DECISION

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

Mr Wayne Merry
v
Swisstec Investment Holdings
(U2024/4032)

DEPUTY PRESIDENT MASSON MELBOURNE, 8 JANUARY 2025

Application for an unfair dismissal remedy

Application for an unfair dismissal remedy – jurisdictional objections raised – whether Applicant dismissed – whether dismissal consistent with Small Business Fair Dismissal Code - jurisdictional objections dismissed – dismissal found to be unfair – reinstatement not appropriate - compensation ordered.

Introduction

[1] This decision concerns an application made by Mr Wayne Merry (the Applicant) for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009* (the Act). The Applicant who was employed by Swisstec Investment Holdings (the Respondent) alleges he was dismissed on 19 March 2024. The unfair dismissal application was lodged by the Applicant on 8 April 2024.

[2] On 16 May 2024, the Respondent filed its Form F3 response to the unfair dismissal application in which it raised a jurisdictional objection to the application, that being the Applicant was not dismissed.

[3] The matter was listed for a conciliation conference before a staff member of the Commission on 21 May 2024 during the course of which a settlement agreement was reached between the parties. The staff member sent a letter to the parties that same day recording that an agreement had been reached to settle the matter and summarised the agreed terms. The Applicant subsequently wrote to the Commission on 12 July 2024 requesting a reopening of the matter because of the alleged failure of the Respondent to comply with the terms of the settlement agreement.

[4] On allocation of the matter to my chambers, a Mention was conducted on 5 September 2024 during which the Respondent confirmed that it had not made all of the payments to the Applicant that it had agreed to do under the settlement agreement and nor would it be doing so. That was the Respondent said, because of alleged breaches of the settlement agreement by the Applicant. I am satisfied that as the payment terms of the settlement agreement have not been

complied with, clause 9 of the settlement agreement which deals with the agreed Release does not operate to prevent the Applicant from pursuing his unfair dismissal application. It also became apparent to me during the Mention that the dispute between the parties over alleged breaches of the settlement agreement was unlikely to be resolved. The substantive unfair dismissal application was then listed for formal determination on 6 November 2024, with directions issued for the filing of material.

[5] Both parties filed material in advance of the determinative conference/hearing on 6 November 2024 in accordance with directions issued. The Applicant appeared and gave evidence and also called two former directors of the Respondent to give evidence, Mr Craig Peppin and Mr Constantine Livissionos. Mr Costa Pouzoulis (the Respondent's Chief Executive Officer) appeared for the Respondent and also gave evidence.

Background and evidence

[6] The Applicant joined the Board of the Respondent in mid-2020 which was then in the start-up phase of the business. As a result of a Board resolution put forward by Mr Pouzoulis on 9 December 2022[1] and which was passed by the Board at a meeting on 15 December 2022[2], offers of employment were made to several people including the Applicant[3]. The Applicant's contract of employment provided for his appointment to the position of Executive Director for a two year 'provisional fixed term' on a Base Salary of $10,500 per month plus superannuation.

[7] After his above-referred engagement as an Executive Director at the start of 2023, the Applicant initially discharged the responsibilities of CFO. He relinquished the CFO duties in mid-2023 which then passed to an external account Mr Harry Papadopoulos. After that change in responsibilities the Applicant says he focussed on other areas of the business including IT.[4]

[8] On 26 May 2023, the Applicant sent an email[5] to the Respondent's admin officer to which was attached an expenses claim[6] and receipts[7].

[9] Consistent with his employment contract, the Applicant received monthly pays for January, February, March, April, May, June and August 2023[8]. He did not receive any salary payment after the August pay which he received on 5 September 2023.

[10] On 21 September 2023, the Applicant sent an email to the Board members expressing concern over the solvency of the business. He cited a number of concerns including the limited buffer between financial assets of the Respondent and its liabilities, the fact the Respondent was a month behind on its salary payments, unpaid PAYG and outstanding superannuation obligations. He estimated these matters would put the Respondent 'under water at least $100,000.'[9]

[11] On 10 October 2023, the Applicant resigned as a director of the Respondent. His resignation as a director followed the resignations of the Respondent's Data Scientist on 27 September 2023[10] and one of its other directors Stephen Johnson on 7 October 2023.[11] In resigning as a director of the Respondent, the Applicant said as follows;

