DECISION

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

Mrs Jacqueline Taylor
v
Classic Sports Industries Pty Ltd
(U2024/14382)

DEPUTY PRESIDENT SLEVIN SYDNEY, 17 FEBRUARY 2025

Application for an unfair dismissal remedy – whether dismissal was genuine redundancy. Dismissal not genuine redundancy. Dismissal Unfair. Compensation awarded.

[1] Ms Jacqueline Taylor has applied under section 394 of the *Fair Work Act 2009* (the Act) for an unfair dismissal remedy. Her former employer, the respondent to the application, Classic Sports Industries Pty Ltd (Classic Sports) contends that Ms Taylor was not unfairly dismissed as her dismissal was a case of genuine redundancy.

[2] I find that the dismissal does not meet the description of genuine redundancy in s 389 of the Act and that Ms Taylor's dismissal was harsh, unjust or unreasonable. I will order Classic Sports pay Ms Taylor compensation in the sum of $23,586.58. These are my reasons.

[3] The application was heard by way of conference and Ms Taylor represented herself. Classic Sports was represented by Mr Ross Smart, Chief Executive Officer.

When can the Commission order a remedy for unfair dismissal?

[4] Section 390 of the Act provides that the Commission may order a person's reinstatement, or the payment of compensation to a person in lieu of reinstatement if satisfied that the person was protected from unfair dismissal and the person has been unfairly dismissed. Section 385 provides that a person has been unfairly dismissed if the Commission is satisfied of four matters: the person has been dismissed; the dismissal was harsh, unjust or unreasonable; the dismissal was not consistent with the Small Business Fair Dismissal Code; and the dismissal was not a case of genuine redundancy.

[5] There was no question that Ms Taylor was dismissed, and the respondent does not claim that it is a small business to which the code applies. In this case the questions for determination under s 385 are first whether the dismissal was a case of genuine redundancy and second whether it was harsh, unjust or unreasonable.

Background

[6] Ms Taylor was employed on 5 December 2023 as a Co-ordinator – Elite Process and Timelines. Ms Taylor was full time employee, working 38 hours per week and paid an annual salary of $100,000 plus superannuation. At 2.00 pm on 25 November 2024, Ms Taylor was called to a meeting with Mr Smart. Ms Taylor was told that the business had been undergoing a review of its operations for some months. Ms Taylor was told that as a result of the review her role had been made redundant and that her employment would end. Mr Taylor responded that the decision came as a shock and explained that it would have an impact on her personally and professionally. Ms Taylor was told her employment would end the following day, 26 November 2024. She was paid one week in lieu of notice and her accrued annual leave entitlement. Mr Taylor's account of the meeting included that he told Ms Taylor that she could respond to the decision in writing if she wished. The meeting ended at 2.20 pm.

[7] At the meeting Ms Taylor was handed a letter. The letter informed Ms Taylor that her position was being made redundant due to organisational changes. It said the decision was made after restructuring. It stated there were no suitable alternative positions available within Classic Sports or its related entities for Ms Taylor to be redeployed to. The letter confirmed that Ms Taylor's employment would terminate on November 26, 2024 and she would not be required to work out her notice period and would be paid in lieu of notice. It stated that Ms Taylor would receive one week's notice pay and her accrued but unused annual leave but no redundancy pay was provided as her service was less than one year.

[8] In an exchange with Mr Smart via text message on 26 November 2024 Ms Taylor challenged her final pay asserting that she was also due 4 weeks pay for redundancy. Mr Smart responded to the effect that as the employment ceased on 26 November 2024 and Ms Taylor had commenced on 5 December 2023, she had not served 12 months and so was not entitled to redundancy pay.

[9] During the proceedings Mr Smart described the restructure of the business stating the redundancy was due to operational requirements as Ms Taylor's role was no longer required. Ms. Taylor identified new roles that had been created as roles that she may have been suitable for. Mr Smart responded that the two new roles were created, advertised, recruited and appointed in a process which commenced in July 2024, and concluded with offers of employment in mid-November 2024, prior to the time the decision to make Ms Taylor's role redundant. The first of the two roles was National Teamwear Manager. The role was advertised in July 2024 by way of internal expression of interest. After a satisfactory candidate was not found, the position was advertised externally in September and October 2024. Interviews were conducted on 31 October and 1 November and the role was offered to an external candidate, and accepted, on Monday 18 November 2024. The appointee commenced on Monday 2 December. The second role, Regional Account Manager – NSW Metro South, was first advertised in late September 2024. Interviews were conducted on Wednesday 6 November. The role was offered to the successful candidate on Friday 15 November and accepted on Monday 18 November. The successful candidate commenced employment on Monday 9 December. At no point did the Applicant participate in, nor show any interest in, these roles.

