DECISION

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

Mr Murray Hobson
v
Murrin Murrin Operations Pty Ltd
(U2024/11966)

DEPUTY PRESIDENT ROBERTS SYDNEY, 21 JANUARY 2025

Application for an unfair dismissal remedy - jurisdictional objection - high income threshold - annual rate of earnings – salary continuance scheme - objection upheld - application dismissed.

Background and issue for determination

[1] This matter concerns an application by Mr. Murray Hobson (Applicant) in which relief is sought from an alleged unfair dismissal under Part 3-2 of the *Fair Work Act* 2009 (Cth) (Act). The respondent to the application was originally Minara Resources Pty Ltd, however the parties agreed that the Applicant's employer was at all times Murrin Murrin Operations Pty Ltd. The application was amended under s.586(a) by consent to reflect the correct name of the Respondent as Murrin Murrin Operations Pty Ltd (Respondent).

[2] The Respondent has objected to the application on the basis that the Applicant is not a person protected from unfair dismissal under s.382 of the Act.

[3] Section 382 provides:

> *A person is protected from unfair dismissal at a time if, at that time:*
>
> *(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 than the high income threshold.*

[4] In order for a person to be protected from unfair dismissal both limbs of s.382, i.e. subsections (a) and (b) must be met. No issue arises here in relation to the first limb.

[5] The Respondent contends that the Applicant does not meet the description in s.382(b) because s.382(b)(i) and (ii) do not apply and the sum of the Applicant's annual rate of earnings exceeds the high income threshold. It was not disputed that the Applicant was not covered by a modern award. Nor did the Applicant contend that an enterprise agreement applied to the Applicant in relation to the employment. The issue for determination here is whether or not s.382(b)(iii) has been satisfied.

High income threshold

[6] The high income threshold is defined in section 333 of the Act as the amount prescribed by the Regulations. At the time of the Applicant's dismissal on 26 September 2024, the amount prescribed as the high income threshold was $175,000.

Facts

[7] The key facts for the purpose of determining the matter in issue were not controversial. The Applicant commenced employment with the Respondent on 6 May 2019, and was employed in the position of Coordinator, Tailings & Water Management[1]. The terms and conditions of the Applicant's employment with the Respondent were set out in his letter of offer and contract of employment dated 6 May 2019 (Employment Contract)[2]. The Applicant also received remuneration in accordance with the Respondent's Remuneration and Benefits Policy (Remuneration Policy)[3].

[8] Under the Employment Contract and the Remuneration Policy, the Applicant's annual remuneration consisted of:

(a) his base salary;
(b) a site allowance of $20,000;
(c) a family medical allowance of $5,000;
(d) a 3% superannuation employer contribution of $5,663.82; and
(e) a compulsory superannuation contribution in accordance with the applicable superannuation guarantee levy[4].

[9] Under the Employment Contract, the Applicant's initial base salary totalled $147,000 as at his commencement date with the Respondent[5]. During his employment with the Respondent, the Applicant received salary increases in accordance with the Employment Contract and the Remuneration Policy. From 1 January 2023 until the date of termination the Applicant's base salary was $163,794[6].

[10] On 14 August 2023, the Applicant took personal leave due to a non-work-related illness and subsequently exhausted his accrued paid leave. He then took unpaid leave from 7 December 2023 to the date of termination[7]. From 6 November 2023, the Applicant has been receiving an amount equivalent to 75% of his gross salary pursuant to the Respondent's Salary Continuance Policy dated 1 November 2018 (**Salary Continuance Policy**).[8] The benefits payable under the Salary Continuance Policy continue for 2 years from commencement[9].

[11] As at the date of termination, the Applicant had been receiving payments under the Salary Continuance Policy for approximately 10 months[110].

Contentions

[12] At the hearing the Applicant said that he had not been paid the site allowance, medical allowance or additional superannuation contribution since he had been in receipt of the salary continuance payments. He asserted that his 'total' earnings for the purposes of s.382(b)(iii) amounted to $122,845.50 i.e. 75% of the base salary amount of $163,794. On this basis, the Applicant claims his annual rate of earnings falls below the high income threshold.

