



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Alison Bleyerveen

v

Uniting Mission and Education
(U2018/12731)

COMMISSIONER JOHNS

MELBOURNE, 9 AUGUST 2019

Application for an unfair dismissal remedy – Jurisdictional objection – Genuine redundancy – Reasonable to redeploy.

Introduction

[1] This decision is about whether the termination of employment of Alison Bleyerveen (**Applicant**) was a case of genuine redundancy. The termination was effected by an unincorporated association known as Uniting Mission and Education (**Respondent/Employer/UME**) on 28 November 2018.

[2] If the termination was a case of genuine redundancy then Ms Bleyerveen's application for an unfair dismissal remedy must be dismissed. If the termination was not a case of genuine redundancy it becomes necessary to determine if termination of employment was unfair.

[3] On 10 December 2018 Ms Bleyerveen made an application to the Fair Work Commission (**Commission**) pursuant to s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) seeking a remedy for unfair dismissal. She seeks an order that the Respondent reinstate her into employment.

[4] On 14 January 2019 the Respondent filed a response to the unfair dismissal application. It objected to the Commission exercising jurisdiction in relation to the matter on the basis that, it contended, the dismissal was a matter case of genuine redundancy.

[5] Conciliation was attempted, but the dispute remained unresolved. Consequently the matter was listed for a jurisdictional hearing on 6 March, 9 April and 17 April 2019.

[6] At the hearing;

- a) the Applicant was represented by herself. The Applicant gave evidence on her own behalf and was cross-examined. The Applicant also called the following witnesses:

- i. Reverend Duncan Macleod, Minister – Team Leader, Port Phillip East Presbytery,
 - ii. Reverend Katherine Louise Merrifield, Director, Pathways Secretariat,
 - iii. Reverend Ronald Niall Forest Reid, a Minister of Northmead Uniting Church,
 - iv. Reverend Amelia Koh-Butler, Parramatta Mission's Multi-faith Chaplin to Western Sydney University,
 - v. Reverend Rhonda Jane White, Lecturer in Practical Theology, and
 - vi. Reverend Ken Day, Minister at St Stephen's Uniting Church, Sydney.
- b) the Respondent was represented by Mr David Stewart of counsel. Mr Stewart called the following witnesses:
- i. Reverend Tara Curlewis, from October 2017 the Interim Executive Director of the Respondent,
 - ii. Roxanne Harris, Human Resources Manager for Uniting Resources, and
 - iii. Dr Glen Brian Powell, from July 2018 a Board Member of the Respondent and from October 2018 chair of the Joint Nominating Committees appointed to conduct interviews as a part of a selection process that the Applicant participated in.

[7] In advance of the hearing the parties filed materials. In coming to this decision the Commission, as presently constituted, has had regard to the following documents in addition to the oral evidence and other documents tendered during the hearing:

EXHIBIT NO.	DESCRIPTION	TRANSCRIPT REFERENCE
1	Application form with annexures	PN41
2	Employer's F3 Response	PN41
3	Applicant's Objection Submissions	PN41
4	Applicant's Merits Submissions	PN41
5	Respondent's Submissions	PN41
6	Statement of Agreed facts	PN41
7	Statement of Alison Bleyerveen dated 22 February 2019	PN41

EXHIBIT NO.	DESCRIPTION	TRANSCRIPT REFERENCE
8	Statement of Reverend Duncan Macleod dated 19 February 2019	PN41
9	Statement of Reverend Katherine Louise Merrifield dated 20 February 2019	PN41
10	Statement of Reverend Ronald Niall Forest Reid dated 20 February 2019	PN41
11	Statement of Reverend Amelia Koh-Butler dated 13 February 2019	PN41
12	Statement of Reverend Rhonda Jane White dated 18 February 2019	PN41
13	Statement of Reverend Ken Day dated 17 February 2019	PN41
14	Statement of Sue Kaldor undated	PN41
15	Applicant's further documents	PN41
16	Statement of Reverend Tara Curlewis dated 8 February 2019	PN179
17	Statement of Roxanne Harris dated 8 February 2019	PN973
18	Number not used	
19	Statement of Dr Glen Powell dated 8 February 2019	PN41
20	Statement in Reply of Roxanne Harris dated 28 February 2019	PN979
21	Statement in Reply of Dr Glen Powell dated 1 March 2019	PN41
22	Number not used	
23	Number not used	
24	Number not used	
25	Number not used	
26	Number not used	
27	Respondent's Role Comparison Table	PN41
28	Notes of Interview of Dr Powell	PN1238
29	Supplementary Statement of Roxanne Harris dated 20 March 2019	PN1264
30	Respondent's Table of Potential Redeployment positions	PN1273

EXHIBIT NO.	DESCRIPTION	TRANSCRIPT REFERENCE
31	Section 5 of Employment Manual	PN1288
32	Typed Interview Notes of Glen Powell	PN2273
33	Further supplementary Statement of Roxanne Harris dated 16 April 2019	PN2304
34	Email from the Applicant dated 16 April 2019	PN2304

[8] I have also had regard to the final submissions made by the parties following the hearing. They were as follows:

- a) Respondent's Final Submissions dated 3 May 2019,
- b) Applicant's Final Submissions dated 17 May 2019, and
- c) Respondent's Reply Submissions filed 24 May 2019.

Background

[9] On 4 March 2019 the parties filed a Statement of Agreed Facts (**SoAF**). Having regard to the relevant matters in the SoAF, other matters that were largely uncontested and the evidence in the proceedings I make the following findings of fact:

- a) On 1 July 2011 UME was formed and was registered for an ABN being 73 734 074 344.¹
- b) For all relevant periods UME was an unincorporated association.²
- c) On 3 December 2012 UME was registered with the Australian Charities and Not-for-profits Commission.³
- d) From November 2004 Vicki Roper has been the Employment & IR Manager for Uniting Resources.⁴
- e) From January 2014 until December 2018 Reverend Duncan Macleod was the Uniting Learning Network Director for UME.⁵ He was the Applicant's line manager.
- f) From October 2017 until February 2019 Reverend Tara Curlewis was the Interim Executive Director of UME.⁶
- g) From February 2018 Roxanne Harris was the Head of Human Resources for the Synod and provided Human Resources advice to UME.⁷

¹ SoAF, para 4

² SoAF, para 5

³ SoAF, para 10

⁴ SoAF, para 6

⁵ SoAF, para 7

⁶ SoAF, para 8

- h) Between 1999 and 2014 the Applicant was a secondary school teacher of English and Religious Education. The Applicant holds a Masters of Theology and is a candidate for a Doctor of Ministry. She has undertaken a range of professional development.⁸
- i) From 1 July 2014 the Applicant commenced employment as a ‘Mission Resourcing Consultant’ (**MRC Role**) reporting to the Head of Uniting Learning Network of UME.⁹ The Position Description for the MRC Role was annexure TC-1 to the witness statement of Reverend Curlewis.
- j) The Applicant was initially paid a base salary of \$44,717.00 per annum plus superannuation subject to tax, \$19,164.00 tax free salary, a housing allowance of \$12,652.00 per annum, motor vehicle allowance of \$14,885.00 per annum and a resource allowance of \$1,405.00 per annum.¹⁰
- k) As at the date of dismissal the Applicant received the following earnings:¹¹
 - i. taxable base salary of \$50,223.25 per annum;
 - ii. non-taxable base salary of \$21,524.25;
 - iii. book allowance of \$1,510.00 per annum;
 - iv. housing allowance of \$12,956.00 per annum;
 - v. work provided motor vehicle;
 - vi. superannuation.
- l) The Applicant was not employed pursuant to any Award or enterprise agreement as defined in the FW Act.¹²
- m) At all times the Applicant directly reported to employees of UME.¹³
- n) The Applicant’s position in the original structure sat in the Resourcing Team (a part of the Uniting Learning Network) which was constituted of the following positions:¹⁴
 - i. Next Gen Consultant;

⁷ SoAF, para 9

⁸ Statement of Applicant dated 22 February 2019

⁹ SoAF, para 11

¹⁰ SoAF, para 12

¹¹ SoAF, para 13

¹² SoAF, para 14

¹³ SoAF, para 16

¹⁴ SoAF, para 17

- ii. RE & Safe Church Consultant;
 - iii. New Initiatives Consultant;
 - iv. Lay Discipleship Rural Consultant;
 - v. Mission Resourcing Consultant (Applicant's position);
 - vi. Multi-Cultural Consultant; and
 - vii. Leadership Consultant (x 2).
- o) On 16 February 2018 the Standing Committee of the Synod authorised the General Secretary to engage Good Provider Pty Ltd (**Good Provider**) to conduct a review of UME.¹⁵
- p) On 8 March 2018 all staff of UME were advised by Jane Fry, General Secretary of the Church, that there would be a restructure of UME.¹⁶
- q) In March 2019 Good Provider was appointed to conduct a review of operations. In April 2019 the Applicant was consulted as a part of the review. In total in excess of 40 interviews were conducted by Good Provider.
- r) On 25 May 2018 Good Provider produced a report which contained 14 recommendations.¹⁷
- s) On 25 May 2018 the Board of UME agreed to accept the 14 recommendations which included the creation of 4 separate divisions being:¹⁸
- i. Mission Strategy;
 - ii. Mission Enablement;
 - iii. Vital Leadership; and
 - iv. Uniting Theological College;
- t) Within the Mission Enablement team there were the following positions created:¹⁹
- i. Head of Mission Enablement;
 - ii. Director of Rural & Regional;

¹⁵ SoAF, para 18

¹⁶ SoAF, para 19

¹⁷ SoAF, para 20

¹⁸ SoAF, para 21

¹⁹ SoAF, para 22

- iii. MSM Contractor (although this position was not ultimately advertised); and
 - iv. Mission Facilitation Consultant (**MFC Role**) (x 3);
- u) The change in structure as between the Resourcing Team and the Mission Enablement Team is best represented by the following table:

Resourcing Team (pre-restructure)	Action taken re position	Mission Enablement Team (post-restructure)	Action taken re person (outcome)
1. Next Gen Consultant	Abolished	N/A	Braydon French (resigned) ²⁰
2. RE & Safe Church Consultant	Moved to Uniting Resources	N/A	Emma Parr (moved to Uniting Resources) ²¹
3. New Initiatives Consultant	Redundant	N/A	Raymond Joso (became Mission Facilitator in new structure) ²²
4. Lay Discipleship Rural Consultant	Abolished	N/A	Bronwyn Murphy (moved to new position within Synod) ²³
5. Mission Resourcing Consultant	Redundant	N/A	Alison Bleyerveen (Applicant) (employment terminated)
6. Multicultural Consultant	Redundant	N/A	Fie Marino (employment terminated) ²⁴
7. Leadership Consultant	Redundant	N/A	Sue Caldor (elected to take redundancy) ²⁵

²⁰ Transcript PN74-78

²¹ Transcript PN80-85

²² Transcript PN86-106

²³ Transcript PN109-118

²⁴ Transcript PN119-127

²⁵ Transcript PN128-137

Resourcing Team (pre-restructure)	Action taken re position	Mission Enablement Team (post-restructure)	Action taken re person (outcome)
8. Leadership Consultant	Redundant	N/A	Peter Caldo (elected to take redundancy) ²⁶
		Head of Mission Enablement	Jorge Rebollo ²⁷ (external appointment)
		Director of Rural & Regional	Mark Fawkner ²⁸ (internal appointment)
		MSM Contractor	Not filled or advertised ²⁹
		Mission Facilitation Consultant	Raymond Joso (internal appointment from Resourcing Team) ³⁰
		Mission Facilitation Consultant	Falepaine Maile (external appointment) ³¹
		Mission Facilitation Consultant	Cameron Eccelstone (external appointment) ³²

- v) As is apparent from the table above, within the original 8 person Resourcing Team,
- i. 1 resigned,
 - ii. 2 were reassigned to other Uniting entities,
 - iii. 2 took redundancy packages,
 - iv. 1 took up a new position in the restructure,
 - v. 2 (one of which was the Applicant) had their employment terminated.

²⁶ Ibid

²⁷ Transcript PN139

²⁸ Transcript PN140-147

²⁹ Transcript PN148

³⁰ Transcript PN148

³¹ Transcript PN150-152

³² Transcript PN154

- w) As is also apparent from the table above, specialist consultant roles (including the MRC Role) were made redundant and, 3 generalist and multi-disciplinary roles (MFC Role) were created.
- x) One of the transformation strategies was for UME to become more “user focused”. The June 2018 strategy document contained the following:

“Users (presbyteries and congregations) will be our primary focus. UME will reshape itself so the user experience through integrated mission, discipleship and leadership support that enables church health and growth. Being user focused will require “hardwiring” the relationships between UME, presbyteries and other key Synod agencies. It is expected that significant limb or time will be spent in the field listening to and providing support to users.”³³

- y) The task of implementing the restructure was delegated to a taskforce comprising, David Cornford (UME Executive Officer), Duncan Macleod (Acting Head of Mission Enablement), Gerard Moore (Academic Dean representing UTC), Browyn Moore (General Secretariat) and Reverend Tara Curlewis (UME Interim Executive Director).
- z) On 7 June 2018 all staff were advised of the outcome of the external review of UME.³⁴
 - aa) On 12 July 2018 the Applicant sent an email to Duncan Macleod, Head of Uniting Learning Network, outlining her views of a position description for new positions.³⁵
 - bb) On 26 July 2018 the Applicant attended a meeting with David Cornford, Executive Officer of UME, about the design of teams.³⁶
 - cc) On 11 September 2018 the members of management met with the Applicant to advise that her position was to be made redundant, she could either accept a redundancy package or she could apply for any of the new positions.³⁷
 - dd) On 14 September 2018 all new positions were advertised to all affected staff.³⁸
 - ee) On or about 18 September 2018 the Applicant indicated that she wished to apply for a position which was subsequently determined to be the Head of Mission Enablement and one of the MFC Roles.³⁹

³³ Exhibit 7, Annexure AB1, page 1.

³⁴ SoAF, para 24

³⁵ SoAF, para 25

³⁶ SoAF, para 26

³⁷ SoAF, para 27

³⁸ SoAF, para 28

³⁹ SoAF, para 29

- ff) An interview panel was constituted for the Head of Mission Enablement Role. It included Dr Glen Powell (Chair), Ian Weeks, Danielle Hemsworth-Smith, Alimoni Taumoepeau and Reverend Tara Curlewis.
- gg) On 19 October 2018 the Applicant was interviewed for the Head of Mission Enablement position but was not successful.⁴⁰
- hh) A separate panel was constituted to consider candidates for the MRC Role. It was called a Joint Nominating Committee (JNC). The JNC comprised Dr Powell, David Cornford, Head of Mission Strategy, Reverend Mel Pouvalu, Uniting Church Engagement Team Member and Reverend Dr Rob MacFarlane, Presbytery Minister.⁴¹
- ii) Thirteen applications were received for the MFC Roles comprising of 13 candidates. Nine people, including the Applicant, were offered a first interview.⁴²
- jj) On 22 October 2018 the Applicant was interviewed for one of the MFC Roles and was offered a second interview.⁴³
- kk) The Applicant was unsuccessful in securing a MFC Role.⁴⁴
- ll) On 19 November 2018 the Joint Nomination Committee recommended three people for the MFC Roles.⁴⁵
- mm) On 20 November 2018 Dr Powell telephoned the Applicant to advise that she had been unsuccessful in securing a MFC Role.⁴⁶
- nn) On 21 November 2018 the Applicant attended a meeting with Reverend Curlewis and Dr Powell during which she was advised that her position would be made redundant effective from 28 November 2018.⁴⁷
- oo) The Applicant's employment ceased on 28 November 2018 and she was paid 4 weeks' pay in lieu of notice, 8 weeks redundancy pay and plus accrued but untaken annual leave.⁴⁸

[10] The Applicant submitted that she was unfairly dismissed and sought an Order that she be:

- a) reinstated; or, if reinstatement was not deemed an appropriate remedy, or
- b) compensation.

⁴⁰ SoAF, para 30

⁴¹ Exhibit 19, para 13

⁴² SoAF, para 31

⁴³ SoAF, para 32

⁴⁴ SoAF, para 33

⁴⁵ SoAF, para 34

⁴⁶ SoAF, para 35

⁴⁷ SoAF, para 36

⁴⁸ SoAF, para 37

[11] In its Final Submissions the Respondent submitted that,
 “Section 389(1)(a) FWA – employer no longer required the job to be filled by anyone

1. The position held by the Applicant of Mission Resourcing Consultant (the MRC position) with Uniting Mission and Education (UME), ceased to exist. The MRC position was broken up with some of the duties going to Uniting Resources; and, some of the duties going to the three new Mission Facilitation Consultant positions (the MFC position). The Applicant (eventually) accepted that the unique position of MRC was gone.⁴⁹
2. It is axiomatic that the MRC position was no longer required to be filled by anyone and the position became redundant.⁵⁰
3. Accordingly, the Respondent has satisfied the legislative requirement under s.389(1)(a) FWA.

Section 389(1)(b) FWA – no modern award or enterprise agreement in this case

4. There was no modern award or enterprise agreement that covered the Applicant’s employment with the Respondent. The Applicant appeared to accept this proposition.⁵¹ For completeness, the Applicant cannot “fill” the statutory requirement for a modern award/enterprise agreement by reference to an internal redundancy policy.
5. Accordingly, the Respondent has satisfied the legislative requirement under s.389(1)(b) FWA.
6. At this point, as both s. 389(1)(a) and (b) FWA are satisfied, the Respondent has established that the Applicant’s dismissal was a case of genuine redundancy. Accordingly, the Applicant has not been unfairly dismissed.⁵²

Section 389(2) FWA – redeployment of the Applicant was not reasonable in all the circumstances in this case

7. It was put squarely to the Respondent that it cannot/does not satisfy s.389(2) FWA in this case, because:
 - a. the Applicant was required to go through an open selection process, and that is inconsistent with the authorities in the area.⁵³
 - b. what the Respondent ought to have done before it went out openly was it ought to have made an assessment about whether, or not, the

⁴⁹ PN1613 – PN1629

⁵⁰ s.389(1)(a) FWA; *Jones v Department of Energy and Minerals* (1995) 60 IR 304 AT 308; *Dibb v Federal Commissioner of Taxation* (2004) 136 FCR 388

⁵¹ PN47 – PN48

⁵² S.385(d) FWA

⁵³ PN51

Applicant say, for example, could have been a mission facilitator; which would involve going through the key responsibilities and competencies and simply asking if she could fulfil them. If it made an assessment that she could, then it should have slotted her into the position. If it made an assessment that she was not, then it could have gone out to market;⁵⁴ and

- c. regardless of the above, the Respondent should have offered to redeploy the Applicant to any role available, for example, a cleaning position in a Presbytery in Perth.⁵⁵
8. First, with respect, there is no warrant in the statute or the case law for the proposition that an employer must assess whether a current employee could do the new role before going to market. Put in another way, there is no absolute obligation to exhaust all opportunities for people who are likely to be displaced in a restructure before an employer goes out to market.⁵⁶
9. Of course, there may be such a warrant in an industrial instrument or via a term having been incorporated into a contract of employment from a redundancy policy. However, that is not this case. In the present case the Commission is only called upon to determine whether, or not, s. 389(2) FWA is satisfied. The sub-section operates as an exclusion to a ‘defence’ afforded to an employer against an unfair dismissal claim in the event of a genuine redundancy.
10. The sub-section cannot be elevated to the point where it stands for the proposition set out in paragraph 7(a) and (b) above, because that would require clear and unequivocal words in the statute. With respect, those words do not exist; and, to the contrary the sub-section directs the Commission’s attention to what is reasonable in all the circumstances.
11. Second, the relevant passage (albeit obiter) in *Ulan Coal Mines Limited v A. Honeysett and Ors* [2010] FWAFB 7578, that goes closest to supporting such a proposition (although it is submitted it falls well short), is found at paragraph [34] as follows:

... where an employer decides that rather than fill a vacancy by redeploying an employee into a suitable job in its own enterprise, it will advertise the vacancy and require the employee to compete with other Applicants, it might subsequently be found that the resulting dismissal is not a case of genuine redundancy.
12. It is submitted that the passage goes no further than saying that if such a process is adopted it might be found that the dismissal was not a genuine redundancy; not that it will be found to be so.

⁵⁴ PN51 – PN52; PN311; PN368; PN1047; PN1113

⁵⁵ PN301; PN303; PN307

⁵⁶ Cf PN311

13. Third, the passage in the context of that case was focused on the vacancy being a suitable role for the employee. This proposition is unsurprising given the facts of Ulan Coal.
14. In short, the case involved coal miners ceasing to work at the Ulan Mine (50 kms north of Mudgee) and then (potentially) working as coal miners at other coal mines in the Xstrata Group: at [6]. The only change was the location of the work; nothing about the work changed in any way.
15. Accordingly, it had to be accepted that the employees were suitable for the role (they were coal miners); the issue being whether the role, given the increased travelling, was suitable for the employee/should have been offered to the employees. With respect, that is a very different case to the present one. In the present case, the UME underwent a significant change programme. The change programme involved subjective/cultural/theological skills, whereas Ulan Coal involved objective/practical/manual skills.
16. Fourth, a suitable role is not just that it would suit the employee to fill the position. It is necessary that the employee must also be suitable for the role. This proposition is clear from the preceding words in paragraph [34] of Ulan Coal.
17. The critical part of the passage for the present case is:

Of course the job must be suitable, in the sense that the employee should have the skills and competence required to perform it to the required standard either immediately or within a reasonable period of retraining. (emphasis added)
18. Accordingly, the Full Bench directed specific attention to the required standard. The employer sets the standard that is required; and, the employer then assesses a candidate against the standard. This evaluative process is entirely within the purview of the employer. There is a good reason for this – it is the employer who is undertaking this important function (mission and education); and, employing/paying people to do this work.
19. The Full Bench decision in Ulan Coal does not prescribe that there is a necessary process that requires an employer to:
 - a. First make an assessment about whether, or not, the incumbent employee could fulfil the role by going through the key responsibilities and competencies and simply asking if she or he could fulfil them.
 - b. Then upon making an assessment that he or she could, then it should just slot him or her into the position.
 - c. And, only if the employer made an assessment that she or he was not suitable, then can the employer go out to market.
20. With respect, the authorities do not stand for the proposition that an assessment as to suitability must be made before going to market. There is no doubt that it may be a factor, but, it cannot be elevated to the point where it is fatal to an employer

relying on the section if they have not gone to market before making an assessment of the incumbent's suitability.