> "Dear Costar,

> As per our discussion yesterday, I write to advise that I am resigning as of today from the Swisstec Investment Holdings board of directors and any subsidiaries that I am a director of.
>
> As you are aware, I am the managing director of Great Communities. As the role of Great Communities as a health promotion charity is increasing and it makes use of Swisstec solutions in meeting its charity objectives, it is important that I am not exposed to unnecessary conflicts of interest between Swisstec and Great Communities. Thank you for the opportunity of serving on these boards and I look forward to ongoing collaborations.
>
> Regards,"[12]

[12] Mr Pouzoulis states that it was his understanding that the Applicant's resignation on 10 October 2024 was in respect of both his role as a director and as an employee. He further states that he held discussions previously with the Applicant about him (the Applicant) 'moving on' to Greater Communities (GC) and that the Respondent sought to assist that transition.[13] Mr Pouzoulis also claimed that the Applicant was well aware of the Respondent's financial constraints at the time of his 10 October 2023 resignation.[14]

[13] The Applicant rejected that his 10 October 2023 resignation as a director of the Respondent also constituted his resignation as an employee[15]. He explained that an MOU was entered into between the Respondent and GC which required the Respondent to assist GC in the development of technology, particularly in respect of artificial intelligence (AI) and analytics, which the Respondent would then be able to exploit commercially[16]. He described the relationship as akin to a joint venture arrangement. He further confirmed that he was only a director of GC and that at no stage prior to his resignation from the Respondent on 19 March 2024 was he employed by GC.[17] The Applicant maintained that he remained employed by the Respondent after he stepped down as a director on 10 October 2023 and continued to work in the business.

[14] Mr Peppin who is a former Managing Director of the Respondent gave evidence that he was aware that the Applicant had stepped down as a director of the Respondent in October 2023 but was not aware that any person considered that the Applicant had resigned his employment as well. He went on to state that he (Mr Peppin) continued to work closely with the Applicant in October and November 2023, consistent with the Applicant remaining an employee of the Respondent at that time[18]. When cross-examined, Mr Peppin confirmed that the Applicant continued to work for the Respondent after 10 October 2023.[19] Mr Livissionos, another former director of the Respondent, confirmed that his understanding was the same as Mr Peppin. That is, the Applicant resigned as a director of the Respondent in October 2023 but remained an employee after that date and active in the business.[20]

[15] On 6 November 2023, the Applicant wrote to Mr Harry Papadopoulos regarding non-payment of his salary since August 2023 and also that he had not received reimbursement of his expenses claim submitted in May[21]. He sent a follow-up email to Mr Papadopoulos on 13 November 2023[22], submitted a further expenses claim on 14 November 2023[23] and sent follow-up emails to Mr Papadopoulos on 12 December 2023[24] and 31 January 2024[25] regarding his

unpaid salary and expenses. Following the Applicant's email to Mr Papadopoulos on 12 December 2024, Mr Papadopoulos responded in the following terms that same day;

> "Wayne, thanks for your message and I can assure you the matter is not being ignored. Have spoken to Costar and confirmed that the issue is being addressed.
>
> I believe Costar will be reaching out to you on another matter and will take the opportunity to discuss this further at the time."[26]

[16] Apart from Mr Papadopoulos' above email, the Applicant did not receive any further response from the Respondent in relation to his outstanding salary and expenses claims. Nor did he receive any further salary payments after his August 2023 pay or reimbursement of the claimed expenses prior to his resignation. When questioned on the above-referred email exchange between the Applicant and Mr Papadopoulos, Mr Pouzoulis was unable to point to any formal response to the Applicant clarifying that as of 10 October 2023 he had ceased to be an employee as now claimed in these proceedings by Mr Pouzoulis[27].

[17] On 26 February 2024, the Applicant sent an email to Mr Papadopoulos and Mr Pouzoulis in the following terms;

> "…….
>
> Noting Costar's verbal directions to me back in August last year to focus on Great Communities and to support Craig Peppin on the modular tech part of the business. The Great Community results have been:
>
> * positive Al hackathon results using the VAFA trial data from last year
>
> * the development of the precincts grant which it is anticipated that the stream 1 application will be submitted this week
>
> I have been informed that Craig Peppin has resigned, and the GC grant application is nearly finalised. I would like to know what the next steps that the Swisstec executive would wish me to focus on, especially given Craig's resignation means that there no further support to him that is required.
>
> ……."[28]

[18] On 19 March 2024, the Applicant sent further correspondence to Mr Papadopoulos and Mr Pouzoulis in which he notified them of his resignation in the following terms;

> "…….
>
> I note to my email on the 26th of February requesting what next steps the Swisstec executive would wish to focus on, and aside from Harry requesting Costar arrange a meeting to discuss the same. There has been no further response at this time.
>
> I also note that salary payment to me is more than 6 month in arrears and no business

expenses that I paid on behalf of the company have been settled. These circumstances do not permit me to provide for my family, and therefore it compels my resignation.

