



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Russell Phelps

v

Northern Rivers 4WD Pty Ltd
(U2024/6644)

Taylor McDonald

v

Northern Rivers 4WD Pty Ltd
(U2024/6662)

DEPUTY PRESIDENT EASTON

SYDNEY, 30 OCTOBER 2024

Application for relief from unfair dismissal – redundancy – not genuine redundancy because of a failure to comply with consultation obligations - valid reason found – failure to notify the applicants of the valid reason for dismissal – dismissal was unreasonable – remedy – minimal loss – compensation ordered.

[1] Mr Jason Buckley and Ms Melissa Casey used to be married. In better times Mr Buckley and Ms Casey were both directors of Northern Rivers 4WD Pty Ltd and together operated two 4WD parts and accessories stores on the NSW north coast.

[2] However cooperation between Mr Buckley and Ms Casey appears to have ended in early 2024. On 20 March 2024 Mr Buckley notified ASIC that Ms Casey was no longer a director of Northern Rivers 4WD. Ms Casey claims that Mr Buckley’s notification to ASIC was fraudulent.

[3] Ms Taylor McDonald is Ms Casey’s daughter. Ms McDonald worked for Northern Rivers 4WD until she was dismissed on 27 May 2024. Mr Buckley made the decision to terminate Ms McDonald's employment. Ms McDonald has made a claim under s.394 of the *Fair Work Act 2009* (**the Act**), alleging that her dismissal by Northern Rivers 4WD was unfair.

[4] Mr Russell Phelps was also employed by Northern Rivers 4WD and is Ms McDonald's de-facto partner. Mr Buckley also made the decision to terminate Mr Phelps’ employment on 27 May 2024. Mr Phelps has similarly made an unfair dismissal claim against Northern Rivers 4WD.

[5] Ms McDonald’s claim and Mr Phelps’ claim were heard at the same time. The circumstances of each dismissal are not materially different.

[6] The evidence provided by each party included a significant amount of material that was relevant to the awful breakdown in relationships between Mr Buckley, Ms Casey, Ms McDonald and Mr Phelps, but was irrelevant to the matters I must decide. Most of this material was not admitted into evidence, or if it was admitted, it is not material to which I have attached any significant weight.

[7] For the reasons that will become apparent, it is not necessary to describe in intricate detail the breakdown of the relationships within Northern Rivers 4WD's business. Instead I will refer to the key matters of fact to be drawn from the evidence.

[8] Immediately prior to the dismissal of the Applicants, Northern Rivers 4WD operated two stores selling and installing 4WD equipment under a franchise arrangement with an external franchisor.

[9] Mr Phelps worked for Northern Rivers 4WD for approximately four years, although there was an interruption when Mr Phelps resigned over an incident in 2022. Mr Phelps worked as a full-time salesperson and manager and was also nearing the end of an apprenticeship as a mechanic. Ms McDonald was employed by Northern Rivers 4WD as a part-time salesperson.

[10] Mr Phelps and Ms McDonald worked at the Lismore store for a time. Mr Buckley's son also worked at the Lismore store. As the marriage broke down tensions rose between those affiliated with Mr Buckley and those affiliated with Ms Casey.

[11] Eventually Ms Casey, Ms McDonald, Mr Phelps and perhaps others who were more closely affiliated to Ms Casey, were all deployed to the Ballina store to work with Ms Casey. As Ms Casey said in her witness statement:

“[On] 14 February I insisted Mr Buckley purchase my shares of the company, split the stores and I take over the Ballina Store or an administrator take over as I no longer wanted to partner or associate with Mr Buckley. Mr Buckle[y] and I started negotiations.”

[12] The evidence of Ms Casey's day-to-day activities after she 'took over' the Ballina store is somewhat vague. Ms Casey did not say in her witness statement what role she played at the Ballina store. She did say in her statement that around this time she was offered a separate franchise by the franchisor. Ms McDonald said under cross-examination that Ms Casey "ended up working [in the Ballina store] or she'd work remote". Ms McDonald said that Ms Casey did "bookkeeping but then I heard that she was not doing the bookkeeping near the end once we go into Ballina." Ms McDonald said that she (Ms McDonald) was the store manager when she moved to the Ballina store.

