[2022] FWC 1352 [Note: An appeal pursuant to s.604 (C2022/3705) was lodged against this decision.]

DECISION

Fair Work Act 2009
s.120 - Application to vary redundancy pay for other employment or incapacity to pay

Ready Workforce (A Division of Chandler Macleod) Pty Ltd T/A Chandler Macleod
(C2021/8025)

COMMISSIONER CAMBRIDGE SYDNEY, 7 JUNE 2022

Variation of redundancy pay.

[1] This Decision is made in respect of an application taken under s. 120 of the *Fair Work Act 2009* (the Act). The application was lodged with the Fair Work Commission (the Commission) at Sydney on 26 November 2021.The application was made by *Ready Workforce (A Division of Chandler Macleod) Pty Ltd* trading as *Chandler Macleod* (the applicant or the employer or Chandler Macleod). The application indicated that the employer was represented by *Colin Biggers and Paisley Lawyers*.

[2] The application seeks a determination of the Commission to reduce the amount of redundancy pay that would otherwise represent an entitlement purportedly derived from s. 119 of the Act, and payable to *Andrew Lowe* (the 1st respondent employee), *Bernard McIntyre* (the 2nd respondent employee), *David Lindsay* (the 3rd respondent employee), *Glen Munro* (the 4th respondent employee) *James Eason* (the 5th respondent employee), *Johnathon Barbara* (the 6th respondent employee), *Mark Keller* (the 7th respondent employee), *Matthew Emanuel* (the 8th respondent employee), *Robert Snelgrove* (the 9th respondent employee), *Scott Ditchfield* (the 10th respondent employee), *Scott McFarlane* (the 11th respondent employee), and *Timothy Farrow* (the 12th respondent employee). The 12 named respondent employees are collectively referred to as the respondent employees.

[3] The application seeks to reduce each of the respondent employees' redundancy entitlement from respectively, 6, 6, 6, 6, 7, 6, 6, 7, 6, 7, 7 and 6 weeks' pay to nil in each case. The reduction to the respondent employees' redundancy entitlements has been advanced on the basis that the employer obtained other acceptable employment for each of the respondent employees.

[4] On 9 December 2021, the matter was the subject of a Mention and Directions proceeding conducted by the Commission via telephone. At the proceedings held on 9 December, Mr P O'Halloran from *Colin Biggers and Paisley Lawyers*, together with Mr M Graham from

Chandler Macleod, appeared for the employer. Ms J Short from the *Construction, Forestry, Maritime, Mining and Energy Union* (CFMMEU) appeared for 7 of the respondent employees, and she indicated that in future she would also represent the 3rd respondent employee, the 7th, respondent employee appeared unrepresented, and the other respondent employees did not participate in the proceedings.

[5] Following the proceedings held on 9 December 2021, the Commission issued Directions which firstly fixed the date of 10 January 2022, by which time any Party seeking to be represented by lawyers or paid agents were required to provide written submissions in support of permission being granted under s. 596 of the Act. Secondly, any Party opposing permission being granted under s. 596 of the Act were Directed to provide written reasons in support of such opposition by no later than 24 January 2022. Additionally, the Commission issued further Directions for the Parties to file and serve their respective documentary cases in accordance with a timetable that fixed the Hearing of the matter for 4 April 2022.

[6] On 23 December 2021, lawyers acting on behalf of the employer provided written submissions seeking permission under s. 596 of the Act, for the employer to be represented by lawyers or paid agents. No written submissions opposing permission being granted for the employer to be represented by lawyers or paid agents were provided to the Commission. Consequently, on 31 January 2022, the Commission issued a Decision [2022] FWC 187 confirming that the requirements of s. 596 of the Act had been satisfied, and permission was granted for any of the Parties to be represented by lawyers or paid agents.