21. The decision in *Wilson v North Rockhampton Bowls Club Inc* [2011] FWA 1928 at [87] makes good this point, because in that case it was held:

Was that a reasonable decision? In my view it was on the basis of my findings above that the change from the old role to the new role was sufficiently different, broader and requiring particular skills that the Respondent was entitled to determine whether a more suitable candidate than the Applicant wished to apply for the position. The Respondent has also made submissions that the new role receives higher remuneration on the basis of the changed nature of the position.

22. The reason that there is no such proscriptive approach is because to adopt such an approach is to lose sight of the critical words of s. 389(2) FWA in that:

389(2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

- (a) the employer's enterprise; or
- (b) the enterprise of an associated entity of the employer.

(emphasis added)

23. Fifth, it is accepted that the Respondent needs to demonstrate that there is a material difference between the old role and the new role in order to demonstrate that the employee does not have the skills and competence required to perform it to the required standard either immediately or within a reasonable period of retraining.

24. In the present case some of the functions of the MRC position were now to be carried out by a person in the MFC position. However, contrary to the submission of the Applicant, the MRC position and the MFC position were very different.⁵⁷

25. The critical point which the Applicant refused to accept during the selection process and throughout the proceedings (as did the witnesses called on her behalf), is that the MFC position required an entirely new approach to mission and education.

26. With respect, the starting point for the analysis in this case is not the incumbent employee and the old role. The starting point (taking into account all the circumstances), was the need for change in the UME.

27. In October 2017, external consultants were engaged to conduct a review on the effectiveness of the UME Board. As a result of this review, it was determined that there was a need for increased governance of the UME and for there to be a complete review of the entire portfolio.⁵⁸

⁵⁷ PN23 – PN24; Exhibit 27, Respondent's Comparison Table, Third Column

⁵⁸ Exhibit 16, Curlewis 8/2/19 statement [11]

28. At a meeting in February 2018, it was determined that an external consultant conduct this review, which led to the appointment of Good Provider Pty Ltd (Good Provider) in March 2018.⁵⁹
29. Following in excess of 40 interviews (including with the Applicant), Good Provider submitted its report dated 25 May 2018;⁶⁰ which having identified the “the big issues” made a series of significant recommendations.⁶¹ The recommendations were adopted by the UME Board on 25 May 2018.
30. The Applicant was included in the review and received the document titled UME Transformation Strategy June 2018.⁶²
31. The implementation of the new structure is explained by Reverend Curlewis.⁶³ Dr Powell gave evidence about the interview programme. Ms Harris explained the HR process including the creation of the position description for the MFC role. The Applicant provided her input throughout the process.
32. Importantly, the main thrust of the change programme was the move to an end user system/being “hard wired” to congregations etc/enabling and supporting leaders at a grass roots level/collaborating with a diversity of theological and cultural groups in the Church. This significant change in the way things were to be done in the mission and education space needs to be fully understood. The change is embracing theological and cultural diversity. With respect, this could not be further from coal mine work.
33. The theological and cultural issues were somewhat skirted around⁶⁴. In short, the change means working within conservative congregations and giving credence to those congregations’ theological and cultural views.
34. The fact that the language around this change in the UME has been imprecise/poorly articulated/not crisply communicated, is part of, and indicative of, the change in the way things were to be done in the UME. The JNC, headed by Dr Powell, was tasked with finding the right people for these new roles.
35. Dr Powell set out clearly the reasons the Applicant was not offered a role at.⁶⁵ He was not seriously challenged on these reasons. The key areas of lack of competence included the poor understanding of the new structure, an inability to understand the position was more focused and collaborative, and a lack of vision for the new structure.
36. The Applicant maintained that the new role was substantially the same if not identical to the role she already occupied;⁶⁶ and, doggedly sought to say on one

⁵⁹ Ibid [16]

⁶⁰ See exhibit 16, Curlewis 8/2/19 statement [17], ‘TC-1’ pp. 14-92

⁶¹ Summarised at exhibit 16, pp. 22-23

⁶² Ex 7 Bleyerveen statement [13]-[18]

⁶³ Ibid [22] – [31]

⁶⁴ Until PN 825

⁶⁵ Exhibit 19, [19]

⁶⁶ Exhibit 7, [33]

hand it was the same role and in turn if there was any difference then she was already doing that work.⁶⁷ Not only is this a good reason not to offer her the role, it is why an approach of slotting the same people into the new roles is problematic as it is prone to perpetuate the old ways. The Commission put this to the Applicant - she appeared to reluctantly accept the proposition.⁶⁸

37. The Applicant also sought to have the Commission accept that her MRC position description (and the one for the MFC position description) was rubbish and never reflected what I did from the first day that I began.⁶⁹ Her evidence in this regard was not only undermined but demonstrated that she was unwilling to accept, despite it being obvious, that the roles were markedly different.⁷⁰
38. It is submitted that the Applicant's evidence on the whole was prolix and difficult to comprehend yet it tended towards her trying to put forward that she was capable of accepting other views that did not accord with her own and she was collaborative⁷¹ in the sense of end user focussed/from grass roots up and had the capacity to work across theological and cultural diversity. Of course, these are the other areas that Dr Powell had identified as being where the Applicant lacked competence.⁷²
39. That the Applicant had these requisite skills can be rejected because:
 - a. As to being end user focused she was squarely asked – Just give me the best example that you – of being user focused in the six months prior to June 2018 that you did? The Applicant's answer was with respect to her joining a strategy committee at their request. The description of her work (despite her being at pains to use the terms collaboratively/developing a dream), was sitting on a standing committee, drafting position descriptions and being on a JNC recruitment panel. In short, she provided a resource to the Presbytery.⁷³
 - b. The Applicant having accepted that views in certain congregations that homosexuality was against god was an ongoing big issue in the Church, did not include this anywhere in her notes with respect to the new roles.⁷⁴ The Applicant understood that this was an issue going forward in the new roles, although it was not particularly well articulated during the process.⁷⁵
 - c. Cultural and theological diversity and a “bottom up” or “grass roots approach” was squarely raised with the Applicant in cross-

⁶⁷ PN1607 – PN1612; PN1667 – PN1683; PN1656 – PN1659 – PN1669

⁶⁸ PN1685 – PN1869

⁶⁹ PN46; The Applicant had previously put it slightly less stridently at PN24

⁷⁰ PN1545 – PN1604; PN1613 – PN1629

⁷¹ The Applicant had described ‘collaboration’ as being a weasel word

⁷² Exhibit 19, para 19

⁷³ PN1648 – PN1655

⁷⁴ Exhibit 7, AB-03; PN1693 – PN1717

⁷⁵ PN1757 – PN1777

examination.⁷⁶ The Applicant was specifically asked for the best example of her dealing with a Tongan congregation that was anti-homosexual.⁷⁷ The Applicant sought to have the Commission believe that her example, Griffith Uniting Church, involved dealing and engaging with cultural and theological diversity at a grass roots level. With respect, that is not correct. It is not correct because not only did her answers go only to a dispute over resourcing (i.e. a funding grant being used for multi-cultural celebrations); but, because in her application for the MFC role,⁷⁸ the work with Griffith Uniting Church is described by her as her facilitating a consultation process between Anglo and a range of Pacifica cultures who held different views about resourcing mission. With respect, she was a third-party facilitator. The MFC role required direct engagement with culturally and theological diverse congregations i.e. different from the Applicant's perspective.

40. The Applicant has been recognised as having valuable skills and experience, but she was not the right person for the new role of MFC.
41. Sixth, with respect, it is wrong to approach the question of re-deployment in this case on the basis of slotting the same people into the new roles because it was not simply about roles. It was a change in culture and an approach to theology in the congregations.
42. The only way to really grapple with this change was to go to the market. If the employer was wrong, then the current employees would have been placed in the new roles – two were. That is simple merit-based selection in action. Section 5 of the Employment Manual makes clear that the merit principle will be applied in all instances where affected employees are being considered for a vacant position.⁷⁹ Leaving aside whether the Church is a “business”, the UME being a National System Employer should be afforded this flexibility pursuant to the Objects of the Act.
43. Not only is this a different case from Ulan Coal, it is a case about change – change that is at times esoteric/rubbery – but that is the very space in which this change programme took place at UME.
44. That became and only could have become apparent from an open selection process. With respect, to prevent an open selection process/to slot the Applicant into the new role provided she had the basic competencies is to:
 - a. ignore the significant change that was required, and took place, at UME;
 - b. exclude other potential and, as it turned out, better candidates; and

⁷⁶ PN1785 – PN1790

⁷⁷ PN1787

⁷⁸ Exhibit 7 “AB-8” under the heading – *ability to work with diverse culture*

⁷⁹ Exhibit 31, page 7 last bullet point

- c. make the organisation hidebound and ossified. An organisation that has declining membership and needs to directly engage with its culturally and theologically diverse congregations.
45. Seventh, it is not surprising in this case, where significant change was taking place, that it was difficult to precisely articulate what the employer was looking for in a prospective employee. However, the employer undertook an open and transparent selection process.
46. While a selection process is never ‘perfect’ and there are always disgruntled candidates who miss out on a position; in the present selection process a Joint Nominating Committee (JNC), interviewed a number of candidates (twice) and chose the candidates they were “looking for” to fulfil the roles.
47. The Applicant, despite having many attributes, was unsuccessful, in circumstances where she was given every opportunity, including a guaranteed first interview as well as a second interview despite having the lowest ranking (other than ‘not acceptable’) in the first interview.⁸⁰
48. Additionally, to only focus on her application for the position is to lose sight of the other candidates. In the present case, there were far more suitable candidates for the role. A review of the first and second round interview notes⁸¹ clearly demonstrates why candidates other than the Applicant were chosen for the positions. Of course, not only was the Applicant not the next best candidate, it was most likely that if the other candidates had not accepted the positions, the positions would have been re-advertised.⁸²
49. Eighth, it was put by the Commission that Reverend Duncan MacLeod, as the Applicant’s direct supervisor/line manager, was the best person to give evidence about whether or not the Applicant could fulfil the position description.⁸³ Dr Powell agreed in this exchange that this was possibly the case.
50. With respect, it was apparent from Reverend MacLeod’s evidence that he was in fact entirely unsuitable to give a view on the Applicant’s suitability for the role. Reverend MacLeod’s statement⁸⁴ displayed real animosity towards the change process.
51. In cross-examination, having been taken through the Good Provider report dated 25 May 2018⁸⁵ he refused to accept:
- a. there was any need for real change, as all that was required was a stronger focussed strategic framework under which staff would be more effective;⁸⁶ and

⁸⁰ Exhibit 19 [15]; [17]; [19]; [20]; [21]; [22]; GP-1 pp. 15 – 16; Exhibit 21, [4] – [11]; Exhibit 28

⁸¹ Exhibit 19 pp. 15 – 16; Exhibit 28

⁸² Exhibit 21, [9]; PN585 – PN588

⁸³ PN395 – PN399

⁸⁴ Exhibit 8, [7.15]

⁸⁵ PN1985 – PN2030

- b. that it was a direct indictment on his management.⁸⁷
52. It is submitted that Reverend MacLeod’s evidence displayed one of the fundamental problems in the Applicant’s case. The fundamental problem is that Reverend MacLeod, like the Applicant, did not believe there was any need for change in the UME.
53. It is submitted that the evidence of the Applicant and her witnesses, while all maintaining the Applicant should be placed in a new role as she had dealt with cultural and theological diversity (which is not the case): appeared to oscillate between the notion that there was no need for change in the UME because it was already doing what the report recommended, or, any need for change could be achieved by tweaking the structure and having a stronger focus on strategy.⁸⁸ Reverend Reid as her academic supervisor added nothing.⁸⁹
54. It is submitted that the evidence of each witness called by the Applicant did not assist her because the witnesses did not accept that there was any need for fundamental change in the UME. It followed that they each believed that the Applicant was suitable for the new role.
55. If the proposed “internal” assessment was carried out prior to going to market in this case, it would mean placing significant emphasis on the flawed and somewhat myopic views of the Applicant’s witnesses.
56. Ninth, it is submitted that in cases such as the present which involve ‘cultural’ change there are six good practical reasons for going to market in all the circumstances:
- a. If the employer goes to market it is a fortiori the case that it does not think that the employees in the old roles are entirely suitable for the new roles.
 - b. The employer necessarily believes that there are external candidates who may be better suited to the new roles.
 - c. The employer is in a position to assess its current staff and the external candidates to find the best person for the job. While the incumbent may well be the best person for the job the employer can only know this once it has tested the market.

⁸⁶ PN2019

⁸⁷ PN2029 – PN2030

⁸⁸ Day XX PN1904 – PN1922; MacLeod XX PN1985 – PN 2096; Koh-Butler XX PN2164 – PN2176; Merrifield XX PN2323 – PN2383; White XX PN2407 – PN2422

⁸⁹ PN2232 – PN2237

- d. The current employees simply do not have an elevated security of employment that provides - so long as they are able at the most basic level to do the new job - then they should be kept on in the new role.
- e. It facilitates change in the way the work is done where there is significant resistance to this change from the current staff (as was the case here).
- f. Proper regard is had to the requirement laid down by the Full Bench in that the employee must be able to perform the role to the required standard.

57. The Objects of the FWA are clear in this regard. The Act is to provide a balanced framework for co-operative and productive workplace relations - that promote national economic prosperity and social inclusion for all Australians - that are ... flexible for businesses.⁹⁰

Re-deployment within the employer's enterprise

- 58. Dr Powell suggested the Applicant apply for the education position; she did not want to as it was more in her past than her future.⁹¹
- 59. The proposition that the Applicant should have been re-deployed to any role available, whilst problematic, as a matter of reality does not go very far in this case.⁹²
- 60. The Commission called on the production of every single vacancy that existed within the entire Uniting Church all over the country as at 28 November and the four [then six] weeks thereafter.⁹³
- 61. The Respondent complied with the call.⁹⁴
- 62. With respect to the available positions in UME and Uniting Resources,⁹⁵ it was clear that of the 13 'available' positions, the Applicant was never in the running for 10 of the positions, for example, Senior Business Analyst IT.
- 63. It is submitted that there were only three possible positions on the face of the job title, being:
 - a. a Guest Relations Officer;
 - b. a Casual Venue Attendant; or

⁹⁰ s.3(a) FWA

⁹¹ Exhibit 7 at para 62(c); See also para 67

⁹² *Technical and Further Education Commission t/as TAFE NSW v Pykett* [2014] FWCFB 714

⁹³ PN305; PN307

⁹⁴ Exhibit 29

⁹⁵ Exhibit 29, para 4

c. a Corporate Communications Manager.

64. As was submitted,⁹⁶ the three roles, while on the face of the job title, may have been roles within the Applicant's skill set; when the position description for each was considered, the Applicant was entirely unsuited for the role. An aide memoire was provided by the Respondent that became Ex. 30. As is noted the first two positions were award covered; part time and casual respectively; and paid \$26,130.62 and \$13,145.00 respectively. It is fanciful to suggest that these roles were suitable. The Corporate Communications Manager position was salaried and paid \$152,000.00 per annum.
65. The Guest Relations Officer position⁹⁷ required, inter alia, three years' experience working in office administration. It was desirable also that the candidate had a sound knowledge of hospitality general operations and front of house or bookings and reservations. The Applicant's office administration experience was a long time ago, and she conceded that she did not have a sound knowledge of hospitality and no formal hospitality qualifications⁹⁸.
66. The Casual Venue Attendant position,⁹⁹ required, inter alia, experience in housekeeping, catering, gardening, grounds work or building maintenance and a basic food hygiene certificate. The Applicant conceded that she had did not have work experience in the former and did not have the latter.¹⁰⁰
67. The Corporate Communications Manager position,¹⁰¹ required, inter alia, relevant tertiary qualifications in Public Relations, Communications and/or Business. The Applicant conceded that she had did not any of these qualifications.¹⁰²
68. There were also 9 vacancies listed on the Advisory Committee on Ministerial Placements (ACOMP).¹⁰³ The Applicant had applied for the position of Uniting – Church Engagement Leader – Parramatta Nepean Presbytery. It is submitted that this was not a vacancy available at the time of her redundancy as it only became available from 14 January 2019. In any event, the Applicant was unsuccessful in her application. UME had no control over the recruitment for the position as it was determined by the Presbytery.¹⁰⁴
69. The other Uniting position¹⁰⁵ again only became available from 14 January 2019, so after the Applicant's redundancy.

⁹⁶ PN1270 – PN1271; PN1276 – PN1285

⁹⁷ Exhibit 29, pp. 36 – 41

⁹⁸ PN 1801 – PN 1803

⁹⁹ Exhibit 29, pp. 31 – 35

¹⁰⁰ PN1804 – PN1805

¹⁰¹ Exhibit 29, pp. 47 – 51

¹⁰² PN1807

¹⁰³ Exhibit 29, [6]

¹⁰⁴ Exhibit 33, [5]

¹⁰⁵ Exhibit 29, [6.8]

70. The Canberra Region Presbytery position at Braidwood¹⁰⁶ required demonstrable congregational preaching experience as an inherent requirement of the position. In fact, the successful Applicant had in excess of 10 years congregational preaching and pastoral experience serving congregations throughout rural NSW and Victoria.¹⁰⁷
71. It is submitted that the Applicant's evidence as to her experience in this regard was directed at her giving narrative sermons - within a service presumably conducted by a Minister or lay preacher.¹⁰⁸ With respect, that does not qualify her for the role at Braidwood. In any event, the successful candidate was far better qualified.

“associated entities”

72. Ms Harris gave evidence as to the way in which the Uniting Church operates in Australia through its Synods, unincorporated associations, presbyteries and congregations.¹⁰⁹ It is clear from this evidence that these other entities are not the employer, i.e. UME's, enterprise. Accordingly, the “wider” Church is not part of the employer's enterprise for the purposes of section 389(2)(a), even adopting the “wider concept” as discussed in Ulan Coal at [29].
73. The evidence is also that these entities are not corporations. The evidence is one of fact, in that it is not expert evidence.¹¹⁰ The evidence was not challenged. In any event, even if it was challenged it would remain that there are hundreds if not thousands of unincorporated associations carrying out the work of the Uniting Church in Australia.
74. Of course, the FWA adopts the definition of associated entity from s 50AAA of the Corporations Act 2001: s. 12 FWA. For ease of reference, s 50AAA and the sections to which it refers, is attached to these submissions and marked “A”.
75. Accordingly, the issue of ‘associated entity’ of UME is relatively straightforward in this case, because as the entities are unincorporated associations, they are not a natural person, a body corporate (other than an exempt public authority), a partnership or a trust.¹¹¹

Sections 385-387 FWA – no unfair dismissal

76. No issue was taken by the employer with the Applicant's capacity, conduct or performance; there was real and genuine consultation with the Applicant about the change programme; her redundancy; and, termination.¹¹²

¹⁰⁶ Exhibit 29, [6.1]

¹⁰⁷ Exhibit 33, [9]

¹⁰⁸ PN2288 – PN2330

¹⁰⁹ Exhibit 17, [2]; Exhibit 29, [10] – [13]

¹¹⁰ PN1237 – PN1331

¹¹¹ There is a statutory property trust under the *Uniting Church in Australia Act 1977* (NSW): see Ex. 5 [3]-[7]

¹¹² s.387(a)–(g) FWA

77. Accordingly, it is only as to any other matters the FWC considers relevant.¹¹³ It is submitted that there are no other relevant matters and that the dismissal was fair.¹¹⁴

[12] In her Final Submissions the Applicant submitted that,

“Pursuant to s389 a. FWA-employer no longer required the job to be filled by anyone because of operational changes in the employer’s enterprise.

