DECISION

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

Adam Smith
v
Adcon Admin Pty Ltd
(U2024/1618)

COMMISSIONER CONNOLLY MELBOURNE, 4 OCTOBER 2024

Application for an unfair dismissal remedy – respondent in court appointed liquidation – no valid reason – dismissal found to be harsh, unjust and unreasonable – determined reinstatement not suitable – compensation ordered.

[1] On 15 February 2024, Mr Adam Smith (**the Applicant**) made an application under s.394 of the *Fair Work Act 2009* (the Act) alleging that his dismissal from Adcon Admin Pty Ltd (**Adcon** or **the Respondent**) on 31 January 2024 was harsh, unjust or unreasonable. The Respondent did not respond to this application.

What this decision is about

[2] Mr Smith commenced working for Adcon on 10 January 2022. He worked as a Quality, Safety and Environmental Manager focused on safety, Workcover claim administration and return to work coordination. His main place of work was Altona North in Victoria. He performed his work for Adcon and a group of associated companies.

[3] On 25 January 2024, Mr Smith was told by Adcon that their business arrangements were changing and that Adcon would no longer be operating from the end of that month. He was told he would not be employed by a new company Adcon had made arrangements with. Rather, he was told he would be made redundant and paid out his notice period until he could be re-employed when a new job became available.

[4] Mr Smith was provided with a separation certificate terminating his employment on 31 January 2024. He was not provided with any other notice of termination. There was no discussion with him about alternative employment opportunities. He was not provided with any other information about his termination. On termination, he was paid out his unused leave entitlements but was not paid notice or redundancy entitlements as promised. He has suffered financial stress and family pressure because of losing his job and not being paid his entitlements.

[5] At the time he was told he was being dismissed Mr Smith was managing 13 active Workcover claims. On his last day he called each of these employees telling them they were being made redundant the next day. After his dismissal he continued taking calls from some of

these employees and Workcover up until 6 February 2024, when his phone access was removed. In taking these calls he was told by some employees they were still being paid by Adcon. Others told him they had made claims for unfair dismissal and had been reinstated after 31 January 2024.

[6] The fact that other employees of Adcon continued to be paid and had been reinstated after the day he was told his employer would close down and his termination led Mr Smith to believe he had been unfairly dismissed. On 15 February 2024, he filed this application for an unfair dismissal remedy.

What happened next?

[7] Mr Smith's application was allocated to my Chambers and on 3 May 2024 I directed both Mr Smith and Adcon to provide their evidence and material so it could be determined at a Hearing on 24 June 2024. Mr Smith complied with my directions. Adcon did not.

Adcon in liquidation

[8] On 17 June 2024, Mr Paul Langdon (Liquidator for the Respondent) wrote to my Chambers advising that Adcon had been placed into liquidation by an Order of the Supreme Court of Queensland on 19 April 2024 and that he was appointed Liquidator by the Court. Mr Langdon also suggested that under Section 471B of the *Corporations Act 2001*, a person cannot bring an action against Adcon except with leave of the Court. He also informed me he was without funds in the liquidation to participate in any legal proceedings and that as Mr Smith was terminated prior to his appointment he would not be attending the Hearing. Mr Langdon also advised that he did not consent or object to Mr Smith proceeding against the Respondent.

What are the issues in this case?

[9] There are three central issues to this case. First, can Mr Smith's application proceed even when Adcon is in liquidation and not prepared or with capacity to participate in this matter. Second, if it can proceed, then was Mr Smith unfairly dismissed. Third, if he was unfairly dismissed, how should he be compensated in circumstances where he cannot be reinstated.

[10] I consider each issue in turn below.

Issue 1: Can Mr Smith's application proceed?

[11] Section 440D (Stay of Proceedings) of the *Corporations Act 2001* provides that during the administration of a company, a proceeding in a court against the company cannot be begun or proceeded with, except with the administrators written consent or leave of the Court. In *Smith and Ors v Trollope Silverwood and Beck Pty Ltd (in liquidation)*[1] the Full Bench of the Australian Industrial Relations Commission (AIRC) considered s.471B of the *Corporations Act 2001* and held that the reference to "proceeding in a court" did not include the AIRC and that, therefore, court leave was not needed for AIRC proceedings to commence or continue.

[12] Various decisions of the Commission have confirmed that the Full Bench's construction of s.471B in *Smith* was equally applicable to s.440D, holding that where a company is in

administration or court ordered liquidation, leave of a court for Commission proceedings against the company to commence or continue is not required because the Commission is not a court.[2]

[13] I rely on these authorities and determine that despite Mr Langdon's correspondence, the Commission retains jurisdiction to determine Mr Smith's unfair dismissal application.