My resignation will be immediate, unless you are able to commit to paying me all of the outstanding payments plus the normal notice period of 4 weeks. Due to the circumstances, I would need to receive this commitment by close of business today, otherwise my resignation will be considered effective today.

I thank you for the opportunity to be involved with Swisstec and wish you all the best in the future. I also look forward to a timely settlement of the outstanding payments.

……..”[29]

Has the Applicant been dismissed?

[19] A threshold issue to be determined in this matter is whether the Applicant has been dismissed from his employment. The circumstances in which a person is taken to be “dismissed” are set out in s 386 of the Act. Section 386(1) relevantly provides as follows:

(1) A person has been dismissed if:

(a) the person’s employment with his or her employer has been terminated on the employer’s initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

[20] Section 386(2) of the Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[21] In *Bupa Aged Care Australia Pty Ltd t/a Bupa Aged Care Mosman v Shahin Tavassoli*[30] (Bupa), a Full Bench was dealing with an appeal of a decision in which the member at first instance found that the dismissal was within the meaning of s 386(1) and that the dismissal was unfair. The Full Bench identified there were two elements to s 386(1) and after extensively considering the authorities, said as follows;

“[47] Having regard to the above authorities and the bifurcation in the definition of “dismissal” established in s 386(1) of the FW Act, we consider that the position under the FW Act may be summarised as follows:

(1) There may be a dismissal within the first limb of the definition in s 386(1)(a) where, although the employee has given an ostensible communication of a resignation, the resignation is not legally effective because it was expressed in the “heat of the moment” or when the employee was in a state of emotional stress or mental confusion such that the employee could not reasonably be understood to be conveying a real intention to resign. Although “jostling” by the employer may contribute to the resignation being legally ineffective, employer conduct is not a necessary element. In this situation if the employer

simply treats the ostensible resignation as terminating the employment rather than clarifying or confirming with the employee after a reasonable time that the employee genuinely intended to resign, this may be characterised as a termination of the employment at the initiative of the employer.

(2) A resignation that is "forced" by conduct or a course of conduct on the part of the employer will be a dismissal within the second limb of the definition in s 386(1)(b). The test to be applied here is whether the employer engaged in the conduct with the intention of bringing the employment to an end or whether termination of the employment was the probable result of the employer's conduct such that the employee had no effective or real choice but to resign. Unlike the situation in (1), the requisite employer conduct is the essential element." (my emphasis added)

[22] The Applicant contends that he was dismissed within the meaning of the second limb of s 386(1), that being he resigned, but was forced to do so because of conduct or a course of conduct engaged in by the Respondent. It is to that I now turn.

Whether Applicant was dismissed within meaning of s 386(1)(b)

[23] The Applicant submits that his resignation was forced by a course of conduct of the Respondent in that it had failed to pay his salary after August 2023, it had failed to reimburse expenses he had incurred in conducting business for the Respondent and it had failed to provide him with directions regarding the duties he was required to perform. The Applicant refers to the numerous emails he sent to Mr Papadopoulos and Mr Pouzoulis regarding unpaid salary and expenses and to his email of 26 February 2024 in which he sought clarity on the tasks he was required to focus on. None of that communication from the Applicant elicited a response from the Respondent apart from Mr Papadopoulos' email reply on 12 December 2023 assuring the Applicant that his concerns of non-payment of salary and expenses were not being ignored. The Respondent rejects that there was in fact a resignation in March 2024 and cites the Applicant's earlier resignation in October 2024 as the point at which the Applicant ceased to have any salary entitlement. That argument by the Respondent must be rejected for the following reasons.

[24] The Applicant was a director of the Respondent following its 'start-up' in 2020. He also became an employee at the start of 2023 as a consequence of a resolution presented to the Board in December 2022 by Mr Pouzoulis. The resolution which was passed by the Board provided for contracts of employment to be offered to several employees including the Applicant. In the case of the Applicant, he was employed as an Executive Director and was entitled to receive a monthly salary of $10,500 which he did in fact receive up until August 2023, after which no further salary payments were made. As earlier stated, the Applicant resigned as a director of the Respondent on 10 October 2023 for the reasons set out in his email to Mr Pouzoulis on that day.