[13] The Respondent maintains that the relevant amount is the quantum of the employee's annual salary at the time of their dismissal, rather than the amount actually paid to the employee in the preceding 12-month period. They say that the Applicant's earnings are not the average amount received over the last 12 months, which includes the payments made to the Applicant under the Salary Continuance Policy, but the amount "*to which the employee is entitled to* (sic) *at that point*", being the point of dismissal[11].

Earnings and sum of annual rate of earnings

[14] Sections 332 of the Act relevantly provides:

> *(1) An employee's* ***earnings*** *include:*
>
> > *(a) the employee's wages; and*
> > *(b) amounts applied or dealt with in any way on the employee's behalf or as the employee directs; and*
> > *(c) the agreed money value of non-monetary benefits; and*
> > *(d) amounts or benefits prescribed by the regulations.*
>
> *(2) However, an employee's* ***earnings*** *do not include the following:*
>
> > *(a) payments the amount of which cannot be determined in advance;*
> > *(b) reimbursements;*
> > *(c) contributions to a superannuation fund to the extent that they are contributions to which subsection (4) applies;*
> > *(d) amounts prescribed by the regulations.*
> >
> > *Note: Some examples of payments covered by paragraph (a) are commissions, incentive-based payments and bonuses, and overtime (unless the overtime is guaranteed).*
>
> *(3)* ***Non-monetary benefits*** *are benefits other than an entitlement to a payment of money:*
> > *(a) to which the employee is entitled in return for the performance of work; and*
> > *(b) for which a reasonable money value has been agreed by the employee and the employer;*

but does not include a benefit prescribed by the regulations.

[15] As can be seen from the above, the term 'earnings' is defined, non-exhaustively in s.332(1). Earnings includes 'wages', a term not defined in the Act. It has been held that the term 'wages' is a narrower concept than 'remuneration'[12]. The broad exclusion in s.332(2)(a) however means the concept of earnings, including in the case of 'wages', is confined to certain payments the amount of which is ascertainable in advance. Bonuses and non-guaranteed overtime are two examples cited in the note to subsection (2) as being excluded by subsection (2)(a). Having regard to the matters set out in s.332(1), it is apparent that the earnings referred to must have a connection to the employment and do not encompass earnings in the broadest sense of any income received by the employee.

[16] Regulation 3.05(6) also provides that non-monetary benefits may be taken into account for the purposes of s.382(b)(iii), in certain circumstances, where the monetary value of the benefit has not been agreed under s.332(1)(c) and s.332(3). It says:

Benefits other than payment of money

(6) If:

(a) the person is entitled to receive, or has received, a benefit in accordance with an agreement between the person and the person's employer; and
(b) the benefit is not an entitlement to a payment of money and is not a non-monetary benefit within the meaning of subsection 332(3) of the Act; and
(c) the FWC is satisfied, having regard to the circumstances, that:
(i) it should consider the benefit for the purpose of assessing whether the high income threshold applies to a person at the time of the dismissal; and
(ii) a reasonable money value of the benefit has not been agreed by the person and the employer; and
(iii) the FWC can estimate a real or notional money value of the benefit; the real or notional money value of the benefit estimated by the FWC is an amount for subparagraph 382(b)(iii) of the Act.

'Annual rate of earnings'

[17] The Respondent argued that the authorities make it clear that for the purposes of section 382 of the Act, it is the employee's annual rate of earnings at the time of termination that is the relevant figure, and not the amount actually received by the employee in the previous 12 months of employment. Reliance for that proposition was placed on the Full Bench decisions in *Zappia v Universal Music Australia Pty Ltd (2012) 225 IR 122 (Zappia)* and *Low Latency Media Pty Ltd v Rossi* [2023] FWCFB 14 (*Rossi*). In the former matter, the Bench was considering, amongst other things, whether the first instance decision-maker had erred by concluding that the amount that constituted the annual rate of earnings was the quantum of the employee's annual salary at the time of the termination of his employment rather than the amount that the appellant had actually earned in the 12 months prior to his dismissal. The former amount in that case was higher than the latter. The Bench concluded:

