[2018] FWC 3576

DECISION

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

[redacted]

v

Audi Enterprises Pty Ltd T/A Audi Repair & Service Centre
(U2017/6357)

Mr Maxim Zintchenko

v

Audi Enterprises Pty Ltd T/A Audi Repair & Service Centre
(U2017/6360)

COMMISSIONER CIRKOVIC MELBOURNE, 13 JULY 2018

Application for an unfair dismissal remedy

1. Background

[1] [redacted] and Mr Zintchenko ("the Applicants") performed worked for the benefit of Audi Enterprises Pty Ltd ("the Respondent"). The Respondent is a franchisee to a courier company, Couriers Please, and pursuant to a franchise agreement entered into between the two, the Respondent provides Couriers Please with courier services. The services were performed pursuant to five franchise agreements concerning five "runs" in different geographic locations. The Applicants were engaged by the Respondent to perform work servicing two of the five runs. On 24 May 2017 the Applicants' employment was terminated following the decision of Couriers Please to prohibit the Applicants from attending the workplace and performing work.

[2] The Applicants made an application for relief from unfair dismissal on 14 June 2017 ("the applications"). Pursuant to an application made by the Applicants, the applications were heard together. Hearings were held on 27 September, 11 October, 4 December 2017 and 24 January 2018. On 28 March 2018 I handed down a decision ("the Decision") in which I found that the termination of the Applicants' employment was unfair.[1] I issued further directions on 18 April 2018 that ordered parties to file submissions on the issue of remedy.

[3] The compensation proceedings were the subject of a hearing on 21 May 2018 and the below written submissions were filed prior to the hearing:

- Applicants' submissions remedy (dated 3 May 2018).

- Respondent's submissions as to remedy (dated 15 May 2018).

[4] I do not consider that reinstatement is an appropriate remedy and the Applicants confirmed at the hearing that they were not seeking reinstatement.[2] Having regard to the circumstances in which the dismissals occurred and in particular my findings in the Decision as to the lack of redeployment opportunities with the Respondent,[3] I do not consider reinstatement to be an appropriate remedy.

[5] Given my findings that the dismissals were unfair under s.385 of the *Fair Work Act 2009* ("the Act"),[4] I consider that an award of compensation to the Applicants would be appropriate.

2. The Assessment of Compensation

[6] This decision concerns the amount of compensation to be ordered. In assessing compensation, it is necessary to take into account all the circumstances of the case, including the specific matters identified in s.392(2)(a) to (g) of the Act, and to consider the other relevant requirements of s.392.

[7] The well-established approach to the assessment of compensation under s.392 is to apply the 'Sprigg formula', derived from the Australian Industrial Relations Commission Full Bench decision in *Sprigg v Paul Licensed Festival Supermarket*.[5] This approach was articulated in the context of the current legislative framework in *Bowden v Ottrey Homes Cobram and District Retirement Villages.*[6] Under that approach, the first step to be taken in assessing compensation is to consider s.392(2)(c), that is, to determine what the applicant would have received, or would have been likely to receive, if the person had not been dismissed. In *Bowden* this was described in the following way:

> "[33] The first step in this process - the assessment of remuneration lost - is a necessary element in determining an amount to be ordered in lieu of reinstatement. Such an assessment is often difficult, but it must be done. As the Full Bench observed in *Sprigg*:
>
> > '... we acknowledge that there is a speculative element involved in all such assessments. We believe it is a necessary step by virtue of the requirement of s.170CH(7)(c). We accept that assessment of relative likelihoods is integral to most assessments of compensation or damages in courts of law.'
>
> [34] Lost remuneration is usually calculated by estimating how long the employee would have remained in the relevant employment but for the termination of their employment. We refer to this period as the '*anticipated period of employment*'..."

