DECISION

Fair Work Act 2009
s.394—Unfair dismissal

David Arnold

v

Real Estate Mt Hawthorn Pty Ltd T/A Oxford Property Group
(U2019/4315)

DEPUTY PRESIDENT BINET PERTH, 2 SEPTEMBER 2019

Application for an unfair dismissal remedy.

Introduction

[1] On 15 April 2019, Mr David Arnold (**Mr Arnold**) filed an application (**Application**) pursuant to section 394 of the Fair Work Act 2009 (Cth) (**FW Act**) with the Fair Work Commission (**FWC**) alleging he was unfairly dismissed by Real Estate Mt Hawthorn Pty Ltd t/a Oxford Property Group (**Oxford**) from his position as a Real Estate Sales Representative.

[2] On 6 May 2019, Oxford filed a response to the Application. The response raised two jurisdictional objections to the Application. The first objection asserting that Mr Arnold was not dismissed. The second objection asserting that if Mr Arnold was dismissed then his dismissal was a case of genuine redundancy. (collectively the **Jurisdictional Objections**).

[3] The parties participated in a conference before me on 19 June 2019 however the Application could not be resolved by conciliation.

[4] Taking into account the parties wishes and circumstances I determined that a determinative conference rather than a hearing would be the most effective and efficient way to determine the Application. Consequently, the Application was listed for a determinative conference in Perth on Friday, 16 August 2019 (**Determinative Conference**).

[5] Directions were issued to the parties on 28 June 2019 requiring them to file materials in relation to the Jurisdictional Objections and the merits of the Application (**Directions**).

[6] On 5 July 2019 Mr Arnold filed a document list, eight documents a witness statement for himself and two witness statements. Contrary to the Directions Mr Arnold failed to file an outline of submissions or any cogent response to the Jurisdictional Objections.

[7] On 5 July 2019 Oxford filed a document which contained both evidence and submissions, a Document List and six documents. Contrary to the Directions Oxford failed to file any witness statements in support of the assertions of fact set out in the document which it filed.

[8] The Directions and the original listing date were amended to accommodate the availability of the parties and to assist the parties properly prepare their respective cases. The parties were provided with additional materials to assist them present their respective cases. Oxford filed these materials on 1 August 2019. Mr Arnold was granted a further extension until 4 August to file the balance of his materials.

[9] Neither party sought permission to be represented and at the Determinative Conference Mr Arnold represented himself and Mr Paul Rados (**Mr Rados**) a Director of Oxford represented Oxford.

[10] At the Determinative Conference Mr Arnold gave evidence on his own behalf and the following witnesses also gave evidence on his behalf:

a. Mr Roy Barraclough (**Mr Barraclough**)
b. Mr Greg D'Arcy (**Mr D'Arcy**)

[11] Mr Barraclough and Mr D'Arcy, as with Mr Arnold, were previously employed by Oxford as real estate sales representatives (collectively the Sales Representatives).

[12] The following witnesses gave evidence on behalf of Oxford.

a. Mr Rados
b. Ms Sandra Behan

[13] Ms Behan is employed by Oxford as a receptionist.

Background

[14] On 24 February 2017 Mr Arnold entered into a contract of employment with Davey Real Estate Mt Hawthorn ABN 69 603 395 811 (**Contract**) as a real estate sales representative.[1]

[15] Cause 10 of the Contract provides that the Contract had an initial term of 12 months but would continue in force beyond that date until replaced by a new agreement. There is no evidence before me that the Contract was replaced by any other agreement.[2]

[16] Clause 2 of the Contract provides that Mr Arnold would be *"... remunerated on a 'commission only' basis in accordance with the Award."* Presumably a reference to the *Real Estate Industry Award 2010* (**Award**) which covers Mr Arnold's employment.[3]

[17] Clause 5 of the Contract provides that the Contract can be terminated on notice or by payment of notice in accordance with the following schedule:[4]

Employee's period of continuous service with the employer

Period of Service	***Notice Period***
Not more than 1 year	*At least 1 week*
More than 1 year but not more than 3 years	*At least 2 weeks*
More than 3 years but not more than 5 years	*At least 3 weeks*

More than 5 years	*At least 4 weeks*

The period of notice is increased by 1 week if, at the time of termination, the employee is over 45 years of age and has completed at least 2 years continuous service with the Agent.