1. Despite a change of title and a slightly changed reporting structure, the Mission Facilitation job, in intention, essence and disposition, is substantially the same as the Mission Resourcing job evolved to be in practice, and is in fact so important to the ‘operational requirements’ and missional strategy of UME that it is now being done by three newly hired people.
2. The Commissioner asked whether it was reasonable and logical to hold that a job now being done by three people could be the same as one, discrete position. He put it to me that my “unique position”, that is the position solely held by me, is gone, now to be done by three.¹¹⁵ I agreed with this in a qualified way.¹¹⁶ In a technical sense it is true that the discrete position, with the title Mission Resourcing Consultant, and relating to other positions as part of a group known as the Resourcing Team, does not appear under that designation in the reorganisation of the UME Portfolio. However, I respectfully submit that this is not the same as the job no longer being required to be done by anyone. A job, very substantially the same in disposition, intent and practice, was advertised and is now being done by three people.
3. It is arguable, and on the evidence plausible, that I never held one discrete job to be done only by me, in the sense that my job was always intended to be a multi-disciplinary role working collaboratively in a multi-disciplinary team, with at least the Mission Initiatives Consultant but also a variety of others both within and external to the UME team.¹¹⁷ I was employed on this basis. The Portfolio Review Report (PRR) Executive Summary, on which the Respondent claims to rely, indicates that multi-disciplinary teams were an essential element of its recommendations.¹¹⁸ The PRR also defines a multi-disciplinary team.¹¹⁹
4. The Mission Resourcing role was also a moveable feast of duties and responsibilities that took shape in relation to a variety of cross Synod multi-disciplinary teams who were listening for and responding collaboratively to the missional needs of users. The fact that I never solely carried out the discrete job described in the Mission Resourcing Consultant Position Description and always did far more, doesn’t mean that a job didn’t exist. A job existed, and I was paid to

¹¹³ s.387(h) FWA

¹¹⁴ s 381(2) FWA

¹¹⁵ PN1628

¹¹⁶ Ibid

¹¹⁷ Exhibit 9, para 4.1; Exhibit 8, paras 4.2 – 4.3; 5.1

¹¹⁸ Exhibit 16, TC-1, page 22

¹¹⁹ Exhibit 16, TC-1, page 40

do it. My argument is that the Mission Facilitation role is substantially the same as the job I was always intended to do in the Mission Resourcing role, but in practice, in response to the user demands of the church, I did more than this.¹²⁰

5. The Commissioner asked if the new Mission Facilitation role took away parts of what I was doing, and whilst I agreed with this¹²¹ I submit that the parts that were taken away were parts that could be broadly described as other duties as directed. It was an inherent and expected requirement that the Mission Consultant's role would evolve iteratively in response to the discerned needs of the wider church.¹²² The part of the job that has been taken away is identified by Dr Powell¹²³ and the Respondent in Closing submissions¹²⁴ as "property work...moved to Uniting Resources". Property work, except as it tangentially related to missional grants through the use of sales proceeds, was not an inherent requirement of my job. Property work has always been the primary responsibility of Uniting Resources (UR)¹²⁵ but in response to the needs of the church there were many times I was asked by the Executive Director of UR to facilitate conversations and agreed outcomes with a missional focus because UR staff didn't have the requisite skills and experience.¹²⁶
6. The Commissioner asked whether I was "type cast" as a property officer and Reverend Macleod agreed that that was the view of people who had mainly worked with me as part of their work with Uniting Resources¹²⁷ but emphasised that my work with Uniting Mission and Education (UME) was so much more than that. Although I was identified by staff within UR, Uniting Financial Services, Uniting and various Presbyteries as the 'property' person for UME, this was never intended by my Position Description. It was not originally my skill set, nor do I have business management, insurance or building and engineering qualifications. I developed some expertise in these areas by being left as the default person when Reverend Niall Reid moved on from his role facilitating property conversations and projects on behalf of UR.¹²⁸
7. The responsibility for Property was never explicitly mine nor UME's. It has always been the responsibility of UR. Therefore, I submit that the work that has apparently been redirected to UR, was always and remains their responsibility and that what may appear to have been taken away from the new Mission Facilitation roles was never an inherent requirement of my job.
8. The need for flexibility and responsiveness or to embrace other duties as directed is still an inherent requirement of the Mission Facilitation roles and is expressed in

¹²⁰ PN1733

¹²¹ PN1626

¹²² PN1604

¹²³ Exhibit 21, page 3

¹²⁴ RCS p.1, para 1

¹²⁵ Exhibit 25; PN1530

¹²⁶ PN1551

¹²⁷ PN2052 – PN2055; PN2086

¹²⁸ Exhibit 10, paras 1; 6.1

Horizons 2 and 3 of the UME Transformation strategy.¹²⁹ The focus of the duties in the Mission Resourcing role varied and, in the future, the duties in the Mission facilitation role will vary from time to time. The inherent requirement and disposition of both roles are to be user focused, demand driven, collaborative, and to bridge theological and cultural diversity.

9. I clearly identify this in my first and second round interviews¹³⁰ where in the first interview I explicitly reference theological and cultural diversity in terms of both the multi-cultural and indigenous parts of the church and in the second interview emphasise the need to be sent into places beyond the UME bubble, as ‘persons of peace’, the need to listen, journey and partner with non-Christians, as well as the need to develop more focused goals to which everyone contributes. These references are both examples of my experience and practice, and an indication of the importance that I place on them going forward. It is also very evident in the scope, structure and language of both the job applications I wrote and tendered as evidence¹³¹ and in the work plan I submitted as evidence of the type of work I was doing.¹³²
10. Notwithstanding that the scope and intent of the Position Description criteria for the Mission Resourcing role aligns with the advertised criteria for the Mission facilitation positions, a focus on the precise words used in relation to the duties of each role is unhelpful. Whilst it was always a multi-disciplinary role and I always worked in close collaboration with team members both within and outside of UME, the Position Description did not and could not anticipate the ways in which it would become necessary to work in order to be responsive and effective in relation to user focus and demand.
11. I have clarified that whilst they are not completely ‘rubbish’ the described duties were not a good indication of what the role entailed on the ground, when worked out in the complexities of inter-conciliar relationships within the Synod, and in response to perceived user needs at the time.¹³³ Word choice in position descriptions depend upon the disposition of the person who writes them and the presenting context at the time. Position descriptions are not the right or best indicator of what a role or job actually entailed. Mr Stuart, in his opening remarks on the first day says “what is important is the way that this job was to actually operate out in the missions”.¹³⁴ I have made clear what actually happened in my job, all of which arose out of collaborative discernment across the breadth and diversity of the church, and how I responded with facilitation and resources that equipped people for effective leadership and discipleship. None of that is different from what is envisaged in the Mission Facilitation roles.
12. Respectfully, I draw attention to the fact that there are two parts to s. 389 a. which pivot on the word ‘because’. The word ‘because’ functions to imply a causal

¹²⁹ Exhibit 7, AB-1

¹³⁰ Exhibit 32, page 1; Exhibit 21, GP-2, pages 1 – 2

¹³¹ Exhibit 7, AB-7 – AB-8

¹³² Exhibit 15, LSE 1

¹³³ PN1525 – PN1551; PN1564 – PN1573; PN1591 – PN1592

¹³⁴ PN53.

relationship between a job ceasing to exist and changes in operations in the employer's business. Another way of putting this would be to say that the changes in operations made the redundancy inevitable.

13. To make this pertinent to my application the question becomes: Did changes in the operational requirements of the employer's enterprise necessitate my role being made redundant and the employment of new people to do new work?
14. The Portfolio Review Report¹³⁵ named particular concerns and recommended changes. In Closing Submissions¹³⁶ the Respondent has indicated that the "main thrust of the change programme was the move to an end user system being hard wired to congregations etc/enabling and supporting leaders at a grass roots level/collaborating with a diversity of theological and cultural groups in the Church." The Respondent argues that the changes made in relation to the Mission Resourcing Consultant position responded to these concerns, however, this is to overlook or misconstrue the evidence available.
15. The need for change and to formally ratify this in a renewed structure that is hard wired to the grassroots is not in dispute, however, this does not represent an operational change necessitating my redundancy. Although some changes to the Uniting Mission and Education Portfolio are genuinely new, others identified in the Portfolio Review Report and endorsed by the UME Board are not in fact changes as they were already inherent requirements and expectations, particularly in relation to my job.
16. In the Mission Resourcing Consultant Position Description, under Selection Criteria,¹³⁷ the inherent requirements and expectations of the role are clear. The need to negotiate complex relationships across the breadth of the church, within the UME team and with pastoral sensitivity, is essential, as is flexibility and the ability to adapt to changing circumstances. Under personal attributes, an inherent requirement and expectation of the role is "strong, personal awareness, particularly in relation to interactions with others, being able to see things from other perspectives, including those from differing cultural backgrounds". In order to be appointed to the Mission Resourcing role judgements were made that I could fulfil the essential, desirable and personal criteria required to carry out the role effectively. There was never any performance related issue raised with me in relation to any of these. To be clear, the supposedly new skills and competencies required by UME were already inherent requirements of my role and I carried these out effectively. They are not changes to the operational requirements of the business necessitating my redundancy.
17. The Respondent's assertion that the differences between mission facilitation and mission resourcing are like the differences between coal miners and fitter and turners is spurious and not supported by the evidence. These are completely different trades, whereas on the evidence the qualifications, skills, experiences and

¹³⁵ Exhibit 16, TC-1

¹³⁶ Para 32

¹³⁷ Exhibit 16, TC-1 pages 10 – 11

competencies that I brought to the mission resourcing role were those needed in the Mission Facilitation role.¹³⁸

18. This is not to say that further change was not needed and I have never disputed that. My original letter of offer, under Accountabilities, makes clear that the description contained in the Mission Resourcing Position Description is “not intended to be exhaustive and the employer may require you to perform other duties in addition to those set out in the attached position description, provided that these duties are consistent with the nature of the position, or are otherwise consistent with your seniority, skills and experience”.¹³⁹ It is the nature of mission work to notice and be responsive to particular circumstances as they emerge. I was already doing this, in consultation, discernment and collaboration with my managers, other senior executive leaders within the NSWACT Synod, members and leaders of the various councils of the church and my team.¹⁴⁰ These are not new changes responding to operational requirements that necessitated a redundancy of my role, nor my dismissal.
19. Other changes had already taken place in response to the listening the team was doing out in the field. All of us could see that a more collaborative, user focused and demand driven approach was needed. We had explicitly identified this in our Team retreat process at the end of 2016 and had made firm commitments in relation to this.¹⁴¹ It is confirmed in Duncan Macleod’s testimony¹⁴² and his re-examination¹⁴³ that the Portfolio Review report was responding to the transformation strategies suggested by members of the team, which arose from the firm commitments and changes to behaviour already made. To be clear, I was already working much more collaboratively with members of my team, and as a member of other teams, to listen and respond together to the needs of congregations, Presbyteries and other parts of the wider Uniting Church. This is very evident in my work plans which clearly identify outcomes, strategies and collaborations.¹⁴⁴
20. Further, it is clear from these work plans that in the context of my work within UME, and in addition to the wider responsibilities that had been added to my role by different entities within the Synod, my main foci were listening and responding to the needs of Presbyteries and the congregations under their oversight in contextual, team based and agreed ways, the development and contextualisation of Mission Shaped Ministry as a mission, discipleship and leadership development tool, grants and non-real estate mission applications (NREMA) for mission, and various healthy church initiatives including Life and Witness consultations. On the evidence before the Commission the core platform proposed in the UME transformation strategy, was in fact, already well underway.¹⁴⁵

¹³⁸ Exhibit 8, 4.1 – 4.3; 5.1; 6.1 – 6.3; Exhibit 9, 4.1 – 4.4; 5.2; annexures

¹³⁹ Exhibit 16, TC-1, p.2

¹⁴⁰ PN1646

¹⁴¹ Exhibit 7, AB-6

¹⁴² Exhibit 9, 5.1 – 5.3; 7.3

¹⁴³ PN2100

¹⁴⁴ Exhibit 15, LSE 1 and 2

¹⁴⁵ Exhibit 15, LSE 1

21. On the evidence before the Commission, it is clear that the Portfolio Review Report made recommendations based on the input of those who intimately knew and understood what mission looked like out in the field.¹⁴⁶ The Commissioner asked me whether the organisation thought it was a bigger change than I accepted.¹⁴⁷ Whilst this was conceded, this is to do with a failure by the UME Board, the review team and the Interim Executive Director to understand how much change had already happened and was happening. They had no involvement at all in the day to day transactions of this work. My assertion that things had already changed and that I was already doing the role is not an example of me being inflexible, but rather an example of how the operational environment of UME was not understood by the Board, whom the Portfolio Review Report labelled as lacking the “technical capability for good governance”¹⁴⁸ and who were identified as “lacking the information and relational dynamic”¹⁴⁹ needed “to make good, informed decisions”. Indeed Reverend Macleod indicates he “was struck by the lack of curiosity about how roles worked in practice” and the way that this led to “caricatures of the existing operational model and the development the team was going through” and that “nuances were sacrificed.”¹⁵⁰
22. On the evidence tendered and accepted by Reverend Curlewis the transformation would require all of the staff to work together to affect the restructure and its recommendations and that there was no intention in the Portfolio Review Report to make staff redundant in order to support the operational changes it identified as being important.¹⁵¹ To be clear, it was unreasonable on the evidence of the report to do so.
23. The Portfolio Review Report also counselled against “organisational blitzkrieg” as staff had already been negatively impacted by uncertainty and previous restructures.¹⁵² This was explicitly named as a harmful approach, that could have wide ranging, unintended consequences on staff, and yet this is what has happened. There was no need for redundancy in order to meet the operational requirements of the organisation. It was unreasonable, unjust and harsh to proceed in this way, as it was contrary to the recommendations of the experts that had been asked to advise on the restructure.
24. It is not disputed that the UME Board engaged in a restructure that in some respects responded to the concerns and recommendations raised in the Portfolio Review Report. Some positions may well have been made genuinely redundant because of real changes to operational requirements. For example, the focus of the Lay Discipleship and Rural Consultant position has indeed been redistributed between different parts of the organisation, to different discrete positions, and with a changed focus that does make it more user and demand driven.

¹⁴⁶ Exhibit 16, TC-1, p.89

¹⁴⁷ PN1685

¹⁴⁸ TAB 16, TC-1, page 16, para 5

¹⁴⁹ Ibid, page 21

¹⁵⁰ Exhibit 8, 7.15

¹⁵¹ Exhibit 16, TC-1, p. 94, p. 242 – 243

¹⁵² Exhibit 16, TC-1, p. 24

25. This was not universally the case. Some roles do seem to have been understood as suitable for redeployment of staff. On the evidence the original position held by Mr David Cornford, that of Executive Officer, was deemed by the Uniting Mission and Education Board to be similar enough to the position of Head of Mission Engagement to simply transfer him into this position with full continuity of service,¹⁵³ notwithstanding evidence which shows that the title of the roles have changed, the accountabilities have changed, the degree of positional authority and line management responsibilities have changed, the relationships with other staff have changed, and the nature of the specific duties have changed. The HR Manager, Roxanne Harris' submissions show Mr Cornford's position in the structure before the reorganisation,¹⁵⁴ and the UME Transformation strategy diagram shows the relationships, accountabilities and duties of the Head of Mission Strategy role after the reorganisation.¹⁵⁵
26. Further, Reverend. Curlewis made admissions in evidence that there was no review of the similarities or differences between the two positions carried out even though the EO duties were now only a part of a job with a broader scope.¹⁵⁶ It appears no proper comparison was done but rather assumptions were just made that he was suitable for the role even though it was clearly, at least on the surface, a different position. Clearly, where there was a will there was a way. The Commission can assume Mr Cornford must be a valued and competent employee. The Commission can also assume that the changes between Mr Cornford's two roles, which are very similar to the changes between my role and the Mission Facilitation roles, were not so important as to affect the operational requirements of Uniting Mission and Education.
27. Although not conceded by me, all the things that the Respondent is arguing were so central to the decision to dismiss me, that is precisely worded Position Descriptions, the precise duties of the roles, the structure of the team, a user focused and demand driven focus and core platform of tools, a collaborative intra and inter team culture were waived in relation to the redeployment of Mr Cornford.
28. It is not reasonable and just for the Board to have made this call in the case of Mr Cornford and not in my case. On Reverend. Curlewis's evidence I was a long standing, valued and competent employee.¹⁵⁷ Mr Cornford had only been employed in June.¹⁵⁸ The Synod of NSWACT Employment Manual Chapter 5 states: "Employers support the principle of 'procedural fairness' and therefore will develop, promote and maintain systems and processes which are procedurally fair and respect the rights of individuals in the workplace".¹⁵⁹ It is clear that the

¹⁵³ PN325 – PN337

¹⁵⁴ Exhibit 17, RH-1, p. 8.

¹⁵⁵ Exhibit 16, TC-1, p. 47.

¹⁵⁶ PN331; PN326.

¹⁵⁷ PN446 – PN451

¹⁵⁸ PN321 – PN322

¹⁵⁹ Exhibit 31, 1.7

Respondent has not followed their own policies. It is unreasonable and unjust to apply one set of rules to one employee and a completely different set to another.

29. In making the decision to redeploy Mr Cornford into this role without any independent and proper comparisons being made, and without an independent assessment of whether it was reasonable in all the circumstances given the nature of the role and Mr Cornford's qualifications, skills, competencies and experiences, a role that I would have been suited to was not made available to me. To then assert that my job, in similar circumstances, with a change of title and a new structure around it, was radically different, is inconsistent, unreasonable, and because it led to me being made redundant, harsh. This is unreasonable, unjust and harsh because it was discriminatory and lacked procedural fairness. The result of such decisions is that I do not have a job and have lost my livelihood.

Pursuant to s389 (2) FWA A person's dismissal will not be a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within the employers enterprise, or the enterprise of an associated entity.

30. The Act provides that in determining whether redeployment was reasonable a number of matters may be relevant, including: whether there exists a job or a position or other work to which the employee can be redeployed¹⁶⁰; the nature of any available position; the qualifications required to perform the job; the employee's skills, qualifications and experience; and the location of the job in relation to the employee's residence and the remuneration (pay and entitlements) which is offered. An employer must consider whether it is reasonable to redeploy an employee to an associated entity. The degree of managerial integration between the different entities is likely to be a relevant consideration.
31. There were a number of suitable jobs available, or which would soon become available within UME, into which I could reasonably have been redeployed, including: 3 Mission Facilitation roles, the Head of Mission Engagement, the Head of Mission Strategy and Lay Pathways Educator.¹⁶⁰
32. I decided to apply for the Mission Facilitation roles and the Head of Mission Engagement role. The Mission Facilitation role was very close in scope and intent to the way I had been performing the Mission Resourcing role for the previous 21 months so cross examination largely focused on this role, with some cross over to the other role. Both the job advertisements, however, stated that Applicants would be assessed on their ability to demonstrate particular criteria. This was put to Dr Powell, specifically in relation to the Mission Facilitation role, and he agreed.¹⁶¹ Both applications clearly addressed the advertised selection criteria, demonstrating with specific examples that my qualifications, skills, experiences and competencies made me suitable for the positions. Dr Powell was asked about this, again in relation to the Mission Facilitation role, and agreed.¹⁶² Dr Powell also

¹⁶⁰ Exhibit 16, TC-1, p. 112 – 113

¹⁶¹ PN706 – PN708

¹⁶² PN713

agreed that my application addressed these criteria and that it was a very strong application.¹⁶³

33. In relation to the Mission Facilitation role each of the Key Responsibilities in the Position Description¹⁶⁴ were closely examined on a number of occasions and by a number of witnesses. Reverend Curlewis agreed that in her capacity as Interim executive director she had not taken responsibility to assess whether I could perform these responsibilities even though it would have been reasonable to do so.¹⁶⁵ The Commissioner established that Reverend Merrifield, as Executive Director of UME during much of my tenure, had a significant degree of direct knowledge of my competencies either personally or through conversations with my line manager.¹⁶⁶ The Commissioner clearly put each responsibility in the Mission Facilitation Position Description to Reverend Merrifield asking her whether I had that competency and to give a specific example. In every instance she affirmed and elaborated on my capabilities.¹⁶⁷ It is very clear that I have demonstrated all of the competencies required in the Mission Facilitation role in practical, on the ground ways. This is because they were also inherent requirements of the job I had been doing.¹⁶⁸
34. There were no performance related issues identified at the time of my dismissal and I was not dismissed for this reason.¹⁶⁹ During my employment I discussed my performance on a regular basis with both Reverend Macleod and Reverend Merrifield, and with my professional supervisor Reverend Reid. At no time were concerns raised about my abilities to perform any of the responsibilities inherent in the Mission Facilitation Position Description.¹⁷⁰ Some aspects of my role inevitably raised questions about how to proceed or caused tension or conflict, however, Reverend Merrifield, Reverend Macleod and Reverend Reid have confirmed in their witness statements that I managed this honestly, collaboratively, flexibly and appropriately. There is no evidence that there was ever a time where concerns were discussed and I was unable to respond honestly, collaboratively, flexibly and appropriately.¹⁷¹
35. There is no evidence that I have ever shown any reluctance to think about or approach things in new ways. I have demonstrated through my willingness to take up training and coaching opportunities, throughout my time at UME and in my flexible and responsive approach to the scope of my duties and the need for change, that I had a positive interest and approach to new insights and approaches.¹⁷² I participated enthusiastically in team planning and retreats and actively contributed to the Portfolio Review and restructure process, on the

¹⁶³ PN732

¹⁶⁴ Exhibit 16, TC-1, p. 99

¹⁶⁵ PN385 – PN388

¹⁶⁶ PN2352 – PN2353

¹⁶⁷ PN2353 – PN2381

¹⁶⁸ Exhibit 8, 6.1-6.4; Exhibit 9, 4.1-5.5

¹⁶⁹ Exhibit 16, TC-1, p. 112

¹⁷⁰ PN2096

¹⁷¹ Exhibit 8, 6.4; Exhibit 9, 5.4, 6.2; Exhibit 10, 5.3-6.2

¹⁷² Exhibit 7 AB 7, AB 8; Exhibit 33; Exhibit 34

occasions that the team was invited to do so, in a future and user focused way.¹⁷³ When asked in cross examination if he had ever seen me change my mind, Reverend Macleod gave a specific example of how the Civic Leadership Training I undertook had reshaped my thinking and practice in regard to the relationship between theology and leadership.¹⁷⁴

36. The Employer had an obligation to me to make a proper and comprehensive evaluation of my qualifications, skills, competencies and experiences, and to ascertain whether any gaps could be addressed by re-training or coaching. They did not do this. They did not approach anyone who had managed my work. In fact, on the record, they acted in a prejudicial way towards me by relying on personal anecdotes about my personality based on how I was perceived as a teenager.¹⁷⁵ On the evidence of my professional supervisor, my colleagues, those I have worked with in the field and my managers, assertions that I am unsuitable for the Mission Facilitation role cannot be substantiated.¹⁷⁶
37. The harshness of this in my particular case should not be overlooked. It is not an insignificant thing to be out of a job for anyone. However, in my case the supports available to ministers in the same position are not in place. Ministers who have had their placement terminated go back onto the ACOMP (placement) list and every month a group of people from across the Synod consider their profiles and actively seek to find them a new placement. This continues for at least two years, and sometimes beyond two years. As a lay minister, I am not supported in this way. Further my gender and my age make it statistically more likely that I will not be able to secure another full-time permanent position. In spite of applying for jobs within the church I have thus far been unsuccessful and I have only been able to secure irregular casual teaching, possibly and ironically, because of my experience which makes me more expensive than a younger, less experienced teacher.
38. A proper assessment of whether I could have been redeployed into other suitable jobs within UME was not done. Although Dr Powell expressed an opinion that I was well suited to the Lay Pathways role, and my indication that I would be prepared to consider this, or any other role that the church might feel I was suited to, nothing proactive was done about this.¹⁷⁷
39. Other suitable roles were also in the pipe-line or available across the associated entities of the church.¹⁷⁸ I indicated that two of these in particular could be considered suitable as I could demonstrate that I had the qualifications, skills, experiences and competencies needed to perform the roles effectively. One of these was a Church Engagement position with Uniting, which I applied for in an open, competitive interview process, and one was a part-time Lay Pastor position.¹⁷⁹

¹⁷³ Exhibit 7, AB 3, AB 5

¹⁷⁴ PN2120 – PN2125

¹⁷⁵ Exhibit 19, page 4

¹⁷⁶ Exhibit 8 – Exhibit 14

¹⁷⁷ Exhibit 7, Para 62.c

¹⁷⁸ Exhibit 29

¹⁷⁹ Exhibit 33; Exhibit 34

40. The Respondent has not proven that the different entities of the church are not associated.¹⁸⁰ It is clear from evidence provided, and found under Proposals ii, ii a. b.. and c.¹⁸¹ and heard in cross examination¹⁸² that UME at least is associated and under the oversight of the broader Synod, through the Synod Standing Committee. The complexity and shifting relationships within the Uniting Church NSWACT Synod is also evident in my original letter of offer which claims that in relation to intellectual property created in the course of my job the employer should be regarded as The Uniting Church in Australia Synod of NSW and the ACT.¹⁸³
41. Priority placements for lay persons are sometimes made via the ACOMP process, so it is not without precedent that I could not have been proactively assisted into a role for which I am qualified, skilled, competent and experienced, such as the Braidwood lay pastor role. Assumptions were made and continue to be made that I was not suitable without anyone even making me aware that it was a possibility¹⁸⁴ and without any proper assessment of my suitability. The assumption is made that there were better candidates than me. This is irrelevant, and not tested as I was not given the opportunity to have the conversation. The Respondent has not discharged its obligations to actively assist me to find employment in any way. Given its published policies and common practices this is unreasonable, and shows no care for me as a person.
42. I was not, at any stage prior to the decision being made to make my position redundant, consulted about or offered redeployment into any of these roles or any other roles. This is an established precedent of Industrial Case Law.¹⁸⁵ No-one made any attempt to consider or make inquiries about whether it would be reasonable to slot me into these roles.¹⁸⁶ In spite of the Synod's Employment Manual¹⁸⁷ which states that "Employers will take all reasonable steps to assist any employee whose position will no longer exist", on the evidence¹⁸⁸ the HR manager took no proactive steps at all to redeploy me within UME or any other part of the NSWACT Synod, or any other part of the Uniting Church. Rather I was invited to apply for roles within UME in an open, competitive market process¹⁸⁹
43. I should never have had to apply in an open competitive market with external candidates for roles into which it would have been reasonable in all the circumstances to redeploy me. Howarth vs Ulan Coal Mines Limited (2010) FWAFB 4817, and Ulan Coal Mines Limited vs Honeysett (2010) FWAFB 7578 make this plain.

