DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Donald Pettifer
v
MODEC Management Services Pty Ltd
(C2016/1378)

SENIOR DEPUTY PRESIDENT O'CALLAGHAN
DEPUTY PRESIDENT BINET
COMMISSIONER HAMPTON

PERTH, 22 AUGUST 2016

Appeal against decision [2016] FWC 3194 of Commissioner McKenna at Sydney on 25 May 2016 in matter number U2016/3901- incapacity to undertake duties - valid reason.

[1] This decision concerns an appeal (**Appeal**) by Mr Donald Pettifer (**Mr Pettifer**) pursuant to section 604 of the *Fair Work Act 2009* (**FW Act**) against a decision and subsequent order of Commissioner McKenna dated 28 July 2016[1] (**Decision**) dismissing Mr Pettifer's application (**Application**) for an unfair dismissal remedy pursuant to section 394 of the FW Act.

[2] Mr Pettifer had been employed by labour hire company MODEC Management Services Pty Ltd (**MODEC**) and placed with BHP Billiton Petroleum Inc (**BHPB**) pursuant to a contract between MODEC and BHPB for the provision of labour for the Pyrenees Venture, a floating production, storage and offloading vessel (**BHPB Site**).

[3] Mr Pettifer had an unblemished employment record throughout the period of his employment from his commencement in 2009, until an incident occurred on 30 October 2015 which BHPB characterised as a 'near miss'. As a result of the incident BHPB decided to exercise its right under the contract between itself and MODEC on 12 November 2015 to direct MODEC to remove Mr Pettifer from the BHPB Site.

[4] MODEC did not agree that Mr Pettifer's conduct justified the disciplinary action imposed by BHPB, but nevertheless removed Mr Pettifer from the BHPB site in accordance with its contractual obligations and endeavoured to find an alternative placement for Mr Pettifer in its Australian or New Zealand operations. MODEC was unable to find an appropriate position for Mr Pettifer, so on 25 November 2015 advised him that his employment was terminated.

[5] The Commissioner found that MODEC did not rely on any matter related to Mr Pettifer's capacity or conduct as a reason for his dismissal and that therefore the question of

whether the reason for his dismissal was valid under section 387(a) of the FW Act did not arise. She stated:

> *"[20] The respondent did not rely on any matter related to the applicant's capacity or conduct as a reason for the dismissal, so the question as to whether any such reason was a valid one does not arise. As the applicant submitted, the respondent did not make any finding of wrong-doing on the part of the applicant. Indeed, the respondent's witnesses were not unsympathetic to the applicant and had their own view about what might otherwise have occurred in relation to the incident."*

[6] As a consequence, the Commissioner found subsections 387(b) and (c) did not apply. The Commissioner concluded that, pursuant to subsection 387(d) there was no unreasonable refusal to allow a support person and that the termination of Mr Pettifer's employment did not relate to performance pursuant to subsection 387(e).

[7] For the purposes of subsections 387(f) and (g), the Commissioner found MODEC was not a small employer and had 'in-house' human resource management personnel.

[8] In terms of subsection 387(h) the Commissioner stated:

> *"[26] The applicant submitted that the respondent did nothing to investigate the legitimacy of BHPB's concern and, moreover, the alleged wrong-doing was not serious enough to warrant dismissal. The submissions continued that the applicant had been a long-term employee of the respondent who had not been the subject of any disciplinary attention, and there was nothing in his work history to suggest he could not continue to be a part of the respondent's workforce. The applicant's submissions strongly advocated for reinstatement, more particularly given the financial consequences of the applicant's unemployment following the dismissal (including having to sell the family home).*
>
> *[27] The submissions for each party referred to labour hire type-cases including Dale v Hatch Pty Ltd [2016] FWCFB 922 and Kool v Adecco Industrial Pty Ltd T/A Adecco [2016] FWC 925, albeit neither decision is directly in point given the particular circumstances of this case. (Reference was also made to other cases includingToms v Harbour City Ferries Pty Limited [2015] FCAFC 35 and Parmalat Food Products Pty Ltd v Wililo [2011] FWAFB 1166 at [24] as to "valid reason"). Here, the applicant was employed specifically to work on the Pyrenees project; this was set-out in the contract of employment. The commercial contract between the respondent and BHPB gave the latter specified rights as to those who were permitted to work on the Pyrenees project. Upon BHPB's exercise of those contractual rights, which was a matter beyond the respondent's control, the applicant could no longer work on the Pyrenees Venture. The respondent, through Mr Kennedy, was informed simply that the decision had been made. As the submissions for the respondent pointed out, there was nothing, in practical terms, the respondent could do as to the circumstances that had unfolded concerning the actions and decision of BHPB. The respondent subsequently made endeavours to find alternative placements for the applicant locally and overseas, but the there was no suitable vacancy. Moreover, the collaborative approach between the respondent and the MUA concerning trying to facilitate a "swap" for the applicant to be placed on the MV-11 FPSO was also ultimately unsuccessful in relation to the applicant. Thus, the respondent did not have*