[18] Davey Real Estate Mt Hawthorn later changed name to Real Estate Mt Hawthorn Pty Ltd, the respondent to this Application. The ABN for both entities is identical.[5]

[19] Like many real estate businesses in Western Australia, Oxford was adversely impacted by the economic down turn in Western Australia. Mr Rados gave evidence that in the months leading up to the decision to retrench Mr Arnold he had implemented a number of measures to improve the viability of the business. These measures included:[6]

a. Moving the business to much smaller premises.
b. Retrenching a receptionist.
c. Buying out a fellow Director.

[20] Effective 2 April 2018 the Award was amended. The Award now relevantly provides inter alia that:

a. A 'commission only' employee's gross income must be reviewed annually.
b. In the case of employees such as Mr Arnold who were employed on a 'commission only' basis prior to 2 April 2018, the first review was required to occur by 2 April 2019.
c. Where the review establishes that the gross income of the 'commission only' employee for the year under review is less than a specified amount (**Minimum Income Threshold Amount**) the "commission-only arrangement must cease."

[21] The practical effect is that employees who were previously only paid when they achieved sales, if they did not achieve a minimum value of sales, would be entitled to be paid a salary regardless of whether they achieved any sales or not.

[22] During the review period Mr Arnold sold a total of 3 properties producing a commission which the parties agreed was less than the Minimum Income Threshold Amount for the relevant classification. The Award therefore prohibited Oxford continuing to engage Mr Arnold on a 'commission-only' basis and required Oxford to pay him a salary if he continued his employment with the business.

[23] In late March 2019 both Mr Rados and Mr Arnold attended a seminar conducted by the Real Estate Employers Federation of Western Australia (**REEFWA**) which explained the changes to the Award in relation to the renumeration of 'commission only' real estate sales representatives.

[24] In light of the changes to the Award and the limited number of sales achieved by the Sales Representatives Mr Rados decided to restructure the business, reduce the number of Sales Representatives employed by the business and focus primarily on property management.

[25] On 10 April 2019 Mr Rados and Mr Arnold held a meeting at which they discussed the impact of the changes to the Award. Mr Rados informed Mr Arnold of his decision to decrease the number of Sales Representatives. Mr Rados says that he convened the meeting. Mr Arnold says that he did. Mr D'Arcy says that the discussion occurred during the normal weekly sales meeting.

[26] Regardless of who called the meeting it is agreed that Mr Rados informed Mr Arnold that the business could not continue to afford to employ him in light of the changes to the Award because Mr Arnold posed too much of a financial risk to the business given his low number of sales. Mr Arnold says that he and Mr Rados discussed what date his employment would end and agreed that it would end on Friday 12 April 2019. Mr Arnold requested that Mr Rados provide him with a letter confirming the circumstances of his dismissal to provide to Centrelink.

[27] On 10 April 2019 Mr Rados forwarded a letter to Mr Arnold (**Dismissal Letter**) stating that the business was struggling financially in the wake of the downturn of the Western Australian real estate market. Mr Rados set out the steps he had taken to reduce costs and explained that not withstanding these steps the business could not afford to pay a retainer without realistic chance of recouping these costs. Mr Rados acknowledged that many of the facts affecting Mr Arnold's performance were beyond Mr Arnold's control and he offered to provide a reference or otherwise assist Mr Arnold obtain alternative employment.[7]

[28] The men discussed when Mr Arnold would finish working for Oxford and agreed that Mr Arnold's employment would end on 12 April 2019. Since his dismissal Mr Arnold has found alternative employment.[8]

[29] Mr Arnold submits he was unfairly dismissed and seeks an Order that he be compensated $11,000 gross.[9]

Is Mr Arnold protected from unfair dismissal?