[13] One apparent task that Ms Casey did perform was to conduct a supposed toolbox meeting. The "minutes" of this "toolbox meeting" are not complimentary towards Mr Buckley. The "minutes" contain 20 dot points. 15 dot points refer to Mr Buckley and criticise him and/or his decisions. According to the minutes, the toolbox meeting took place from 10:00AM until 11:00AM on 1 May 2024. Mr Buckley said he reviewed the CCTV footage for this period and that no such meeting took place.

[14] Both Ms McDonald and Mr Phelps agreed that in their sales function they were required to receive monies on behalf of Northern Rivers 4WD by way of cash or deposits. Each was required to issue invoices for sales. Some customers paid in cash and Mr Buckley attended the Ballina store as required to collect and bank cash receipts. Mr Buckley was also responsible for checking and reconciling sales at the end of each day for both stores.

[15] However the duties and responsibilities might have been assigned between Ms Casey, Ms McDonald and Mr Phelps at the Ballina store, Mr Buckley said that in mid-May 2024 he came to realise that whatever monies were being received at the Ballina store were not being banked in Northern Rivers 4WD's bank accounts. Moreover, Mr Buckley said that in the last two weeks of May 2024 no monies were received at the Ballina store – neither electronically nor in cash.

[16] Mr Buckley, as the sole director of Northern Rivers 4WD, took matters into his own hands on Tuesday, 21 May 2024 when he sent a text message to the Ballina staff in the following terms:

“Tom, Jacob, and Ethan

Unfortunately, due to Melissa diverting all money from work being completed at Ballina into her own personal bank account, and not that of the TJM Business account (stealing), I am forced to put the following option to you:

As of TOMORROW morning, IF you wish to continue to work for TJM Northern Rivers, and to be paid by TJM Northern Rivers, you will be required to work from TJM LISMORE Store only.

Unfortunately, it is not feasible, economical, nor in the company's best interests to have mechanics work out of Ballina whilst; all money from jobs are going directly into Melissa's bank account.

Therefore, in the interim, until such matters are resolved; Should you decide you wish to continue to work in the long term for TJM Northern Rivers.

I understand your contractual hours are 8am – 4pm, you will be expected to either continue this from TJM Lismore, or understanding the extra travel time, work from 8:30am – 4pm moving forward.

However, should you decide you wish to continue out of Ballina, you may but, TJM Northern Rivers will NOT be responsible for your pay's moving forward.

You will need to seek your pay as of next week from Melissa as she is the one reaping the income from Ballina and not TJM.

All orders that are purchased from suppliers for jobs for Ballina moving forward will be declined if invoiced to TJM Northern River.

Suppliers moving forward will be directed to no longer provide to Ballina store supplies unless they are intending to invoice Melissa directly and not TJM.

I do hope I will see you first thing tomorrow morning at Lismore.

Please feel free obviously to quickly drop into Ballina in the morning to grab all your tools to bring to Lismore before you commence work.

Should you decide to stay at Ballina moving forward, I wish you well.”

[17] On 24 May 2024 Ms Casey issued counter communications to the staff at the Ballina store that included the following:

“... It is apparent that the inappropriate message that Jake has sent you all is completely untrue and misleading. On Thursday we were all in a state of confusion. I would like to try and explain how the company works. The biggest problem is Jake thinks he is Northern Rivers 4wd Pty Ltd.

...

If you are not paid, and a number of you have not, a letter of demand for wages needs to be sent to [redacted] demanding the payment. If he refuses to pay then ring the fair work ombudsman and they will prosecute the company and the person that is claiming to be in charge. Fair work is aware of the situation and wanting to act next week if need be. Jake is not allowed to do what he has done to you all. It is bullying and harassment and on behalf of the company I apologise.

...