[7] In due course, the employer, the CFMMEU acting on behalf of the 1st, 3rd, 4th, 6th, 9th, 10th, 11th, and 12th respondent employees, and separately, the 7th respondent employee who was unrepresented, all filed and served material broadly in accordance with the Directions issued on 17 December 2021. Tragically, the 8th respondent employee was deceased. The Commission has no record of any material being provided by either the 2nd or 5th respondent employees.

[8] At the Hearing held on 4 April 2022, Mr I Latham, barrister, instructed by Mr P O'Halloran from *Colin Biggers and Paisley Lawyers* appeared for the employer, and Mr A Guy, barrister, instructed by Ms J Short from the CFMMEU, appeared for the 1st, 3rd, 4th, 6th, 9th, 10th, 11th, and 12th respondent employees. The 7th respondent employee provided advice that he was unable to attend the Hearing, and the 2nd and 5th respondent employees did not appear at the Hearing nor did they provide the Commission with any communication regarding their position in respect to the application.

[9] At the Hearing, Mr Latham called the employer's Chief People Officer, Mr M Graham, to provide evidence as a witness and he was cross-examined by Mr Guy. In addition, evidence on behalf of the employer was provided by way of a statement of Ms S Lowe. Mr Guy called a total of 9 witnesses including each of the individual respondent employees who were represented by the CFMMEU. All the witnesses called by Mr Guy were cross-examined by Mr Latham, and two of the respondent employee witnesses provided their evidence via video link. The witness statement provided by the 7th respondent employee was admitted into evidence without objection and having due regard for the absence of the 7th respondent employee to provide witness evidence.

[10] At the conclusion of the Hearing held on 4 April 2022, the evidence had been completed and the Parties requested an opportunity to provide further written submissions. Subsequently, the Parties agreed upon a timetable for the provision of further written submissions which concluded with the applicant's closing submissions in reply being filed on 2 May 2022.

Relevant Factual Circumstances

[11] In September 2014, the employer successfully tendered for a contract to provide labour at the Mount Arthur coal mine (Mac), which is located in the Hunter Valley region of New South Wales. This labour hire contract primarily involved the provision of suitably qualified drivers for the Mac haul truck fleet. In September 2021, Mac required the employer to re-tender for the labour hire haul truck fleet contract. On about 29 September 2021, the employer received notification that it had been unsuccessful in its tender bid for renewal of its labour hire contract with Mac. Mac had awarded the labour hire contract to another labour hire company, Programmed Skilled Workforce Limited (Programmed).

[12] The employer considered the prospect of redeployment of inter alia, the respondent employees. However, particularly as Mac was the employer's only mining client in the Hunter Valley region, no suitable redeployment opportunities were identified. Consequently, the loss of the Mac labour hire contract meant that the employer would no longer continue the employment of inter alia, the respondent employees, who were anticipated to become redundant on 31 October 2021, which was the last day before Programmed commenced to provide labour for Mac.

[13] On 30 September 2021, the employer provided all impacted employees with a communication which advised that the employer had been unsuccessful in re-tendering for the labour hire haul truck fleet contract, and that the successful tenderer was Programmed. This communication relevantly advised that all impacted employees would have an opportunity to apply for roles with Programmed. The communication also included advice of times at which Programmed would be conducting information sessions about the anticipated transition of employment. On the following day, 1 October 2021, the employer provided a further communication to all impacted employees which included a link to a Programmed website which contained roles that would be available, and the means by which an employee could express their interest in any such roles.

[14] On 1 October 2021, the employer's Chief Executive Officer had a telephone discussion with the Chief Executive Officer of Programmed during which the employer offered to assist with any transition of Chandler Macleod employees to employment with Programmed. The Chief Executive Officers agreed that their organisations respective "Heads of People function" would communicate about any further arrangements regarding transition of employment from Chandler Macleod to Programmed.