[25] The Respondent seeks to characterise the Applicant's 10 October 2023 resignation from the Respondent's Board as also being a resignation as an employee. It is not. The Applicant's roles of director and employee were separate and distinct, and his email of 10 October 2023 specifically referred to his resignation from the board of the Respondent only. The email made

no reference to him resigning his employment. Furthermore, the evidence of the Applicant, Mr Peppin and Mr Livissionos comfortably establishes that the Applicant continued to perform work for the Respondent after 10 October 2023. Mr Pouzoulis' evidence to the contrary is not accepted. Moreover, no steps were taken by Mr Pouzoulis to clarify his view of the Applicant's employment status after 10 October 2023 despite multiple emails from the Applicant regarding unpaid salary and expenses. In fact, Mr Papadopoulos assured the Applicant on 12 December 2023 that the Applicant's concerns over non-payment of salary and expenses were not being ignored. If it is true as Mr Pouzoulis now claims that the Applicant ceased his employment on 10 October 2023, it is striking that there is no evidence of any communication to the Applicant from the Respondent after that date clarifying that he had no salary entitlement after the 10 October 2023 by reason his 'resignation' both as a director and employee.

[26] It follows from the foregoing that I do not accept the Respondent's argument that the Applicant resigned his employment on 10 October 2024. Rather, he resigned his employment on 19 March 2024 following several months of non-payment of his contractual entitlement of a monthly salary of $10,500, non-payment of claimed expenses and no apparent direction on the tasks he was required to focus on. By any standard, the non-payment of salary for several months is conduct of an employer that is likely to leave an employee no choice but to resign. That the Applicant put up with that state of affairs for several months shows remarkable forbearance on his part and his apparent regard for the tenuous financial position of the Respondent.

[27] I accept that the Applicant was a shareholder of the Respondent, was also a former director, had an appreciation of the difficult financial position of the Respondent and that Mr Pouzoulis held a genuine desire to assist the Applicant transition to GC. That said, as of 19 March 2024, the Applicant was still an employee and had not been paid for several months. I accept that those circumstances 'forced' his resignation and while it may not have been deliberate conduct of the Respondent, I am satisfied that the Applicant's resignation was the probable result of the employer's conduct such that he had no effective or real choice but to resign. It follows that the Applicant was dismissed within the meaning of s 386(1) of the Act.

Initial matters

[28] Having found that the Applicant was dismissed with the meaning of s 386(1) of the Act, I am now obliged under section 396 of the Act, to decide the following matters before considering the merits of the application:

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

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

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

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

[29] Relevant to the determination of the preliminary matters I am satisfied that;

- the Applicant was dismissed on 19 March 2024 and filed his unfair dismissal application on 8 April 2024, that latter date being within 21 days of the date of his dismissal;

- the Applicant commenced employment with the Respondent on 1 January 2023 and at the time of his dismissal had been employed for a period of approximately 15 months, that period being more than the minimum employment period of twelve months in the case of a small business employer;

- the Applicant was employed on an annual salary of $126,000, which was less than the high-income threshold (HIT) at the time of his dismissal, that of $167,500; and

- the Applicant was not dismissed due to the Respondent no longer requiring the Applicant's job to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise.

[30] Having considered each of the initial matters, I am satisfied that the application was made within the required period in s 394(2), the Applicant was a person protected from unfair dismissal and the dismissal was not a genuine redundancy. However, at the time of the Applicant's dismissal the Respondent claims that it employed seven employees and was a small business employer within the meaning of s 23 of the Act. I am consequently required to determine whether the Respondent was a small business employer and if so whether the Applicant's dismissal was consistent with Small Business Fair Dismissal Code (the Code). It is to that I now turn.

Small Business Fair Dismissal Code

[31] It was uncontested and I accept that the Respondent had less than 15 employees at the time of the Applicant's dismissal taking into account associated entities. It follows that the Respondent was a small business employer (as defined in s 23 of the Act) for the purposes of s 388(1) of the Act. The Code declared by the Minister pursuant to s 388(1) of the Act applies to small business employers with less than 15 employees and relevantly provides as follows:

> "**Summary dismissal**
>
> It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.
>
> **Other dismissal**
>
> In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

> The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.
>
> The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.
>
> **Procedural matters**
>
> In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.
>
> A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements."

[32] I have found above that the Applicant was dismissed with effect on 19 March 2024 by the Respondent. The Respondent does not contend that the Applicant was dismissed within either the first or second limb of the Code in circumstances where it believed the Applicant resigned in October 2023 and that the Respondent was attempting to support him transition to GC. It follows from the Respondent's concession that the dismissal was not consistent with the Code. Having reached that conclusion, I must now turn to consider whether the dismissal was harsh, unjust or unreasonable.