another role into which the applicant could be placed (and it had also made about 70 employees redundant a few months earlier) after the decision of BHPB, and proceeded to effect the termination of employment as advised in the letter of 25 November 2015 with a payment in lieu of notice."

[9] Having been satisfied that Mr Pettifer's dismissal was not harsh, unjust or unreasonable she dismissed his Application.

[10] In accordance with directions issued by Vice President Hatcher on 17 June 2016, the parties filed submissions in support of their respective applications for permission to be represented. Based on those submissions, leave to appear on behalf of Mr Pettifer was granted to Mr Slevin of Counsel and leave to appear on behalf of MODEC was granted to Mr Lewis of Counsel pursuant to section 596(2)(a) of the FW Act.

Grounds of Appeal

[11] The grounds on which Mr Pettifer appeals the decision to dismiss his Application are that the Decision contains the following errors:

(a) The Commissioner erred by finding that the question of whether there was a valid reason for the termination did not arise on the facts of the case.

(b) The Commissioner failed to take into account the mandatory consideration that there was no valid reason for the termination of Mr Pettifer's employment.

(c) The Commissioner failed to take into account the relevant consideration of the unfairness of the decision of BHPB to direct MODEC to cease employing Mr Pettifer on the BHPB Site.

Permission to Appeal

[12] Counsel for Mr Pettifer submitted that permission to appeal should be granted because the Decision contains appealable error in the exercise of discretion in the application by the Commissioner of section 387 of the FW Act.

[13] This appeal is one to which section 400 of the FW Act applies. Section 400 of the FW Act provides as follows.

*"**400 Appeal rights***

(1) Despite subsection 604(2), FWC must not grant permission to appeal from a decision made by FWC under this Part unless FWC considers that it is in the public interest to do so.

(2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact."

[14] Mr Pettifer's Counsel did not assert that the Decision involved any error of fact.[2] It is therefore necessary for the Full Bench to determine whether it is in the public interest to grant permission for the Appeal.

[15] In the Full Court of the Federal Court decision in *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54 at [43], Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under section 400 as "*a stringent one*". He went on to explain that the task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[3]

[16] In *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 at [26]–[27] a Full Bench of Fair Work Australia, a predecessor to the Fair Work Commission (**FWC**), identified some of the considerations that may attract the public interest:

> *"... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters."*

[17] Counsel for Mr Pettifer submitted that the appeal raises matters of importance with respect to the general application of section 387 of the FW Act in circumstances where the contractual arrangements surrounding employment permit a party other than the employer to act to bring about the dismissal of an employee. He also asserted that the Decision is contrary to the approach taken in *Kool v Adecco Industrial Pty Ltd T/A Adecco* [2016] FWC 925 (**Adecco**) to section 378 of the FW Act.

[18] In Adecco, at [49], Deputy President Asbury made the following comments in relation to contractual arrangements in which the actions of a host employer might be relied on by a labour hire company to prevent an employee of the labour hire company from accessing a remedy under the FW Act for unfair dismissal.