¹⁸⁰ PN1328 – PN1331

¹⁸¹ Exhibit 16, TC-1, p. 93

¹⁸² PN215 – PN216

¹⁸³ Exhibit 16, TC-1, p.4

¹⁸⁴ Respondent's Closing Submissions, paras 70 – 71

¹⁸⁵ *Alfred v Hutchinson PTY Ltd* (2012) FWA 8289; *Suridge v Boral Window Systems Pty Ltd T/A Dowell Windows* (2012) FWA 3126

¹⁸⁶ PN357 – PN371; PN351; PN370; PN388; PN1026 – PN1052

¹⁸⁷ Exhibit 31, para 1.9

¹⁸⁸ PN1399 – PN1403

¹⁸⁹ Exhibit 16, TC-1, p.112

44. In Howarth vs Ulan, the Commissioner writes at [20]: “While some of the ex-Ulan employees found jobs at other Xstrata mines, they had to apply for such positions”; and at [36]: “A stark point of difference between the parties concerns what is meant by ‘redeployment. I do not accept the definition put forward by Ulan. It says one must give the word a broad, practical and purposeful meaning. Its argument results, in effect, to mean employment in an associated entity. In my view, to suggest that redeployment equates to employment elsewhere is not to take an expansive view of the word redeployment. It is to alter its meaning”.
45. At 40] the Commissioner writes: Redeployment as envisaged by s389(2) requires a transfer of the employee. This is so even if it also might mean the entering into a new contract of employment”; at [41]: “Any action of Ulan to make some job vacancies known to employees, taking steps to have associated entities delay closing employment opportunities and then with those associated entities offering employment following an open selection process is not redeployment. It is merely assisting in the gaining of employment. Those engagements do not constitute redeployment.”; and at 47]: “Ulan made broad criticism of those Applicants who took no or insufficient steps to apply for available positions. This, it said, pointed to redeployment not being reasonable in those circumstances. I find that a failure to pursue job opportunities where they may have been competing against all comers is not on point. It would only be relevant if any available positions had been restricted to those retrenched and any Applicant had not shown sufficient interest”.
46. The above excerpts, together with the Full Bench dismissal of the employer’s appeal in Ulan, shows that Fair Work Australia sets a very high bar in terms of what is expected of employers when seeking to redeploy workers who would otherwise be made redundant. Not only will the employer be required to facilitate and make workers aware of other employment options, both internally and in its related entities, it will also be required to proactively assert that those employees be given jobs ahead of any competitive application process.
47. Once Sue and Peter Kaldor made it clear that they would be taking a redundancy I was the only employee within UME to whom the Respondent had obligations under the Fair Work Act and the National Employment Standards. UME’s obligation was first and foremost to me. If I could have done the job, or if I could have done it with a reasonable amount of upskilling or training, and if I was willing to take the job, UME had an obligation to prefer me and to redeploy me into the job.
48. I made UME aware of this in a letter to David Cornford, Michael Anderson, Jane Fry, Roxanne Harris and Duncan Macleod¹⁹⁰ which I wrote in the week immediately after I became aware that my position was to be made redundant. I asked in an interview at which Duncan Macleod, David Cornford, Fie Marino and Raymond Joso were present that a comprehensive internal process in line with the way the church assesses vitality of ministry take place before the positions went to

¹⁹⁰ Exhibit 7, AB 4

open market.¹⁹¹ It was clear in both this conversation and in my letter which was widely addressed to those responsible that I wanted to have a conversation about this and that we sought a procedurally fair process to assess our suitability and ongoing sense of call.

49. On the evidence Reverend Curlewis and Ms Harris also did not consider it was part of their brief to personally follow up or act on this letter.¹⁹² Surely it would be reasonable to expect them to do so given their roles and positional authority. Rather it seems that Ms Harris relied on the advice of others who had formed a view that they wanted to go to open market.¹⁹³ Ms Harris made references to a ‘they’ who were explaining things to her rather than the other way round. Clearly the employer must take responsibility for the way ‘they’ have driven this process which has resulted in me being unfairly dismissed and without a job that adequately provides for my needs and commitments.
50. I clearly indicated that I believed that my position at least was substantially the same if not identical to the newly created MF PDs and provided evidence of this. The fairest, most reasonable, most ethical, most pastoral thing to do, under the standards set by the Assembly and in the Employer’s own Employment Manual would have been to take a consultative, collaborative, procedurally fair approach to assessing my suitability that drew from my own experience in the role, and from the evidence of my colleagues in ministry who I had worked with on various projects and initiatives, and most particularly from my line managers who were in the best position to know my capabilities.¹⁹⁴ This would have been in line with the Uniting Church’s published theological anthropology, which the intrinsic dignity of people and work as participation in God’s own image and work. They did not do this and in failing to do so fell well short of their own published guidelines, standards and procedures.
51. Given Reverend Curlewis’ position in the organisation and the fact that just before she went on annual leave she had put me and others on notice that we were in danger of losing our jobs, I submit that her lack of curiosity, and responsibility here is truly breathtaking in its lack of duty of care to me. It is seriously unreasonable for Reverend Curlewis not to have made herself aware on her return, wilfully unjust not to have taken steps once belatedly reading the letter to intervene in the illegal process unfolding, and extremely harsh not to have offered me every assistance to secure a suitable job because I was a valued long standing employee, had no performance issues, and was reliant on a full-time income to support myself and my family, particularly in maintaining a home and mortgage.
52. Further, the Employment Manual explicitly mandates that Employers will follow procedures and policies in accordance with the Fair Work Act 2009 and National Employment Standards, and this is confirmed by Ms Harris.¹⁹⁵ To my detriment this did not occur.

¹⁹¹ Exhibit 7, para 36 – 38; Exhibit 8, para 7.12

¹⁹² PN 438 – PN440; PN1139 – PN1152

¹⁹³ PN1149

¹⁹⁴ Exhibit 7, AB 21; PN1376; PN1398; Exhibit 31, Para 1.9

¹⁹⁵ Exhibit 31, para 1.1; PN994; PN1062

53. The process put in place did not address my claim that my job as it had evolved was essentially the same as the newly created ones in a procedurally fair way. The Employment Manual Chapter 5 clearly outlines a process where a grievance has been raised, indicating that the process must be in accordance with principles of natural justice. Explicitly, decision makers must act fairly and without bias and must not be the judge in their own cause. Parties must have the opportunity to put their case in a manner where all relevant issues are heard.¹⁹⁶ The reply to my letter ignored this completely, nor is there any evidence that my work plan was fairly and properly assessed against the criteria in the PD, nor that my line manager was consulted. Reverend Macleod has given evidence that my concerns were assessed by the people who had made the original decision, namely the UME Board Portfolio Review Committee, the HR manager and the Chairman of the UME Board.¹⁹⁷ Ms Harris has indicated that she was the person who originally reviewed the PDs and determined on the advice of these same people that the positions were different.¹⁹⁸ My concerns were judged by the same people who had made the original determination and the person most qualified to comment on my concerns and suitability for redeployment was not consulted. This, by the employer's own standards, must be judged to be unfair and unreasonable.
54. What was communicated to be the process was done in a cold manner, lacking in any pastoral concern. Dr Powell and Reverend Curlewis both acknowledge this.¹⁹⁹ This denied me procedural fairness by failing to address concerns or give me an opportunity to elaborate my concerns.
55. My comments that the terminology around redeploy and apply were unclear and conflated in the Employment Manual were not addressed. These terms remain undefined and unclear, as do important terms such as workplace. As such they provide a clear example of how the claims of the Respondent to follow the provisions of the Fair Work Act are at best haphazard and disingenuous and at worst non-compliant with the law, with seriously harsh and unjust consequences.
56. Although I should not have been required to do so, I agreed to take part in an open, competitive process, as it appeared to be the only avenue the Employer would agree to. However, even this interview process lacked procedural fairness for the following reasons:
57. Whilst it may have been expedient for the employer to assess my qualifications, skills, competencies and experiences in the same process that they assessed external Applicants, it was not appropriate for them to rank me against them. The Respondent's various submissions make it clear that I was ranked against other Applicants.²⁰⁰ As I was the only person they had an existing employment relationship in terms of the Fair Work Act, once they had determined that I met all the selection criteria, it should have been an automatic priority to redeploy me into

¹⁹⁶ Exhibit 31, 3.2

¹⁹⁷ Exhibit 8, para 7.12

¹⁹⁸ PN1116; PN1124; PN129; PN1131

¹⁹⁹ PN868; PN451

²⁰⁰ Exhibit 2, paras 10, 11; Exhibit 19, Para 17; PN875; PN514

it. Dr Powell clearly said to me in my exit interview that all the candidates that progressed to the second round could “do all of them”²⁰¹ and this is confirmed in cross examination where Dr Powell says “everyone we thought could potentially do the job went through to the next round”²⁰² As I have shown, Ulan demonstrates that it is irrelevant whether anyone other than another internal candidate, with whom the employer had an employment relationship under the FWA, was weaker or stronger than me.

58. There have been a number of issues raised by the Respondent in relation to why it was not reasonable in all the circumstances to redeploy me. These reasons have shifted and evolved from those given to me at my exit interview,²⁰³ those submitted in the Respondent’s response to my application,²⁰⁴ and in the various submissions from Dr Powell.²⁰⁵ Given their knowledge that the consequences would be that I was unemployed, it was unreasonable and lacked procedural fairness to hold doubts about my capacities and not put these to me. This was put to Dr Powell and conceded.²⁰⁶
59. Dr Powell’s notes of the interviews and my responses to these show clearly what was asked and what was not asked in the interviews. In the first interview the nature of the questions and my responses are clear.²⁰⁷ I demonstrated that I could do all of the things they asked about and I progressed to a second interview. People who could not demonstrate this were culled at this stage.²⁰⁸
60. Although Dr Powell ‘s testimony is that there were questions that they wanted to put to me in regards to certain areas of my competency for the work, they did not explicitly raise any concerns in the second interview about the things they have asserted were concerns. They did not put to me concerns about capacity to bridge theological and cultural diversity, an inability to avoid or manage conflict, a lack of demonstrable ability to collaborate, a personality unamenable to supervision or coaching or any of the things they asserted in response to my application. This is unreasonable and lacks procedural fairness. In cross examination when this is put to him Dr Powell agrees that this is unfair.²⁰⁹
61. By Dr Powell’s admission the panel ran out of time and did not ask all the questions necessary.²¹⁰ He also noted that I appeared tired and when questioned by the Commissioner agreed that he did not take steps to give me another opportunity as he did not regard himself as the employer, even though his evidence indicates that he was at the time on the UME Board.²¹¹ I was tired because of the long drawn

²⁰¹ Exhibit 7, AB-10

²⁰² PN545

²⁰³ Exhibit 7, AB-10

²⁰⁴ Exhibit 2, paras 9 and 11

²⁰⁵ Exhibit 19; Exhibit 21

²⁰⁶ PN877 – PN888

²⁰⁷ Exhibit 32

²⁰⁸ Exhibit 2, para 10

²⁰⁹ PN875 – PN907

²¹⁰ PN909

²¹¹ PN906 – PN907; Exhibit 19, paras 5 and 6

out process I was required to participate in and because of increasing evidence that no-one was listening to my concerns about the process. It also appeared to me, and is born out by the notes Dr Powell submitted, that the panel were not really interested in my answers and had already reached a conclusion. Their questions did not seem to relate to a second interview and were very generalised. This is why I closed the interview with the comment: "This has been a difficult process. You're not clear what you're looking for".²¹² This was unreasonable. It was unfair not to redeploy me on the basis of a short and rather perfunctory interview process. Contrary to the Employer's own employment policies, this denied me procedural fairness.²¹³

62. Dr Powell asserted a kind of novel definition of collaboration beyond the plain meaning of the word was in play, but he couldn't adequately explain that it in cross examination.²¹⁴ It was procedurally unfair to have insider knowledge/backgrounding, on perceived intra-team issues and not put these to me explicitly if these were to be the basis on which I was denied a job.²¹⁵ If Dr Powell and the other panel members had been provided with information about the propensity of parts of the team to work in a more collegial rather than collaborative manner, then these should have been put to me in a clear and explicit manner so that I could address them. They were not.²¹⁶
63. As I was not allowed access to the secret I therefore had no opportunity to respond to that assertion. Whilst it is true that at times members of my team and other teams responded to the work that needed to be done in collegial ways rather than in effective collaboration, it is not therefore true that I am not able to collaborate or that I did not collaborate. On the evidence I did. We were on a journey with this. We were much more effective in our collaborations in the last two years of my time with UME than in the first two years. On the evidence this had been recognised and was being integrated into the way we worked with each other. Some team members were unwilling and wanted to continue working independently, but this was not me.
64. The employer is aware that I have a large mortgage, taken late because of the commitments of my husband and I to serve the church and to live in church manses. It was as a result of one of his placements being terminated that we needed to find our own accommodation, and on the basis of my employment and housing allowance, chose to buy our own house. The church encourages ministers to invest in their own houses for their security in retirement. My ability to service this mortgage depends on my having a job.
65. The employer continues to be aware of these things and have not made any redress or moved to actively assist me to gain employment within their organisation. This is particularly harsh given the timing of my dismissal, late in the year, and when businesses, and particularly schools closed down, meant I missed the window

²¹² Exhibit 19, annexures

²¹³ PN1377; PN1426; Exhibit 7, AB-21, pp. 72 – 73

²¹⁴ PN699 – PN701; PN918 – PN934

²¹⁵ PN917; PN924; PN937

²¹⁶ PN734 – PN735; PN885 – PN888

where fulltime alternative positions that I am qualified and competent to perform, such as teaching positions, could be applied for. Most of these these positions are filled by the beginning of Term 4 for the following year. It is harsh because my age and experience means that I may be considered too expensive for the various contract and casual teaching position that become available on an ad hoc basis throughout the year. Schools need to manage their budgets and often prefer relatively unskilled and younger people for casual work as they are cheaper.

66. I worked in lots of collaborations both intra-resourcing team, particularly in developing Mission Shaped Ministry and Healthy Church Initiatives; and also in inter conciliar teams with Presbyteries, associated entities of the church such as Uniting, and Uniting Resources, Parish Missions, and congregations. On the evidence and corroborated by my witnesses, I didn't decide what I would do independently or in a vacuum. Rather I was prompted and directed to explore, discover, research, support, and respond with others. The work took shape in an organic way that responded to context and circumstance, was approved by my line mangers and understood and often shared by my team.²¹⁷
67. The Respondent has tried to make a case that being Tongan or Korean was an inherent requirement of the job because of the issues around same gender marriage in the church, and the particular pressure points on these two communities.²¹⁸
68. It is discriminatory to require someone to be of a particular ethnicity for a job unless it can be shown clearly that the duties of the job require that. Where it does happen that a role is advertised as having an inherent requirement for a particular cultural ethnicity, it is usually for reasons of safety and client well-being. For example, in Uniting a woman's refuge may require a woman, or a Chinese language support service may require a person who speaks both Chinese and English. This requirement is always clearly flagged in the position description and the advertised role.
69. There is no evidence at all in the advertised criteria for the Mission Facilitation role, nor for any of the jobs UME had available, that being Tongan or Korean is a requirement. Nor is there any explicit reference in the PD of the political and ideological pressure points which are at play in the UCA at the moment, and in relation to which I have been very much at the coal face in attempting to bridge cultural and ideological diversity. The Commissioner asked if there were any code words in the PD that might point to this issue²¹⁹ and I indicated that, other than a general criteria on bridging theological and cultural diversity, I did not see any. This is because they are not there. The Commissioner asked if anyone had expressly put it to me that I would not be effective working in theologically and culturally diverse environments and I indicated that they had not.²²⁰ The Respondent agreed that this was not made explicit.²²¹

²¹⁷ Exhibit 7, AB-7, AB-8; Exhibit 8, 4.3, 6.4; PN2431 – PN2433

²¹⁸ PN835; PN841

²¹⁹ PN1757 – PN1770

²²⁰ PN1772; PN1777

²²¹ PN1765 – PN1766

70. It is unfair and unreasonable to have secret criteria for a role that are not made known to Applicants. It is unfair and unreasonable not to have asked me about my involvement in these matters, and particularly harsh to make assumptions about my position and work in regards to this in a way that led to serious consequences for me.
71. I gave evidence of the ways in which I have participated and worked across the spectrum of theological and cultural diversity in the church, and explicitly in relation to same gender marriage in the Space for Grace process.²²² This was confirmed by Reverend Macleod and Reverend Merrifield.²²³ The Commissioner asked Reverend Macleod and Reverend Merrifield if anyone had ever expressed concerns about my work in this area.²²⁴ Both indicated that they had not.²²⁵ Reverend Koe-Butler has also given evidence that she has directly observed me in theological and culturally diverse settings and believes, as do others from culturally diverse communities that I am helpful, effective and pastorally sensitive in such settings.²²⁶ She has stated that I am as much at home working with evangelical theological contexts as I am with Reformed or Catholic ones.²²⁷ Reverend Koe-Butler also confirms that I have particular gifts and experiences in cross cultural work that have resulted in my appointment to a select National body of the Assembly, known as the Seeking Common Ground Circle. Her witness statement elaborates on why I was chosen over others for this role.²²⁸
72. I gave evidence that our polity is geared towards cross-cultural or inter cultural approaches, fostering mutual understanding and collaboration, rather than towards working in ethnic enclaves.²²⁹ Reverend Koe-Butler confirmed this²³⁰. The Portfolio Review Report emphasises that multi-ethnic ministries need to be mainstreamed and integrated.²³¹ Choosing an insider would be tantamount to making that insider and their community solely responsible for their own well-being and development and is not consistent with the Uniting Church's commitments to dialogue and relationship. Choosing an insider is in fact a mono ethnic strategy with feel good multi-cultural window dressing.
73. Reverend Koe-Butler's evidence supports this. She has made it clear in cross examination that National policies and processes such as Space for Grace prioritise the kind of deep listening and going deeper that results in people coming to a greater understanding of their own and others' positions, rather than an attempt to get them to change their mind. She indicated that she has observed me demonstrate this kind of flexibility and growth.²³² The Commissioner asked about and has

²²² PN1772 – PN1775; PN1787 – PN1790

²²³ PN2093 – PN2095; PN2383

²²⁴ PN2096; PN2382

²²⁵ PN2096; PN2382 – PN2383

²²⁶ Exhibit 11, para 12; PN2164 – PN2165

²²⁷ PN2156

²²⁸ Exhibit 11, para 11

²²⁹ PN1746; PN1755 – PN1756

²³⁰ PN 2176

²³¹ Exhibit 16, TC-1, p. 45

²³² PN2171; PN2175

heard that the Uniting Church holds that people can take different positions on same gender marriage with integrity.²³³ The Commissioner asked: “How I would the Applicant go working with, you know, a conservative Tongan community about those issues that she clearly is quite passionate in a different way?” Reverend Koe-Butler observed that I would fit in well in her own Fijian congregation and that quite often mono-ethnic migrant congregations will only open up to somebody who is not in their own family connection to be able to discuss theological issues.²³⁴ Insiders get caught up in insider dynamics and are not able to hold the space for grace as effectively as someone who is outside of the cultural dynamics is able to.