[10] Ms Taylor said that if she had known that the restructure would affect her job she would have applied for the National Teamwear Manager role.

Consideration

Was the dismissal a genuine redundancy?

[11] The first question is whether the dismissal was a genuine redundancy for the purposes of s 385 of the Act. Genuine redundancy is defined in s 389(1). A person's dismissal is a case of genuine redundancy if the employer no longer wants the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise and the employer has complied with any obligation in a modern award or enterprise agreement to consult about the redundancy. Subsection 389(2) provides that a dismissal is not a genuine redundancy if it would have been reasonable to redeploy the person in the business or an associated entity of the business.

[12] Classic Sports submitted, and I agree, that the evidence demonstrated that the employer no longer wanted Ms Taylor's job to be performed by anyone because of changes in the operational requirements of the enterprise. Classic Sports contends that Ms Taylor's role was not covered by an Award or enterprise agreement and so there was no obligation that was required to be followed. Ms Taylor did not contend that this was not the case.

[13] While I note the parties held the view at the time Ms Taylor commenced employment that an Award did not cover the employment, parties cannot contract out of an Award. A modern award covers an employer or employee if the award is expressed to cover them.[1] Determining this involves the consideration of two questions:

a) first, a legal question concerning the proper construction of the award's coverage clause (and any other relevant provisions of the award); and
b) second, a factual question as to whether the employer and employees fall within the scope of the coverage clause, properly construed.[2]

[14] This matter was raised with the parties during the proceedings and an opportunity was given to provide further submissions on the question of award coverage. In particular, whether the *Clerks – Private Sector Award 2020* (Clerks Award) covered Ms Taylor's employment. Ms Taylor contended that it did. Classic Sports submitted that it did not. Classic Sports submits that any clerical duties performed by Ms Taylor were incidental to her primary role of overseeing client timelines and ensuring customers were accountable.

[15] The Clerks Award is an occupational award. Clause 4.1 of the Award provides that it covers private sector employees who are wholly or principally engaged in clerical work. Clerical work is defined in clause 2 in this way:

> **clerical work** includes recording, typing, calculating, invoicing, billing, charging, checking, receiving and answering calls, cash handling, operating a telephone switchboard, attending a reception desk and administrative duties of a clerical nature.

[16] Clause 3 of Ms Taylor's contract of employment describes her duties in this way:

> Your position is Coordinator - Elite Process & Timelines reporting to Warren Carney – Managing Director or such further or other person(s) as directed by Classic Sportswear from time to time.
>
> 3.1. Your initial duties, responsibilities and performance targets are described in the Position
> Description attached to this agreement at Schedule 1 and forms part of the agreement. This is
> not an exhaustive list. From time to time you will be required to perform other tasks.
>
> 3.2. Classic Sportswear may vary or change your position, duties and responsibilities as it considers necessary from time after consultation with you. Such alteration may be permanent or temporary, in whole or in part. Notwithstanding any change, this agreement shall continue to
> apply. For the avoidance of doubt, all variations to the role performed by you will be taken to
> have the effect of expressly affirming the terms of this agreement, and you and Classic Sportswear specifically agree that the terms of this agreement will continue to apply to our relationship notwithstanding such a change.

[17] While clause 3.1 refers to a position description, there was none. In September 2024 Ms Taylor was asked to provide a draft position description to Mr Smart. The draft position description had the title Coordinator – Elite Process and Timelines. The list of duties was in the following terms:

- Keeping track on the process of pro clubs and super rugby clubs – keeping KC and Clubs accountable for their required actions and submissions.
- Shark Tank Invoices
- Shark Tank orders for pro clubs
- Shark Tank orders for super rugby
- Team wear orders
- Customer orders
- Customer queries
- Investigating orders and missing orders
- Accounts receivable – chasing money
- Drafting documents for distribution to clubs
- SSFA (this one is a big account and I assist Warren with it)

[18] The reference to Warren in the last dot point is a reference to Mr Carney, the Managing Director.

[19] Ms Taylor also explained the work she performed. Classic Sports has 12 key contracts to supply sportswear to a number of professional sports clubs including six clubs with teams playing in the National Rugby League competition, 5 clubs with teams playing in the Super Rugby competition and a contract with the Australian Rugby League to provided sportswear to representative teams. Ms Taylor was familiar with each of the contracts. They were described as contracts which set out the customers' needs for sportswear, and the manner in which Classic Sports would meet those needs through orders, the timeframes in which those orders were to be made and when the sportwear was to be provided. The timelines for supplying the sportswear

presented some logistical challenges for Classic Sports and required monitoring of customers to ensure orders were made at times that would ensure the product could be supplied in accordance with the contractual obligations. Ms Taylor's job was to monitor the orders to ensure that timelines were met. This required familiarity with the contracts, liaison with others within Classic Sports who had responsibility for dealing directly with the clubs, and from time to time liaising directly with clubs.