[15] On 5 October 2021, the employer's Chief People Officer, Mr Graham, had a telephone conversation with his counterpart at Programmed, Mr Cameron. This telephone conversation included discussion about the employer recommending that Programmed make offers of employment to employees of Chandler Macleod who were working at Mac, and to assist, it would provide a list of relevant names. Further, the employer advised that it would grant paid time off for its employees to attend interviews and other meetings with Programmed, it would

facilitate the sharing of training and other records with Programmed, and it would also offer CV writing support and interview preparation services. Shortly after this telephone conversation, the employer provided Programmed with a list of permanent employees that were engaged at Mac and who were anticipated to transition from Chandler Macleod to Programmed.

[16] On 11 and 14 October 2021, Mr Graham sent further email communications to Mr Cameron which included the names of 13 permanent employees, including the respondent employees, who Chandler Macleod had encouraged Programmed to make offers of employment to. Further, Mr Cameron requested information about the selection process being adopted by Programmed, and he reiterated offers to provide further assistance and information about transitioning staff from employment with Chandler Macleod to Programmed.

[17] On or about 14 October 2021, the 2nd respondent employee accepted an offer of employment with Programmed. On 29 October 2021, the 3rd respondent employee accepted an offer of employment with Programmed. On 1 November 2021, the 4th respondent employee commenced employment with Programmed. On or about 24 October 2021, the 5th respondent employee accepted an offer of employment with Programmed. On 1 November 2021, the 6th respondent employee commenced employment with Programmed. On 1 November 2021, the 7th respondent employee commenced employment with Programmed. On or about 24 October 2021, the 8th respondent employee accepted an offer of employment with Programmed, but unfortunately, he is now deceased. On 12 November 2021, the 9th respondent employee accepted an offer of employment with Programmed and he commenced work with Programmed on 15 November 2021. On 6 November 2021, the 10th respondent employee accepted an offer of employment with Programmed and he had commenced work with Programmed on 1 November 2021. On 1 November 2021, the 11th respondent employee accepted an offer of employment with Programmed and he commenced work with Programmed on 11 November 2021. On 10 November 2021, the 12th respondent employee commenced employment with Programmed.

[18] At no time was the 1st respondent employee offered employment with Programmed.

[19] The respondent employees were provided with termination of employment letters which relevantly included the following:

> *"As we have explained previously, in either case, no severance payments are payable to you, as Chandler Macleod has obtained, or caused to be made available, employment with Programmed."*

[20] Consequently, the employer advanced the application taken under s. 120 of the Act, seeking a variation of the redundancy pay that the respondent employees were entitled to receive, on the basis that, in accordance with subsection 120 (1) (b) (i) of the Act, it had obtained other acceptable employment for the respondent employees with Programmed. Further, in respect to the 1st respondent employee, the employer asserted that there was a rejection of any process which would have provided for engagement in other suitable alternative employment with Programmed which had been obtained by the employer. The employer sought to have the amount of redundancy pay reduced to zero in all cases.

The Case for the Employer

[21] The submissions made on behalf of the employer firstly addressed a jurisdictional issue arising from the operation of an enterprise agreement, that being the *Chandler Macleod Northern District of NSW Black Coal Mining Agreement 2015* (the EA). The employer recognised that the EA covered and applied to the employment of the respondent employees, and it contained at clause 19, terms that provided for entitlements in respect to redundancy. The employer submitted that although the redundancy provisions of clause 19 of the EA broadly provided for entitlements that were more beneficial than those established by the National Employment Standards (NES), there was no jurisdictional barrier to the operation of s. 120 of the Act in respect to the lesser components of the redundancy entitlements comprehended by clause 19 of the EA, and which equated with the entitlements recognised in the NES.