74. Same gender marriage was not an issue I was asked about it in the interviews. It was a complete surprise to me when it was raised as a factor at the hearing.²³⁵ It was unfair to make this an issue retrospectively and a denial of procedural fairness not to advertise this, or make it known to me in the interview process. Nevertheless, the Respondent’s assertion that I am unable to work effectively in relation to this issue is not true. I have worked with congregations such as Camden where diverse theological views on marriage were pertinent to the missional work being explored.²³⁶ In these circumstances I have not tried to change people’s minds, but rather to foster respectful and supportive relationships and to find the points of alignment which would enable partnerships for mission.
75. There is no evidence that I am unaware or insensitive to how cultural and theological diversity impacts people within the church. As Reverend Koe-Butler and Duncan Macleod both testified, I have always made careful choices about language and music and theological and biblical approaches to ensure that people feel included, and valued and that they can own what the next step in mission looks like for them.²³⁷ As Reverend Merrifield has testified, I am acknowledged as someone who can be trusted to help in situations where diverse opinions over the many difficult issues facing the church have led to conflict.²³⁸ Reverend Day was explicit about the ways in which my approach to conversation and mission helped bridge theological and cultural diversity and resolve significant points of conflict within his congregation.²³⁹ He gave examples of the ways in which I sought to facilitate and curate the wisdom of the congregation rather than imposing my own views²⁴⁰ and the collaborative manner in which I worked with himself as the leader and with the elders and leaders of the congregation to gain consensus about the way forward.²⁴¹
76. It is unclear whether the old culture referred to by the Respondent in their closing submissions is about the toxicity and deviance in the work place referred to by

²³³ PN2174

²³⁴ PN2176

²³⁵ PN1772

²³⁶ PN1770

²³⁷ Exhibit 11, para 12; Exhibit 8; PN2094

²³⁸ Exhibit 9, paras 5.3 – 5.4

²³⁹ Exhibit 13, pp. 48 – 50

²⁴⁰ Exhibit 13, p. 49

²⁴¹ Exhibit 13, pp. 49-50

Reverend Curlewis or about the need to shift from a collegial to a collaborative culture referred to by Dr Powell.²⁴² In either case, the Portfolio Review Report was not made available to staff, and there were no opportunities to address these things. This is confirmed in the witness statements of Reverend White and Ms Sue Kaldor.²⁴³ There is no evidence that cultural factors were ever put to me in a way that gave me an opportunity to understand that my job was at risk and that it was considered that I could not respond to the need for change. There is plenty of evidence that I and the team that I was part of had embraced the need for change, understood cultural complexities and were proactively in addressing these.²⁴⁴ To be clear, I have never believed that the organisation did not need to change. It was put to me by the Respondent that I believed that things would be “business as usual” and I made it very clear that I did not hold this view.²⁴⁵

77. In my letter to David Cornford I indicated that I had left a full time secure position on a guarantee that the position I was taking up fell under National Employment standards and the Fair Work Act.²⁴⁶ I sought this guarantee and I was given it. Enclosed in my letter of offer was a pamphlet laying out these provisions.²⁴⁷ It is important that these are not just understood as pro forma, going through the motions elements of a business decision. They must be understood as an indication of a relationship where the Employer and Employee have mutual obligations to each other. I have not been given a fair go here.
78. It would be unthinkable in my previous employment context, a school, that teachers would be made redundant because of the need to change a culture. That responsibility would be the Principal’s who would work with staff to explain, to coach, to upskill and if necessary to formally warn where breaches were occurring. Unless there was substantive evidence to the contrary, existing staff would be valued, trusted and equipped to make the necessary shifts so that the organisation could function effectively on behalf of its clients. It is unthinkable that staff would be made redundant simply because of changes to approaches in curriculum, technology, pedagogy. In my time as a teacher I navigated and helped others to navigate many of these changes. None of this has happened here. There is no evidence that I would not be able to do so in these circumstances. I simply wasn’t given a chance. The obligations to me under the Fair Work Act were not in view.
79. In conclusion, it is clear to me, and I sincerely hope to this Commission, on the evidence, that pursuant to s 389 I have been unfairly dismissed. The picture painted of me by the Respondent does not stand on the evidence. The way they have treated me and the circumstances of this dismissal were, pursuant to s 387 wilfully and seriously unjust, unreasonable and harsh. They were made aware of this and they did it anyway.”

[13] In its Final Reply submissions the Respondent submitted that,

²⁴² Exhibit 16, para 18; Exhibit 19, para 11.4

²⁴³ Exhibit 12, para 6; Exhibit 14, para 5

²⁴⁴ Exhibit 7, AB-6; Exhibit 15, LSE 1 – LSE 2; Exhibit 8, para 5.1; Exhibit 14, p.58 Competencies of Colleagues

²⁴⁵ PN1668

²⁴⁶ Exhibit 7, AB-4

²⁴⁷ Exhibit 16, TC-1, p.6

“Short point

1. The Applicant’s closing submissions dated 17 May 2019 (ACS), continue with the fallacy that has persisted in her approach to the change programme that occurred at the UME commencing in October 2017.
2. At paragraph [1] of the ACS, the Applicant continues to maintain that the MFC role was in intention, essence and disposition substantially the same as the MRC role evolved to be in practice.
3. Her assertion is false because there was an independent report of Good Provider that identified the need for change at the UME; the report’s recommendations were adopted by the Board; and, a change programme was implemented which included the creation of new, and necessarily different, roles.
4. Once the Applicant’s fallacy is understood it is readily apparent why an open selection process was necessary; why she was unsuccessful in obtaining one of the new roles; and, why her claim before the Commission must fail.
5. An open selection process was necessary because the incumbents, including the Applicant, opposed the changes recommended for the UME. The Applicant was unsuccessful in obtaining one of the new roles, in part, because she did not see any need for change, or, she believed she was already doing what was required.
6. The Applicant’s claim before the Commission must also fail because the roles were different; as she did not accept there was any need for change or that the roles were even different, it was entirely reasonable not to re-deploy her to any of the new roles;²⁴⁸ and, there was simply no unfairness in her dismissal because ultimately the only thing that mattered was that the Applicant did not want to change/see any need to change, whereas the UME needed to change.

For completeness²⁴⁹

7. The Applicant’s description of her job as a moveable feast and the amorphous way in which she described what she was actually doing, is the thing that was specifically criticised by Good Provider.
8. The Good Provider report Executive Summary²⁵⁰ stated that while the UME environment was collegial, there was very little evidence of active collaboration to achieve overarching outcomes. Notably, the UME tended to focus on activity and delivery of programs rather than outcomes of benefit and consequence. Good Provider found that: the overall posture is responsive and “busy” rather than

²⁴⁸ As to another role in the employer’s enterprise or an associated entity the Respondent relies upon its final submissions dated 3 May 2019 in that regard.

²⁴⁹ The Respondent replies to the principal propositions put forward by the Applicant in her submission of 17 May 2019. Where the Respondent has not replied it is submitted that the point is immaterial or if it is contrary to its final submission, the Respondent relies upon its final submissions.

²⁵⁰ TC-16, pages 18-21.

strategic or of identifiable value. With respect, this accurately describes the Applicant.

9. The Applicant was given every opportunity before the Commission to specify in detail actual factual examples of her exhibiting the requisite skills needed in the new UME role. As set out at paragraph [39] of the Respondent's final submission dated 3 May 2019 (RFS), each of her examples, when examined, showed that she did no more than react to issues and provide resourcing.
10. The reason that the Applicant was unsuccessful in obtaining a new role included, as Dr Powell's evidence explained²⁵¹ that she had a poor understanding of the new structure, an inability to understand the position was more focused and collaborative, and she had a lack of vision for the new structure. It also included her shortcomings in dealing with theological and cultural diversity.
11. The Applicant submits at the top of page 2 of the ACS, that although she was identified by staff and various presbyteries as the "property" person at UME, this was never intended by her Position Description.
12. It is difficult to comprehend how this submission could be made where the Position Description for the MRC role²⁵² states as a General Objective (p.7), that the position is to provide advice and encouragement to the Synod, presbyteries and congregations in relation to the way in which mission might be effectively and substantially resourced; and, to provide missional support and oversight of projects to which the Synod has committed financial resources. Under the heading Specific Responsibilities there is an entire section (p.8) devoted to Resource Development and Delivery.
13. The Applicant had every opportunity during the interview process to set out her suitability for the new role. On her own evidence, she submitted a comprehensive and detailed application (longer than anyone else's, she noted), and this was read and considered by the members of the JNC. The Applicant had two interviews; despite being the lowest ranked candidate who went through to the second round. The first round summary identifies the significant shortcomings of the Applicant.²⁵³
14. In seeking to support her case, the Applicant continues to seek to rely upon the evidence of Reverend McLeod et al. With respect, the Applicant's witnesses' evidence did not help her and in fact undermined her case.²⁵⁴
15. The Applicant seeks to make a new point at paragraph 2 of page 7, apparently dealing with the alleged harshness in her case because others in the organisation, in particular Ministers, are placed on ACOMP, whereas as a "lay minister", she is not supported in this way. However, she applied for at least one role on ACOMP so it

²⁵¹ Exhibit 19 at [19], RFS [35]

²⁵² Exhibit 16, "TC-1", pp.7-11

²⁵³ Exhibit 19, p. 16

²⁵⁴ See RFS [49] – [55]

is difficult to understand how she can maintain she has been unfairly treated compared to Ministers.

16. For the Applicant to suggest that the change programme did not represent operational change in the UME,²⁵⁵ is simply wrong. Operational change means no more and no less than the way in which the organisation is to function.
17. And, to continue the Ulan Coal analogy – the Applicant’s fallacy is that she believed that she was working as a coalminer, and the change would mean that she would continue working as a coalminer.
18. The Applicant submits that at the end of 2016 there had been a firm commitment at a Team retreat to be more collaborative, user focussed and demand driven²⁵⁶. However, by October 2017 nothing had happened in this regard. We know this because it was necessary to undertake a review of the UME, and the Good Provider report found nothing to suggest that the commitment made at the Team retreat had been actioned. The same can be said for her work plans²⁵⁷.
19. In the third paragraph on page 4, the Applicant says that there was a failure to understand how much change had already happened and was happening. With respect, that submission should be rejected, where Good Provider had undertaken over 40 interviews whilst assessing this organisation. There is nothing to suggest, and nor was it ever put, that the Good Provider report was anything other than a frank, independent assessment of an organisation that had real problems.
20. In the fifth paragraph on page 4, the Applicant seeks to equate what occurred in the restructure to an organisational blitzkrieg. An organisational blitzkrieg is to sack everybody and then start with a fresh slate. That did not happen at the UME.
21. The Applicant misapprehends at page 5, what occurred in that she said there was no review of the similarities or differences between the two positions. It was clear that moving some functions to UR was undertaken and that the position description needed to be new, but, the UME was not starting with a blank piece of paper.
22. The Applicant seeks to start a new case at paragraphs 3 to 5 on page 5 of her submission, which did not feature in any way until her submission of 17 May 2019. The point seems to be that Mr Cornford was directly placed into a new position. The Applicant cannot now seek to raise a new point where she has not at any stage prior to 17 May 2019, made submissions in this regard, put on evidence of this, or challenged the Respondent’s witnesses on this issue.
23. In the last paragraph on page 6 the Applicant says there is no evidence that shows that she has shown any reluctance to think about or approach things in new ways. However, the best evidence of her reluctance is her approach to the changes required at the UME.

²⁵⁵ See ACS, para. 4 on page 3

²⁵⁶ See last paragraph of page 3

²⁵⁷ See the paragraph at the top of page 4

24. The Applicant makes a point at paragraph 2 on page 9 about Reverend. Curlewis and Ms Harris not following up on her letter. The Applicant did receive a response to her letter from Mr Cornford.²⁵⁸ The position of her employer was made clear to her in that letter.
25. It is somewhat disingenuous for the Applicant to now say (see paragraph 3 on page 11), that she was not allowed access to the secret and therefore had no opportunity to respond. With respect, the Applicant accepted that she understood the code in the MFC position description that meant the role would have to deal with communities who are opposed to same sex marriage.²⁵⁹
26. The JNC Committee gave the Applicant every opportunity to put her best foot forward for the new role. In fact, Dr Powell the head of the JNC, who had known the Applicant for decades, spoke very highly of her. Unfortunately for the Applicant, she just did not make the grade.
27. Whilst extremely disappointing no doubt for the Applicant, there was no unfairness in her dismissal. It was not harsh because it is, unfortunately, just the way things turned out in this significant and wide-ranging change programme. It is not unjust because the Applicant had every opportunity during the process to put forward her views, and she did just that. The dismissal was not unreasonable given on an objective analysis there was a fair go all round.
28. The Respondent does not say the Applicant was a poor performer or guilty of poor conduct. The reality is that the organisation needed to change; and, the Applicant was not the right person for the job. Unfortunately, there were no other positions to which she could be re-deployed. In fact, her submissions do not assert she was suitable/would have taken any of the roles addressed in the RFS, save for Braidwood. However, the Braidwood position is something of a furphy in this case.²⁶⁰
29. Finally, at paragraphs 2 to 4 of page 12, the Applicant seems to suggest that a candidate would only get an MFC role if he or she were Tongan or Korean. The submission should be rejected. It is also mischievous of the Applicant to suggest that the Respondent has tried to make a case that being Tongan or Korean was an inherent requirement of the job. With respect, neither submission should have been made by the Applicant given there was no evidence of this and the Applicant never put it to any of the Respondent's witnesses. In any event, it is not borne out when the people who did actually obtain the MFC roles are considered."

Was the Applicant protected from unfair dismissal?

[14] An order for reinstatement or compensation may only be issued where the Commission is satisfied the Applicant was protected from unfair dismissal at the time of the dismissal. Section 382 of the FW Act sets out the circumstances that must exist for the

²⁵⁸ Exhibit 7, AB 5

²⁵⁹ PN1759

²⁶⁰ See RFS [70] – [71]

Applicant to be protected from unfair dismissal and, in the present matter, the Respondent does not submit that the Applicant was not protected.

[15] There being no dispute, the Commission, as presently constituted, is satisfied the Applicant has completed the minimum employment period and earned less than the high income threshold. Consequently, the Commission, as presently constituted, is satisfied the Applicant was protected from unfair dismissal.

[16] I will now consider if the dismissal of the Applicant by the Respondent was unfair within the meaning of the FW Act.

Was the dismissal unfair?

[17] A dismissal is unfair if the Commission is satisfied, on the evidence before it, that all of the circumstances set out at s.385 of the FW Act existed. Section 385 provides the following:

“385 What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388.”

Was the Applicant dismissed?

[18] A person has been unfairly dismissed if the termination of their employment comes within the definition of “dismissed” for purposes of Part 3–2 of the FW Act. Section 386 of the FW Act sets out the meaning of “dismissed”. In the present matter it is common ground that the Respondent dismissed the Applicant.

[19] Consequently, the Commission, as presently constituted, finds that the Applicant was dismissed from her employment with the Respondent within the meaning of s.386 of the FW Act.

Was the dismissal consistent with the Small Business Fair Dismissal Code?

[20] A person has not been unfairly dismissed where the dismissal is consistent with the *Small Business Fair Dismissal Code*. In the present matter the Respondent was not a small business.

[21] Consequently, the Commission as presently constituted, finds the Respondent was not a small business employer within the meaning of s.23 of the FW Act.

Was the dismissal a genuine redundancy?

[22] The Respondent submits I should dismiss the application because the dismissal was a case of genuine redundancy. Section 389 of the FW Act defines the meaning of genuine redundancy:

“389 Meaning of genuine redundancy

- (1) A person’s dismissal was a case of genuine redundancy if:
 - (a) the person’s employer no longer required the person’s job to be performed by anyone because of changes in the operational requirements of the employer’s enterprise; and
 - (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
- (2) A person’s dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:
 - (a) the employer’s enterprise; or
 - (b) the enterprise of an associated entity of the employer.”

Was the Applicant’s job no longer required to be performed?

[23] To be satisfied the dismissal was a case of genuine redundancy, I must be satisfied that the MRC Role within UME was no longer required to be performed by anyone because of operational changes undertaken by the Respondent. The Respondent contended that this was the case.

[24] The Applicant at some stages appeared to concede that her discrete job as Mission Resourcing Consultant was no longer being performed. It was an appropriate concession to make. For example, in her submissions²⁶¹ the Applicant wrote “my job is now being done by three people.” However, as is evident from the Applicant’s closing submissions (included in full above), the Applicant later resiled from what was an appropriate concession to make.

[25] The Applicant’s reversion to a submission that her job was still required is a continuing demonstration of her inability to accept that UME was entitled to make the decisions that it made to restructure its operations. It also demonstrates her continuing lack of understanding about what constitutes a job for the purposes of determining whether it is no longer required to be performed due to operational reasons. Her reluctance to make and then, once made, her refusal to maintain appropriate concessions reflects poorly on the Applicant. Her witness evidence and submissions revealed a degree of stubbornness and inflexibility that

²⁶¹ Exhibit 3

was no doubt detrimental to her in the interviews she undertook for the MFC Role. It seems evident that, rather than establish her credentials for the new MFC Role, in her application and before the interview panel she sought to argue that the new MFC Role was the same as her old MRC Role. It was not.

[26] There is no doubt that many of the tasks performed by the Applicant in the MRC Role continued to be required to be performed after the restructure. Some of the duties were allocated to other roles. A vast majority of her previous functions are to be found in the MFC Role. Three such roles were created. Despite the Applicant's dogged refusal to accept that her unique position of Mission Resourcing Consultant was no longer required to be performed by UME for operational reasons that is what occurred. The Applicant's prosecution of old arguments against the need for organisational change and the consequence of the decisions made by the UME Board (which lead to the creation of the new MFC Roles) were not persuasive. It may be that her MRC Role was more multi-disciplinary than the official Position Description suggests, but that does not mean that it was the same as the MFC Role that came out of the restructure.

[27] The findings of fact (above) establish that the Respondent no longer required the Applicant's job as Mission Resourcing Consultant to be performed by anyone because of changes in its operational requirements.

[28] Consequently, having considered all the evidence in the matter the Commission, as presently constituted, is satisfied that, as a result of changes in operations decided upon by the Board of UME on 28 May 2018, the role of Mission Resourcing Consultant within UME was no longer required to be performed as a result of its operational requirements.

Did the Respondent have any obligation to consult?

[29] I must now consider whether the Respondent complied with any obligation in a modern award or enterprise agreement that applied to the Applicant's employment to consult about the redundancy.

[30] In the present matter it is agreed that the "Applicant was not employed pursuant to any Award or enterprise agreement as defined by the FW Act".²⁶² Consequently, there was no obligation to consult with the Applicant about the operational decision. There being no obligation to consult, s398(1)(b) of the FW Act is not relevant in the present matter.

Was redeployment reasonable in all the circumstances?

[31] Section 389(2) provides that even if the Commission is satisfied that,

- (a) the role of Mission Resourcing Consultant was no longer required to be performed by anyone (which I am), and
- (b) all consultation obligations in a modern award or enterprise agreement that applied to the Applicant's employment were complied with (not relevant in the present matter),

²⁶² SoAF, para 14

a dismissal will not be a genuine redundancy if redeployment was reasonable in all the circumstances.

[32] Whether redeployment of an employee is considered reasonable will depend on the circumstances that exist at the time of the dismissal.²⁶³

[33] In determining whether the redeployment was reasonable a number of matters may be relevant including:

- a) whether there exists a job or a position or other work to which the employee can be redeployed;²⁶⁴
- b) the nature of any available position;
- c) the qualifications required to perform the job;
- d) the employee's skills, qualifications and experience; and
- e) the location of the job in relation to the employee's residence and the remuneration (pay and entitlements) which is offered.²⁶⁵

[34] Having regard to the authorities I accept the submission made by the Respondent that there is no established requirement that an employer must conduct an internal process before "going out to market" or "spilling and filling" where the result is internal candidates compete against external candidates. There is no requirement, mandated by s389(2), that internal candidates be given preferential treatment. However, in "all the circumstances" of a particular matter, whether there was an internal process in advance of an external one is a relevant consideration in determining whether redeployment was reasonable. I also note that the Employment Manual of the broader Uniting Church states that,

"Employers will take all reasonable steps to assist any employees whose position will no longer exist as a result of bona fide organisational change or restructuring."²⁶⁶

Was there a job or a position or other work to which the employee could have been redeployed?

[35] We know from the chronology of events that, the restructure was signed off by the UME Board on 25 May 2018. This created a new "Mission Enablement" Team and 6 new positions. Three of those positions were to be the MFC Roles. Consequently, it necessarily follows that there were three positions which provided for the possibility of redeployment.

What was the nature of the available position and the qualifications required to perform the MRC role?