[8] The identification of this starting point amount "necessarily involves assessments as to future events that will often be problematic,"[7] but, as the Full Bench observed in *McCulloch v Calvary Health Care Adelaide,*[8] "while the task of determining an anticipated period of employment can be difficult, it must be done."[9]

[9] Once this first step has been undertaken, various adjustments are made in accordance with s.392 and the formula for matters including monies earned since dismissal, contingencies, any reduction on account of the employee's misconduct and the application of

the cap of six months' pay. This approach is however subject to the overarching requirement to ensure that the level of compensation is in an amount that is considered appropriate having regard to all the circumstances of the case.[10]

[10] Before turning to the assessment of total remuneration I note that pursuant to a term of a contract between Couriers Please and the Respondent, the former had an unfettered right to ban the Applicants from driving and thereby performing courier services. In particular, it is not disputed that:

- [redacted] began working as a courier driver for [redacted] in around September 2010,[11] and Mr Zintchenko began working as a courier driver for [redacted] in around July 2011;[12]
- the Applicants were paid a flat weekly rate for the provision of their services. As at May 2017 the flat rate was $1330.00 for a five day week. From this, the Respondent deducted $200 for the van that was provided by Audi Enterprises and a $40 payment for comprehensive vehicle insurance;[13]
- [redacted] is 43 years old,[14] and Mr Zintchenko is 47 years old;[15]

Remuneration that would have been received if the dismissal had not occurred (s.392(2)(c))

[11] In considering this question, I have had regard to my findings that notwithstanding the existence of a valid reason for the termination of the Applicants' employment based on their capacity, the Respondent failed to notify the Applicants of the reason for termination, provide the Applicants with an opportunity to respond, and as such failed to afford them the required procedural fairness.

[12] On the basis of the above, the Applicants' employment with the Respondent would have continued for as long as it took to afford the Applicants the requisite procedural fairness. In the context of this case, I find that the Applicants would have remained working for the Respondent for no more than 3 weeks after their employment was terminated. There is no basis to conclude that the consultation required would have taken longer than 3 weeks or that it would have led to a result other than termination. In coming to this conclusion, I have considered my findings at paragraphs [72] and [73] of the Decision that the Applicants' dismissal related to their capacity as opposed to conduct and that opportunities for alternative suitable employment with the Respondent did not exist.

[13] I find that both [redacted] and Mr Zintchenko would have remained working for the Respondent for 3 weeks (up until 14 June 2017). Further I accept Mr Lardi's submission that I should consider the weekly wage to be $1,330 rather than $1,090 given that I found the Applicants to be employees.[16] Accordingly I find that the Applicants would have each received $3,990.00 given that procedural fairness would have afforded them a further 3 weeks of pay.[17] This is the starting point of my assessment of compensation.

Remuneration earned (s.392(2)(e)) and income reasonably likely to be earned (s.392(2)(f))

[14] There was no evidence that in the 3 weeks after the Applicants' dismissal either [redacted] or Mr Zintchenko were able to earn any other remuneration. Therefore there will be no deduction on this score.

Length of service (s.392(2)(b))

[15] I accept the Applicants' submission that I should consider their employment as having commenced with the Respondent when they started work for Kote Pty Ltd. Accordingly I have taken into account the fact that [redacted] length of service is 6 years and 8 months and Mr Zintchenko's length of service is 5 years and 11 months.[18]

[16] Ultimately I do not consider that the Applicants' length of service calls for any upward or downward adjustment to the compensation amount that should otherwise be ordered.

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

[17] As I do not deal with any significant element of future economic loss, there is no basis for any deduction for contingencies. In relation to taxation, compensation will be determined as a gross amount and it will be left to the Respondent to deduct any amount of taxation required by law.

Viability (s.392(2)(a))

[18] There was no evidence that an order of compensation would have any effect on the Respondent's viability. There will be no deduction from the compensation amount on this score.

Mitigation efforts (s.392(2)(d))

[19] Mr Champion did not seek to challenge the Applicants' submissions relating to this issue.[19]

[20] On the material before me, I do not consider a deduction relating to the mitigation efforts (or lack thereof) should be applied to the Applicants.

Misconduct (s.392(3))

[21] Given my findings at paragraphs [72] and [73] of the Decision that the dismissals related to capacity rather than conduct, I do not consider a deduction is required.