[22] Consequently, the submissions made on behalf of the employer asserted that the application made under s. 120 of the Act would apply to only those entitlements which were identified in s. 119 of the Act as being a part of the more beneficial entitlements that were provided by clause 19 of the EA. The employer submitted that the operation of s. 120 of the Act in respect to the minimum entitlements prescribed by s.119 which were identified to be comprehended by clause 19 of the EA, was supported by authority established in the Full Bench Decision in *Maritime Union of Australia v FBIS International Protective Services (Aust) Pty Ltd* (FBIS).[1]

[23] The employer submitted that the circumstances in the FBIS case were very similar to those in this instance and could be distinguished from the circumstances that applied in respect to another Full Bench Decision in the case of *Cameron Fraser; Construction, Forestry, Maritime, Mining and Energy Union v JFM Civil Contracting Pty Ltd* (JFM)[2]. Therefore, the employer submitted that the application taken under s. 120 of the Act in respect to the respondent employees, could proceed on a sound jurisdictional foundation in respect to that part of the redundancy entitlements of the respondent employees which were to be paid in accordance with s. 119 of the Act.

[24] The employer made further submissions in support of the proposition that it had obtained other acceptable employment for the respondent employees, and that these circumstances satisfied the requirements of s. 120 (1) (b) (i) of the Act. The employer submitted that it had obtained employment for all of the respondent employees and that employment had actually materialised, other than in the case of the 1st respondent employee. The employer further submitted that when objectively considered, the employment with Programmed was acceptable employment. The employer submitted that the rates of pay, hours of work, work location, and other terms and conditions of the employment with Programmed, were all comparable such that when viewed objectively, the other employment should be found as acceptable.

[25] The employer further submitted that it had sent details of information sessions with Programmed to its workforce, provided a link to the landing page at the Programmed website, provided a list of names of permanent employees to Programmed, provided paid overtime for employees to attend sessions with Programmed, facilitated the sharing of training and other related records, provided CV writing support and interview preparation assistance, and other measures, all of which amounted to obtaining employment for the respondent employees with Programmed. The employer submitted that its proactive actions established that it had obtained

other employment for the respondent employees with Programmed, and this was reflected in the fact that all of the respondent employees, other than the 1st respondent employee, actually commenced employment with Programmed.

[26] The employer submitted that the position of the 1st respondent employee was different and that he was not offered employment with Programmed because he had refused to get a COVID-19 vaccination which was necessary to enable employment with Programmed. The employer submitted that the 1st respondent employee had taken a position which effectively represented a rejection of the suitable alternative employment with Programmed and which had been obtained by the employer.

[27] The further submissions made by the employer relied upon the purpose for which redundancy payments were established. The employer submitted that because the respondent employees stepped into acceptable employment almost immediately after termination of employment with the employer, the underlying purpose for payment of redundancy had not been established. In summary, the employer submitted that the heart of this case was the very purpose for which redundancy payments were made. The employer submitted that when the employment of the respondent employees finished in late October or early November, and they started working with Programmed in early to mid-November, and the work was the same, the wages were higher, they suffered no loss, and therefore this case was an example in the very heartland of cases where s. 120 of the Act should be applied. In conclusion, the employer submitted that the Commission should find that it had jurisdiction to deal with the application, and it should exercise its discretion in favour of the applicant and determine that any redundancy payments for the respondent employees be reduced to zero in each case.

The Case Advanced by the CFMMEU Representing the 1st, 3rd, 4th, 6th, 9th, 10th, 11th, and 12th Respondent Employees

[28] The CFMMEU provided written outline of submissions documents on behalf of the respondent employees that it represented. The submissions made by the CFMMEU opposed the application to vary the redundancy pay that the respondent employees would otherwise be entitled to receive. In broad terms, the CFMMEU opposed the application on the basis that, firstly, the employer had not obtained the alternative employment, and secondly, the alternative employment was not acceptable alternative employment.

[29] The CFMMEU submissions firstly dealt with the question of whether there was any jurisdictional impediment to the application. The CFMMEU generally agreed with the employer submissions in respect to the Commission having jurisdiction to determine the application.

[30] According to the submissions made by the CFMMEU, there were two sources of redundancy entitlement that existed in this instance, s. 119 of the Act and the EA. The CFMMEU submitted that although the redundancy entitlements in the EA were more generous than the entitlements established by s. 119 of the Act, those more generous terms of the EA supplemented the terms of s. 119 of the Act. In support of this proposition the CFMMEU referred to and relied upon subsection 55 (6) of the Act. Therefore, according to the submissions of the CFMMEU, the Commission had jurisdiction to determine the matter in relation to the NES redundancy pay entitlements set out in s. 119 of the Act.