[36] The Position Descriptions of the MRC Role and MFC Role line up as follows:

Mission Resourcing Consultant (MRC)	Mission Facilitation Consultant (MFC)
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²⁶³ *Ulan Coal Mines v Honeysett* (2010) 199 IR 363, 370 [26]

²⁶⁴ *Technical and Further Education Commission (t/a TAFE NSW) v Pykett* (2014) 240 IR 130, [36]

²⁶⁵ *Ulan Coal Mines v Honeysett* (2010) 199 IR 363 [28]

²⁶⁶ Exhibit 31, para 1.9

Mission Resourcing Consultant (MRC)	Mission Facilitation Consultant (MFC)
<p>Accountable to</p> <ul style="list-style-type: none"> • Director, Uniting Learning Network 	<p>Accountable to</p> <ul style="list-style-type: none"> • Head of Mission Enablement
<p>Work Relates to</p> <ul style="list-style-type: none"> • Resourcing Team Members of Presbyteries and congregations 	
<p>General Objective</p> <ul style="list-style-type: none"> • As part of the Uniting Learning Network, to provide advice and encouragement to the Synod, Presbyteries and congregations in relation to ways in which mission might be effectively and sustainably resourced. • To provide pastoral and missional support and oversight of projects to which the Synod has committed financial resources. • To contribute to the leadership for missional thinking and new expressions for the Church of living faithfully amongst the community. 	<p>About the Role</p> <ul style="list-style-type: none"> • This position has responsibility for equipping Presbyteries and congregations to develop their current and emerging missional capacity, to support the growth and vitality of the church. • This position sits within Mission Enablement Team, reporting to the Head of Mission Enablement. It will work closely with the other Mission Facilitation Consultants, and will play a key role in developing the UME Mission Facilitation Platform, a set of resources and tools developed to support and equip Presbyteries. • The Mission Enablement Team encourages the development and delivery of a unique and distinctive mission enablement experience that addresses the needs of leaders in presbyteries, congregations, missions, schools and UCA agencies.
<p>Position Overview</p> <ul style="list-style-type: none"> • Uniting Mission and Education is a team of people who work co-operatively to achieve team goals. Inter-dependence and flexibility is an expected quality of staff relationships. From time to time specific tasks may be introduced into a particular job description, or all job descriptions, to reflect the changing context in which the UME works. 	
<p>Specific Responsibilities</p> <p>Team Projects</p> <ul style="list-style-type: none"> • In consultation with the whole team and under the direction of the Director, ULN, team members will be expected to contribute to major team projects. These may include: <ol style="list-style-type: none"> 1. An annual 'In-service' or 'Leadership Retreat' providing ongoing ministry formation and leadership development for people in ministry, including Lay Pastors, Pastors, Youth Workers, Children and Family Workers, Lay Preachers and other people in paid and unpaid leadership roles. 2. Report to Synod - each 18 months, 	<p>Key Responsibilities</p> <p>This role will take responsibility for the following areas;</p> <ul style="list-style-type: none"> • Building and maintaining collaborative working relationships with (allocated) key leaders in Presbyteries, negotiating shared outcomes. • Working collaboratively within a multidisciplinary team, actively contributing to the achievement of team objectives. • Regularly gathering, recording and sharing insights on Presbytery missional needs, capacity and capability with the Mission Enablement Team.

Mission Resourcing Consultant (MRC)	Mission Facilitation Consultant (MFC)
<p>team members will be expected to attend (whether as members or not) Synod and be involved in activities reporting on behalf of the team or the wider UME.</p> <p>Resource Development and Delivery All members of the team will be involved in resource development, delivery and ‘train the trainer’. Wherever possible these resources will be developed and delivered collaboratively with presbyteries, agencies and other UCA education and training providers. In consultation with the whole team, and under the direction of the Director, ULN, particular team members might be expected to be the ‘lead agent’ for a particular resource, course or program, providing overall coordination, and significantly contributing content to the development, delivery and ‘train the trainer’ for that particular resource, and enabling the contributions of others from the team and from presbyteries or other agencies to be appropriately used. This team member might particularly be asked to be the ‘lead agent’ for resources to assist local project leaders to secure financial resources and to develop new leaders and contributors:</p> <ol style="list-style-type: none"> 1. Development of educational and other resources, and delivery of educational courses and events, particularly which focus on missional activity, community engagement and including strategies for evangelism and faith sharing. 2. Deliver of ‘Train the Trainer’ courses for ministry agents, equipping them to use educational resources developed by the team. <p>Consultancy</p> <ul style="list-style-type: none"> • All members of the team will be involved in consultancy, with presbyteries and congregations, under the overall direction of the Director, ULN. For this position those consultancy situations may particularly concern mission development and developing sustainable resources for missional engagement: <ol style="list-style-type: none"> 1. General consulting and mission planning with presbyteries and congregations – assisting Presbyteries and congregations to think creatively for future missional directions. 2. Assist with financial planning, 	<ul style="list-style-type: none"> • In collaboration with other UME teams provide support to Presbyteries and congregations that is engaging, reliable and easily accessible. • In collaboration with Presbyteries support and resource the mission and related governance needs to grow healthy congregations. Giving priority to rural presbyteries struggling to access adequate resources. • Facilitating the formation of Communities of Practice across Presbyteries to support the effective implementation of key elements of the Mission Facilitation Platform (e.g. Mission Shaped Ministry, Church planting, Life and Witness consultations). Enabling the development of resources and best practice models, and to support the growth in Synod-wide capacity. • Developing, testing, fine tuning and sharing resources that address the emerging missional needs across Presbyteries within and beyond the Synod. • Creating a flexible and creative model of mission planning that will be accessible and life giving to congregations and Presbyteries. Consulting and training appropriately. • Applying models of theological reflection to the development of missional resources. • Contributing to significant Synod projects and initiatives as required. (e.g. Pulse, Saltbush, Pathways.) • Supporting congregations in grant applications and NREMA proposals through assessing missional opportunities and feasibility. • Liaising with Presbyteries to identify emerging needs for education, training and resourcing in missional and discipleship needs. • Individually, and as a member of the Mission Enablement Team and the broader UME Team, manage and

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<p>property stewardship and other matters that impact the development of sustainable ministries. Identify alternative funding sources and grant processes that may be appropriate in local area strategic planning.</p> <p>3. Mentoring presbytery-based and other ministry agents in the use of consultancy techniques, tools and approaches.</p> <p>Networking</p> <ul style="list-style-type: none"> • All team members will be expected to be members of, or in connection with, various committees, networks or groups in which they will contribute to the understanding of those groups, seek ways of developing and maintaining collaboration, and advocate for their own focus area, as well as for the work of the team more generally. The participation of team members in committees and networks will be determined in consultation with the whole team under the direction of the Director, ULN: <ol style="list-style-type: none"> 1. Advocate for and encourage action on issues and pressures experienced by those trying new missional activities. 2. developing networks that assist congregations, agencies, ministers and leaders to support each other in understanding and practising missional ministry 3. Contribute to continued theological and professional reflection regarding effective mission initiatives within UME, and beyond. 4. Ensure that Synod strategies and educational programs are grounded in the contemporary missional context. 5. Liaise with other parts of the Synod and Presbyteries in developing new policies that will further the missional work of the Church <p>Meetings policies and procedures</p> <ul style="list-style-type: none"> • This position is part of a collegial Ministry team and will • require a commitment to understanding, respecting and valuing the gifts and individual faith journeys of other team members, and to continual high quality communication within the team. The team will also be committed to developing and maintaining strong 	<p>prioritize the timely delivery of budgeted projects, engagements and resources.</p> <ul style="list-style-type: none"> • Participating in the discernment and development of the UME strategy for contemporary mission. • Sharing good news stories and learnings to inspire and encourage the wider church in their in missional activity. <p>In addition to those outlined above, specific responsibilities also include:</p> <ul style="list-style-type: none"> • Reading and understanding the Basis of Union and having a preparedness to work within the polity and ethos of the Uniting Church in Australia • Abiding by the policies and procedures of the Uniting Church in Australia Synod of NSW and the ACT • Having a genuine willingness to embrace challenges as they arise and to work flexibly in support of the overall key objectives of Uniting Resources, Uniting Financial Services and the Synod • A willingness to work flexible hours, including weekends, when required • A willingness to travel within the Synod as required. • Follow policy and procedures in relation to workplace health and safety • Participate in maintaining a safe working environment for both yourself and others in the workplace • Undertaking additional duties as directed

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<p>collaborative relationships with other institutions and agencies.</p> <ol style="list-style-type: none"> 1. Attend regular team meetings, and other such UME and Synod meetings, as determined by the Director, ULN and/or Executive Director, and contribute as appropriate. 2. Participate in team retreats and planning sessions. 3. Contribute to the continuous development of UME policies, systems and processes <p>General</p> <ol style="list-style-type: none"> 1. In addition to UCA policy and procedures ensure all activities undertaken comply with relevant Acts, legal demands and ethical standards including, but not limited to, compliance with Occupational Health and Safety requirements. 2. Read and understand the Basis of Union and have a preparedness to work within the polity and ethos of the Uniting Church in Australia as described in the Basis of Union, Constitution, regulations and by-laws. 3. Abide by the discipline processes as set out in the Constitution and Regulation of the Uniting Church and the Code of Ethics and Ministry Practice adopted by the National Assembly as they relate to ministerial practice. <p>Other</p> <p>Any other duties as directed by the Director, ULN or Executive Director</p>	
<p>Selection Criteria</p> <p>Essential</p> <ul style="list-style-type: none"> • A deep understanding of missiology and contemporary missiological thinking • Pastoral sensitivity and an ability to understand and negotiate complex relationships with Presbyteries, congregations, project leaders and team members • Demonstrated administrative and 	<p>Key Competencies</p> <p>Essential</p> <p>(b) Supporting and Cooperating Supports other and shows respect and positive regard for them in social situations. Puts people first, working effectively with individuals and teams, clients and staff. Behaves consistently with clear personal values that complement those of the organisation.</p> <p>Working with people</p>

Mission Resourcing Consultant (MRC)	Mission Facilitation Consultant (MFC)
<p>communication skills.</p> <ul style="list-style-type: none"> • Enthusiastic self-starter • Flexible and highly adaptable to changing circumstances. • A team player who can be flexible and work with others but can work independently as required. • Ability to multi-task and prioritise work load. • Advanced levels of Microsoft Office Software. • Commitment to the ethos of the Uniting Church in Australia - read and understand the Basis of Union and have a preparedness to work within the polity and ethos of the Uniting Church in Australia as described in the Basis of Union. 	<ul style="list-style-type: none"> • Demonstrates an interest in and understanding of others • Adapts to the team and builds team spirit • Recognises and regards the contribution of others • Listens, consults others and communicates proactively • Supports and cares for others • Develops and openly communicates self-insight such as an awareness of own strengths and weaknesses <p>Adhering to principles and values</p> <ul style="list-style-type: none"> • Upholds ethics and values • Demonstrates integrity • Promotes and defends equal opportunities, builds diverse teams • Encourages organisational and individual responsibility towards the community and the environment
<p>Desirable</p> <ul style="list-style-type: none"> • Previous experience in grant processes or management. • Relevant qualifications in an area such as Theology, HR, Education, Community Welfare or the like. • Experience in missional entrepreneurial effort, developing new missional work or church planting 	<p>(c) Interacting and Presenting</p> <p>Communicates and networks effectively. Successfully persuades and influences others. Relates to others in a confident and relaxed manner.</p> <p>Presenting and communicating information</p> <ul style="list-style-type: none"> • Speaks clearly and fluently • Expresses opinions, information and key points of an argument clearly • Makes presentations and undertakes public speaking with skill and confidence <p>Responds quickly to the needs of an audience and to their reactions and feedback</p> <ul style="list-style-type: none"> • Projects credibility <p>Relating and networking</p> <ul style="list-style-type: none"> • Establishes good relationships with members and staff • Builds wide and effective networks of contacts inside and outside the organisation • Relates well to people at all levels • Manages conflict • Uses humour appropriately to enhance relationships with others
<p>Personal Attributes</p> <ul style="list-style-type: none"> • A deep personal faith in Christ, and commitment to spirituality, Christian life and practice in life and leadership. • A good sense of intuition and timing to know what might be possible at any given moment, and to be able to discern the appropriate way forward. • An ability to read how people are feeling in times of change or uncertainty, and to pace initiatives to ensure that change does not stall, nor is paced in a way that overly destabilises. • Strong personal awareness, particularly in relation to interactions with others, being able to see things from others perspectives, including those from differing cultural backgrounds. 	<p>(d) Analysing and Interpreting</p> <p>Shows evidence of clear analytical</p>

Mission Resourcing Consultant (MRC)	Mission Facilitation Consultant (MFC)
<ul style="list-style-type: none"> • A high-level of self-confidence and personal integrity. • An optimistic spirit and an ability to foster hope among others. • Sense of humour 	<p>thinking. Gets to know the heart of complex problems and issues. Applies own expertise effectively. Quickly learns new technology. Communicates well in writing</p> <p>Writing and reporting</p> <ul style="list-style-type: none"> • Writes clearly, succinctly and correctly • Writes convincingly in an engaging and expressive manner • Avoids the unnecessary use of jargon or complicated language • Writes in a well-structured and logical way • Structures information to meet the needs and understanding of the intended audience <p>(e) Creating and Conceptualising</p> <p>Open to new ideas and experiences. Seeks out learning opportunities. Handles situations and problems with innovation and creativity. Thinks broadly and strategically. Supports and drives organisational change.</p> <p>Creating and Innovating</p> <ul style="list-style-type: none"> • Produces new ideas, approaches or insights • Creates innovative products or designs • Produces a range of solutions to problems • Seeks opportunities for organisational improvement • Devises effective change initiatives <p>Section 1.02 Desirable</p> <p>(a) Leading and Deciding</p> <p>Takes control and exercises leadership. Initiates action, gives direction and takes responsibility.</p> <p>Deciding and initiating action</p> <ul style="list-style-type: none"> • Makes prompt, clear decisions which may involve tough choices or considered risks • Takes responsibility for actions, projects and people • Takes initiative, acts with confidence and works under own direction • Initiates and generates activity

Mission Resourcing Consultant (MRC)	Mission Facilitation Consultant (MFC)
	<p>(b) Creating and Conceptualising Open to new ideas and experiences. Seeks out learning opportunities. Handles situations and problems with innovation and creativity. Thinks broadly and strategically. Supports and drives organisational change.</p> <p>Creating and Innovating</p> <ul style="list-style-type: none"> • Produces new ideas, approaches or insights • Creates innovative products or designs • Produces a range of solutions to problems • Seeks opportunities for organisational improvement • Devises effective change initiatives <p>(c) Interacting and Presenting Communicates and networks effectively. Successfully persuades and influences others. Relates to others in a confident and relaxed manner.</p> <p>Persuading and Influencing</p> <ul style="list-style-type: none"> • Makes a strong personal impression on others • Gains clear agreement and commitment from others by persuading, convincing and negotiating • Promotes ideas on behalf of self or others • Makes effective use of political processes to influence and persuade others <p>(d) Adapting and Coping Adapts and responds well to change. Manages pressure effectively and copes well with setbacks.</p> <p>Adapting and responding to change</p> <ul style="list-style-type: none"> • Adapts to changing circumstances • Accepts new ideas and change initiatives • Adapts interpersonal style to suit different people or situations • Shows respect and sensitivity towards cultural and religious differences

Mission Resourcing Consultant (MRC)	Mission Facilitation Consultant (MFC)
	<ul style="list-style-type: none"> • Deals with ambiguity, making positive use of the opportunities it presents <p>Coping with pressures and setbacks</p> <ul style="list-style-type: none"> • Works productively in a high pressure environment • Keeps emotions under control during difficult situations • Balances the demands of work life and personal life • Maintains a positive outlook at work • Handles criticism well and learns from it <p>(e) Enterprising and Performing</p> <p>Focuses on results and achieving personal work objectives. Works best when work is related closely to results and the impact of personal efforts is obvious. Shows and understanding of business, commerce and finance. Seeks opportunities for self-development and career advancement.</p> <p>Achieving personal work goals and objectives</p> <ul style="list-style-type: none"> • Accepts and tackles demanding work goals with enthusiasm • Works hard and puts in longer hours when it is necessary • Identifies development strategies needed to achieve career goals and makes use of developmental or training opportunities • Seeks progress to roles if increased responsibility and influence
	<p>Qualifications and Experience Essential</p> <ul style="list-style-type: none"> • Demonstrated capacity in managing relationships and timely delivery of shared outcomes • Relevant training or education in theology, mission and leadership • Experience in • Mission Leadership; or • Church planting/new mission initiative experience; or • Mission planning development;

Mission Resourcing Consultant (MRC)	Mission Facilitation Consultant (MFC)
	<ul style="list-style-type: none"> • Demonstrated ability to develop resources that support new and emerging expressions of church in a changing secular context. • Ability to work effectively with diverse cultural, generational, institutional, geographic and other communities. • Proven capacity to work collaboratively in a team within a complex environment • Excellent verbal and written communication skills. • Ability to use common software tools • Proven ability in project delivery/management and assessment in local and regional contexts. • Understanding and commitment to work within the ethos and polity of the UCA as expressed in the Basis of Union. • Understanding and commitment to work within the Code of Ethics and Ministry Practice or Code of Conduct for Lay Leaders • UCA Membership, or willingness to become one. • Vibrant Christian Faith • NSW Working with Children Clearance • Entitlement to work in Australia • Current NSW Drivers Licence <p>Section 1.03 Desirable</p> <ul style="list-style-type: none"> • Cert IV Training and Assessment • International Association of Public Participation Cert. • Awareness of the governance structures required for healthy congregations • Experience in a variety of congregational settings.

Mission Resourcing Consultant (MRC)	Mission Facilitation Consultant (MFC)
	<p>Key Relationships Section 1.04 Internal</p> <ul style="list-style-type: none"> • Mission Enablement Team • Head of Mission Enablement • UME Leadership team • Vital Leadership Team • Pulse Team. Saltbush Team • Faculty <p>Section 1.05</p> <p>Section 1.06 External</p> <ul style="list-style-type: none"> • Presbytery office bearers and staff • Congregations • Church Engagement Leaders – Uniting. • Other church agencies

[37] In Exhibit 27 the Respondent sought to contrast the Position Description of the MRC Role as against the MFC Role. The Respondent contended that,

PD element	Respondent submission
Accountability:	The roles have same reporting level status.
What the work relates to:	The work of the URC position is specifically related to resourcing. The UFC position is not.
General objectives/About the role	<p>The URC role involved advising and encouraging the Synod. The UFC does not.</p> <p>Both roles require the person to work co-operatively with others in the UME team.</p> <p>Both roles involve working with Presbyteries and congregations. However, how this is to be done is markedly different.</p> <p>The MRC role was to advise on effective and sustainable financial resourcing and to contribute to leading missional thinking and new expressions for the Church.</p> <p>Whereas, the MFC role is about equipping these grass roots levels of the Church so they develop their own current and emerging missional capacity.</p> <p>The MFCs of which there are three (compared to only one MRC), are to achieve this by working closely together to develop</p>

	<p>the Mission Facilitation Platform, which is a set of resources and tools developed to support and equip the Presbyteries. The role of the MFC is to encourage the development of a unique and distinctive mission enablement experience that addresses the needs of the actual leaders at these levels of the Church.</p> <p>The core difference is that the MRC was about resourcing the spread of Church doctrine throughout the Presbyteries and congregations; the MFC is now about the Presbyteries and congregations being empowered to determine what is important for their own communities.</p>
Specific responsibilities/Key responsibilities	<p>On the one hand, the URC role was about major team projects, including in-service education for ongoing ministry formation and leadership development; reporting to the Synod; resource development, delivery and ‘train the trainer’; where possible this is to be done collaboratively; the person in the role will be the ‘lead agent’; significantly contributing content for the resource; developing and delivering educational resources and events; to consult with presbyteries and congregations but under the direction of the Director, Uniting Learning Network; general consulting and mission planning; assisting the Presbyteries and congregations to think creatively for future missional directions; financial planning; networking under direction; assisting congregations, agencies, ministers and leaders to support each other in understanding and practising missional ministry; ensuring educational programs are grounded in the contemporary missional context; and attending meetings and complying with policies and the law.</p> <p>On the other hand, while the UFC position understandably has overlap with a number of the functions previously within the remit of the URC:</p> <ol style="list-style-type: none"> 1. The UFC role does not conduct major team projects to educate the leadership. Instead the MFC role is to build and maintain collaborative

	<p>relationships with key leaders in Presbyteries, and to negotiate shared outcomes.</p> <ol style="list-style-type: none"> 2. The UFC role is not about being the lead agent on what educational content is provided or how it is to be provided. The UFC role is about sharing resources that address the emerging missional needs across Presbyteries within and beyond the Synod. 3. The UFC role is not about consultation but about collaboration. This may at first blush appear to be merely using a different word for the same thing. However, in this case it is a difference with an important distinction. Consultation under the URC model was about providing education and resourcing to a Prestery or congregation and then obtaining feedback from them. Collaboration is fundamental to the UFC role and involves working with the Prestery and congregation to develop what Prestery or congregation wants. 4. The URC role directed the Presbyteries and congregations. The UFC role is directed by the Presbyteries and congregations.
Selection Criteria/Key competencies	<p>It is perhaps what attributes each role requires that the core differences between the two positions becomes stark.</p> <p>In order to be a URC, one needed to have a deep understanding of missiology and contemporary missiological thinking; pastoral sensitivity to negotiate complex relationships with Presbyteries, congregations, project leaders and team members; demonstrate admin and communication skills; be a self-starting team player who could multi-task; use Outlook; and be committed to the ethos of the Church.</p> <p>It was desirable for a URC to have previous</p>

	<p>experience in grant processes or management; have Theology, HR, Education or Community Welfare qualifications; missional experience. The personal attributes were simple.</p> <p>The UFC is focused from the outset on supporting and co-operating with others and working with people in a fundamentally open and collaborative way.</p> <p>The further Key Competencies of the UFC have some similarities or overlap with the URC role; as do the Desirable attributes and qualifications of each. With respect, that is to be expected given they were both designed to work in the mission space of the Church. Of course, the overlap is also understandable as no position description in this area would seek to employ someone who could not think, write or communicate to an acceptable standard or who was unethical, irresponsible, lazy, bigoted, cruel and/or anti-God.</p> <p>The critical difference is in the core way in which the person who is suited for the role engages with others who have a different view to their own.</p> <p>The URC position was didactic, pressed a singular orthodox theological view, and had control of financial and educational resources.</p> <p>The UFC role requires a person who is open minded, able to understand and engage with different views and work together with those that hold different views to their own, so as to promote what is important to others, including their different views.</p> <p>With respect, it is wrong to say the roles are identical or similar because they both involve the promotion of missional work. The core difference is how this is to be achieved – one is a centralised model; the other, a decentralised model. The change in the model fundamentally changed how the role was to be carried out i.e. how the work is to be done and this is the determinative factor.</p>
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[38] I have carefully considered the position description for each of the MRC Role and the MFC Role. Having done so, it is apparent to me that, for their own purposes, both the Applicant and the Respondent overstate their respective positions. It is not the case, as the Applicant contended, that the two roles are essentially the same. They are not. But also, neither are the positions substantially different as the Respondent urged the Commission to find. The truth lies somewhere in the middle.