[20] Based on the draft job description and the account Ms Taylor gave of her role, I find that Ms Taylor's work fits within the definition of clerical work in the Award. This is because her work included; monitoring and recording the progress of customer orders, ensuring the timeframes associated with contracts were met, invoicing and dealing with orders and billing, and performing other administrative duties of a clerical nature.

[21] Classic Sports also contended that the classifications in the Clerks Award do not match the work done by Ms Taylor, which it contended was a senior role. The classification structure in Schedule A of the Award provides for 5 levels which are described by reference to indicative skills and duties. Clause A1.3 of the Schedule states that the lists of typical duties and skills listed at each level are non-exhaustive and provide an indicative guide only. At the most senior level, the list of typical duties and skills in the Award reads:

> **A.7 Level 5**
>
> **A.7.1 Characteristics**
>
> (a) Employees at this level are subject to broad guidance or direction and would report to more senior staff as required.
>
> (b) Employees at this level will typically have worked or studied in a relevant field and will have achieved a standard of relevant or specialist knowledge and experience sufficient to enable them to advise on a range of activities and features and contribute, as required, to the determination of objectives, with the relevant field or fields of their expertise.
>
> (c) Employees at this level are responsible for their own work and may have delegated responsibility for the work under their control or supervision including scheduling workloads, resolving operations problems, monitoring the quality of work produced and counselling staff for performance and work related matters:
>
> (d) Employees at this level would also be able to:
>
> (i) train and supervise employees in lower levels by means of personal instruction and demonstration; and
> (ii) assist in the delivery of training courses.
>
> (e) Employees at this level would often exercise initiative, discretion and judgment in the performance of their duties.
>
> (f) Employees at this level may possess relevant post-secondary qualifications. However, this is not essential.

A.7.2 Typical duties and skills required

Indicative typical duties and skills at this level may include:

[1] Application of knowledge of organisation's objectives, performance, projected areas of growth, product trends and general industry conditions;
[2] application of computer software packages including the integration of complex word processing and desktop publishing, text and data documents;
[3] providing reports for management in any or all of the following areas:
(i) accounts and finances; and
(ii) staffing; and
(iii) legislative requirements; and
(iv) other company activities;
[4] administering individual executive salary packages, travel expenses, allowances and company transport; administering salary and payroll requirements of the organisation.

[22] The description of the work performed by Ms Taylor and contained in the position description accords with the descriptions of the characteristics and typical duties and skills required for Level 5 classification in the Clerks Award. Her role included the following characteristics.

- She was subject to broad guidance or direction and would report to the Chief Executive Officer and General Manager.
- She held specialist knowledge and experience in relation to the contracts she was managing to enable her to advise on a range of activities and features and contribute, as required, to the determination of objectives under those contracts.
- She was responsible for monitoring the timelines in the contracts and was responsible for her work including scheduling workloads, resolving problems, monitoring the quality of work produced.
- She often exercised initiative, discretion and judgment in the performance of their duties.

[23] Her duties included:

- Application of knowledge of organisation's objectives, performance, projected areas of growth, product trends and general industry conditions.
- Application of computer software packages including word processing and desktop publishing, text and data documents.
- Providing reports for management on accounts and finances; and other company activities.

[24] I do not agree with Classis Sports' characterisation of those duties being in excess of the duties performed under the Award. I find that the Clerks Award applied to Ms Taylor's employment.

[25] Clause 38 of the Clerks Award requires employers to consult employees about major workplace change, including changes in structure that are likely to have significant effects on employees. Significant effects include termination of employment and job restructuring. Consequently, clause 38 imposed an obligation on Classic Sports to consult Ms Taylor about the restructure that resulted in her losing her job. The obligations included giving Ms Taylor

notice of the changes and discussing with her the introduction of change, the likely effect on her and measures to avoid or reduce the adverse effects of the change. Those discussions should have commenced as soon as practicable after a definite decision to restructure had been made. The clause required Classic Sports to give Ms Taylor information in writing about the change. In discussions about the change, Ms Taylor should have been given the opportunity to raise matters about the changes and Classic Sports was required to respond to those matters promptly.