Was the dismissal harsh, unjust, or unreasonable?

[33] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust, or unreasonable, the Commission must take into account:

> (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
>
> (b) whether the person was notified of that reason; and
>
> (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
>
> (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

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

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

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

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

[34] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded"[31] and should not be "capricious, fanciful, spiteful or prejudiced[32]." However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it were in the position of the employer[33].

[35] The Respondent submits that the Applicant failed to perform various requirements of the CFO role which left a 'lot of holes in the business'. Those shortcomings and the Applicant's passion for community health were said by the Respondent to have led to an agreed transition of the Applicant to GC. Accepting that the Respondent was keen to support the Applicant's transition to GC, there was no evidence on how and when that transition would occur. More fundamentally, there was no probative evidence led by the Respondent that indicated that at the time of the Applicant's dismissal in March 2024, the dismissal was for conduct or capacity reasons. For his part, the Applicant confirmed that he did not wish to continue performing the CFO role from mid-2023 onwards which led him to focus on other activities and resulted in Mr Papadopoulos being engaged to look after the financial requirements of the Respondent.

[36] There is no evidence before me that would establish there was a valid reason for the Applicant's dismissal. This weighs in favour of a finding that the dismissal was unfair

Notification of the valid reason – s 387(b)

[37] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[34] and in explicit[35], plain and clear terms[36].

[38] I have found that there was not a valid reason for the Applicant's dismissal. As such, the Applicant was not notified of a valid reason for his dismissal prior to the dismissal decision having been made. This weighs in favour of a finding that the dismissal was unfair.

Opportunity to respond to any reason related to capacity or conduct – s 387(c)

[39] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[37]

[40] The opportunity to respond does not require formality and the factor is to be applied in a common-sense way to ensure the employee is treated fairly.[38] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to the concern, this is enough to satisfy the requirements.[39]

[41] As the Applicant was forced to resign by the Respondent's conduct, the opportunity to respond to the reasons for dismissal was largely moot in the circumstances of this case. I therefore regard this as a neutral consideration.

Support person – s 387(d)

[42] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present. In the present circumstances, there was no meeting conducted prior to the dismissal so the opportunity for a support person to be requested by the Applicant present was entirely moot. This criterion is consequently a neutral consideration in the circumstances.

Warnings regarding unsatisfactory performance – s 387(e)

[43] The dismissal did not relate to unsatisfactory performance. This factor is therefore not relevant in the circumstances.

Impact of the size of the Respondent on procedures followed – s 387(f)

[44] The Respondent's *Form F3 - Employer Response* indicates that at the time of the Applicant's dismissal it employed 7 employees. There is no evidence before me, and nor did either party contend, that the Respondent organisation's size impacted on the procedures followed by it in dismissing the Applicant. This factor weighs neutrally in my consideration.

Impact of absence of dedicated human resources management specialist/expertise on procedures followed – s 387(g)

[45] The evidence in this matter indicates that the Respondent did not have access to the services of an in-house human resources specialist. This factor weighs neutrally in my consideration.

Other relevant matters – s 387(h)

[46] Neither party raised any other matters that are relevant to assessing whether the dismissal of the Applicant was unfair.

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

[47] I have made findings in relation to each matter specified in s 387 of the Act as relevant. I must consider and give due weight to each as a fundamental element in determining whether the termination was harsh, unjust, or unreasonable.[40]

[48] I have found that the Applicant's dismissal was not supported by a valid reason. This weighs in favour of a finding that the dismissal was unfair. The remaining matters weighed either neutrally or in favour of a conclusion that the dismissal was unfair. On balance I am satisfied that the dismissal was harsh, unjust and unreasonable.

Remedy

[49] Having found that the Applicant was unfairly dismissed I now turn to consider the question of remedy pursuant to section 390 of the Act. Significantly, under s 390(3) of the Act, I must not order the payment of compensation to the Applicant unless:

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

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

[50] Dealing firstly with whether reinstatement is inappropriate, the Applicant submits that reinstatement is not appropriate in circumstances where he claims to have been treated poorly by the Respondent over a period of time up to and including his dismissal. The Respondent agrees that reinstatement is inappropriate in the circumstances. I also note that the business employs a small number of employees. In all of these circumstances I consider that reinstatement is inappropriate.

[51] Having found that reinstatement is inappropriate, it does not automatically follow that a payment for compensation is appropriate. As noted by the Full Bench, "[t]he question whether to order a remedy in a case where a dismissal has been found to be unfair remains a discretionary one…"[41].