I no longer have access to any methods of payment or directing where customers pay. On the advice of my solicitor and accountant yesterday afternoon I set up a company to direct the money that customers are paying into a business account to try and keep us going until court day. This money will cover invoices e.g. cash payments to TJM, ray sargent, fuel for forklift and the wages while fair work investigates Jake if he continues to not pay us. Any excess money then goes back into the Northern Rivers 4wd Pty Ltd. I need to account for every cent and this is the only way to do it. That is the only reason this was set up yesterday, not to take over or employ anyone.

The only way Northernrivers 4wd Pty Ltd can stop paying you is if Jake sacks all of us, which would be unfair dismissal.

I hope this helps you all understand. I was not given an opportunity to explain the situation as I feel like Jake had terrified everyone. If you work at the Ballina store please return when you see fit and know that you will be paid. Should you receive any more messages that are concerning please contact me first before making decisions...”

[18] It seems that Ms McDonald and Mr Phelps attended work on 23 and 24 May 2024. Neither tried to make contact with Mr Buckley about his SMS message, although Mr Phelps sent Mr Buckley an email about his wages. At the hearing both claimed to have been confused at this time about what was going on between Mr Buckley and Ms Casey.

[19] On Monday 27 May 2024 Mr Buckley went to the Ballina store and changed the locks and closed the store. The Ballina store has not reopened although Northern Rivers 4WD has maintained its lease on the premises. There was some evidence of Mr Buckley attending the store to fill customer orders.

[20] Two other events occurred on 27 May 2024: (1) Ms McDonald and Mr Phelps made workers compensation claims and (2) Ms McDonald and Mr Phelps were given letters advising that their employment was terminated.

[21] The letters of termination were materially identical and included the following:

“The purpose of this letter is to confirm the outcome of a recent review of our financial situation at our TJM Ballina outlet, and what this will mean for you.

As result, we have made the decision to close our Ballina outlet at this time, therefore the position of Sales/Store Manager is no longer needed. Regrettably, this means your employment will terminate.

We are not in a position to offer you alternative employment at our Lismore outlet.

Based on your length of service with TJM, your notice period is two (2) weeks, in accordance with your contract of employment, reflecting the Fair Work Act 2009 (Cth) (the Act). You are not required to fulfill this notice period and your last day of employment is effective 27 May, 2024. In lieu of that notice, you will be paid.

As a small business under the Fair Work Act 2009, redundancy payment is not applicable.

Due to accounting discrepancies identified regarding annual leave entitlements and other financial matters within the outlet, we are conducting a complete financial audit and will advise as soon as possible of your entitlements and payment of any dues. We unfortunately have no timeline for finalisation of your entitlements until the forensic audit is completed.

If you have been paid for annual leave in advance, any amount of annual leave outstanding that you have already been paid for will be deducted from your final pay.”

[22] Since their dismissal Ms McDonald and Mr Phelps have both received weekly workers’ compensation benefits.

Genuine Redundancy?

[23] Northern Rivers 4WD claimed that the dismissal of each applicant was a genuine redundancy. Genuine redundancy is a complete defence to an unfair dismissal application (per *Ulan Coal Mines Limited v Honeysett and others* (2010) 199 IR 363, [2010] FWAFB 7578 at [26]). If the dismissal was a case of genuine redundancy as defined in s.389 of the FW Act, then the dismissal cannot be an unfair dismissal under s.385:

“385 What is an unfair dismissal

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.**

Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388.”

[Emphasis added]

...

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.”

[24] I am required to decide whether the dismissal was a case of genuine redundancy before considering the merits of the application (per s.396).

[25] Section 389 requires a series of stepped findings (per *Pankratz v Regional Housing Limited* [2013] FWC 1259 at [6]-[9]):

- (a) firstly, whether the Applicant's job is redundant;
- (b) secondly whether the employer complied with any applicable consultation obligations under a modern award or agreement; and
- (c) thirdly whether it would have been reasonable to redeploy the Applicant in another role.