[30] Section 390 of the FW Act provides that the FWC may order a remedy for unfair dismissal if the FWC is satisfied that an applicant was protected from unfair dismissal at the time of being dismissed and that the applicant has been unfairly dismissed.

[31] Section 382 of the FW Act provides that a person is protected from unfair dismissal if, at the time of being dismissed:

a. the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

b. one or more of the following apply:

    (i) a modern award covers the person;
    (ii) an enterprise agreement applies to the person in relation to the employment;
    (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

[32] Mr Arnold commenced employment with Davey Real Estate Mt Hawthorn on 24 February 2017. Davey Real Estate Mt Hawthorn later changed its business name to Real Estate Mt Hawthorn Pty Ltd (which is the respondent to this Application). The ABN for both businesses is identical. [10] While the ownership of the business now trading as Oxford may have changed since 2017 I am satisfied that Mr Arnold has continuously been employed by the same legal entity from 2017 until his employment ended in April this year.

[33] There is no dispute that Oxford is a national system employer or that Mr Arnold's employment was covered by the Award.

[34] I am therefore satisfied that Mr Arnold has completed the minimum employment period and that he is protected from unfair dismissal.

Was Mr Arnold's dismissal unfair?

[35] Section 385 provides that a dismissal will be unfair if the FWC is satisfied that:

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

[36] Mr Rados submits that Mr Arnold was not dismissed. He says that an operational decision was made that Oxford would no longer employ sales representatives and that Mr Arnold's position was made redundant.

[37] A person has been dismissed for purposes of section 385 of the FW Act if the termination of their employment comes within the definition of "dismissed" in section 386 of the FW Act. Relevantly section 386 provides that:

> *"**386 Meaning of dismissed***
>
> *(1) A person has been dismissed if:*
> *(a) the person's employment with his or her employer has been terminated on the employer's initiative; or*
> *(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.*
> *(2) However, a person has not been dismissed if:*
> *(a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or*
> *(b) the person was an employee:*
> *(i) to whom a training arrangement applied; and*
> *(ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;*
> *and the employment has terminated at the end of the training arrangement; or*
> *(c) the person was demoted in employment but:*

(i) the demotion does not involve a significant reduction in his or her remuneration or duties; and

(ii) he or she remains employed with the employer that effected the demotion.

(3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part."

[38] In light of the evidence before me, including but not limited to the Dismissal Letter,[11] I am satisfied that Mr Arnold's employment came to an end at the initiative of Mr Rados and that Mr Arnold was therefore dismissed from his employment for the purposes of section 386 of the FW Act.

[39] Section 396 of the FW Act requires the FWC to decide the following matters before considering whether a dismissal was harsh, unjust or unreasonable:

a. whether the application was made within the period required in subsection 394(2);
b. whether the dismissal was consistent with the Small Business Fair Dismissal Code (**Code**); and
c. whether the dismissal was a case of genuine redundancy.

[40] Section 394(2) requires an application to be made within 21 days after the dismissal took effect. It is not disputed, and I find that, Mr Arnold was dismissed from his employment effective 12 April 2019 and made the Application on 15 April 2019. I am therefore satisfied that the Application was made within the period prescribed by subsection 394(2) of the FW Act.

[41] It is not disputed, and I find, that Oxford is a Small Business Employer for the purposes of the FW Act. Mr Rados concedes that he did not comply with the Code before dismissing Mr Arnold. Mr Rados submits however that the dismissal was a case of genuine redundancy.[12]

Was Mr Arnold's dismissal a genuine redundancy?

[42] Mr Rados submits that Mr Arnold's dismissal was a case of genuine redundancy. Section 389 of the FW Act defines the meaning of 'genuine redundancy' as follows:

*"**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 Mr Arnold's job no longer required to be performed?