[52] The Applicant submits that payment of compensation is appropriate because he had been unfairly dismissed and has until recently been unable to secure alternate employment since his dismissal, whereas the Respondent argues that no compensation would be appropriate in circumstances where the Applicant was well aware of the Respondent's financial position and had resigned.

[53] Having found that the Applicant was unfairly dismissed and noting that the Applicant was until recently unemployed, in these circumstances, I consider that an order for payment of compensation is appropriate. There is nothing in the material filed by the Respondent in the substantive proceedings that persuades me that a payment of compensation would be inappropriate.

[54] Turning now to the question of compensation, s 392(2) of the 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.

[55] I consider all the circumstances of the case below.

Effect of the order on the viability of the Respondent's enterprise (s 392(2)(a))

[56] The Respondent submits that it is not a large employer and is confronting difficult financial conditions although there was a recent injection of funds into the business for software development.[42] While indicating that he was happy to disclose the Respondent's bank statements, the Respondent failed to file any evidence that would support a finding that an order for compensation would have an effect on the viability of the employer's enterprise. The Applicant while agreeing that he had held concerns over the financial solvency of the business when he sent a note to the Board on 21 September 2023 stated he was not in a position to comment on the current financial position of the Respondent.[43] Despite the stated concerns of the Applicant in September 2023, there is insufficient evidence before me to find that an order for compensation was likely to have an effect on the viability of the employer's enterprise.

Length of the Applicant's service (s 392(2)(b))

[57] The Applicant commenced employment with the Respondent on 1 January 2023 and was terminated on 19 March 2024, a period of some 15 months which was served as a permanent full-time employee. I consider that the Applicant's short length of service does not favour a significant award of compensation.

Remuneration likely to have been received by the Applicant but for his dismissal (s 392(2)(C))

[58] As stated by a majority of the Full Court of the Federal Court, "in determining the remuneration that the Applicant would have received, or would have been likely to receive… the Commission must address itself to the question whether, if the actual termination had not occurred, the employment would have been likely to continue, or would have been terminated at some time by another means. It is necessary for the Commission to make a finding of fact as to the likelihood of a further termination, in order to be able to assess the amount of remuneration the employee would have received, or would have been likely to receive, if there had not been the actual termination."[44]

[59] The Applicant was unable to say with any confidence how much longer he would have remained employed by the Respondent had he not been dismissed. He explained that his lack of confidence arose from the uncertainty of business decisions although some positive developments had occurred with respect to some projects that he had been working on, including the Specialist Direct platform and the 'AI Hackathon'. He did however acknowledge that his involvement with the Specialist Direct platform had declined and that the Respondent had not identified a meaningful role for him in the business.[45] He also accepted that he held concerns over the solvency of the business and that if the business made particular decisions not to pursue certain opportunities then he would not have had much of a role and his ongoing employment would have been limited.[46] Mr Pouzoulis indicated that there had been a recent cash injection for software development but did not point to any other business development opportunities that would have sustained the Applicant's employment.

[60] Neither the Applicant nor the Respondent were able to confidently estimate how much longer the Applicant would have remained employed but for his dismissal. That uncertainty appears to derive from the nature of the Respondent's business which looks to still be in the start-up and development stage, resulting in an uncertain financial position. In these circumstances I am unable to conclude that the Applicant would have remained employed by the Respondent for a significant period of time but for his dismissal. The Applicant himself conceded that point. In fact, I am drawn to a conclusion that in light of the uncertain state of the business, it is unlikely the Applicant would have remained employed for a period beyond 2 months. The Applicant's monthly salary was $10,500 therefore the anticipated earnings for that two-month period of continued employment is $21,000.

Applicant's efforts to mitigate his loss (s 392(2)(d))

[61] Turning to the Applicant's efforts to mitigate his losses, the Applicant must provide evidence that he has taken reasonable steps to minimise the impact of his dismissal[47] and what is reasonable depends on the circumstances of the case.[48] Despite submitting that he had made multiple job applications, the Applicant produced no evidence on the roles he had applied for or when such applications had been made. I am not satisfied on the evidence that the Applicant has taken reasonable steps to mitigate his loss. In these circumstances I intend to discount the amount of compensation that would be otherwise calculated by 25%.

Income earned by Applicant since dismissal (s 392(2)(e))

[62] The Applicant gave evidence that at the date of the hearing he had earned $14,000 from employment with GC which commenced in June 2024. He also confirmed that he had more recently commenced some consulting work, although no information on earnings from

consulting activities was provided. The income that the Applicant has earned since his dismissal falls outside the two-month anticipated period of employment period. As such no discount will be applied to the compensation otherwise calculated.