[26] There must be an appropriate evidentiary basis for these stepped findings and the relevant facts are usually particularly within the knowledge of the employer respondent rather than the dismissed applicant.

[27] As can be seen from the evidence above, Northern Rivers 4WD did not consult with the Applicants about their potential redundancy. The relevant modern award required the employer to consult about the introduction of major change, which included termination of employment and, in this case, the closure of the operation altogether.

[28] The consultation obligations in the award were not complied with. On this basis I do not need to consider the first or the third step because I must find that the dismissals of the Applicants were not genuine redundancies within the meaning of section 389.

[29] As such, the complete defence provided in s.389 has not been made out and therefore both applications must be considered against the criteria listed in section 387.

Consideration

[30] In determining whether the dismissals were harsh, unjust or unreasonable s.387 of the *Fair Work Act 2009* (Cth) (**FW Act**) requires me to take into account the following matters:

- (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.

Was there a valid reason for the dismissal related to the Applicants' capacity or conduct (s.387(a))?

[31] To be a valid reason, the reason for the dismissal should be sound, defensible or well founded and should not be capricious, fanciful, spiteful or prejudiced. In assessing the validity of the reason(s) for dismissal the Commission will not stand in the shoes of the employer and determine what the Commission would have done in the same position.

[32] I am satisfied that there was a valid reason for the dismissal. Mr Buckley was the sole director of Northern Rivers 4WD and there is no challenge to his capacity or power as a director to dismiss the Applicants.

[33] The Applicants were dismissed because Mr Buckley decided that Northern Rivers 4WD would cease trading at the Ballina site. Ms McDonald's position and Mr Phelp's position were redundant as a consequence of this decision.

[34] The Applicants challenged Mr Buckley's motivation for deciding to close the store, suggesting that he did so out of spite towards his ex-wife, but this motivation is not particularly relevant. There is no suggestion that the closure of the store is a sham or a fiction. To the contrary Mr Buckley's explanation reveals a reasonable business case. On his evidence the store was trading for the last two weeks of May 2024 and orders were placed for new parts, which indicated commercial activity at the store. However Mr Buckley said that no money at all was received by the store, either by way of cash receipts from customers, EFT transactions or bank transfers. According to Mr Buckley, the company was paying wages and paying for consumables and parts but its receipts were being diverted away from the business. He was cautious in stating precisely who was responsible for diverting receipts away from the business – it is clear that he believes his ex-wife was involved but his evidence was equivocal about whether either applicant was involved.

[35] Either way it made no commercial sense for Northern Rivers 4WD to continue trading at Ballina in the circumstances.

Were the Applicants notified of the valid reason (s.387(b))?

[36] Section 387(b) requires me to take into account whether the employee "was notified of that reason." Sections 387(b) and (c) direct the FWC's inquiry to matters of procedural fairness. In general terms a person should not exercise legal power over another, to that person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case (per *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at 151 [70] citing *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Kioa v West* (1985) 159 CLR 550; *Annetts v McCann and others* (1990) 170 CLR 596).

[37] In context, the inquiry to be made under s.387(b) is whether the employee was “notified” of that reason *before* the employer made the decision to terminate (per *Sydney Trains v Trevor Cahill* [2021] FWCFB 1137 at [60]). The reference to “that reason” is a reference to the valid reason(s) found to exist under s.387(a) and the reference to being “notified” is a reference to explicitly putting the reasons to the employee in plain and clear terms (per *Bartlett v Ingleburn Bus Services Pty Ltd* [2020] FWCFB 6429 at [19] and *Sydney Trains v Trevor Cahill* [2021] FWCFB 1137 at [60]).

[38] Northern Rivers 4WD issued letters to the Applicants advising them of their dismissal however these notifications were given before the decision was made to terminate.

[39] It is worth noting that there was evidence of ongoing hostility, animosity, undermining behaviour in the weeks leading up to the dismissal of the Applicants. For example, Ms Casey was sending emails to the staff suggesting they make complaints to the Fair Work Ombudsman. The minutes of the “toolbox meeting” is basically a list of gripes against Mr Buckley. Other events took place in May 2024 that added fuel to the fires already burning within the business.