Background

[14] Further to my directions on 3 May 2024, I directed the parties to attend a Mention on 9 May 2024. The Applicant participated in this Mention, the Respondent did not and failed to advise my Chambers of the reason for their non-compliance.

[15] The Respondent continued to not reply to repeated attempts to contact them and failed to file their material as required by my directions. On 11 June 2024, I advised the Respondent that should they continue to not comply with my directions a non-compliance hearing would be held.

[16] On 17 June 2024, I received the correspondence identified above from the Respondent's liquidator, advising me of his appointment as liquidator of the company by order of the Supreme Court of Queensland. Mr Langdon also filed correspondence provided to the Applicant on 8 May 2024 advising of his appointment and providing details of the Fair Entitlements Guarantee.

[17] On 19 June 2024, my Chambers emailed both parties responding to Mr Langdon's letter and advising them of my preliminary view that the authority in *Smith* indicated above was applicable and inviting the Applicant to consider his position and advise should he wish to proceed with the application. On 20 June 2024, the Applicant advised he would like to proceed to determination. The Respondent added nothing further.

[18] To this date, the Commission has not received a Form F3 Employer Response from the Respondent or any submissions in response to the application.

Hearing of 24 June 2024

[19] The Hearing commenced at 10:00am on Monday 24 June 2024, as programmed. Mr Smith was in attendance and represented himself in proceedings, providing sworn evidence in support of his submissions.

[20] The Respondent failed to attend. In advance of the Hearing, my Chambers again sought confirmation of the Respondent's position, and they again failed to engage.

[21] Mr Smith filed submissions, including a written statement, supporting materials and gave sworn evidence in proceedings.

[22] The Respondent and their representative did not file submissions despite being directed.

The position of the Respondent

[23] The only material I have been provided by the Respondent was the correspondence of 17 June 2024 indicating that Adcon had been placed into court ordered liquidation along with supporting materials, including correspondence provided to the Applicant advising him of his entitlements under the FEG. This correspondence also indicated the liquidator did not have means or capacity to participate on the Respondent's behalf in these proceedings and indicated they neither consented nor objected to Mr Smith pursuing his application.

[24] I have considered the Respondent's position above and determined the Commission has jurisdiction to proceed to determine Mr Smith's application. I have made the liquidator aware of this determination and provided them opportunity to make submissions on the Respondent's behalf. They have elected not to do so.

[25] Section 600 of the Act allows the Commission to determine a matter before it in the absence of a person who has been required to attend before it. Section 577 of the Act also requires the Commission to perform its functions and exercise its powers in a manner which is fair, just and quick.[3]

[26] Notwithstanding the absence of engagement of the Respondent's representative, it remains necessary for Mr Smith to establish any jurisdictional and merit considerations arising from the Act.

The position of Mr Smith

[27] Mr Smith has complied with all my directions and filed written submissions and provided sworn evidence to the Commission at the Hearing in support of his case.

[28] His evidence and submissions can be summarised as follows:

- He commenced employment with the Respondent on 10 January 2022.
- His employment was terminated on 31 January 2024.
- At the time of termination his gross weekly income was $2,884.62, plus superannuation.
- On 25 January 2024, he was told by Adcon that their business arrangements were changing and that Adcon would no longer be operating from the end of that month. He was also told he would not be employed by a new company Adcon had started, but that he would be made redundant and paid out his notice period until he could be re-employed when a new job became available.
- On 31 January 2024, he was provided a separation certificate terminating his employment. He was not provided with any other notice of termination. There was no discussion with him about alternative employment opportunities. He was not provided with any other information about his termination. On termination he was paid out his unused leave entitlements but was not paid notice or redundancy entitlements as promised.

- He has suffered financial stress and family pressure because of losing his job and not being paid his entitlements. He has made attempts to find alternative employment since the time of his dismissal and was able to secure a new job which commenced on 1 March 2024 with a shortfall of earnings compare to his role at Adcon.

- At the time he was told he was dismissed, Mr Smith was managing 13 active Workcover claims for Adcon. On his last day he called each of these employees telling them they were being made redundant the next day.

- After his dismissal he continued taking calls from some of these employees and Workcover up until the 6 February 2024 when his phone access was removed. In taking these calls he was told by some employees they were still being paid by Adcon. Others told him they had made claims for unfair dismissal and had been reinstated after 31 January 2024.