> *"[49] However, the contractual relationship between a labour hire company and a host employer cannot be used to defeat the rights of a dismissed employee seeking a remedy for unfair dismissal. Labour hire companies cannot use such relationships to abrogate their responsibilities to treat employees fairly. If actions and the consequences for an employee would be found to be unfair of carried out by the labour hire company directly, they do not automatically cease to be unfair because they are carried out by third party to the employment relationship. If the Commission considers a dismissal is unfair in all the circumstances, it can be no defence that the employer was complying with the direction of another entity in affecting the dismissal. To hold otherwise would effectively allow labour hire employers to contract out of legislative provisions dealing with unfair dismissal."*

[19] Labour hire arrangements in which the host employer has a contractual right to exclude a labour hire employee from its worksites are increasingly becoming a common part of the landscape of employment in Australia. We have decided to grant permission in this situation because the appeal raises a broader question associated with the obligations of a labour hire employer.

Consideration of Appeal Grounds

[20] For the reasons that follow we have considered only the first appeal ground. In this respect Mr Pettifer asserts that the Commissioner erred in finding that MODEC did not rely on Mr Pettifer's capacity or conduct in its decision to dismiss him, and that therefore the question of whether MODEC had a valid reason for Mr Pettifer's dismissal in accordance with subsection 387(a) of the FW Act did not arise and did not therefore require her consideration.

[21] Section 387 of the FW Act provides as follows.

> *"387* ***Criteria for considering harshness etc****.*
>
> *In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC 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."*

[22] Mr Pettifer asserts that he was dismissed for a reason related to his capacity or conduct because he says that his dismissal occurred as a result of BHPB forming the view that his conduct demonstrated unacceptable safety behaviours. Mr Pettifer's assertion is that this cannot be a valid reason for his dismissal because MODEC, on its own admission, made no finding of wrong doing on Mr Pettifer's part, instead relying solely on the contractual provision which allowed BHPB to exclude Mr Pettifer from their worksite.

[23] The evidence was that MODEC did not support the severity of the BHPB action in excluding him from their worksite, but that he was dismissed because Mr Pettifer was excluded from the BHPB site **and** MODEC could not redeploy him elsewhere.[4]

[24] The evidence before the Commissioner was that Mr Pettifer was employed specifically by MODEC for the purpose of providing labour to BHPB for the Pyrenees Venture.[5]

[25] Whilst Mr Pettifer asserts that he was dismissed because of his conduct, namely his involvement in an alleged 'near miss', we do not consider his conduct was the reason for his dismissal. MODEC was clearly prepared to place Mr Pettifer elsewhere in its operations but could not find a position for him. While the evidence indicates that BHPB had concerns over Mr Pettifer's conduct and elected to exercise its contractual right to direct MODEC to remove Mr Pettifer from the BHPB Site, this was not the reason why MODEC dismissed Mr Pettifer. That dismissal occurred because Mr Pettifer did not have the capacity to perform the duties which he was engaged to perform and could not be redeployed elsewhere by MODEC.

[26] Having rejected the contention that the termination of Mr Pettifer's employment related to his conduct we have considered the extent to which that termination of employment related to his capacity. The issue of capacity has been considered in a broad range of contexts.

[27] *In Crozier v Australian Industrial Relations Commission* (2001) FCA 1031, the Full Court of the Federal Court stated:

> *"The word "capacity", as used in s 170CG(3)(a), means the employee's ability to do the work he or she is employed to do. A reason will be "related to the capacity" of the employee where the reason is associated or connected with the ability of the employee to do his or her job. The terms of s 170CG(3)(a) provide no support for Mr Crozier's contention that there can be no "valid reason ... related to the capacity ... of the employee" where an employee is working to his or her personal best, even though this personal best is less than what is required to do the job for which he or she is employed. Plainly, there can be a valid reason for the termination of an employee's employment where he or she simply does not have the capacity (or ability) to do the job. In this case, the Full Bench found that Mr Crozier knew that "the main focus of his position was to generate new business"; that he failed to meet this objective; and that his failure was not due to external factors but to a lack of capacity (or ability) as a sales representative (at 150 & 152-153). In making these findings it acted within jurisdiction, and we detect no jurisdictional error in its approach."*