[43] To be satisfied the dismissal was a case of genuine redundancy, I must be satisfied that Oxford no longer required Mr Arnold's job to be performed by anyone because of operational changes to Oxford's business.

[44] A job involves 'a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employer's organisation, to a particular employee'. Where there has been a reorganisation or redistribution of duties, the question is whether the employee has 'any duties left to discharge'. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant.[13]

[45] An employee may still be genuinely made redundant when there are aspects of the employee's duties still being performed by other employees.[14] The test is whether the previous job has survived the restructure or downsizing, rather than a question as to whether the duties have survived in some form.[15]

[46] The FW Act does not define the term "operational requirements". It is a broad term that permits consideration of many matters including the state of the market in which the business operates and the application of good management to the business.[16] Some examples of changes in operational requirements include a downturn in trade that reduces the number of employees required and the employer restructuring the business to improve efficiency including the redistribution of tasks done by a particular person between several other employees thus resulting in the person's job no longer existing.[17]

[47] The onus is on the employer to prove that, on the balance of probabilities, the redundancy was due to changes in operational requirements.[18]

[48] Mr Rados gave evidence that Oxford no longer required sales representatives because:

- The Award imposed rigorous obligations which were administratively and commercially onerous.
- The Sales Department wasn't making a profit and hadn't made a profit the previous financial year.
- Given the historic performance of the Sales Department the business could not afford to retain sales representatives on a salary.
- He had made a business decision to focus on property and strata management rather than real estate sales.

[49] Mr Arnold did not contest that Oxford no longer required his job to be performed by anyone because of changes in its operational requirements.

[50] I am satisfied that Oxford no longer required Mr Arnold's job to be performed by anyone because of changes in the operational requirements of its enterprise.

Was redeployment reasonable in all the circumstances?

[51] Mr Rados submits that redeployment was not reasonable in the circumstances because there were no roles for Mr Arnold in the restructured business or any related entities. Mr Arnold concedes this is the case.

[52] In the circumstances, I am satisfied that it would not have been reasonable for Mr Arnold to be redeployed within Oxford or any associated entity.

Did Oxford comply with any consultation obligations?

[53] At the time of the dismissal the Award applied to the employment relationship.

[54] The consultation provisions in the Award appear at clause 8 and provide that:

> *"**8 Consultation***
>
> *8.1 Consultation regarding major workplace change*
>
> *(a) Employer to notify*
>
> *(i) Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.*
>
> *(ii) **Significant effects** include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.*
>
> *(b) Employer to discuss change*
>
> *(i) The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in clause 8.1(a), the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.*
>
> *(ii) The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 8.1(a).*

> *(iii) For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.*

[55] At the meeting held on 10 April 2019 Mr Rados and Mr Arnold discussed the impact of the changes to the Award. At that meeting Mr Rados informed Mr Arnold of his decision to decrease the number of Sales Representatives. It appears that Mr Rados made this decision during or shortly before the meeting. The decision to downsize the Sales Department is a major change for the purposes of clause 8.1 of the Award. I am satisfied that the discussion occurred as soon as practicable after Mr Rados made a definite decision to introduce the change.

[56] At the meeting the parties discussed the nature of the change and its likely impact. Neither Mr Rados or Mr Arnold posed any measures which might avert or mitigate Mr Arnold's dismissal.

[57] Mr Rados concedes that he did not provide written information about the nature of the changes and its expected effects as required by clause 8.1(b)(iii) before the discussion occurred, although he did provide that information later the same day in the Dismissal Letter. This letter was provided to Mr Arnold two days before the dismissal took effect. Potentially in this period Mr Arnold could have proposed steps which might have mitigated or avoided his dismissal. He did not do so and since that time has not identified any measures which might have averted his dismissal.

[58] Consequently, I am not satisfied Oxford fully complied with the requirement to consult with Mr Arnold about the redundancy prior to dismissing him. Had Oxford done so I would have concluded that Mr Arnold's dismissal was a case of a genuine redundancy.