[26] Mr Smart described the business as being in a constant state of change as it sought to improve the business. He provided emails where employees were advised of the changes and described the creation of a committee responsible for identifying improvements in the business. The evidence however describes this process in generalities. It does not indicate that when decisions were made that had a direct impact on Ms Taylor's employment there was any consultation with Ms Taylor about those decisions. The evidence was that Ms Taylor found out that her position was being made redundant on the same day that she was dismissed. In those circumstances there can be no suggestion that the requirements in clause 38 were met.

[27] Section 389(2) also provides that a dismissal will not be a genuine redundancy if it would be reasonable in all of the circumstances for the person to be redeployed within the employer's enterprise or the enterprise of an associated entity of the employer.

[28] In *Helensburgh Coal Pty Ltd v Bartley* [2021] FWCFB 2871 at [8], the Full Bench adopted the following description of the principles concerning redeployment as follows:

> (1) The exclusion in s.389(2) poses a hypothetical question which must be answered by reference to all of the relevant circumstances.
>
> (2) The question is concerned with circumstances which pertained at the time of the dismissal.
>
> (3) In order to conclude that it would have been reasonable to redeploy the dismissed person, the Commission must find, on the balance of probabilities, that there was a job or a position or other work within the employer's enterprise (or that of an associated entity) to which it would have been reasonable in all the circumstances to redeploy the dismissed employee.
>
> (4) A number of matters are capable of being relevant in answering the question, including the nature of any available position, the qualifications required to perform the job, the employee's skills, qualifications and experience, the location of the job and the remuneration which it offered.

[29] In this case the circumstances were that the redundancy of Ms Taylor's role was part of an ongoing review of Classic Sports' operations that had gone on for some months. Two new roles were created during this period. They were created as part of the review. They were created, advertised, recruited and appointed in a process that commenced in July 2024 with appointments being made on 18 November 2024. They were the Regional Account Manager – NSW Metro South and National Teamwear Manager roles. Ms Taylor was not made aware that there was a restructure that would affect her. There had been no consultation with her and no suggestion that her role would be made redundant. Ms Taylor was qualified to perform at least the Regional Account Manager – NSW Metro South role. She did not apply for the role because

she did not know that her position was to be made redundant. She said that she could perform the role as she had been assisting in a related role for some months. She was not told that would be the case until 24 November 2024. a week after the appointments to the new roles were made. I note that the person appointed did not take up the role until 2 December 2024, a week after Ms Taylor was dismissed.

[30] Mr Smart contended that because an offer was made to someone else on 18 November 2024 the role was not available at the time Ms Taylor's position was made redundant. Mr Smart accepted that there had been internal discussions about making Ms Taylor's role redundant prior to 24 November 2024. The decision was not made the same day of the dismissal. Calculations prepared for Ms Taylor's termination pay were prepared on 21 November 2024. Mr Smart said he had been considering making Ms Taylor's role redundant in the weeks prior to that. Mr Smart also said that during the review other employees were encouraged and did take up new roles within the business.

[31] I find that given the timing of the recruitment process it would have been reasonable in all of the circumstances to redeploy Ms Taylor into the Regional Account Manager – NSW Metro South role.

[32] Given my findings above that the Clerks Award applied and Ms Taylor was not consulted about her role being made redundant and that she could have been redeployed to another role, I reject the proposition that Ms Taylor's dismissal was a case of genuine redundancy.

Was the dismissal harsh, unjust or unreasonable?

[33] As the dismissal was not a case of genuine redundancy, it is left to consider whether the dismissal was harsh, unjust or unreasonable. In considering that question I must take into account the matters set out in s 387 of the Act.

[34] Ms Taylor was dismissed for operational reasons. The dismissal was not a reflection on her conduct or performance. Consequently, s 387(a), going to whether there was a valid reason for the dismissal related to capacity or conduct, is not relevant. Similarly, s 387(b), which goes to whether the employee was notified of the valid reason related to capacity or conduct, is not relevant. Subsection 387(c) and (d), going to whether the employee was given an opportunity to respond to the reason and was permitted to have a support person, is also not relevant. Section 387(e) goes to warnings about unsatisfactory performance and is also not relevant here. Section 387(f) goes to the size of the enterprise. Because Classic Sports had 19 employees at the time of Ms Taylor' dismissal, I do not find this to be a relevant factor.

[35] Section 387(g) goes to whether dedicated human resource management specialists or expertise would likely impact on the procedures followed in effecting the dismissal. Classic Sports did not have dedicated human resource specialists. If it did e, I expect it would not have taken the course that it did and would have complied with its obligations to consult and/or redeploy Ms Taylor into the new role. I find this to be a factor in favour of a finding that the dismissal was harsh, unjust or unreasonable.

