DECISION

Fair Work Act 2009
s.120—Redundancy pay

Watters Electrical Pty Ltd T/A Watters Electrical
v
Bill Harold McLaughlin
(C2023/8105)

DEPUTY PRESIDENT MASSON MELBOURNE, 14 FEBRUARY 2024

Variation of redundancy pay – whether other acceptable employment offered– alternate role found not to constitute other acceptable employment – application dismissed.

Introduction

[1] On 22 December 2023, Watters Electrical Pty Ltd T/A Watters Electrical (Watters) made an application pursuant to s.120 of the *Fair Work Act 2009* (the Act) for the variation of its obligation to pay redundancy pay pursuant to s.119 of the Act. The Application is made in relation to a former employee, Mr Bill Harold McLaughlin and seeks to reduce Mr McLaughlin's redundancy entitlement from thirteen to six weeks' redundancy pay.

[2] The matter was set down for hearing on 13 February 2024 in advance of which Watters filed material in support of the application. Mr McLaughlin did not file any material in objection to the application. At the hearing Ms Kate Ryan (Business Manager) appeared on behalf of Watters, gave evidence and called Mr Robin Knaggs, who is the Director/Owner of Watters, to give evidence. Mr McLaughlin also appeared and gave evidence.

Background and evidence

[3] Mr McLauglin commenced employment with Watters on 1 February 2016 in the role of an A-Grade Electrician and was employed under the terms of the *Watters Electrical Pty Ltd Enterprise Agreement 2010 - 2014*[1] (the Agreement). He commenced working in Watters' HV Department in July 2022, also commencing a QA2 – Certificate III in ES1 Distribution Underground at the same time. Mr McLaughlin lives in Beechworth and while working for Watters commuted to its Albury workshop each day. At the time of his termination of employment, Mr McLaughlin performed the role of a working foreperson, was in receipt of an hourly base rate of pay of $45.00 and had the benefit of a fully maintained company motor vehicle (twin cab ute) as part of his employment conditions.

[4] In October 2023, Watters which is based in regional Victoria, decided to close its High Voltage (HV) department due to ongoing difficulties in recruiting and retaining staff, as well as declining work opportunities. On 10 October 2023, Mr Knaggs and Mr Peter Copley

(General Manager of Watters) met with management of GPE Electrical & Communications (GPE) and discussed a range of matters including GPE taking on Watters' existing HV jobs, reviewing Watters' quoted works to assess if GPE would take on those works and also the purchase of some of Watters' plant and equipment. The potential for GPE to take on employees who were then employed in Watters' HV business was also discussed. Management of Watters then met with employees in its HV Department that same day to inform them of the opportunity to move across to GPE if they were interested.

[5] On 18 October 2023, Mr Copley forwarded contact details and current hourly rates of pay of Mr McLauglin and three other employees to Mr Chad Williams of GPE for consideration. Each of the four employees were also required to attend an interview with GPE. GPE subsequently agreed to take on all of Watters' existing jobs, review its tendered jobs, purchase agreed plant and equipment and employ all of Watters' HV Division staff who had indicated interest in joining GPE.

[6] Prior to the closure of Watters' HV Division, the prospect of Mr McLauglin being offered ongoing employment with Watters within its electrical division as a qualified A-Grade Electrician was raised with him by his supervisor, but this did not materialise into a formal offer of ongoing employment with Watters. He ceased employment with Watters on 20 December 2023 and commenced employment with GPE at its Albury workshop on 8 January 2024 on a base rate of pay of $45.00. A fully maintained motor vehicle was not provided as part of Mr McLaughlin's employment conditions with GPE. His on-going employment with GPE is also subject to a three-month probationary period.

Statutory Framework

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

> **"119 Redundancy pay**
>
> *Entitlement to redundancy pay*
>
> (1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:
>
> (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
>
> (b) because of the insolvency or bankruptcy of the employer.
>
> Note: Sections 121, 122 and 123 describe situations in which the employee does not have this entitlement.
>
> *Amount of redundancy pay*

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

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

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

"120 Variation of redundancy pay for other employment or incapacity to pay

(1) This section applies if:

(a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and

(b) the employer:

(i) obtains other acceptable employment for the employee; or

(ii) cannot pay the amount.

(2) On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.

(3) The amount of redundancy pay to which the employee is entitled under section 119 is the reduced amount specified in the determination."