[59] In the absence of compliance with the consultation obligations contained in the Award I find that Mr Arnold's dismissal was not a case of genuine redundancy within the meaning of section 389 of the FW Act.

[60] I am therefore required to consider the merits of the Application.

Was the dismissal harsh, unjust or unreasonable?

[61] Section 387 of the FW Act provides that, 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 applicant's capacity or conduct (including its effect on the safety and welfare of other employees); and
b. whether the applicant was notified of that reason; and
c. whether the applicant was given an opportunity to respond to any reason related to the capacity or conduct of the applicant; and
d. any unreasonable refusal by the employer to allow the applicant 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 applicant – whether the applicant 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.

[62] Normally I would be under a duty to consider each of these criteria in reaching my conclusion.[19] However, being satisfied that dismissal was not a case of genuine redundancy (only because of Oxford's failure to consult) 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 Oxford. Matters arising from the redundancy; such as the failure to consult fall within section 387(h).[20]

[63] For completeness I set out my consideration of each below.

Was there a valid reason for Mr Arnold's dismissal related to his capacity or conduct? (s.387(a))

[64] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded" and should not be "capricious, fanciful, spiteful or prejudiced."[21] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.[22]

[65] While there is some dispute as to whether Mr Arnold fully applied himself during business hours to discharging his duties for Oxford or whether he could have reasonably secured more sales he was not dismissed due to his performance or his conduct. Mr Arnold was retrenched because the overall performance of the business prompted Mr Rados to restructure the business to reduce costs.

[66] The reason for Mr Arnold's dismissal was not related to Mr Arnold's capacity or his conduct. In the circumstances, I have therefore regarded this as a neutral factor in my consideration as to whether Mr Arnold's dismissal was harsh, unjust or unreasonable.[23]

Was Mr Arnold notified of the valid reason for his dismissal? (s.387(b))

[67] As I am not satisfied that there was a valid reason for the dismissal related to Mr Arnold's capacity or conduct, this factor is not relevant to the present circumstances. I have therefore regarded this as a neutral factor in my consideration as to whether Mr Arnold's dismissal was harsh, unjust or unreasonable.[24]

Was Mr Arnold given an opportunity to respond to any valid reason related to his capacity or conduct? (s.387(c))

[68] As I have not found that there was a valid reason for the dismissal related to Mr Arnold's capacity or conduct, this factor is not relevant to the present circumstances. I have

therefore regarded this as a neutral factor in my consideration as to whether Mr Arnold's dismissal was harsh, unjust or unreasonable.[25]

Did Oxford unreasonably refuse to allow Mr Arnold to have a support person present to assist at discussions relating to the dismissal? (s.387(d))

[69] Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

[70] There is no positive obligation on an employer to offer an employee the opportunity to have a support person:

> *"This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them."*[1]

[71] There is no evidence before me that Mr Arnold was unreasonably refused the opportunity to have a support person present to assist in discussions relation to his dismissal.

[72] I therefore find Oxford did not unreasonably refuse to allow Mr Arnold to have a support person present at discussions relating to his dismissal.

Was Mr Arnold warned about unsatisfactory performance before his dismissal? (s.387(e))

[73] As the dismissal did not relate to unsatisfactory performance, this factor is not relevant to the present circumstances and I have therefore regarded this as a neutral factor in my consideration as to whether Mr Arnold's dismissal was harsh, unjust or unreasonable.

To what degree did Oxford's size and the absence of dedicated human resource management specialists or expertise impact on the procedures followed in effecting the dismissal? (s.387(f) and (g))

[74] Sections 387(f) and (g) of the FW Act look at factors that might have impacted on the ability of the employer to follow a fair process in effecting a dismissal. Whether the employer was a small business or a larger employer will be relevant. For example, a small business may not have the same resources on hand as a larger business which may employ managers or specialist human resources staff.