[31] The further submissions made by the CFMMEU asserted that the employer had not obtained the employment that the respondent employees, other than the 1st respondent employee, had gained with Programmed. In this regard, it was asserted that the actions undertaken by the employer which involved; communications to its impacted employees about information sessions being conducted by Programmed; communication of the link for a landing page website for Programmed; encouragement for employees to attend information sessions; the provision of a list of names of employees; facilitation of the transfer of training and other employment related records; offers to provide letters of recommendations; and CV writing sessions and interview preparation assistance; was insufficient to establish that the employer had obtained the employment that the respondent employees, other than the 1st respondent employee, gained with Programmed.

[32] The CFMMEU submissions stressed that the evidence did not provide for a finding that the employer had secured the offers of employment that were made to the respondent employees, other than the 1st respondent employee. The CFMMEU submitted that, in summary, the employer provided information to its employees that jobs were available at Programmed, passed on some names to Programmed, and were involved in the passing of information to assist with the respondent employees gaining employment with Programmed. According to the submissions made by the CFMMEU, the respondent employees were left to their own devices to apply for and obtain employment with Programmed on the open market. Further, the CFMMEU stated that although the respondent employees may have had a higher chance of being employed by Programmed by virtue of the fact that they did the exact same job as when they were employed with the employer, this was not the applicable test, and the actions of the employer fell short of obtaining the employment for the redundant employees in the particular circumstances of this case.

[33] The CFMMEU further submitted that, in the alternative, if it was found that the employer did obtain work for the redundant employees, then the work obtained for them was not acceptable employment. These submissions asserted that the work obtained by the respondent employees at Programmed was not acceptable employment because, (a) the work shifts were 10 minutes longer, (b) the employment involved a probationary period, (c) employees previous service was not recognised, (d) it involved a less beneficial bonus scheme, (e) the particular roles previously performed by certain individuals were lost, and (f) one of the respondent employees was required to work a different roster and undertake a wellness program. It was submitted that when these factors were considered, the employment gained by the respondent employees with Programmed could not be objectively found to be other acceptable employment.

[34] The submissions of the CFMMEU also dealt with the circumstances of the 1st respondent employee who was not offered employment with Programmed. In this regard it was submitted that although the 1st respondent employee may have indicated that the roster arrangements at Programmed would have been unacceptable to him, he rejected the proposition that he would not have been vaccinated if he was offered employment with Programmed. Consequently, the CFMMEU submitted that the employer did not do enough to obtain employment with Programmed for the 1st respondent employee.

[35] The submissions of the CFMMEU concluded by asserting that the Commission had jurisdiction to determine the application. However, the CFMMEU submitted that the application should be dismissed because the employer did not obtain work for each of the redundant employees and/or the employer did not obtain acceptable alternative work for the redundant employees.

Consideration

[36] In this instance, the application made by the employer to have the Commission determine to reduce the redundancy pay which the respondent employees were entitled to receive under s. 119 of the Act, was advanced on the basis that the employer had obtained other acceptable employment for the respondent employees. Consequently, the matter for determination by the Commission has primarily involved the question of whether the employer had obtained other acceptable employment for the respondent employees. However, the circumstances in this case have also introduced a potential jurisdictional impediment.

[37] Obtaining other acceptable employment is one basis for variation of redundancy pay provided for in s. 120 of the Act. Section 120 of the Act is in the following terms:

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

(1) <u>This section applies if</u>:

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

(b) the employer:

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

(ii) cannot pay the amount.

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

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

[38] The application in this instance has been made on the basis that there is satisfaction of subsection 120 (1) (b) (i) of the Act. In this regard, the onus is on the employer to prove that it obtained other acceptable employment for the respondent employees. However, any application made under s. 120 of the Act must relate to redundancy pay to which the employee is entitled to <u>because of section 119 of the Act</u>.