> *It is clear that the time at which the annual rate of earnings must be ascertained is at the time of the termination of the person's employment. What needs to be ascertained is the annual rate of earnings **at** that time, not the annual earnings **to** that time (the amount earned in the 12 months to that time).*[13](original emphasis)

[18] In *Rossi*, the Appellant sought to argue on appeal that a salary amount above the high income threshold that the Respondent was paid for a period during his employment, but that he was not actually being paid at the point he was dismissed, was to be included in the sum of his annual earnings for the purposes of s.382(b)(iii) of the Act. They argued that the reduction to the Respondent's salary to an amount below the high income threshold, was not effective at law because of mutual mistake and that at all times, the Respondent was entitled to be paid at the higher rate. In construing the terms of s.382(b)(iii) the Bench said at [102]:

> *The phrase "sum of the person's annual rate of earnings" is a composite expression with a broader meaning than the annual earnings of the person who has been dismissed. That the phrase is broader than annual earnings simpliciter is also apparent from the definition of earnings in ss.332 and 333. Firstly, the definition in s.332(1) is inclusive and non-prescriptive in comparison with the exclusions in s. 332(2). The framing of the exclusion in s.332(2)(a) is restricted to payments that cannot be determined in advance. These matters indicate that the sum of the annual rate of earnings is not limited to amounts that are actually paid to the employee at the time of the dismissal and the expression is broad enough to encompass amounts to which the employee is entitled. However, the chapeau to the section makes clear that relevant amounts must be calculated with reference to the time of the dismissal. This indicates that before an amount that has not been paid at the point of dismissal can be included in the sum of the employee's earnings for the purposes of s.382(b)(iii), the amount must be one to which the employee is entitled at that point.*

[19] Further, the Respondent referred to decisions where it had been concluded that a period of unpaid leave did not affect or reduce the annual rate of earnings referred to in s.382[14]

[20] The above decisions, in particular *Zappia*, establish that it is the employee's annual rate of earnings at the time of termination that is the relevant figure, and not the amount actually received by the employee in the previous 12 months of employment. It is therefore not simply a matter of calculating what has been received by the Applicant in the 12 months preceding the date of dismissal and assessing whether that amount exceeds the threshold. Rather the question here is whether the sum of the annual rate of earnings at the point of dismissal is constituted by the amounts received under the salary continuance arrangement or whether it is determined by reference to the amounts to which the Applicant was entitled under the Employment Contract and Remuneration Policy. In my view it is the latter.

[21] Indisputably, the amount payable to the Applicant under the Employment Contract and Remuneration Policy was not the amount that he was receiving at the point of termination. However, as *Rossi* makes plain, the fact that an amount is not being paid at the point of dismissal does not necessarily mean that it is not to be taken into account as part of the sum of the annual rate of earnings. Consideration must be given to whether the amount in question is an amount to which the employee is entitled to receive. The amounts which the Applicant is entitled to receive are derived from the Employment Contract and the Remuneration Policy.

[22] In circumstances where an employee has exhausted paid leave entitlements and is and has been on a period of leave without pay at the point of termination which has exceeded 12-months, I think it is unlikely that it could be the case that because the employee was not receiving any payments from the employer, the annual rate of earnings of the employee was zero. *Tresize* at least, points against such an outcome and *Zappia* confirms it is not simply an exercise in adding up the earnings actually received.

[23] In this case, the employee has received payments. The employer has insured its employees against lost earning capacity in certain circumstances. The claim has been accepted and the payments are being made. The Applicant argued in effect that his annual rate of earnings was therefore no longer what the Employment Contract provided for in ordinary circumstances but rather what it provides for in situations of extended absences for specified reasons. However, there is no unqualified right arising from the Employment Contract for the employee to receive these amounts. The payment of the benefit arises from the policy and is subject to acceptance by the insurance provider.[15] The payments themselves are made by the insurer, not the Respondent. What the Employment Contract provides for is income insurance coverage the cost of which for the employer is the cost of the premiums paid. That may be a benefit for the purposes of Regulation 3.05(6).