- The fact that other employees of Adcon continued to be paid and had been reinstated after the day he was told Adcon would close down and was terminated led Mr Smith to believe he had been unfairly dismissed.

Observations on the evidence

[29] The determination of this matter is made difficult by the circumstances facing the Respondent and its representative responsible for this liquidation by court order. Given the Respondent has not filed any material or information to contest Mr Smith's application, I consider it appropriate to make a *Jones v Dunkel* inference that the Respondent has no evidence to contradict Mr Smith's submissions and proceed on that basis. The Oxford Australian Law Dictionary defines a *Jones v Dunkel* inference to mean:[4]

> "The Rule in *Jones v Dunkel* is 'a principle of the law of evidence whereby a particular form of reasoning is authorised'… the reasoning is that if a prima facie case has been established… and the other party offers no explanation or contradiction of facts from which an inference may be drawn, then the fact that the party might have proved the contrary had the party chosen to give evidence may properly be taken into account as a circumstance in favour of drawing the inference; it increases the weight of the proof brought by one side and reduce the weight of the incomplete evidence brought by the other…".

[30] Regarding the unchallenged evidence of Mr Smith, I note that in the Full Bench decision of *INPEX Australia Pty Ltd v the Australian Workers Union*, the Bench noted:[5]

> "[29] The Commission is not a court. It is not bound by the rules of evidence. It is required to perform its functions and exercise its powers in a manner that is quick, informal and avoids unnecessary technicalities. But when the Commission makes a finding of fact, it must proceed by reference to rationally probative material. That may include material, *inter alia*, evidence or, in an appropriate case, submissions. For example, it may be appropriate for a finding of fact to be made on the basis of an unchallenged submission made by one party, particularly when the other party is legally represented."

[31] Further, the Full Court of the Federal Court of Australia stated in *Ashby v Slipper* that:[6]

> "The second aspect, critical to this appeal, relates to the weight or cogency of the evidence: that is, as a general proposition, evidence, which is not inherently incredible and which is unchallenged, ought to be accepted…."

[32] As the Respondent or court appointed liquidator has not made any attempt to file material or make any submissions to challenge Mr Smith's contentions, I am satisfied it is appropriate to accept Mr Smith's unchallenged evidence as to the merits of this case.

Issue 2: Consideration if Mr Smith was unfairly dismissed?

When can the Commission order a remedy for unfair dismissal?

[33] Section 390 of the Act provides that the Commission may order remedy if:

(a) the FWC is satisfied that the Applicant was protected from unfair dismissal at the of being dismissed; and

(b) the person has been unfairly dismissed.

[34] Both limbs must be satisfied. Therefore, I am required to consider whether the Applicant was protected from unfair dismissal at the time of being dismissed and, if I am so satisfied, next consider whether the Applicant has been unfairly dismissed.

When is a person protected from unfair dismissal?

[35] Section 382 of the Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less that the high-income threshold.

[36] It is not disputed that Mr Smith commenced employment with the Respondent from 10 January 2022 and he was terminated from this employment on 31 January 2024. On this basis, I am satisfied he is an employee who has completed the minimum period of employment with the Respondent.

[37] It is also not in dispute that Mr Smith's annual rate of earnings is less the high-income threshold of $167,500 for a dismissal taking effect on or after 30 June 2023 and prior to 30 June 2024. On this basis, I am satisfied that at the time he was dismissed, Mr Smith was a person protected from unfair dismissal.

When has a person been unfairly dismissed?

[38] Section 385 of the Act provides that a person has been ***unfairly dismissed*** if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

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

"The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

(a) Whether the application was made within the period required in subsection 394(2);

(b) Whether the person was protected from unfair dismissal;

(c) Whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(d) whether the dismissal was a case of genuine redundancy."

[40] In the present case, it is not contested, and I am satisfied that Mr Smith's application was filed on 15 February 2024 and is made within the required timeframe. It is not contested, and I am satisfied that Mr Smith was earning below the high-income threshold and is a person protected from unfair dismissal. There is also no evidence before the Commission that the Respondent is a small business.

[41] Mr Smith contends that while he was advised he would be provided 6 weeks' redundancy pay in addition to 4 weeks' notice of termination, he was paid neither. His evidence is that he was only paid out his final pay and unused entitlements. There is no evidence before the Commission that this is a case of genuine redundancy.

[42] On the basis of the above, I am satisfied that all the requirements of s.396 are met and I am required to consider the merits of whether the Applicant's dismissal was harsh, unjust or unreasonable.