[36] Section 386(h) requires that I consider other relevant matters. I consider it is relevant that the decision to dismiss was made without giving Ms Taylor information about the restructure and the opportunity to discuss whether she could fill one of the new roles under the new arrangements.

[37] In this case there was scope for some accommodation of Ms Taylor in the new structure by offering her a new role. Mr Smart focussed on the suitability of the candidates chosen for the roles. No doubt the candidates who took the roles were well suited, however Ms Taylor as an existing employee should have been given the opportunity to take on the role. Mr Smart said he did not believe Ms Taylor was the best candidate for the role that she nominated as the role she would have applied for, Regional Account Manager – NSW Metro South, and doubted that the work she had done assisting in a similar role made her a better candidate for the role than the person selected. That is beside the point. It was unfair on Ms Taylor to not let her know her position was in jeopardy and thereby deprive her of the opportunity to make a case for being redeployed into the new role. While the decision that her position would be made redundant may not have been in contemplation at the commencement of the recruitment process for the new role, it certainly was before the successful candidate was offered the position in the week before Ms Taylor was dismissed. It was unreasonable to not give Ms Taylor the opportunity to consider taking up the role before she was dismissed.

[38] For these reasons I am satisfied that Ms Taylor's dismissal was harsh, unjust or unreasonable.

[39] In all of the circumstances, I am satisfied that Ms Taylor was unfairly dismissed within the meaning of s 385 of the Act.

Remedy

[40] Ms Taylor did not seek reinstatement. Reinstating Ms Taylor either to her former position or another position would not be appropriate in these circumstances as it would likely result in displacing another employee. Consequently, I am satisfied that reinstatement is inappropriate. Ms Taylor seeks compensation. I am satisfied that it is appropriate to make an order for payment of compensation in lieu of reinstatement.

[41] Section 392(2) of the Act requires all of the circumstances of the case be taken into account when determining an amount to be paid as compensation in lieu of reinstatement. I find the following circumstances relevant to an order for compensation. Ms Taylor was dismissed because her position was made redundant; she was not consulted about redundancy; she was denied the opportunity to have input into any of the decisions made leading to the restructure; she was not provided with information about the restructure. I also find that there was scope for Ms Taylor to be accommodated in the new structure. Despite the misgivings of Mr Smart, which I consider could have been resolved, Ms Taylor may still be working for Classic Sports today.

[42] Subsection 392(2) of the Act also directs me to specific matters which are listed in paragraphs 392(2)(a) to (g). In relation to paragraph (a) nothing was put that an order for compensation would affect the viability of Classic Sports' enterprise. For the purposes of paragraph (b) I note that Ms Taylor had only worked for Classic Sports for around 12 months. For paragraph (c) which refers to the remuneration Ms Taylor would have earned if she had not

been dismissed, this requires some speculation, but I consider that Ms Taylor would still be working in the new role at a similar salary to her salary at the time of dismissal had she been given the opportunity to do so. As to mitigation which is mentioned in section 392(2)(d) of the Act, Ms Taylor has been trying to find other work but has been unsuccessful. Regarding paragraphs (e) and (f), Ms Taylor has not earned remuneration since the dismissal and is unlikely to have any earnings from the time of any order for compensation and the payment of the compensation.

[43] The well-established approach[3] to the assessment of the quantum of compensation under s 392 of the Act is to apply the "Sprigg formula" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket*.[4]

[44] 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.

[45] Applying this formula, the remuneration lost to the time of this decision was 11 weeks' pay or $21,153.88 and superannuation at 11.5% of $2,432.70 giving a total of $23,586.58. There is no reason to make a reduction in the amount for contingencies. Taxation matters can be dealt with in accordance with the relevant taxation laws. No reduction is necessary on account of misconduct by Ms Taylor under s 292(3), as there was no misconduct.

Conclusion

[46] For the reasons outlined, I consider that Ms Taylor was unfairly dismissed and a payment of $23,586.58 from Classic Sports to Ms Taylor as compensation in lieu of reinstatement is an appropriate remedy.

[47] An order requiring payment in this amount within 21 days of this decision will issue separately.

DEPUTY PRESIDENT

Appearances:

Applicant: Ms Jacqueline Taylor

Respondent: Mr Ross Smart

Hearing details:

Sydney

24 January 2025

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[1] FW Act s48(1)

[2] *Gourabi v Westgate Medical Centre* [2019] FWCFB 3874

[3] See *Bowden v Ottrey Homes Cobram and District Retirement Villages* [2013] FWCFB 431 and *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206.

[4] (1998) 88 IR 21.