[75] While the FW Act recognises that "small business' are genuinely different in nature both organisationally and operationally", it does not follow that such an employer's procedures in effecting a dismissal can be entirely devoid of fairness.

[76] Mr Rados submitted that size of the business and his lack of human resource expertise impacted on the procedures which he followed in effecting the dismissal.

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[1] Explanatory Memorandum, Fair Work Bill 2008 (Cth), [1542].

[77] Mr Rados failed to comply with the consultation provisions set out in the relevant Award. I am satisfied that he did so as a consequence of a lack of human resource expertise. There is no evidence that compliance with the consultation provisions would have led to any different outcome. Mr Rados took a variety of steps to avoid the redundancies. He explained in detail the steps he had taken and the reasons why he believed the retrenchment was necessary. He endeavoured to assist Mr Arnold secure alternative employment including offering to provide a reference. I am satisfied that in the circumstances the procedures which he adopted were deficient as a consequence of his lack of human resource expertise but were not devoid of fairness.

[78] In all the circumstances, I find that the size of the Respondent's enterprise and the lack of dedicated human resource management specialists or expertise impacted on the procedure followed in effecting Mr Arnold's dismissal.

What other matters are relevant?

[79] Section 387(h) requires the FWC to take into account any other matters that the FWC considers relevant.

[80] Mr Arnold submits that I should take into account that he was not paid any notice.

[81] Clause 5 of the Contract provides that the Contract can be terminated on notice or by payment of notice. Given he was over 45 years as at the date of his dismissal Mr Arnold was entitled to be given three weeks notice of his dismissal. Mr Arnold says that he and Mr Rados discussed what date his employment would end and agreed that it would end on Friday 12 April 2019. There is no evidence that Mr Rados required Mr Arnold to stop work before he had completed his notice period or that Mr Rados had elected to pay Mr Arnold in lieu of notice. I am therefore satisfied that Mr Arnold waived the notice period he was otherwise entitled to.

[82] Mr Rados did not identify any other relevant matters.

[83] I consider the following matters to be relevant to the determination of whether the dismissal of Mr Arnold was harsh, unjust or unreasonable.

[84] There was a sound, defensible and well-founded reason for the termination of Mr Arnold's employment, being that Oxford no longer required four Sales Agents because of changes in the operational requirements of its enterprise. This matter tells against a conclusion that the dismissal was harsh, unjust or unreasonable.

[85] There were no redeployment opportunities within Oxford or any related entity. This tells against a conclusion that the dismissal was harsh, unjust or unreasonable.

[86] The significant matter that possibly tells in favour of a conclusion that the dismissal was harsh, unjust or unreasonable is Oxford's failure to fully comply with the consultation provisions contained in the Award. The usual rule is that consultation must not be perfunctory advice about what is about to happen (and this is what occurred in the present matter). The exception to the usual rule arises in circumstances where consultation is highly unlikely to negate the operational reasons for the dismissal or lead to any other substantive

change. In those circumstances the failure to consult may not be so strongly considered by the Commission in determining whether it was an unfair dismissal.

[87] A failure to consult in accordance with the relevant industrial instrument does not necessarily mean a retrenchment was harsh, unjust or unreasonable.[26]

[88] In *Maswan v Escada Textilvertrieb t/a Escada*[27],Vice President Watson relevantly commented that:

> *"In my view a decision to dismiss on account of redundancy will only be harsh, unjust or unreasonable if the rationale for the decision is seriously undermined or if there is a serious error in procedure such that renders the termination unfair in the circumstances ... The failure to consult is not a trivial matter. But as it is clear that consultation was highly unlikely to have negated the operational reasons for the dismissal or lead to any other substantive change, I do not believe that the failure to consult prior to the date of termination rendered the dismissal unfair. Given the evidence in relation to the operational need to restructure, I am of the view that it is likely that Mr Maswan would have been dismissed in any event, even if timely consultation had occurred."*

[89] Mr Rados failed to fully comply with the consultation provisions set out in the relevant Award. I am satisfied that he did so as a consequence of a lack of human resource expertise. There is no evidence that compliance with the consultation provisions would have led to any different outcome. Mr Rados took a variety of steps to avoid the redundancies. He explained in detail the steps he had taken and the reasons why he believed the retrenchment was necessary. He endeavoured to assist Mr Arnold secure alternative employment including offering to provide a reference.