[28] In *Lion Dairy & Drinks Milk Ltd v Peter Norman* [2016] FWCFB 4218 a Full Bench recently considered a range of circumstances which could represent incapacity.[6]

[29] That approach was consistent with the conclusion reached by a Full Bench in *Callychurn v Australian and New Zealand Banking Group T/A ANZ* [2016] FWCFB 1944. That Full Bench involved an appeal against a decision which found that a credit assessment officer was unable to perform the inherent requirements of her role because she had been banned from engaging in credit activities. The Full Bench endorsed the approach adopted at first instance. In the first instance decision, Commissioner Wilson concluded that the employee was unable to perform the inherent requirements of her job. The Commissioner stated:

"[71] The reference point in a decision that an employee is unable to perform the inherent requirements of their position is to the substantive position, not a modified position, or one involving restricted duties or a temporary alternative position. In this regard, Boag and Son v Button follows Qantas Airways Ltd v Christie, in which an appeal was allowed over an expansive interpretation of the rights of a pilot then restricted, by virtue of age, from certain international flying. In Qantas Airways Ltd v Christie, Gaudron J held the following in relation to the proposition that a restraint from international flying was a matter of age discrimination and thereby not an inherent requirement;

> *"Applying that test, Marshall J held that "Mr Christie [was] not disqualified from being able to perform the characteristic tasks or skills required in being a pilot, he [was] only inhibited geographically as to where he [might] perform such tasks". His Honour added that "[i]t was not necessary for Mr Christie to be able to fly to any part of the world ... to be a Qantas B747-400 captain" because "[h]e was capable of being rostered so that his services were utilised in flying to locations where he was not prohibited from so doing by the laws of other countries". And in his Honour's view, difficulties which might result from his being rostered in that way were relevant to the question whether Mr Christie should be reinstated but not to the operation of s 170DF(2) of the Act.*
>
> *There may be many situations in which the inherent requirements of a particular position are properly identified as the characteristic tasks or skills required for the work done in that position. But that is not always so. In the present case, the position in question is that of captain of B747-400 aircraft flying on Qantas' international routes, a matter as to which there is no real dispute between the parties. To identify the inherent requirements of that position as "the characteristic tasks or skills required in being a pilot", as did Marshall J in the Full Court, is to overlook its international character.*
>
> *Moreover, the international character of the position occupied by Mr Christie cannot be treated as irrelevant simply because it derives from his contract of employment or from the terms and conditions of the industrial agreements which have, from time to time, governed his employment with Qantas. It is correct to say, as did Gray J in the Full Court, that an inherent requirement is something that is essential to the position. And certainly, an employer cannot create an inherent requirement for the purposes of s 170DF(2) by stipulating for something that is not essential or, even, by stipulating for qualifications or skills which are disproportionately high when related to the work to be done. But if a requirement is, in truth, essential, it is irrelevant that it derives from the terms of the employment contract or from the conditions governing the employment relationship." (references omitted)*

[72] McHugh J noted in the later matter of X v The Commonwealth that Christie stands for the proposition that the legal capacity to perform the employment tasks is, or can be, an inherent requirement of employment, and that what is an inherent requirement of a particular employment will usually depend upon the way in which the employer has arranged its business, and addressed the need for the overall context of the situation to be taken into account;

"Unless the employer's undertaking has been organised so as to permit discriminatory conduct, the terms of the employment contract, the nature of the business and the manner of its organisation will be determinative of whether a requirement is inherent in the particular employment. But only those requirements that are essential in a business sense (including where appropriate public administration) or in a legal sense can be regarded as inhering in the particular employment. The Commission must give appropriate recognition to the business judgment of the employer in organising its undertaking and in regarding this or that requirement as essential to the particular employment. Thus, in Christie, Qantas had no obligation to restructure the roster and bidding system which it utilised for allocating flights to its pilots in order to accommodate Mr Christie. In the end, however, it is for the Commission, and not for the employer, to determine whether or not a requirement is inherent in a particular employment." (citations omitted)

[30] Mr Pettifer's circumstances are akin to those of the applicant in *Applicant v Department of Defence* [2014] FWC 4949 who became incapable of performing the inherent functions of his role because of the actions of a third party. In that case, Commissioner Deegan found that the dismissal of an employee whose employment with a government agency was terminated when his security clearance, essential to perform his duties, was removed by another government agency responsible for issuing security clearances was for a valid reason related to his incapacity to undertake the inherent requirements of his job.