[39] There is a different emphasis between the positions in the sense that the MFC Role is more decentralised and focused on the “ground up” as opposed to “top-down”. The MFC Role is less centralised in its focus. The MFC Role is less of a “lead agent”. The MFC Role is also less focused on resourcing and is not project based. There is a greater focus on multi-disciplinary work in the MFC Role. However, the differences identified by the Respondent were exaggerated.

[40] Both positions involve working with presbyteries and congregations. Both positions speak of the essential requirement of collaborative working relationships. Both positions deal with (using the specific language of the MFC Role) developing, testing, fine tuning and sharing resources. Both roles require a contribution to Synod projects and initiatives. There is also a focus on the timely delivery of budgeted projects, engagements and resources that is relevant to both roles.

[41] Comparing the two roles demonstrates that there is a difference in emphasis (albeit important) as between the two roles. It is not, as the Respondent contended, significantly different. When regard is had to the “Selection Criteria” for the MRC Role and the “Key Competencies” for the MFC Role the differences between the two roles are even more difficult to discern. It is not, as the Respondent contended, where “the core differences between the two positions becomes stark”.²⁶⁷ There is more overlap than the Respondent was willing to concede.

[42] Having considered the position description for each of the MRC Role and the MFC Role, and the evidence about the actual work performed, I am satisfied that, although the roles are different (a fact that the Applicant would have been well advised to accept and engage with rather than argue against), the MFC Role was not so sufficiently different or broader or requiring a particular skill set that was unlike the MRC Role. I reject the Respondent’s submission “that the MFC position required an entirely new approach to mission and education.” During the course of the hearing the Respondent’s witnesses were unable to establish an evidentiary foundation for such a contention.

[43] What did reveal itself during the oral evidence and was not to be found in the written position description for the MFC Role or the witness statements filed by the Respondent was that the MFC Role description has within it code words for key competencies that are not expressly named concerning cross cultural and theological issues. The issue revealed itself in an exchange²⁶⁸ about what occurred during the interview process for the MFC Role.

²⁶⁷ Exhibit 27

²⁶⁸ Transcript PN818-853

"Mr Stewart: That's actually not (a) the evidence; and (b) Commissioner, it's clear in the last page of the first statement that one of the things that was identified as a second round focus was cross-cultural.

Ms Bleyerveen: Yes, okay.

Commissioner Johns: Yes, but that doesn't say there anything about dealing across a spectrum of conservative to progressive. That's not a cultural issue, it's a theological issue.

Mr Stewart: I thought - - -

Commissioner Johns: Maybe the witness can - - -

Mr Stewart: Perhaps that's - - -

Commissioner Johns: Just step outside (indistinct).

[THE WITNESS WITHDREW]

Commissioner Johns: Mr Stewart.

Mr Stewart: Yes, Commissioner. I had understood that first of all we accept conservative/non-conservative concepts of religion. There was that involved that there were certain - and I had understood the evidence was conservative/non-conservative spectrum, and the cultural groups that may have held on that spectrum. Can I say - - -

Commissioner Johns: I think the issues - I'm saying I think that that's a theological question, not a cultural one. and you will see next to Theology where it says "second round focus" asterisk, you come down, it says:

Has a Bachelor of Theology and capacity to work with theological diversity.

So it is dealt with in that area.

Mr Stewart: It's dealt with in that sense, which is the question mark against it.

Commissioner Johns: Yes.

Mr Stewart: I don't want to be at cross purposes. I think it came from a very odd conservative/non-conservative and a series of questions. But I don't think it could be put to him that it was not an issue for this panel with respect to this applicant.

Commissioner Johns: Can I assume that - and I don't want to jump to a conclusion or a generalisation, but would it be the case that within the church there are some cultural groups who are theologically more conservative?

Ms Bleyerveen: Yes, that's correct.

Mr Stewart: Cutting to the chase, Commissioner, because with the greatest of respect to at least the first two witnesses and perhaps the applicant, there's a degree of skirting

around what is a particular issue. There is, for example, in the Pacific Islander community, a very anti-homosexual position adopted. I'm not saying that that's all Pacific Islander people, but it is a - I will use the word characteristic. The progressive part of - - -

Commissioner Johns: Same-sex marriage in the Uniting Church might be an issue for them.

Mr Stewart: And - - -

Ms Bleyerveen: A live issue.

Mr Stewart: A live issue.

Ms Bleyerveen: Very live issue.

Mr Stewart: And in that sense, as you will - people would know that the Uniting Church was one of the first to be quite supportive of (a) gay marriage; and (b) also gay ministers and so forth. The other thing is also the Korean - there is a very strong Korean area, and in that sense there is again a degree of conservative in the practice of the church - I'm going to use the word doctrine because it's my own. So that is a really core fundamental battle that has been raging, certainly in this UME.

And I think that that should be exposed, and in that sense should be actually dealt with, in rather the sort of coy language around it, but that is what Dr Powell is, as I understand it, trying to convey. It was a very important thing for Ms Bleyerveen, as I understand it, not wanting to put words in her mouth. But that's what we're talking about in this cultural/theological sense.

Commissioner Johns: All right. Let's get the witness back in.

Mr Stewart: Thank you, Commissioner.

[GLEN BRIAN POWELL, RECALLED]

Commissioner Johns: Dr Powell, whilst you were out of the room Mr Stewart explained some matters to me that are probably best if that comes from a witness. I don't doubt that you won't be honest or - what I want you to do is be very candid. What are you really talking about when we talk about cultural diversity and theological diversity? I don't want you to skirt around the issue. What are we really talking about? What's it code for?

Dr Powell: So the Uniting Church has 14 or so national conferences which are different cultural groups. They don't have the same values and traditions that Anglo-Celtic groups have. We have significant diversity within the Anglo-Celtic community. But when - but you have different sort of centred sets, if you like, in those different communities. They tend to be, if you look at a mean or a median or whatever, more conservative than the Anglo-Celtic communities. Perhaps more significantly, their leadership is more conservative. And within each community there is diversity.

So as I would think the most progressive mainstream church in Australia, the Uniting Church is seeking to be both inclusive of all the various forms of diversity that we have in humanity at the same time as being accepting and affirming of different cultural groupings, whether it be the Aboriginal or an Islander Christian Congress, or Koreans, or Pacific Islander groups. We have several different ones, but the Tongans are the largest community in the Uniting Church.

Commissioner Johns: So they might not have a more welcoming view of same-sex marriage in their churches?

Dr Powell: Precisely. So in recent times we've made a decision nationally as a church to support same-sex marriage, to give congregations the opportunity of offering same-sex marriages. That is not the only diversity I'm talking about, but that is a significant one. And within every one of those communities, even if they're in denial, we would have significant diversity of identity of - what would be the correct language? Sexual preference. And other forms, different beliefs. So working respectfully with those communities without necessarily affirming some of those things is quite difficult.

And to be strongly progressive and - I wouldn't say impatient, but what is it - strongly progressive but not very flexible, can make it difficult to work across that diversity. We're trying to move people into a more inclusive orientation, but it takes time and patience, and so in looking at these different candidates, how do they work across that cultural and theologically diversity and ranking people, we were looking at people that can get inside and do that work. We had a Tongan, we had a Samoan, we had an Indonesian in amongst the candidates, you know, so there were some people who were sort of insiders in some of those groups. And all of the candidates had different ranges of strengths.

Commissioner Johns: So the successful candidate is a Raymond Joso?

Dr Powell: He's Indonesian.

Commissioner Johns: Right. And then Falepaine?

Dr Powell: Tongan.

Commissioner Johns: And then Cameron?

Dr Powell: He's Anglo-Celtic.

Commissioner Johns: Right, and you held a concern that the applicant who has progressive views, as I think I heard your evidence earlier, you had some concerns about her ability to deal with those more conservative cultural groups?

Dr Powell: In trying to limit our decisions to what we heard in the interviews other applicants addressed those concerns better.

Commissioner Johns: But you didn't form a view that the applicant couldn't talk to or engage with other cultural groups, more conservative cultural groups?

Dr Powell: Well, anyone can at one level, yes.”

[44] I was indebted to Mr Stewart for “cutting to the chase”. Finally, the “cat was out of the bag”. Finally, we could see the “elephant in the room”. However, none of these concerns about cultural/theological issues affecting more conservative congregations were expressly put to the Applicant during the interview process. She was judged against a criterion that was unspoken or couched coyly. There was an inherit unfairness in that process.

What were Ms Bleyerveen’s skills, qualifications and experience?

[45] It is a fact that the Applicant was interviewed for the MFC role but was unsuccessful in securing a position. However, that does not lead to a conclusion that she lacked the skills, qualifications and experience to perform the role. It is evidence only of the fact that the JNC preferred other candidates.

[46] From October 2017 Reverend Curlewis was the Interim Executive Director of the Respondent. Reverend Curlewis was a part of the committee of the Respondent’s board appointed to review the operations of the Respondent. She was part of the committee that engaged Good Provider. She was a member of the board that, on 25 May 2018, accepted the 14 recommendations made by Good Provider. Reverend Curlewis was then a member of the task force charged with implementing the recommendations accepted by the Board. One of the duties of the task force was to draft position descriptions for the positions in the new structure. That process was undertaken in consultation with staff of the Respondent. She along with Ms Harris and Reverend Macleod met with a group of employees, including the Applicant on 11 September 2018 to advise them that their positions were being made redundant and about the opportunity to discuss redeployment. She was not a member of the JNC that interviewed candidates for the MFC Role. However, she was a member of the Board of the Respondent which accepted the recommendation of the JNC about the appointment of candidates to be 3 MFC Roles. Reverend Curlewis was a participant in the meeting where the Applicant was notified of the termination of her employment. Reverend Curlewis’ witness statement did not traverse the skills, qualifications and experience of the Applicant.

[47] Under cross-examination by the Applicant Reverend Curlewis denied that she had had any,

“conversations with Dr Powell in the context of the redundancies and are looking for new people to fill the positions about toxicity and deviancy in the workplace or [her] concerns about the culture of the resourcing team or any of those kind of things.”²⁶⁹

[48] Although Reverend Curlewis was giving her evidence by telephone from Jerusalem and was unable to be observed in the witness box, she presented as a witness of truth. I accept her evidence that she had nothing to do with the non-selection of the Applicant for one of the MFC Roles except when the recommendation of the JNC came before the Board of the Respondent.

²⁶⁹ Transcript PN284

[49] In her evidence before me Reverend Curlewis agreed with the propositions that she was familiar with the Applicant,²⁷⁰ knew of her work²⁷¹ and, to a degree, the Applicant's capabilities.²⁷² She agreed that she knew of the Applicant's qualifications,²⁷³ skills²⁷⁴ and, to a degree, her experience.²⁷⁵ I then explored with Reverend Curlewis the Applicant's ability to satisfy the Key Responsibilities of the MFC Role. However, her answers did not demonstrate very much knowledge about the Applicant's qualifications, skills and experience. This was a surprise given that she had been in the Interim Executive Director role and only one layer of management removed from the Applicant. Her evidence was that she was "unsure [about whether the Applicant could build and maintain] collaborative working relationships."²⁷⁶ Her evidence was that she had "not seen the direct engagement of the applicant in those relationships."²⁷⁷ Reverend Curlewis then said that the Applicant could "possibly"²⁷⁸ work collaboratively within a multidisciplinary team, actively contributing to the achievement of team objectives. She said she did not know about the Applicant's recording and reporting capacity.²⁷⁹ Noting that Reverend Macleod was the Applicant's direct line manager, Reverend Curlewis agreed that it was possible²⁸⁰ that he was the best person to give evidence about whether or not the Applicant could fulfil the MFC Role. She gave no further evidence about the Applicant's skills, qualifications and experience. However, Reverend Curlewis did confirm that the Applicant was a valued employee,²⁸¹ are no issues had been raised with the Applicant about her performance²⁸² or her conduct.²⁸³

[50] Dr Powell was, from July 2018 a Board Member of the Respondent and from October 2018 chair of the JNC appointed to conduct interviews as a part of a selection process that the Applicant participated in. His evidence was to the effect that as a member of the JNC for the MFC Role he was a part of the decision to select the Applicant for interview and then for a second interview. His evidence was that after the 2nd interview it was decided that,

"...the Applicant did not meet the requirements of the position and did not have the necessary skills, qualifications and experience. The key areas of lack of competency were:

- For understanding of new structure and inability to understand that the position was more focused and collaborative than previous roles;
- lack of vision for new structure;
- limited ability to avoid and resolve conflict;

²⁷⁰ Transcript PN375

²⁷¹ Transcript PN376

²⁷² Transcript PN377

²⁷³ Transcript PN378

²⁷⁴ Transcript PN379

²⁷⁵ Transcript PN380

²⁷⁶ Transcript PN381–382

²⁷⁷ Transcript PN384

²⁷⁸ Transcript PN389

²⁷⁹ Transcript PN390

²⁸⁰ Transcript PN395

²⁸¹ Transcript PN447

²⁸² Transcript PN448

²⁸³ Transcript PN449

- reluctance to accept views and ideas that did not accord with her own weather in the wider Church or from team leadership;
- lack of capacity to work across theological and cultural diversity generally but in particular reluctance to accept cultural and conservative/non-conservative concepts of religion; and
- no demonstrated ability to effectively collaborate with in a team dynamic.”²⁸⁴

[51] Dr Powell indicated that,

“The JNCFC placed particular emphasis on cultural and religious diversity as well as conflict resolution skills, which the applicant scored poorly in, and the capacity to work in a collaborative team under direction. These elements were viewed as inherent requirements of the Mission Facilitation Consult position. These areas were thought to be critical to the position because the facilitation consult will work closely with varied cultural groups within the Church and this, in turn, the Mission Facilitation Consultant needed to be a cohesive member of the team. The roles were generalist roles and had to cover a number of aspects. Having regard to the large Korean and Tom in communities within the Church, the Church’s commitment to the Covenant of the Uniting Original and Capile of the Christian Congress, it was necessary for all 3 Mission Facilitation Consultants respect and work with diversity in alternative cultural concepts of religion.”²⁸⁵

[52] He continued,

“During the evaluation process we considered whether training would assist in resolving any shortcomings of the candidates. ... With respect to the applicant, JNCFC’s concerns about her capacity to work constructively across the theological and cultural diversity of the Church and work collaboratively within a team or under the supervision of a line manager was thought to be based on personal conviction which would not change in response to coaching or professional supervision. I also make this comment as I have known the applicant for possibly 35 years.”²⁸⁶

[53] In his second witness statement Dr Powell confirmed that he had told the Applicant that,

“... the fact that the applicant was offered a second interview, as with the same for all other candidates, was that we felt all of the candidates had some capacity to perform the duties of the Mission Facilitation Consult position but this required closer inspection and review.”²⁸⁷

[54] He continued,

“It was subsequently determined that the applicant would not be able to perform the role, primarily because she refused to accept the role as new or different to her previous role and refused to accept that she would have to work differently. I was not

²⁸⁴ Exhibit 19, para 19

²⁸⁵ Exhibit 19, para 20

²⁸⁶ Exhibit 19, para 21

²⁸⁷ Exhibit 21, para 18

saying to the applicant that she could have satisfactorily performed all functions and duties of the Mission Facilitation Consultant.”²⁸⁸

[55] In his evidence before me Dr Powell confirmed that he had not worked with the Applicant in any paid capacity prior to being on the selection committee, had not worked with her as an employee and that she had never reported to him.²⁸⁹ He accepted that prior to being on the selection committee he would did not have a great deal of information about her skills, competencies, qualifications or experience.²⁹⁰ His evidence was that at the end of the second interview the Applicant was ranked not suitable because,

“The Applicant had formed the opinion that the role was the same as the previous role she had been in, and we were looking for someone to work quite differently what we understood to be a different role.”²⁹¹

[56] I then explored with Dr Powell the Applicant’s ability to satisfy the Key Responsibilities of the MFC Role. His evidence was that the JNC thought the Applicant:

- a) could build and maintain collaborative working relationships with allocated key leaders in presbytery’s, negotiating shared outcomes,²⁹²
- b) “could potentially do the job”²⁹³ and that is why she was offered a second round interview,
- c) did not demonstrate at interview her ability to work collaboratively within a multidisciplinary team, actively contributing to the achievement of team outcomes,²⁹⁴
- d) could regularly gather, record and share insights on presbytery missional needs, capacity and capability with the Mission in a team,²⁹⁵
- e) had a weakness in relation to collaboration,²⁹⁶
- f) should be ranked fourth, but that he did not know whether the Applicant would be offered the position if one of the first 3 candidates declined. He suggested that the JNC may have recommended re-advertising the position.²⁹⁷

[57] Under cross-examination the Applicant attempted to re-play the interview process and put to Dr Powell that, during the interview, she had demonstrated a number of examples relevant to the Key Responsibilities for the MFC Role. Dr Powell, for the most part, agreed that the Applicant had mentioned those things during the interviews.²⁹⁸ He also agreed that the Applicant’s application for the MFC Role addressed the selection criteria and provided

²⁸⁸ Exhibit 21, para 19

²⁸⁹ Transcript PN484-486

²⁹⁰ Transcript PN490-495

²⁹¹ Transcript PN519

²⁹² Transcript PN523

²⁹³ Transcript PN545

²⁹⁴ Transcript PN559

²⁹⁵ Transcript PN562

²⁹⁶ Transcript PN567

²⁹⁷ Transcript PN587-588

²⁹⁸ Transcript PN662-695

relevant examples.²⁹⁹ A rather “coded” exchange then occurred between the Applicant and Dr Powell about the assessment made of the Applicant that there was a “weakness” around theological diversity.³⁰⁰ That lead to Mr Stewart’s “there’s a degree of skirting around what is a particular issue” comment³⁰¹ referred to above. The Applicant then took Dr Powell back to her application for the MFC Role where she addressed her ability to “work effectively with diverse cultural generational, institutional, geographic and other communities.” Dr Powell accepted that the Applicant addressed those matters in her application.³⁰² Consequently, it seems that the complaint of the JNC seems to be that the Applicant did not address the “cultural/theological” issue at interview despite never being directly asked about it³⁰³ and notwithstanding that it was a question mark that the JNC had about her ability to do the MFC Role.³⁰⁴ Dr Powell conceded they “ran out of time” at the second interview.³⁰⁵ The only conclusion is that the Applicant was denied an opportunity to present her best case before the JNC, at the all-important second interview, because it hid from her their concerns, the interview ran out of time and, at no stage was the Applicant asked directly about the issue the JNC was skirting around. This unfairness ought to have been obvious to the JNC.

[58] Reverend Macleod was, at the time of the dismissal, the Applicant’s line manager. He had been her line manager between 2014-2018. His evidence went to the Applicant’s qualifications, skills and experience in her MRC Role. Importantly, he noted,

“Alison’s experience in a range of church settings meant that she was able to reflect with congregations as they integrated their approach to mission, discipleship, worship and leadership development, including intergenerational practices, listening to community, and bringing together the strengths from a range of theological streams. Alison was able to connect with the Korean Presbytery over their use of funds and the development of Living Our Values training. She worked with a range of multicultural congregations to negotiate ways ahead in mission, notably Griffith Uniting Church.”³⁰⁶

[59] I explored this statement further with Reverend Macleod. I asked him what the paragraph meant.

“Reverend Macleod: Okay. Yes, what I'm saying there is that Alison was able to act as a general practitioner in engaging with the needs of presbyteries and congregations as they presented so that she was able to be flexible, able to help them connect, more than just thinking about property or funding but to help them think about their long term strategic planning, their missional framework in terms of how they connected with the community, how they develop their worship and leadership development.

Commissioner Johns: There's been some evidence in this proceeding that in relation to some theological issues, some congregations approached those issues with integrity but from different perspectives?-

²⁹⁹ Transcript PN713-740

³⁰⁰ Transcript PN768-788

³⁰¹ Transcript PN835

³⁰² Transcript PN856-863

³⁰³ Transcript PN882

³⁰⁴ Transcript PN881

³⁰⁵ Transcript PN877

³⁰⁶ Exhibit 8, para 6.3

Reverend Macleod: Yes.

Commissioner Johns: Conservative perspectives?

Reverend Macleod: Yes.

Commissioner Johns: An example might be Tonga communities aren't so much of a fan of same sex marriage?

Reverend Macleod: Yes.

Commissioner Johns: Are you aware of all of that?

Reverend Macleod: Indeed.

Commissioner Johns: It's sort of been described as the elephant in the room, maybe the pink elephant in the room, I don't know, and it seems, as the evidence has fallen out, that an assessment has been made of the applicant that she would not be best placed to deal with those communities because of her theological difference?

Reverend Macleod: Well, I - - -

Commissioner Johns: You've been her manager?

Reverend Macleod: Yes, I am.

Commissioner Johns: What would you say about that?

Reverend Macleod: (1) I have Alison in action with groups of people who are very conservative and I've seen her able to develop her approach to the work in a way that would help them engage with the - - -

Commissioner Johns: What's an example of that?

Reverend Macleod: An example that would be the congregation at Griffith who were largely Tongan, Fijian, Niuean and Cook Island members, many of whom would have had a very conservative understanding of theology, and Alison and her engagement with that congregation was able to spend more time in biblical reflection with them and find ways of helping them explore language which was appropriate for their situation.

Commissioner Johns: Give me some more detail about that. What does that mean?

Reverend Macleod: That means that rather than presenting challenging or confronting ideas of how the church should be, she would begin with going back to basics about what - about Christian discipleship, about the understanding of Jesus Christ as a leader of mission and invite people to reflect on their own biblical framework.