[40] To this end, by the end of May it is quite understandable, if not sensible, for Mr Buckley to have acted swiftly to address the circumstances at the store. To have taken additional steps to consult with the Applicants in this hostile environment is unlikely to have changed or helped the situation at all. It may be that Mr Buckley’s somewhat drastic decision to close the store caught the Applicants by surprise but their complaints about lack of consultation are at best naïve and at worst disingenuous.

[41] Nonetheless the fact that the Applicants were not notified of the valid reason for dismissal prior to the dismissal taking effect is a factor that points in favour of the dismissals being unfair.

Were the Applicants given an opportunity to respond to any valid reason related to their capacity or conduct (s.387(c))?

[42] The opportunity to respond to which s.387(c) refers is an opportunity to respond to the reason for which the employee may be about to be dismissed.

[43] Neither applicant was given a proper opportunity to respond to the reasons for dismissal. This factor also points in favour of the dismissals being unfair.

Did the Respondent unreasonably refuse to allow the Applicants to have a support person present to assist at discussions relating to the dismissal (s.387(d))?

[44] This factor is not particularly relevant consideration in this matter because I have already found that Northern Rivers 4WD failed to give the applicants the opportunity to respond to the valid reasons for their dismissal.

Was the Applicant warned about unsatisfactory performance before the dismissal (s.387(e))?

[45] As the dismissal did not relate to unsatisfactory performance, strictly speaking this factor is not relevant to the present circumstances.

Other factors – s.387(f)-(h)

[46] The size of the respondent’s enterprise (s.387(f)) and the lack of availability of dedicated human resource management expertise (s.387(g)) are factors that point in Northern Rivers 4WD’s favour in this matter. Northern Rivers 4WD does not appear to have any dedicated human resource expertise. That said, there was evidence that Mr Buckley had access to legal and accounting expertise in and around May 2024 insofar as he and Ms Casey had both engaging professional assistance in their family law proceedings.

[47] There are no other relevant matters (s.387(h)) that impact upon the fairness of the dismissal of the Applicants.

[48] Overall these factors point slightly in Northern Rivers 4WD’s favour.

What other matters are relevant (s.387(h))?

[49] Section 387(h) requires the Commission to take into account any other matters that the Commission considers relevant. In these proceedings there are no other such matters.

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

[50] I have made findings in relation to each matter specified in section 387 as relevant. I must consider and give due weight to each as a fundamental element in determining whether the terminations were harsh, unjust or unreasonable and therefore unfair dismissals.

[51] I find that the dismissals of the Applicants were unreasonable because of the procedural unfairness identified above. As difficult as the circumstances were and as strained as the relationships were, Northern Rivers 4WD through Mr Buckley should have taken the time to give Ms McDonald and Mr Phelps a reasonable opportunity to respond to Mr Buckley’s concerns about the viability of the Ballina store. I am deeply sceptical about whether giving this opportunity would have made any difference to the circumstances at the store, but Mr Buckley should have nonetheless provided the Applicants with this opportunity.

[52] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that the dismissal of Ms McDonald and the dismissal of Mr Phelps were both unfair.

Remedy - Compensation

[53] Being satisfied that Ms McDonald and Mr Phelps were both unfairly dismissed within the meaning of s.385 of the FW Act, I may order their reinstatement, or the payment of compensation, subject to the Act.

[54] Neither applicant sought reinstatement and it is abundantly obvious the reinstatement is inappropriate.

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

[55] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. The question whether to order a remedy remains a discretionary one (per *Nguyen v Vietnamese Community in Australia t/a Vietnamese Community Ethnic School South Australia Chapter* [2014] FWCFB 7198 at [9]).

[56] 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 (per *Vennix v Mayfield Childcare Ltd* [2020] FWCFB 550, [20]; *Jeffrey v IBM Australia Ltd* [2015] FWCFB 4171 at [5]-[7]).