[39] The circumstances in this case confirmed that the employer was covered by the EA which included terms which provided for redundancy entitlements that were more beneficial

than those established by s.119 of the Act. The Parties jointly advanced the position that s.120 of the Act could operate in respect to the minimum entitlements that were comprehended by the more beneficial redundancy provisions of the EA.

[40] Clearly, the redundancy payment entitlements for the respondent employees are derived from the EA. However, the application in this instance is made in respect to only part of those entitlements which represent the minimum set by s. 119 of the Act. Whether the legislative prerequisite for any application made under s. 120 of the Act, namely, that an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119, is questionable in this case. However, in view of the determination that can be made in this instance, and in view of the Parties desire to have the substantive question determined by the Commission it is unnecessary to make any determination of this jurisdictional issue.

[41] The substantive question for determination is whether the employer had obtained acceptable alternative employment for the respondent employees.

Obtained

[42] The first aspect of consideration of this question has involved an examination of the evidence about whether a finding could be made that the employment that the respondent employees, other than the 1st respondent employee, obtained with Programmed, was obtained by the employer. In this regard, the employer has asserted that it was its actions which created the offers of employment that were made by Programmed to the respondent employees, other than the 1st respondent employee. The CFMMEU, on behalf of 7 of the respondent employees, argued that those respondent employees who did gain employment with Programmed, did so largely through their own efforts, and were successful for reasons other than the actions of the employer.

[43] A careful consideration of the evidence has not supported any finding that the actions of the employer operated as the primary means by which the alternative employment of the respondent employees with Programmed was secured. Importantly, the evidence that was provided by the employer did not confirm that it had negotiated and secured any assurances from Programmed regarding any aspect of the employment of the respondent employees with Programmed. The following evidence provided by Mr Graham confirmed that no agreements, commitments or other arrangements had been established between the employer and Programmed in respect to the employment of the respondent employees with Programmed:

> *"Was there any agreement that you extracted or managed to get from Programmed that they would do certain things in respect of the engagement of any of these individuals? --- Commissioner, in all my dealings and those of other managers, Programmed is very clear that they would have their own process and select who they choose to select, whoever they choose to select."*[3]

> *"Right. So, [in] any event, despite any attempts there was no agreement established that programmed would do anything, actually? --- Not to us, but clearly they needed to have a workforce start from 1 November, and we were trying to facilitate as many of our people as possible into that workforce."*[4]

[44] A consideration of the totality of the evidence surrounding the activities of the employer regarding the transition of employment from Chandler Macleod to Programmed has confirmed that what was actually undertaken by the employer was the facilitation and assistance for a potential of employment with Programmed. The nature, level of activity undertaken, and outcomes achieved by the employer in this instance does not provide for a finding that the employer had obtained other employment for the respondent employees. Measures involving the facilitation and assistance for offers of alternative employment was a topic considered by the Full Bench in the FBIS Decision and the following extracts from that Decision are applicable to the circumstances of the present case:

> *"[54] In our view, the limited actions of the Respondent, which did no more than establish contact between its employees and ACG, with the effect that employees were able to participate in the recruitment processes of ACG falls well short of action which "causes acceptable alternative employment to become available to the redundant employee" and the Respondent was not a "strong, moving force towards the creation of the available opportunity".*
>
> *[55] The finding of Commissioner Gregory that "the evidence of Mr Christmas, in particular, indicates FBIS has done enough in all the circumstances to "obtain" alternative employment for the employees"[33] was incorrect and was not open on the evidence given the limited actions of the Respondent which did no more than facilitate the entry of its employees into the recruitment processes of ACG. In our view, as the conclusion was not available to the Commissioner on the evidence it reflects a significant error of fact."*[5]

[45] In order to satisfy the notion that an employer obtains other employment as contemplated by s. 120 (1) (b) (i) of the Act, evidence must be provided upon which to establish that the employer did more than facilitate and assist employees to participate in a recruitment process in the hope that they receive offers of employment. In this case, the absence of any offer of employment to the 1st respondent employee is a clear reflection that the actions of the employer could not satisfy the notion that it had obtained the other employment that the other respondent employees subsequently commenced with Programmed. Programmed clearly maintained the unfettered option to engage or not engage any of the employees of Chandler Macleod.