Commissioner Johns: Right. As I say, as the evidence has sort of fallen it, it seems that an adverse view was formed about the applicant and her ability to deal with those types of congregations or communities. As her direct line manager, did anyone come to you and say 'Look, we've got this concern about Alison. What do you think about it'?

Reverend Macleod: I don't remember anyone coming to me with that concern.

Commissioner Johns: Right. Anything arising, Mr Stewart?

Mr Stewart: No, Commissioner.^{”³⁰⁷}

[60] Under cross-examination the following evidence was adduced,

“Mr Stewart: Thank you, Commissioner. Reverend Macleod, have you ever seen Ms Bleyerveen change her mind on a theological belief that she held?

Reverend Macleod: Yes, I have.

Mr Stewart: Can you tell the Commission what that was?-

Reverend Macleod: I've seen Alison shift her framework to become more accepting of the connection around leadership and theology.

Mr Stewart: When did you see that occur?

Commissioner Johns: Before you say when you saw it occur you'll need to assist me to understand what that means? So what was her position?

Reverend Macleod: Her position was suspicious of much language around leadership as being an unhelpful framework, and by taking part in a leadership intensive and a number of conversations she developed a more generous understanding of how people might reflect on leadership theologically. So that was my experience. That's one example.”³⁰⁸

[61] The Respondent submitted that I should reject Reverend Macleod’s evidence on the basis that he displayed animosity towards the change process and, like the Applicant, he did not believe there was any need for change within the Respondent. The evidence of Reverend Macleod made it clear that he was not a supporter of the review or the transformation strategy. As the immediate manager much of the adverse findings contained in the report reflect poorly on him. However, I did not discern that he was anything other than a witness of truth. He was honest about the misgivings he had concerning the review and in particular the process (including the external recruitment process) that was a part of the transformation strategy. Whilst he may not have valued the need for the restructure, there was nothing in the manner in which he gave his evidence which suggested that his views about the skills and competencies of the Applicant were in any way manufactured.

³⁰⁷ Transcript PN2086-2097

³⁰⁸ Transcript PN2120-2125

[62] Reverend Merrifield was the immediate past substantive Executive Director of the Respondent. She held that position between 2011-2017. This means that she had ultimate authority over the Applicant from 2014-2017 because Reverend Macleod reported to Reverend Merrifield. Reverend Merrifield gave evidence about the Applicant's qualifications, skills and experience. Her evidence was that,

"The Uniting Church is made up of many complex relationships influenced by personal beliefs and past histories. The Applicant showed herself to be highly capable in managing and attending to these complexities in a way that brought clarity and resolution."³⁰⁹

[63] Reverend Merrifield stated that she had "read through the statement of Mr Glen Powell. His assertions regarding the Applicant did not align with my experience of her skills and competencies."³¹⁰ In addressing the Key Responsibilities of the MFC Role with Reverend Merrifield she confirmed that the Applicant could perform the same.³¹¹

[64] In relation to the elephant in the room the evidence of Reverend Merrifield was as follows,

"Commissioner Johns: Right, so some of the evidence I've received in this matter suggests that within the Uniting Church - it's a broad church and there are congregations with different traditions and all beliefs held with integrity. I mean, some of those might be described as conservative or progressive or evangelical or charismatic. And there is a suggestion also in the evidence that so particularly in relation to conservative congregations, the applicant wouldn't work well with them. What do you say about that?

Reverend Merrifield: I don't share that view at all.

Commissioner Johns: And why not?

Reverend Merrifield: It's certainly not been my experience. So for example her work with a congregation like Griffith, that would set itself in the more conservative space, she did some work with during my time the Korean Presbytery which again, would place itself in a very much more conservative space and a variety of other congregations that would be in that space. That never seemed to be - it certainly was never an issue raised with me and the outcomes were certainly I don't think any different from other congregations that that she worked with.

Commissioner Johns: Thank you. Mr Stewart, anything arising?

Mr Stewart: Yes, thank you, Commissioner. You've mentioned the Griffith congregation as more conservative. What's the cultural make-up of that?

Reverend Merrifield: As I understand it has quite a number of Pacific Island people as well as rural farmers.

³⁰⁹ Exhibit 9, para 5.2

³¹⁰ Exhibit 9, para 5.6

³¹¹ Transcript PN2353-2381

Mr Stewart: When you say - how many people would be in that congregation?

Reverend Merrifield: I couldn't tell you that offhand.

Mr Stewart: Could you give me a percentage of Pacific Islanders?

Reverend Merrifield: I couldn't tell you offhand, no, but I could look it up. That information would be available quite easily.

Mr Stewart: What about the farmers? Is it predominantly farmers or predominantly Pacific Islanders?

Reverend Merrifield: Well, as I say I don't - I couldn't tell you what the percentages are.

Mr Stewart: Nothing further, Commissioner.”³¹²

[65] Reverend Reid, a Minister of Northmead Uniting Church, provided Church based (not employment based) supervision of the Applicant. He also worked for Uniting Resources and had some dealings with the Applicant in the years 2014/2015. It was difficult to discern the relevance of Reverend Reid’s evidence in the context of the matters that I had to decide. His evidence was of little assistance to me.

[66] Reverend Koh-Butler is Parramatta Mission’s Multi-faith Chaplin to Western Sydney University. She gave evidence about the Applicant’s “cross-cultural competency”. Before me her evidence was as follows,

“Mr Stewart: Ms Bleyerveen you would describe as particularly rule and process driven. Is that correct?

Reverend Koh-Butler: I'd say that she's particularly organised, yes.

Mr Stewart: Have you ever seen Ms Bleyerveen change her mind on a theological belief that she held?

Reverend Koh-Butler: It's not so much about changing your mind as being open to a deeper or wider interpretation. So I think that would have been evidenced in her participation in the Space for Grace process that was held. So for about eight years I've worked with the national church on developing a process for holding intercultural conversations around questions related to the doctrine of marriage in the Uniting Church and Alison was invited to be one of the participants in I think the Brisbane gathering of that conversation. So the national church decided to hold two national conversations, one in Brisbane and one I think in Melbourne. She was invited - - -

Commissioner Johns: Sorry to interrupt. So is this the assembly Seeking Common Ground Circle?

³¹² Transcript PN2382-2389

Reverend Koh-Butler: No, this is before that. So the Space for Grace was a consultation process that the Reverend Doctor Tony Floyd and I wrote for the national church to assist the church in holding conversations about the church's response to changes in the national position on the definition of marriage.

Commissioner Johns: Right?

Reverend Koh-Butler: Obviously in such a diverse church, and one that claims itself to be multicultural and has claimed itself to be multicultural since 1985, there have been some quite complex conversations to be had.

Commissioner Johns: Because the evidence I've heard is that there are some congregations or communities who come to those questions within integrity but are very conservative in their theology?

Reverend Koh-Butler: Absolutely.

Commissioner Johns: Yes?

Reverend Koh-Butler: And so for the purposes of the national consultation a good cross-section of people were invited to participate in two kind of very large focus groups, and Alison was one of the attendees at those, and that was the one in Brisbane. As part of our conversation after that - I don't think it's so much that there was a change of yes or no to an understanding of theology, but just a greater sense of the breadth of theological positions that different people had and why they had them. So there was less of a change of a mind and more of greater depthing.

Commissioner Johns: So how would the applicant go working with, you know, a conservative Tongan community about those issues that she clearly is quite passionate in a different way?

Reverend Koh-Butler: I've seen her work with Pacific Islander groups. I'm a member of a Fijian congregation myself, and I think that certainly in the context in which I'm in at the Leigh Fijian congregation at Parramatta, she'd be quite well accepted. Quite often mono-ethnic migrant congregations will only open up to somebody who is not in their own family connection to be able to discuss theological issues. So we claim as the Uniting Church to be a multicultural church, and so that actually means that there's a commitment not to be mono-cultural, so the expectations of the mono-cultural congregations is that they will be in discussion with people who are from beyond their culture.

Commissioner Johns: Thank you. Mr Stewart?

Mr Stewart: Nothing further, Commissioner.”³¹³

[67] In 2017 (for two semesters) Reverend White was seconded to the role of Acting Executive Director of the Respondent. That meant she had ultimate authority over the

³¹³ Transcript PN2170-2178

Applicant during this time. Reverend White also had oversight of the Doctor of Ministry programme in which the Applicant was enrolled. She gave evidence about the Applicant's theological and pastoral capacity.

[68] Reverend Ken Day is a Minister at St Stephen's Uniting Church, Sydney. Like the evidence of Reverend Reid, his evidence was of little utility.

[69] Having considered the evidence in its totality from the various witnesses put forward by both the Applicant and the Respondent I am satisfied that the Applicant had the skills, qualifications and experience to undertake the Key Responsibilities of the Mission Facilitation Consultant role. Although she was unsuccessful in the external recruitment process that only evidences the fact that she was not the preferred candidate when assessed against those with whom she was competing in that process. It is not evidence that she could not perform the role. The totality of the evidence establishes that the Applicant was skilled and competent to perform the Key Responsibilities of the Mission Facilitation Consultant role to the required standard.

[70] The Applicant's application demonstrated sufficient competency for her to be selected for a first round interview. Her performance at the first round interview secured her a second round interview. It was the evidence of Dr Powell that only those candidates who demonstrated an ability to do the job in the first interview were selected for a second interview.³¹⁴ There is little doubt that the Applicant then performed poorly in the second interview. That poor performance at a single interview is not evidence that the Applicant could not perform the Mission Facilitation Consultant role.

[71] The Respondent submitted that "the main thrust of the change programme was the move to an end user system/being "hard wired" to congregations etc/enabling and supporting leaders at a grass roots level/collaborating with a diversity of theological and cultural groups in the Church." The evidence establishes that the Applicant did not demonstrate her ability to achieve this, to the satisfaction of the Joint Nominating Panel, in her truncated second interview. However, having considered in greater detail the qualifications, skills and experience of the Applicant, it seems, more likely than not, that the Applicant could perform the MFC position. Had that deeper enquiry been undertaken by the Respondent into the qualifications, skills and experience of the Applicant (prior to requiring the Applicant to participate in open/external selection process), she would likely have been accommodated in the restructure process. There is simply no evidence that the Applicant is unable to work with conservative congregations or that she is unable to give credence to the theological and cultural views of those congregations.

[72] However, having determined that the Applicant was skilled and competent to perform the Key Responsibilities of the MFC Role, I have some concerns about whether there is alignment with all of the Key Competencies of the MFC Role. I had the opportunity to observe the Applicant over 3 days of hearing. That being the case I observed her for longer than the JNC. Admittedly, a hearing is different to an interview. However, while it is no doubt the case that the Applicant is passionate about working for an organisation that is responsive to its call to proclaim and exemplify the life of God and is committed to mission, what I also observed was a person who might be described as stubborn and inflexible. Her dogged insistence that the MRC Role and the MFC Role were the same is an example of that.

³¹⁴ Transcript PN545

It is very clear that the Applicant did not openly engage with and nor did she accept the review of UME and the resulting restructure. Even before me (some 10 months after the Board of the UME signed off on the new structure) the Applicant was arguing against the need for the same. Her apparent inability to “move on” was no doubt detrimental to her in the interview process. Some of the Key Competencies of the MFC Role include being “adaptable”, “open to new ideas” and being someone who “supports and drives organisational change.” I did not see the Applicant demonstrate these attributes. She would be well advised to seek some professional development in these areas.

What was the location of the job in relation to the employee’s residence and the remuneration (pay and entitlements) which was offered?

[73] Location and remuneration as between the MRC role and the MFC role were equivalent.

Conclusion about redeployment

[74] For the reasons set out above, the Commission, as presently constituted, is satisfied that redeployment of the Applicant into one of the three Mission Facilitation Consultant positions would have been reasonable in all the circumstances. Having made that finding it is unnecessary for me to consider what other positions she might reasonably have been redeployed into.

Conclusion about genuine redundancy

[75] For the reasons set out above, the Commission, as presently constituted, is satisfied that:

- a) the Applicant was protected from unfair dismissal,
- b) the dismissal was not a case of genuine redundancy within the meaning of s.389 of the FW Act because redeployment was reasonable in all the circumstances.

Harsh, unjust or unreasonable

[76] Having determined that the termination of Ms Bleyerveen’s employment was not a case of genuine redundancy I must now consider whether I am satisfied the dismissal was harsh, unjust or unreasonable.

[77] The ambit of the conduct which may fall within the phrase ‘harsh, unjust or unreasonable’ was explained in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 465 by McHugh and Gummow JJ as follows:

“.... It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is

disproportionate to the gravity of the misconduct in respect of which the employer acted.”

[78] The criteria the Commission must take into account when assessing whether the dismissal was harsh, unjust or unreasonable are set out at s387 of the FW Act:

“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.”

[79] Ordinarily I would be under a duty to consider each of these criteria in reaching my conclusion.³¹⁵ However, because the dismissal was not a case of genuine redundancy the consideration of the matters specified in s.387(a), (b) and (c) are neutral, unless in the circumstances another valid reason is identified. No other valid reason was identified by the Respondent.

[80] Matters arising from the redundancy (e.g. if relevant, a failure to consult with an employee) fall within s.387(h).³¹⁶

[81] Therefore, in relation to the dismissal of the Applicant I am satisfied that:
Valid reason – s.387(a)

³¹⁵ *Sayer v Melsteel* [2011] FWAFB 7498

³¹⁶ *UES (Int’l) Pty Ltd v Harvey* (2012) 215 IR 263

- (a) The Respondent did not assert that the reason for the dismissal of the Applicant was related to her capacity or conduct. Accordingly there cannot have been, and there was not, a valid reason for the dismissal related to her capacity or conduct.
- (b) In all the circumstances of this case I regard this element of s.387 as a neutral consideration in respect of whether the dismissal of the Applicant was harsh, unjust or unreasonable.

Notification of the valid reason and opportunity to respond – s.387(b); (c)

- (a) The matters in s.387(b) and (c) of the FW Act deal with whether there was procedural fairness in respect of a reason for dismissal related to capacity or conduct.
- (b) The dismissal of the Applicants was not related to capacity or conduct.
- (c) Consequently, in all the circumstances of this case I regard this element of s.387 as a neutral consideration in respect of whether the dismissal of the Applicant was harsh, unjust or unreasonable.

Unreasonable refusal by the employer to allow a support person – s.387(d)

- a) Where an employee protected from unfair dismissal requests a support person be present to assist in discussions relating to the dismissal, the employer should not unreasonably refuse that person being present.
- b) In the present matter this is not a relevant consideration.
- c) In all the circumstances of this case I regard this element of s.387 as a neutral consideration in respect of whether the dismissal of the Applicant was harsh, unjust or unreasonable.

Warnings regarding unsatisfactory performance - s.387(e)

- (a) The Respondent did not assert that the dismissal of the Applicant related to her unsatisfactory performance, so this matter is not relevant to my consideration as to whether the dismissal was harsh, unjust or unreasonable.
- (b) In all the circumstances of this case I regard this element of s.387 as a neutral consideration in respect of whether the dismissal of the Applicant was harsh, unjust or unreasonable.

Impact of the size of the Respondent on procedures followed and Absence of dedicated human resources management specialist/expertise on procedures followed - s.387(f); (g)

- (a) The size of a Respondent's enterprise may impact on the procedures followed by it in effecting a dismissal. Further, the presence of dedicated human

resource management or expertise in a Respondent's enterprise should ensure a higher standard of management of human resources.

- (b) In the present matter the Respondent is an odd creature. It is an unincorporated association that is a part of the wider Uniting Church community. It does not have its own in-house human resource function but relies on the human resource expertise within Uniting Resources. That resource appears limited and stretched.
- (c) In all the circumstances I am satisfied that the size of the Respondent (as a part of the broader Uniting Church community) did not have any adverse effect on the procedures it adopted in dismissing the Applicant. The process of proceeding to an external recruitment in preference to first exploring internal redeployment for the Applicant was clearly open to the Respondent. The advice to proceed in that way was not fundamentally flawed, but was inconsistent with the stated policy of the Uniting Church which envisages a greater measure of support being given to internal employees displaced in a restructure.
- (d) In all the circumstances of this case I regard this element of s.387 as a neutral consideration in respect of whether the dismissal of the Applicant was harsh, unjust or unreasonable.

Any other matters that the FWC considers relevant – s.387(h)

[82] Having considered each of ss.387(a)-(g) of the FW Act, it remains necessary to now consider subsection 387(h) in respect of the Applicant. Section 387(h) provides the Commission with a broad scope to consider any other matters it considers relevant.

[83] Once I have considered s.387(h) in combination with each of ss.387(a)- (g) of the FW Act, I must then decide (in respect of the Applicant) if, in all the circumstances, the termination of the Applicant's employment was harsh, unjust or unreasonable. Deciding whether the termination was ultimately unfair involves the exercise of discretion.

[84] Although s.387 includes matters that the Commission must take into account in deciding how to exercise its discretion, the discretion conferred is otherwise expressed in general, unqualified terms. Of course, the discretion conferred must be exercised judicially, that is to say not arbitrarily, capriciously or so as to frustrate the legislative purpose. Further, the discretion is also confined by the subject matter, legislative context and purpose.

[85] In exercising the discretion, guidance can be drawn from s.381 of the FW Act. It provides that:

“381 Object of this Part

- (1) The object of this Part is:
 - (a) To establish a framework for dealing with unfair dismissal that balances:
 - a. The needs of business (including small business); and

- b. The needs of employees; and
 - (b) To establish procedures for dealing with unfair dismissal that:
 - a. Are quick, flexible and informal; and
 - b. Address the needs of employers and employees; and
 - (c) To provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.
- (2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned.

Note: the expression “fair go all round” was used by Sheldon J in *re Loty and Holloway v Australian Workers’ Union* [1971] AR (NSW) 95.”

[86] In respect of Ms Bleyerveen I consider the following matters to be relevant to the determination of whether her dismissal was harsh, unjust or unreasonable:

Matters telling against a conclusion that the dismissal was harsh, unjust or unreasonable

- a) the Respondent engaged in extensive consultation (despite no obligation to do so under an Award or enterprise agreement) about the new MFC Roles,

Matters that support a conclusion that the dismissal was harsh, unjust or unreasonable

- b) the Respondent failed to give life to its own employment policies which provide that “Employers will take all reasonable steps to assist any employee whose position will no longer exist”³¹⁷,
- c) the Respondent did not proactively assist the Applicant to find alternative employment within it or within the broader Uniting Church organisation,
- d) the open merit selection committee process disadvantaged the Applicant in her ability to properly demonstrate her ability to undertake the MFC Role,
- e) the age of the Applicant,
- f) the very specialised nature of the work that she was undertaking with the Respondent that was not easily transferable outside the context of the Uniting Church,
- g) the time of the year at which time the dismissal was affected which meant that it made it more difficult for the Applicant to obtain alternative employment in her previous career as a teacher.

[87] Having considered each of the matters specified in s.387, the Commission, as presently constituted, is satisfied that, overall, and having regard to the obligation to afford a “fair go all round” the dismissal of the Applicant was unreasonable and harsh. The failure to redeploy the Applicant, leads me to the conclusion that the dismissal was unreasonable because it was decided upon incomplete information in circumstances where the Applicant was not provided with the fairest opportunity to display her capability to undertake the MFC Role. Further it was harsh because of the impact on the Applicant having regard to her age

³¹⁷ Exhibit 31, para 1.9

and the specialist nature of the employment that she was engaged in. The timing of the dismissal also impacted upon the Applicant's ability to secure work in her other discipline of teaching.

[88] Accordingly, the Commission, as presently constituted, finds Ms Bleyerveen's dismissal was unfair within the meaning of the FW Act.

Remedy

[89] Section 390 of the FW Act sets out the circumstances in which I may make an order for reinstatement or compensation:

"390 When the FWC may order remedy for unfair dismissal

- (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
 - (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
 - (b) the person has been unfairly dismissed (see Division 3).
- (2) The Commission may make the order only if the person has made an application under section 394.
- (3) The Commission must not order the payment of compensation to the person unless:
 - (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
 - (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies."

[90] I have already dealt with the issues at s.390(1)(a)–(b) above. The Commission, as presently constituted, is satisfied the Applicant was protected from unfair dismissal pursuant to s.382 of the FW Act and the Applicant was dismissed unfairly. An order dismissing the jurisdictional objection will be issued with this decision.

[91] As a consequence of the above, the Commission is now required to determine whether to order:

- a) the reinstatement of the Applicant or, in circumstances where reinstatement is inappropriate,
- b) compensation if it is satisfied such an order is appropriate in all the circumstances.

[92] However, noting that the termination occurred in November 2018 it is likely that the circumstances of the Respondent and the Applicant may have changed. It may be that the Applicant has found alternative employment and no longer presses reinstatement. It may be that any alternative employment found by the Applicant will reduce any amount of compensation that might be awarded. It may be that, with the passage of time, the Respondent now has other vacancies in which the Applicant could be redeployed. It might even be the case that there is now a vacancy in one of the MFC Roles. If there is no vacancy

in one of the MFC Roles (and no order would be made compelling the Respondent to terminate the employment of one of the people in the MRC Role in order to make a vacancy for the Applicant) and there are no other vacancies within the Respondent or the broader Uniting Church it may be that the only remedy left available to the Applicant is compensation (if appropriate).

[93] Therefore, as a matter of procedural fairness, the parties should be provided with an opportunity to put on further evidence and materials in relation to relevant matters concerning remedy (if any).

[94] Consequently, the matter will be programmed for further hearing about the question of remedy (if any). A Notice of Listing for the conduct of a mention/directions hearing will be issued with this decision.



COMMISSIONER

Appearances:

Ms A Bleyerveen, for the Applicant
Mr D Stewart, Wentworth Chambers, for the Respondent

Hearing details:

6 March 2019, Sydney
9 April 2019, Sydney
17 April 2019, Sydney

Final written submissions:

Respondent's Final Submissions, 3 May 2019
Applicant's Final Submissions, 17 May 2019
Respondent's Reply Submissions, 24 May 2019

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