Income likely to be earned by Applicant (s 392(2)(f))

[63] As to the income likely to be earned in the period between the making of the order for compensation and the payment of compensation I am satisfied on the evidence of the Applicant that he is likely to earn some income from his employment with GC and from consulting work he is now undertaking. The period between the making of an order for compensation and payment of compensation also falls outside of the two-month anticipated period of employment following the Applicant's dismissal on 19 March 2024. Therefore, no deduction will be made for anticipated earnings.

Other relevant matters (s 392(2)(g))

[64] The Respondent submits that another relevant matter to be taken into account in assessing compensation is that the Respondent is currently preparing a legal case against the Applicant in which it will pursue damages from the Applicant arising from his actions. The fact that the Respondent may choose to pursue legal action against the Applicant in a different jurisdiction is a matter for the Respondent and is not a matter that bears upon the question of compensation now being considered by me. Such a case if it is pursued by the Respondent may have little or no merit or may be highly meritorious. That is not for me to speculate upon given the nature of the application being considered by the Respondent is entirely unclear to me. This matter raised by the Respondent is a neutral consideration in my assessment of the question of compensation.

Calculation of compensation

[65] As noted by the Full Bench in *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries*, "[t]he well-established approach to the assessment of compensation under s.392 of the FW Act… is to apply the "Sprigg formula" derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul's Licensed Festival Supermarket* (*Sprigg*).[49] This approach was articulated in the context of the Act in *Bowden v Ottrey Homes Cobram and District Retirement Villages*[50]."[51]

[66] The approach to calculating compensation per *Sprigg* is as follows:

> Step 1: Estimate the remuneration the Applicant 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.
>
> 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.

[67] I have estimated the remuneration the Applicant would have received, or would have been likely to have received, if the Respondent had not terminated his employment to be $21,000 on the basis of my finding it is likely the Applicant would have remained in employment for a further period of two months. This estimate of how long the Applicant would have remained in employment is the "anticipated period of employment."[52]

[68] I have found that while the Applicant has earned remuneration since the date of his dismissal, and that he is likely to earn remuneration between the making of the order for compensation and the payment of compensation, it is not appropriate to make any deduction for those earnings as the earnings are in respect of periods that fall outside the two-month anticipated period of employment.

[69] I have also determined to reduce the award of compensation having determined that the Applicant has failed to take reasonable steps to mitigate his loss. This results in the award of compensation being reduced to $15,750.

[70] I now need to consider the impact of contingencies on the amounts likely to be earned by the Applicant for the remainder of the anticipated period of employment.[53] I do not consider it appropriate to deduct an amount for contingencies.

[71] If I am satisfied that misconduct of the Applicant contributed to the employer's decision to dismiss him, I am obliged by section 392(3) of the Act to reduce the amount I would otherwise order by an appropriate amount on account of the misconduct. As there was no misconduct involved, no reduction in the award of compensation is appropriate.

[72] I have considered the impact of taxation but have elected to settle a gross amount of $15,750 which is to be subject to normal taxation. Having applied the formula in *Sprigg*, I am nevertheless required to ensure that "the level of compensation is an amount that is considered appropriate having regard to all the circumstances of the case."[54] I am satisfied that the amount of compensation that I have determined above takes into account all the circumstances of the case as required by s 392(2) of the Act.

[73] Finally, ss 392(5) & (6) of the Act requires that the amount of compensation ordered by the Commission must not exceed the lesser of 6 months' pay calculated at the high-income threshold (HIT) or the total amount of remuneration the Applicant received or was entitled to receive during the 26-week period prior to his dismissal. Based on the payslips provided by the Applicant, I find that the total amount of remuneration the Applicant was entitled to receive during the 26-week period prior to dismissal was $63,000 while the HIT at the time of dismissal on 19 March 2024 was $167,500. Half of that amount is $83,750. It follows from the foregoing that the amount of compensation ordered must not exceed $63,000.

[74] In light of the above, I will make an order that the Respondent pay $15,750 gross less taxation as required by law to the Applicant in lieu of reinstatement within 14 days of the date of this decision.

Conclusion

[75] I am satisfied that the Applicant was dismissed at the initiative of the Respondent. Having been satisfied in respect of the other initial matters, I have considered and determined that the Applicant's dismissal was not consistent with the Small Business Fair Dismissal Code, was harsh, unjust and unreasonable and thereby unfair. I am further satisfied that reinstatement would be inappropriate and that an award of compensation is appropriate.