[31] Furthermore, this is consistent with the Full Bench position in *J Boag & Son Brewing Pty Ltd v Allan John Button* [2010] FWAFB 4022, where at [22] the Full Bench stated:

"... it is the substantive position or role of the employee that must be considered and not some modified, restricted duties or temporary alternative position that must be considered."

[32] We have concluded that the BHPB instruction that Mr Pettifer was not permitted to work on the BHPB Site represented a matter which went to Mr Pettifer's capacity to work. Consequently, it was a matter that required consideration pursuant to subsection 387(a) to determine whether or not it was a valid reason for the termination of his employment. It has long been established that the Commission is required to consider and reach conclusions about each of the factors specified in section 387. In *ALH Pty Ltd trading as a Royal Exchange Hotel v Mulhall* (2002) 117 IR 357 at [51], the Full Bench of the predecessor to the FWC (the Australian Industrial Relations Commission) said, in relation to section 170CG of the *Workplace Relations Act 1996* (CTH) (**WR Act**), the precursor to section 387 of the FW Act, that:

"[51] Each of the paragraphs (a) to (d) of section 170CG(3) requires the Commission to have regard to 'whether' a circumstance existed. Whether it existed must then be taken into account, considered and given due weight as a fundamental element in determining whether the termination was harsh, unjust or unreasonable. A consequence of this construction of section 170CG(3) is that the Commission is obliged to make a finding in respect each of the circumstances specified in subsection 170CG(3)(a) to (d) in so far as each of these paragraphs is relevant to the factual circumstances of a particular case."

[33] Consequently we have concluded that the Commissioner was in error in her conclusion that the circumstances of the termination of Mr Pettifer's employment did not give rise to valid reason considerations. Mr Pettifer's incapacity to work on the BHPB Site arose directly from the BHPB prohibition on his returning to work on that site, as distinct from any dispute over his conduct. As a consequence, Mr Pettifer was incapable of working on the BHPB Site in a manner which was akin to a bar or the loss of a form of licence, essential to his capacity to work. Hence Mr Pettifer's capacity was a factor which required a conclusion in terms of whether it represented a valid reason for the termination of his employment.

[34] As a result of this conclusion it is not necessary for us to review the remaining appeal grounds. We have taken Mr Pettifer's submissions in this respect and all of the material before us, into account in exercising the powers available to us upon the redetermination of the matter which we have undertaken utilising the powers provided by section 607(3)(b) of the FW Act.

Valid Reason

[35] To be a valid reason the reason must be "… *sound, defensible or well-founded*." A reason which is "… *capricious, fanciful, spiteful or prejudiced* …" cannot be a valid reason.[7] The reason for termination must be defensible or justifiable on an objective analysis of the relevant facts.[8] The valid reason for termination is not to be judged by legal entitlement to terminate an employee, "… *but* [by] *the existence of a reason for the exercise of that right*" related to the facts of the matter.[9]

[36] Clause 18 of the contract between MODEC and BHPB which governed Mr Pettifer's hire to BHPB provided that:

> *"The Company Representative may direct the Contractor to have removed from the Site or from any activity connected with the work under the Contract, within such time as a Company Representative reasonably directs, any subcontractor or person employed in connection with the work under the contract, whose involvement the company representative considers not to be in the best interests of the project.*
>
> *The costs associated with removing such persons shall be borne by the Contractor. The person shall not be employed elsewhere on the Site or on activities connected with the work under the Contract without the prior written approval of the Company. Within a reasonable period of time those person who have been removed from the work under the Contract shall be replaced at the expense of the Contractor if the Company so requires by other suitable qualified persons Approved by the Company"*[10]

[37] MODEC was therefore contractually obliged to remove Mr Pettifer from the BHPB Site if instructed to do so. This was the role which Mr Pettifer was employed to perform.[11] No longer capable of performing the inherent functions of this role, MODEC sought to find alternative employment for Mr Pettifer. Only after exhausting these inquiries did MODEC rely on this reason to terminate Mr Pettifer's employment.[12] In these circumstances the Full Bench is satisfied that MODEC had a valid reason relating to Mr Pettifer's capacity to terminate his employment and only exercised this reason because it genuinely was unable to find suitable alternative employment for him.