Was the dismissal harsh, unjust or unreasonable?

[43] A dismissal may be unfair, when examining if it is 'harsh, unjust or unreasonable' by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:[7]

> "It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

[44] Section 387 of the Act provides for the criteria for consideration whether a dismissal was harsh, unjust or unreasonable as follows:

> "**387 Criteria for considering harshness etc.**
>
> In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:
>
> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
>
> (e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and
>
> (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
>
> (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant."

[45] I am required to consider each of these factors, to the extent they are relevant to the factual circumstances before me.[8]

[46] I set out my consideration of each below.

(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)

[47] In order to be a valid reason, the reason for the dismissal should be "sound, defensible, or well founded"[9] and should not be "capricious, fanciful, spiteful or prejudiced."[10] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[11]

[48] Mr Smith's unchallenged evidence is that he was initially told by his employer that it was shutting down on 31 January 2024, could no longer employ him and that he was being provided with notice of termination and would be made redundant. His further evidence is that he was not provided with payment of notice or redundancy pay, and that the Respondent continued trading and employing other staff after 31 January 2024.

[49] In the absence of any evidence by the Respondent, I am satisfied there was not a valid reason for the termination of his employment.

(b) whether the person was notified of that reason

[50] As I am not satisfied that there was a valid reason for the dismissal, this factor is not a relevant consideration to the present circumstances.[12]

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person

[51] As I have not found there was a valid reason for Mr Smith's dismissal that was related to his capacity or conduct, this factor is not a relevant consideration in this case.[13]

(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

[52] As the unchallenged evidence in this case is Mr Smith was simply told by his employer of their alleged circumstances and decision to terminate his employment be redundancy, there was no opportunity for the Applicant to request a support person. This factor is, therefore, not a relevant consideration in this case.

(e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal

[53] Having accepted Mr Smith's evidence, I find that his performance was not a factor in his dismissal. Consequently, this factor is not a relevant consideration.

(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

[54] Neither party submitted that the size of the Respondent's enterprise was a factor that impacted on the procedures followed in effecting the dismissal and I am satisfied on the material before the Commission that the size of the Respondent's enterprise had no impact.

(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

[55] Neither party made any submission on this factor, and I consider it to be neutral to my determination.

(h) any other matters that the FWC considers relevant

[56] Section 387(h) provides the Commission with a broad scope to consider any other matters that might be relevant. I do not consider there are other matters that are relevant to this case.

Is the Commission satisfied that the dismissal of the Applicant was harsh, unjust or unreasonable?

[57] I have made findings in relation to each of the factors specified in section 387 as relevant to the facts of this case. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust or unreasonable.[14] Having considered these factors and material before me, I am satisfied that Mr Smith was unfairly dismissed and that the dismissal was harsh, unjust and unreasonable.

[58] I am therefore satisfied that the Applicant was unfairly dismissed within the meaning of s.385 of the Act.

Issue 3: Consideration of remedy - how should Mr Smith be compensated?

[59] Being satisfied that the Applicant:

- made an application for an order granting a remedy under s.394;
- was a person protected from unfair dismissal; and
- was unfairly dismissed within the meaning of s.385 of the Act;

I may, subject to the Act, order the Applicant's reinstatement, or the payment of compensation to the Applicant.

[60] Under section 390(3) of the Act, I must not order the payment of compensation to the Applicant unless:

(a) the FWC is satisfied that reinstatement of the Applicant is inappropriate; and

(b) the FWC considers an order for payment of compensation is appropriate in all of the circumstances of the case.

Is reinstatement of the Applicant inappropriate?

[61] In the circumstances of this case, the Applicant submits and accepts that the Respondent finally wound up at the end of March 2024, some 8 weeks after his employment came to an end. In material received by the Commission it is confirmed that Mr Paul Langdon has been appointed as a liquidator of the Respondent by the Supreme Court of Queensland with effect from 19 April 2024.

[62] Considering this evidence, I am satisfied that in the circumstances of this case reinstatement is not an appropriate remedy.

Is an order for payment of compensation appropriate in all the circumstances of the matter?

[63] Having determined that reinstatement is not appropriate, it does not automatically follow that a payment from compensation is appropriate. As noted by the Full Bench:

> "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one…"[15]

[64] Where an Applicant has suffered financial loss as a result of the dismissal, this may be a relevant consideration in the exercise of this discretion.[16]

[65] In the present circumstances, the Applicant submits that he would have continued in his employment until the company eventually wound up on 31 March 2024. Further, his evidence is that he was unable to find alternative employment until 1 March 2024 and that his new position was at a less rate of pay. On this basis, I am satisfied that the Applicant has incurred financial loss in the period since his termination and that some compensation is appropriate.