[90] Having regard to all the evidence before me, while Mr Rados should have more fully consulted with Mr Arnold, I am not satisfied that the failure to meet the consultation obligation in the Award is significant in the overall context of determining whether the termination was harsh, unjust or unreasonable. I find that more extensive consultation would not have altered the outcome arrived at by Oxford. The absence of consultation in accordance with the Award means the redundancy was not a "genuine redundancy", but it was not so serious a procedural deficiency to support a conclusion that the dismissal was harsh, unjust or unreasonable.

Conclusion

[91] I am satisfied that Mr Arnold was protected from unfair dismissal but that the dismissal was not a case of genuine redundancy within the meaning of section 389 of the FW Act because of Oxford's failure to fully comply with its consultation obligations.

[92] However, having considered each of the matters specified in section 387 of the FW Act, I am not satisfied that, overall, the dismissal of Mr Arnold was harsh, unjust or unreasonable. In this case, deficiencies in the consultation about the redundancy would not have altered the outcome arrived at by Oxford and provides little support for a finding that the termination was harsh, unjust or unreasonable. Accordingly, I find that Mr Arnold's dismissal was not unfair within the meaning of the FW Act. The Application must therefore be dismissed.

[93] An order to this effect [PR711896] will be issued with this decision.

DEPUTY PRESIDENT

Appearances:

Mr D. Arnold on his own behalf.

Mr P. Rados for the Respondent.

Hearing details:

Perth
2019
August 16

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[1] Exhibit A6.

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] Exhibit A9 and A4.

[6] Exhibit R1.

[7] Exhibit A7.

[8] Exhibit A2.

[9] Applicant's Outline of Submissions at [1].

[10] Exhibit A6 and A9.

[11] Exhibit A7.

[12] Respondent's Outline of Arguments: Objections filed on 1 August 2019.

[13] *Jones v Department of Energy and Minerals* (1995) 60 IR 304 at p. 308 cited in Ulan Coal Mines Limited v Howarth and others [2010] FWAFB 3488 at [17].

[14] *Dibb v Commissioner of Taxation* [2004] FCAFC 126 at [43]–[44].

[15] *Kekeris v A. Hartrodt Australia Pty Ltd T/A a.hartrodt* [2010] FWA 674 at [27].

[16] *Nettlefold v Kym Smoker Pty Ltd* (1996) 69 IR 370, 373.

[17] Explanatory Memorandum, *Fair Work Bill 2008*, [1548].

[18] *Priest v HFB Pty Ltd ATF HFB Admin Trust t/a Howe Ford & Boxer* [2016] FWC 802 at [21].

[19] *Sayer v Melsteel* [2011] FWAFB 7498.

[20] *UES (Int'l) Pty Ltd v Harvey* (2012) 215 IR 263.

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

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

[23] *UES (Int'l) Pty Ltd v Harvey* (2012) 215 IR 263 and *Grant Skinner, Mark Pemberton, Joshua Ross, Ian Raymond Lucas, Kadin Hill, Abigail Bryant, Mareck Preston v Asciano Services Pty Ltd T/A Pacific National Bulk* [2017] FWC 4273 at [11].

[24] *UES (Int'l) Pty Ltd v. Leevan Harvey* (2012) 215 IR 263.

[25] Ibid.

[26] *UES (Int'l) Pty Ltd v. Leevan Harvey* (2012) 215 IR 263; *Maswan v Escada Textilvertrieb t/as Escada* [2011] FWA 4239 at [39].

[27] (2011) FWA 4239 at [39].