[24] In that situation I am of the view that the ascertainment of the sum of the annual *rate* of earnings is determined by reference to the underlying payments and benefits to which the employee was entitled under the Employment Contract and Remuneration Policy even though those amounts were not actually being paid. I therefore turn to consider the various amounts provided for in those documents to determine the sum of the annual rate of earnings.

Base salary

[25] It was not in issue that the Applicant's base salary under the terms of Employment Contract and the Remuneration Policy at the time of termination was $163,794. I conclude that this amount may be regarded as 'wages' within the meaning of s.332(1)(a) of the Act and therefore constitute 'earnings' for the purposes of that section.

Site allowance

[26] The evidence establishes that the Applicant's site allowance of $20,000 per annum was non-discretionary and payable to the Applicant under the Employment Contract and Remuneration Policy for meeting agreed conditions that the Applicant was a permanent employee who worked at Murrin Murrin Mine Site on a FIFO or DIDO roster[16]. The site allowance forms part of the Applicant's ordinary time earnings for superannuation purposes and was payable to the Applicant during annual leave[17]. In these circumstances I consider that the site allowance should be regarded as part of the Applicant's wages and included as the employee's earnings for the purpose of s.332(1). That is consistent with the approach taken by Deputy President Gooley in *Ferguson v MacMahon Contractors Pty Ltd*[18].

Medical allowance

[27] Under the Remuneration Policy, the medical allowance is paid on a monthly basis upon production of a current private health insurance policy, and forms part of an employee's total remuneration for superannuation purposes[19]. The medical allowance was paid directly to the Applicant, who had sole control over how this payment could be used[20]. I am of the view that the medical allowance is properly to be regarded as part of the Applicant's wages and included as the employee's earnings for the purpose of s.332(1). A similar result followed in *Barnes v. Appian Software Australia Pty Ltd*[21] although it does not appear that the point was argued.

Superannuation

[28] The Applicant's compulsory superannuation contribution is excluded from his earnings under sections 332(2)(c) and 332(4) of the Act. However, the additional 3% superannuation employer contribution of $5,663.88 does not fall within a compulsory superannuation contribution under section 332(4) of the Act. It forms part of the Applicant's annual rate of earnings[22].

Conclusion

[29] I conclude that the sum of the Applicant's annual rate of earnings is the sum of each of the amounts referred to in paragraphs [24] to [27] above. This amount is $194,457.82. In that situation it is unnecessary for me to assess or express a concluded view as to whether the cost of Salary Continuance insurance premiums should also be taken into account under Regulation 3.05(6). I simply note that similar payments were included at first instance in *Zappia*[23] and the ultimate conclusion was not disturbed on appeal.

[30] The amount exceeds the high income threshold and the Applicant is not protected from unfair dismissal.

[31] The application for a remedy for unfair dismissal is dismissed.

DEPUTY PRESIDENT

Appearances:

Mr Murray Hobson, Applicant

Ms Anna Casellas, Solicitor for the Respondent

Hearing details: 15 January 2025 via Microsoft Teams

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[1] Exhibit R1 at [2].

[2] Ibid.

[3] Ibid at [3].

[4] Ibid at [18].

[5] Ibid at [10].

[6] Ibid.

[7] Ibid at [4]

[8] Ibid at [5].

[9] Ibid at [6].

[10] Ibid at [8].

[11] Submissions paragraph [34].

[12] *Rofin Australia Pty Ltd v. Newton* (1997) 78 IR 78 at 81

[13] Ibid at [9]

[14] *Trezise v Universal Music Australia Pty Ltd* [2011] FWA 5960, [12]; *Bolland v Solgen Energy Pty Ltd* [2020] FWC 5005, [19].

[15] R1 Annexure EC1 at 10.1.

[16] Ibid at [14].

[17] Ibid at [15]

[18] [2015] FWC 1294

[19] R1 Op cit at [16].

[20] Ibid at [17].

[21] [2019] FWC 7526.

[22] *Zappia v Universal Music Australia Pty Ltd (2012) 225 IR 122 at 124-125.*

[23] Op cit at paragraph [6].