[38] We have considered Mr Pettifer's position in the context of the conclusions reached by Deputy President Asbury in Adecco.

[39] In that matter the Deputy President observed that:

> *"[71] I accept that the Adecco, by virtue of its contract with Nestlé for the supply of labour, may have been required to remove Ms Kool from the Nestlé site when it was requested to do so. I was not assisted by the failure of Adecco to call any direct evidence about the terms of its contract with Nestlé for the supply of labour and the rights of Nestlé to seek to remove labour hire employees from its site."*

[40] The factual situation before the Deputy President was somewhat different to Mr Pettifer's circumstances. In that case, the Deputy President did not have the terms of the contractual relationship between the labour hire company and the host employer in evidence before her. Some of her comments in that context might well be considered to be, at their highest, a general statement of principle. That principle is that, in the context of labour hire arrangements, the actions of an employer who dismisses an employee following the exercise of a host employer's contractual right to have the employee removed from the host site cannot rely exclusively on the actions of that third party as their defence to a claim of unfair dismissal. A discretion remains with the FWC to decide whether a particular dismissal is unfair in all the circumstances.

[41] In the Adecco case, Deputy President Asbury found that a failure on behalf of the applicant's employer to explore redeployment opportunities for the applicant constituted an element of unfairness in the circumstances of the applicant's dismissal. In this case, there is no contest that MODEC did explore redeployment opportunities for Mr Pettifer both prior to his termination and afterwards, including liaising with his union to explore the opportunity of substitution. In this respect, we would also observe that there is absolutely nothing to suggest that MODEC colluded with its client to remove Mr Pettifer from the work site.

[42] Having determined that there was a valid reason for Mr Pettifer's dismissal related to his capacity it is necessary to make findings in relation to sub-sections 387(b)-(h) as part of our re-determination of the matter.

[43] In relation to subsection 387(b) we are satisfied that Mr Pettifer was notified of the valid reason for his dismissal, namely that BHPB had exercised its contractual right to require Mr Pettifer's removal from the BHPB Site and, further, that Mr Pettifer was advised that MODEC was unable to find suitable alternative employment for him.

[44] In terms of subsection 387(c), Mr Pettifer was given the opportunity to respond to the BHPB decision to refuse him the capacity to work on the BHPB Site. He also had the opportunity to respond to MODEC's advice that it could not identify alternative work options for him. The evidence at first instance was that Mr Pettifer was given an opportunity, both personally and via his union representative, to respond to MODEC's advice to him that he was unable to perform the duties of his role because BHPB had exercised its contractual right to exclude him from the BHPB Site.[13]

> *"7. I then, firstly attempted to telephone the Applicant, on, both, his mobile, and his home phone about BGPB's decision to refuse his return to the Pyrenees Venture. I then sent the Applicant an email indicating that BHPB had exercised its contractual*

right to refuse his return to the Pyrenees Venture. (attached and marked R4).

8. On Saturday 14 November 2015 I received a text message from the Applicant expressing his shock about BHPB's decision and asking me to check whether there were any roles in New Zealand, which I did, without success. On 16 November I sent an update email to Gary Kennedy apprising him of the feedback from the Applicant and the MUA. (attached and marked R5).

9. Later, on 16 November, the MUA sent an email requesting that MODEC reconsider its decision to dismiss the Applicant. Through a subsequent email exchange, a telephone conference was arranged with the MUA for 20 November 2015, as Gary was overseas until 20 November 2015.

10. Gary Kennedy and I participated in the telephone conference on behalf of MODEC, during which we explained that, despite MODEC's view that a final warning may have been fairer than exclusion from the Pyrenees Venture, BHPB had exercised its contractual right to exclude the Applicant from its operation.