[57] If either applicant has suffered a financial loss because of their dismissal that loss is only minimal. Both applicants have received weekly workers compensation benefits since their dismissal. It is not clear from the evidence whether they are fit to resume their duties yet and it is therefore not clear that they would have received any more than their workers compensation weekly benefits if they had not been dismissed on 27 May 2024.

[58] In all the circumstances, I consider that an order for a small payment of compensation is appropriate to compensate the applicants for being unfairly dismissed.

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

[59] Section 392(2) of the FW Act requires all of 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 Respondent's enterprise;
- (b) the length of the Applicant's service;
- (c) the remuneration that the Applicant would have received, or would have been likely to receive, if the Applicant had not been dismissed;
- (d) the efforts of the Applicant (if any) to mitigate the loss suffered by the Applicant because of the dismissal;
- (e) the amount of any remuneration earned by the Applicant 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 so earned by the Applicant 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.

[60] I will consider these factors in sequence:

- a) there is no dispute and I am satisfied that an order for compensation would not have an effect on the viability of the employer's enterprise;
- b) the Applicants' periods of service were not insubstantial and slightly favour a greater amount of compensation;
- c) if the Applicants had not been dismissed on 27 May 2024 their employment would not have lasted any more than two to three days. That is, at best it would have taken Mr

Buckley two to three days to give the Applicants an opportunity to respond to the reasons for their dismissal;

- d) to a significant degree the Applicants' losses were mitigated by their workers' compensation weekly benefits;
- e) the amount of income reasonably likely to be earned by the Applicants between the making of the order for compensation and the payment of compensation is not directly relevant; and
- f) there are no other directly relevant matters.

Compensation – how is the amount to be calculated?

[61] In this case I decided to award each applicant 24 hours' pay as compensation for their unfair dismissal. I am confident that the employment of either Applicant would have extended beyond 30 May 2024 had Northern Rivers 4WD chosen to give each applicant procedural fairness.

[62] The application of the "Sprigg formula" would deliver each applicant an amount less than 24 hours pay. The Sprigg formula is derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21 (***Sprigg***) (see also *Bowden v Ottrey Homes Cobram and District Retirement Villages* (2013) 229 IR 6; [\[2013\] FWCFB 431](#) and *Double N Equipment Hire Pty Ltd t/a AI Distributions v Humphries* [\[2016\] FWCFB 7206](#) at [16]).

[63] 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/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.

[64] Step 2 above would mean that the workers' compensation payments received by the Applicants in the three further days that their employment might have continued would otherwise be reduced by the workers compensation weekly benefits they received.

[65] However I am required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case" (see *Double N Equipment Hire Pty Ltd t/a AI Distributions v Humphries* [\[2016\] FWCFB 7206](#) at [17]).

[66] I am satisfied that the amount of compensation that I have determined above, being three days/24 hours' pay for each applicant, takes into account all the circumstances of the case as required by s.392(2) of the FW Act.

[67] In this matter the amount of the order for compensation is not to be reduced on account of misconduct (per s.392(3)).

[68] The cap on compensation in s.392(5) of the FW Act has no impact upon the present matter.

[69] Ms McDonald's pay slips indicate that she was receiving \$40 per hour at the time she was dismissed. Mr Phelps' pay slips indicate that he was receiving \$45 per hour.

[70] In light of the above, I will make an order that Northern Rivers 4WD pay Ms McDonald \$960 less taxation as required by law in lieu of reinstatement within 21 days of the date of this decision, plus an additional component for superannuation ([PR780792](#)).

[71] I will also order that Northern Rivers 4WD pay Mr Phelps \$1,080 less taxation as required by law in lieu of reinstatement within 21 days of the date of this decision, plus an additional component for superannuation ([PR780791](#)).



DEPUTY PRESIDENT

Appearances:

R Phelps and T McDonald, Applicants
T Dunn for the Respondent

Hearing details:

2024.
Sydney (By Video using Microsoft Teams)
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