Compensation – what must be taken into account in determining an amount?

[66] Section 392(2) of the Act requires all the circumstances of the case to be taken into account when determining an amount to be paid as compensation to the Applicant in lieu of reinstatement, including:

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

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

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

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

(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;

(f) the amount of any income reasonably likely to be 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 Commission considers relevant.

[67] I am satisfied, considering all the circumstances of this case, the evidence presented and additional submissions, that I can form a view as to compensation and consider each of these criteria below.

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

[68] In the present case, it is accepted that from 19 April 2024, the Respondent has been placed into liquidation by the Supreme Court of Queensland. It is also accepted by the Applicant that the Respondent was facing challenges and seeking to reorganise, including winding up as an employing entity from 31 January 2024. The Applicant's submissions are that the Respondent continued trading and employing staff up until 31 March 2024 when it finally wound up. In these circumstances, the effect of any order on the viability of the Respondent's enterprise is a relevant factor. On the Applicant's evidence that I have accepted however, I find the Respondent remained viable to the extent of its obligations to pay employees up until the 31 March 2024, which would have included the Applicant had he not been unfairly dismissed.

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

[69] The Applicant commenced employment with Respondent in a full-time capacity on 10 January 2022 and worked up until 31 January 2024.

[70] I consider that the Applicant's length of service does not support reducing or increasing the amount of compensation ordered.

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

[71] As stated by a majority of the Full Court of the Federal Court:

> "…in determining the remuneration that the employee would have received, or would have been likely to receive… it is necessary for the Commission to address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination".[17]

[72] In the present circumstances, the Applicant's evidence is that he would have continued in his employment up until his employer ceased trading or he was paid his entitlements on termination, including notice and redundancy. The evidence before me is that the Respondent clearly took stops to terminate the Applicant's employment effective from 31 January 2024 as it was reorganising its affairs. It did so unfairly, and thereafter failed to make good promises of paying him his notice period and any redundancy entitlements. Had Mr Smith not been unfairly dismissed, there being no reason otherwise, I am satisfied he would have remained employed for a further 8 weeks and 2 days, until 31 March 2024 when the Respondent really did wind up. I consider this further 8 week and 2-day period to be the "anticipated period of employment."[18]

[73] Mr Smith's annual salary was $150,000.00.

[74] I calculate the remuneration Mr Smith would have been likely to receive for work or payment for work or entitlements during this 8 week and 2-day period to be $24,230.81 gross, less taxation, plus superannuation.

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

[75] I am satisfied that the Applicant took reasonable steps to mitigate his loss.

(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

[76] The Applicant's evidence is that he has secured continuing alternative employment at a reduced rate that commenced on 1 March 2024. The income earned from this employment to date I have found his employment with the Respondent would have ended, but for his unfair dismissal is $9584.00.

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

[77] As I have found the anticipated period of employment would have ended on 31 March 2024, this factor this not relevant.

How is the amount calculated?

[78] As noted by the Full Bench:

> "[t]he well established approach to the assessment of compensation under s.392 of the FW Act … is to apply the 'Sprigg formula' derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licenced Festival Supermarket (Sprigg)*. This approach was articulated in the context of the FW Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages"*.[19]

[79] The approach in *Sprigg* is as follows:

> Step 1: Estimate the remuneration the employee would have received, or have been likely to have received if the employer had not terminated the employment (remuneration lost).
>
> Step 2: Deduct monies earned since termination. Workers' compensation payments are deducted but not social security payments. The failure of an Applicant to mitigate his or her loss may lead to a reduction in the amount of compensation ordered.
>
> Step 3: Discount the remaining amount for contingencies.
>
> Step 4: Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

Step 1

[80] I have estimated that Mr Smith would have remained employed until 31 March 2024.

[81] The remuneration Mr Smith would have received, or would likely to have received, from his dismissal on 31 January 2024 until 31 March 2024 is $24,230.81 gross less taxation, plus superannuation,

Step 2

[82] Only monies earned since termination for the anticipated period of employment are to be deducted.[20]

[83] Mr Smith earnt a total of $9584.00 during the anticipated period of employment and I am satisfied he has made efforts to mitigate his loss. Accordingly, the relevant deduction is $24,230.81 less $9,584.00 = $14,646.81.