No component for shock, distress, humiliation or other analogous hurt (s.392(4))

[22] I confirm that the compensation amount assessed contains no component for any shock, distress, humiliation, or other analogous hurt suffered by the Applicants as a result of the manner of their dismissal.

Compensation cap (s.392(5))

[23] The amount of compensation proposed is below the compensation cap.

Installments (s.393)

[24] I do not consider that there is any reason for compensation to be made by way of instalments.

Other matters

[25] I have considered a range of matter raised in the Applicants' written submissions,[20] including that:

- the Applicants are both aged over 40, speak English as a second language and do not hold tertiary qualifications;
- the Applicants were not paid any notice period and that two weeks of pay has been withheld from [redacted]
- the Applicants were never paid any superannuation or entitlements during their employment and had expenses deducted from their income; and
- the Respondent has not provided the Applicants with a reference thereby affecting their ability to find further employment.

[26] In taking the above factors into account, I have satisfied myself that the current level of compensation is appropriate.

3. Conclusion

[27] In *Balaclava Pastoral Co Pty Ltd t/a Australian Hotel Cowra v Darren Nurcombe*[21] a Full Bench recently observed that in quantifying compensation, it is necessary to set out with some precision the way in which the various matters required to be taken into account under s.392(2) (and s.392(3) if relevant), and the steps in the Sprigg formula, have been assessed and quantified. That is to say, the way in which a final compensation amount has been arrived at should be readily apparent and explicable from the reasons of the decision-maker

[28]	Step 1:	Lost remuneration (3 weeks)	$3990.00
	Step 2:	Remuneration earned or likely to be earned	-$0.00
	Step 3:	Deduction for failure to mitigate loss (0 percent)	-$0.00
	Step 4:	Deduction for misconduct (0 percent)	-$0.00
		Provisional amount:	$3990.00

[29] In all the circumstances I am satisfied that in the case of [redacted] the amount of $3,990.00 is an appropriate amount of compensation and in the case of Mr Zintchenko the amount of $3,990.00 is an appropriate amount of compensation**.** I note that the amount ordered is the equivalent of 3 weeks' pay.

[30] I note that the Applicants' claim that they were not paid superannuation or entitlements during their employment with the Respondent. I am not empowered to deal with those matters in the context of an unfair dismissal application. If the Applicants wish to pursue those claims, they will need to make an application for their recovery in an appropriate court.

[31] I will order that the Respondent pay [redacted] the amount of $3,990.00 and Mr Zintchenko the amount of $3,990.00 within 7 days of this decision. An order to that effect will be issued separately to this decision.

COMMISSIONER

Appearances:

Mr S Lardi of Berrigan Doube Lawyers for the Applicants

Mr M Champion of Counsel for the Respondent

Hearing details:

2018

21 May

Melbourne.

Final written submissions:

Applicants' submissions remedy dated 3 May 2018.

Respondent's submissions as to remedy dated 15 May 2018.

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[1] *Caine & Zintchenko v Audi Enterprises Pty Ltd* [2018] FWC 1097.

[2] Transcript of Proceedings (21 May 2018), PN 22.

[3] [2018] FWC 1097, [73].

[4] Ibid [89].

[5] Print R0235, (1998) 88 IR 21.

[6] [2013] FWCFB 431; 229 IR 6.

[7] *Smith v Moore Paragon Australia Ltd* PR942856, [2004] AIRC 57; (2004) 130 IR 446 at [32].

[8] [2015] FWCFB 873.

[9] Ibid [27].

[10] Ibid.

[11] Agreed Statement of Facts, [22].

[12] Ibid [38].

[13] Ibid [11].

[14] Applicants' Submissions Remedy, [7].

[15] Ibid [20].

[16] Transcript of Proceedings (21 May 2018), PN 40-42.

[17] ($1,330 x 3 = $3,990).

[18] Applicants' submissions remedy, [44](b).

[19] Transcript of Proceedings (21 May 2018), PN 54-56.

[20] Applicants' Submissions Remedy, [44](g).

[21] [2017] FWCFB 429, [43].