[76] Finally, I have determined to make an order that the Respondent pay $15,750 gross less taxation as required by law to the Applicant in lieu of reinstatement within 14 days of the date of this decision. An order giving effect to this decision will be issued separately in conjunction with this decision.

DEPUTY PRESIDENT

Appearances:
W Merry, Applicant.
C Pouzoulis for the Respondent.

Hearing details:
2024.
Melbourne:
November 6.

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<PR783062>

[1] Exhibit A7, Board Resolution dated 9 December 2022, at Court Book

[2] Exhibit A9, Board Meeting minutes of 15 December 2022 meeting

[3] Exhibit A11, Contract of Employment, dated 9 February 2023

[4] Transcript at PN456

[5] Exhibit A14, Email from Applicant to 'Melinda', dated 26 May 2023

[6] Exhibit A15, Expenses Claim for period 26 November 2021 – 17 April 2023

[7] Exhibit A16, Bundle of expenses receipts

[8] Exhibit A6, Payslips for months of January-June & August 2023

[9] Exhibit A34, Email from Applicant to Respondent Board Members, dated 21 September 2023

[10] Exhibit A23, Pranitha Gaddam resignation, dated 27 September 2023,

[11] Exhibit A38, Stephen Johnson resignation from Swisstec Group Boards, dated 10 October 2023

[12] Exhibit A38, Email from Applicant to Costar Pouzoulis, dated 10 October 2024

[13] Transcript at PN537, PN575-576, PN603

[14] Ibid

[15] Transcript at PN565

[16] Transcript at PN561

[17] Transcript at PN567

[18] Exhibit A2, Witness Statement of Craig Peppin, at [4]-[6]

[19] Transcript at PN571

[20] Exhibit A3, Witness Statement of Con Livissionos, at [5]

[21] Exhibit A24, Email from Applicant to Mr Papadopoulos, dated 6 November 2023

[22] Exhibit A25, Email from Applicant to Mr Papadopoulos, dated 13 November 2023

[23] Exhibits A220, 21 & 22, Expenses claim and receipts for period 22 April 2023 – 21 May 2023

[24] Exhibit A26, Email from Applicant to Mr Papadopoulos, dated 12 December 2023

[25] Exhibit A27, , Email from Applicant to Mr Papadopoulos, dated 31 January 2024

[26] Exhibit A28, Email from Harry Papadopoulos to Applicant, dated 12 December 2023

[27] Transcript at PN681-698

[28] Exhibit A29, Email from Applicant to Harry Papadopoulos and Costar Pouzoulis, dated 26 February 2024

[29] Exhibit A30, Letter from Applicant to Harry Papadopoulos and Costar Pouzoulis, dated 19 March 2024

[30] [2017] FWCFB 3941.

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

[32] Ibid.

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

[34] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151.

[35] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[36] Ibid.

[37] *Crozier v Palazzo Corporation Pty Ltd t/a Noble Park Storage and Transport* Print S5897 (AIRCFB, Ross VP, Acton SDP, Cribb C, 11 May 2000), [75].

[38] *RMIT v Asher* (2010) 194 IR 1, 14-15.

[39] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

[40] *ALH Group Pty Ltd t/a The Royal Exchange Hotel v Mulhall* (2002) 117 IR 357, [51]. See also *Smith v Moore Paragon Australia Ltd* PR915674 (AIRCFB, Ross VP, Lacy SDP, Simmonds C, 21 March 2002), [92]; *Edwards v Justice Giudice* [1999] FCA 1836, [6]– [7].

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

[42] Transcript at PN1062-1064

[43] Transcript at PN1095

[44] *He v Lewin* [2004] FCAFC 161, [58].

[45] Transcript at PN1041-1043

[46] Transcript at PN1046-1047, PN1055-1058

[47] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Lockwood Security Products Pty Ltd v Sulocki and Ors* PR908053 (AIRCFB, Giudice J, Lacy SDP, Blair C, 23 August 2001), [45].

[48] *Biviano v Suji Kim Collection* PR915963 (AIRCFB, Ross VP, O'Callaghan SDP, Foggo C, 28 March 2002), [34] citing *Payzu Ltd v Saunders* [1919] 2 KB 581.

[49] (1998) 88 IR 21.

[50] [2013] FWCFB 431.

[51] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [16].

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

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

[54] *Double N Equipment Hire Pty Ltd t/a A1 Distributions v Humphries* [2016] FWCFB 7206, [17].