Step 3

[84] I now need to consider the impact of contingencies on the amounts likely to be earned by Mr Smith for the remainder of the anticipated period of employment.[21]

[85] I have determined Mr Smith's earnings during the anticipated employment period. I therefore do not need to make a deduction for contingencies.

Step 4

[86] I have considered the impact of taxation but have elected to settle a gross amount of $14,646.81 plus superannuation.

Is the amount to be reduced on amount of misconduct?

[87] As this is not a case of misconduct, this is not a relevant factor and there is no need for any reduction on this account

How does the compensation cap apply?

[88] Section 392(5) of the Act provides that the amount of compensation ordered by the Commission must not exceed the lesser of:

(a) the amount worked out under s.392(6); and

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

[89] Section 392(6) of the Act provides:

> (6) The amount is the total of the following amounts:
>
> (a) The total remuneration:
>
> i. Received by the person; or
>
> ii. To which the person was entitled;
>
> (whichever is the higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal…

[90] Given Mr Smith's annual salary rate of $150,000.00 a compensation cap of $75,000.00 applies in accordance with s.392(6) of the Act.

Is the level of compensation appropriate?

[91] Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate have regard to all the circumstances of the case.[22]

[92] The application of the Sprigg formula has resulted in an outcome where Mr Smith would be awarded compensation of $14,646.81 plus superannuation.

[93] In the circumstances of this case, I have found Mr Smith to have been unfairly dismissed. The evidence before me is also that Mr Smith has been denied payment of a notice period and up to 6 weeks redundancy payments. He has also not received the benefit of his entitlement accrual for the period he has been out of work. In this circumstance, I consider it is appropriate to increase the amount of compensation to be awarded identified by my application of the *Sprigg* formula by a further week's pay being an amount of $2,884.62, plus superannuation, less taxation.

[94] On this basis, the amount of compensation to be awarded is $17,531.43, which I am satisfied is the amount of compensation that I have determined takes into account all the circumstances of the case as required by s.392(2) of the Act.

Compensation Order

[95] Given my findings above, an order [PR779990] will be issued requiring the Respondent to pay Mr Smith the amount of $17,531.43 gross, less taxation as required by law, plus superannuation to be paid into Mr Smith's nominated fund, with both payments to be made withing 14 days of the date of this decision.

COMMISSIONER

Appearances:

Mr A Smith *as the Applicant.*

Hearing details:

2024.
24 June.
Melbourne

Final written submissions:

26 July 2024.

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[1] (2003) 142 IR 137.

[2] See *Clifford v S & N Civil Constructions Pty Ltd* [2013] FWC 235; also *Crowe v R and R Poultry Pty Ltd t/a R&R Poultry* [2017] FWC 2954 at [17].

[3] *ZA v GDI Pty Ltd* [2021] FWC 3193 at [26].

[4] *Jennifer Roberts v Drewmaster Pty Ltd* [2024] FWC 332 at [136].

[5] [2021] FWCFB 1038.

[6] [2014] FCAFC 15 at [77].

[7] [1995] HCA 24; (1995) 131 ALR 422; (1995) 69 ALJR 797; (1995) 185 CLR 410 (11 October 1995).

[8] *Sayer v Melsteel Pty Ltd* [2011] FWAFB 7498 at [14]; *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB Ross VP, Lacy SDP, Simmonds C, 21 March 2002 at[69].

[9] *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 at [373].

[10] Ibid.

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

[12] *Chubb Security Australia Pty Ltd v Thomas* Print S2679 (AIRCFC, McIntyre VP, Marsh SDP, Larkin C, 2 February 2000) at [41]; *Read v Cordon Square Child Care Centre* [2013] FWCFB 762 at [46]-[49].

[13] Ibid.

[14] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357 at [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002 at [92].

[15] *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 at [9].

[16] *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550 at [20]; *Jeffery v IBM Australia Ltd* [2015] FWCFB 4171 at [5]-[7].

[17] *He v Lewin* [2004] FCAFC 161 at [58].

[18] Ellawala v Australian Postal Corporation Print S5109 (AIRCFB Ross VP, Williams SDP, Gay C, 17 April 2000) at [34].

[19] [2013] FWCFB 431.

[20] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFC 7206 at [17].

[21] *Enhance Systems Pty Ltd v Cox* PR910779 (AIRCFB, Williams SDP, Action SDP, Gay C, 31 October 2001) at [39].

[22] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFC 7206 at [17].