Acceptable employment

[46] The second component for consideration has involved the question of whether the other (alternative) employment could be objectively determined to be acceptable. In this case it is in a strict sense, unnecessary to determine whether the other employment was acceptable because of the finding made that the employment was not obtained by the employer. However, for completeness, the relevant assessments of the changed terms and conditions of the employment with Programmed has been undertaken.

[47] The evidence in this instance has established that in general terms, the employment that was obtained by the respondent employees with Programmed would be found to be acceptable employment. However, in the absence of any evidence from the 2nd and 5th respondent employees no findings can be made as to whether any engagement with Programmed for them

represented acceptable employment. Further, the alteration in working hours from day work to shift work for the 9th respondent employee has meant that in the particular circumstances of the 9th respondent employee, the employment that he gained with Programmed was not acceptable employment.

[48] In respect of the other respondent employees, specifically the 3rd, 4th, 6th, 7th, 10th, 11th, and 12th respondent employees, the terms and conditions of their employment with Programmed, has been examined and compared with their prior employment with Chandler Macleod. When the various detriments and benefits are balanced, and having regard for the probationary period and the loss of various non-transferable employment credits derived from length of service, upon an overall assessment, the alternative employment with Programmed has been established to satisfy the notion of being acceptable employment.

Conclusion

[49] In summary, in this instance the evidence and submissions provided by the employer has not established that it obtained other acceptable employment for the respondent employees. The evidence has established that the employer provided only assistance and facilitation for a potential for other employment with Programmed. Additionally the other employment that was obtained with Programmed was, when assessed objectively, acceptable other employment, except in the case of the 9th respondent employee. Further, no findings can be made as to whether the employment of the 2nd and 5th with Programmed was acceptable employment.

[50] In conclusion, the employer has not established that it obtained other acceptable employment for the respondent employees. Therefore, the application has not satisfied the requirements of subsection 120 (1) (b) (i) of the Act. In any event, there was a strong prospect that the application was without jurisdictional foundation because the redundancy entitlements of the respondent employees was not an amount established because of s. 119 of the Act, but instead, it is a greater amount arising as an entitlement established because of the terms of an enterprise agreement.

[51] The evidence in this case has established findings that the employer has not satisfied the requirements of subsection 120 (1) (b) (i) of the Act, and the application must be dismissed accordingly. An Order dismissing the application will be issued separately.

<u>COMMISSIONER</u>

Appearances:

Mr I Latham, Counsel with *Mr P O'Halloran* from Colin Biggers and Paisley Lawyers appeared for Ready Workforce (A Division of Chandler Macleod) Pty Ltd.

Mr A Guy, Counsel, with *Ms J Short*, from the Construction, Forestry, Maritime, Mining and Energy Union appeared for the 1st, 3rd, 4th, 6th, 9th, 10th, 11th, and 12th respondent employees.

Hearing details:

2022.
Sydney:
April, 4.

Printed by authority of the Commonwealth Government Printer

<PR742127>

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[1] Maritime Union of Australia v FBIS International Protective Services (Aust) Pty Ltd [2014] FWCFB 6737.

[2] Cameron Fraser; Construction, Forestry, Maritime, Mining and Energy Union v JFM Civil Contracting Pty Ltd [2020] FWCFB 4866.

[3] Transcript @ PN392.

[4] Transcript @ PN394.

[5] Maritime Union of Australia v FBIS International Protective Services (Aust) Pty Ltd [2014] FWCFB 6737 @ paragraphs [54] and [55].