11. Further, as part of that discussion, Gary and I undertook, on behalf of MODEC, to continue to attempt to find an alternative role for the Applicant and to send an invitation for expressions of interest from other personnel to transfer to the Pyrenees Venture (subject to client approval), in a role swap. Bernie Farrelly of the MUA ultimately sent that invitation by email.

12. Ultimately, MODEC was unable to provide an alternate position, and no expression of interest for the "role swap" was received. Gary Kennedy provided me with a copy of his letter providing notice of termination to the Applicant dated 25 November 2015."

[45] In relation to subsection 387(d) there was no evidence of any unreasonable refusal by MODEC to allow Mr Pettifer to have a support person present.

[46] In relation to subsection 387(e) we consider that, as the dismissal was not related to unsatisfactory performance the issue of warnings about performance did not arise. In terms of subsections 387(f) and (g) we have concluded that MODEC was of a size such that it had procedures relating to the dismissal process. We are satisfied that the evidence indicates that these procedures were properly applied. Further, MODEC had, and utilised, in-house human resource management expertise, particularly in its endeavours to redeploy Mr Pettifer.

[47] The Commissioner's conclusions with respect to subsection 387(h) took into account the duration of Mr Pettifer's employment and the extent to which his employment record with MODEC was unblemished. The Commissioner also took into account the commercial contract between MODEC and BHPB and the extent to which MODEC was contractually obligated to comply with the instructions that Mr Pettifer not return to work at the BHPB Site. The Commissioner noted the endeavours made by MODEC to obtain suitable alternative employment for Mr Pettifer, which included consideration of local and international employment opportunities and discussions with Mr Pettifer's union to explore alternative roles. The Commissioner noted that MODEC retained Mr Pettifer as an employee pending clarification of these issues and, only when these avenues had been exhausted, did it provide him with notice of termination of employment. We agree with each of her conclusions in this

respect, including the extent to which these conclusions and the circumstances more generally support her ultimate finding that the termination of Mr Pettifer's employment was not harsh, unjust or unreasonable.

[48] For the reasons we have detailed, the Appeal is upheld. However, we have ultimately arrived at the same conclusion that the termination of Mr Pettifer's employment was not harsh, unjust or unreasonable.

[49] Accordingly, there is no reason to disturb the Commissioner's Order dismissing Mr Pettifer's unfair dismissal remedy application.

Orders

[50] Having regard to the above conclusions, we make the following orders:

(1) Permission to appeal is granted.
(2) The appeal is upheld.
(3) The Order (dismissing Mr Pettifer's unfair dismissal remedy application) is confirmed.

DEPUTY PRESIDENT

Appearances:

T Slevin of Counsel for the appellant.
R Lewis of Counsel for the respondent.

Hearing details:

2016.
Perth:
July 6.

Final written submissions:

Appellant, 28 June 2016
Respondent, 5 July 2016

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[1] *Pettifer v MODEC Management Services Pty Ltd* [2016] FWC 3194 and [PR580750].

[2] Transcript [PN8].

[3] *Coal & Allied Mining Services Pty Ltd v Lawler and others [2011] FCAFC 54* at [44].

[4] *Pettifer v MODEC Management Services Pty Ltd* [2016] FWC 3194 and [PR580750] at [9].

[5] Ibid at [2] and Exhibit R1 at First Instance.

[6] *Lion Dairy & Drinks Milk Ltd v Peter Norman* [2016] FWCFB 4218 at [15]-[24].

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

[8] *Robe v Burwood Mitsubishi* [Print R4471].

[9] *Miller v UNSW* [2003] FCAFC 180 per Gray J at [13].

[10] *Pettifer v MODEC Management Services Pty Ltd [2016] FWC 3194* at [7] and Exhibit R2 at First Instance.

[11] Ibid at [2] and Exhibit R1 at First Instance.

[12] *Pettifer v MODEC Management Services Pty Ltd [2016] FWC 3194* at [10] and Witness Statement of Karen Clarke dated 27 April 2016 at [11] to [12] Exhibit EX5 at First Instance.

[13] Witness Statement of Karen Clarke dated 27 April 2016 at [7] to [12] Exhibit EX5 at First Instance.