Consideration

[9] The approach I intend to adopt in determining this matter is that set out by the Full Bench in *Australian Commercial Catering Pty Ltd v Powell and Togia; Powell v Australian Commercial Catering Pty Ltd*[2] where the following was stated;

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

[10] Central to the present matter is whether the alternate employment offered by GPE to Mr McLaughlin constituted 'other acceptable employment' for the purpose of s.120 of the Act and whether that employment was obtained through the 'conscious and intended acts'[3] of Watters. The Commission has considered the meaning of the words 'other acceptable employment' in numerous authorities which were helpfully summarised and considered at length by Deputy President Sams in *Spotless Services Australia Limited t/as Alliance Catering*[4] (Spotless). The Deputy President also summarised the key considerations in one of his earlier decisions in *DRW Investments t/as Wettenhalls v Timothy Richards & Others*[5] where the following was said;

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

Section 119(1)(a) of the Act

[11] There is no dispute that Mr McLaughlin's employment with Watters ended by way of redundancy on 20 December 2023 and therefore, he is entitled to redundancy pay pursuant to s.119(1) of the Act. Based on his length of service with Watters of seven years, Mr McLauglin is entitled to thirteen weeks' redundancy pay under the NES.

Section 120(1)(b)(i)

[12] With respect to whether Watters obtained acceptable employment, I am satisfied that Watters secured the employment of Mr Mclaughlin with GPE through its intended acts. That is because Watters approached GPE with a proposal that GPE take over Watters' HV contracts, its tenders, some of its equipment, and employees in Watters' HV Department. GPE subsequently employed three of Watters' former HV Department staff including Mr McLaughlin. I have reached this view notwithstanding that Mr McLaughlin along with three other former employees of Watters attended interviews with GPE before being offered employment.

[13] Turning to consider whether the alternate employment is acceptable, the following may be said. The role undertaken by Mr McLaughlin with GPE is substantially the same as the role he undertook for Watters with the notable exception that he does not perform any supervisory

duties for GPE. I do not regard this as particularly significant however in circumstances where he is in receipt of the same base hourly rate of pay of $45.00. The new work location with GPE is also in Albury so the commute distance for Mr McLaughlin from Beechworth to Albury of approximately 45 minutes each way is the same and his hours of work of 38 ordinary hours per week is also the same as with Watters. I note also for completion that Mr McLauglin's ongoing employment with GPE is subject to a three-month probationary period although there was no evidence to suggest that such on-going employment was at risk or unlikely.

[14] There is one difference in employment conditions that is of substance and that is the motor vehicle Mr McLaughlin had the private use of while working for Watters. He does not have the benefit of the private use of a motor vehicle in his new role with GPE. No value was placed on this benefit by either party. Based on Mr McLaughlin's private use of the vehicle for travel between Beechworth and Albury each day, which represents an 80km round trip, the total km travelled per year to and from work alone would have been between 15,000 and 20,000km. In terms of saved petrol costs and private vehicle wear and tear, this represented a substantial financial benefit for Mr McLaughlin while he was employed by Watters. He now bares those costs himself at GPE having not been provided with a motor vehicle in his new role. I am satisfied that the foregone benefit of the company provided motor vehicle with Watters represents a substantial lost financial benefit that must be weighed in assessing whether the role with GPE represents suitable alternate employment.

[15] While I accept that much of Mr McLaughlin's new role with GPE is substantially the same as the former role held by him with Watters, the loss of the private use of a company motor vehicle is significant in my view and is sufficient to lead me to conclude that the new role with GPE does not constitute 'other acceptable employment' within the meaning of s 120(1)(b)(i) of the Act.

Conclusion

[16] Having found that Mr McLaughlin's new role with GPE does not constitute 'other acceptable employment' for the purpose of 120(1)(b)(i) of the Act, s 120 does not apply and there is no basis for me to reduce the redundancy obligation Mr McLaughlin is entitled to receive under s 119 of the Act. As I have found that Watters failed to obtain 'other acceptable employment' for Mr McLaughlin, the application must be dismissed.

DEPUTY PRESIDENT

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

Hearing details:
2024,

Melbourne (via Microsoft Teams):
February 13.

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[1] AE400493

[2] [2016] FWCFB 5467.

[3] Ibid.

[4] [2016] FWC 4505.

[5] [2016] FWC 461.