17. As I have found that the dismissal was for valid financial reasons resulting in the two positions held by Mr Cioffi being made redundant, I consider that it would be appropriate to tax the compensation sum as an eligible termination payment.

[180] These sums are to be payable within fourteen days of the date of this decision.

[181] I issue an order to this effect.[24]

DEPUTY PRESIDENT

Appearances:

T. Cioffi *on his own behalf.*

S. Hartman, assisted by L. Turner, *of and on behalf of* the Murray Bridge Basketball Association Incorporated.

Hearing details:

2024.
Murray Bridge;
24 September.

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<PR779920>

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[1] A2.1

[2] R1 Attachment A

[3] R1 Attachment H (2022); R1 Attachment I (2023)

[4] A2.4

[5] A2.5

[6] R1 Attachment S

[7] A2.7

[8] R1 Attachment U

[9] A2.9

[10] A2.12

[11] R1 Attachment M

[12] A2.15

[13] R1 Attachment N

[14] Audio recording 24.09.2024 at 4:09:00 (1:29pm)

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

[16] Ibid, 58 per Katzman and Snaden JJ

[17] Equity on 1 February 2022 [redacted]. Equity on 31 January 2024 [redacted]. Differential [redacted].

[18] Cleaning Services Award cl 27; Clerks Private Sector Award cl 38

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

[20] *Ianella v Motor Solutions Australia Pty Ltd* [2010] FWA 3125

[21] *Selverchandron v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 37

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

[23] These are the same amounts as paid (after adjustment) as two weeks in lieu of notice: see R1 Attachment D

[24] PR779921