



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Grant Baldwin**

v

**Kev Baldwin Wholesale Confectionary P/L**  
(U2019/4042)

DEPUTY PRESIDENT BOYCE

SYDNEY, 24 DECEMBER 2019

*Application for an unfair dismissal remedy — jurisdictional objection — whether the dismissal was a case of genuine redundancy — whether the employer no longer required the employee's job to be performed by anyone because of changes in operational requirements — where there is dispute as to the employee's job — whether the employer complied with any obligation in a modern award to consult about the redundancy — where modern award consultation terms were not considered but nonetheless satisfied — whether it would have been reasonable in all the circumstances for the employee to be redeployed within the employer's enterprise — where no suitable alternative role was available — jurisdictional objection upheld — matter dismissed*

## **Introduction**

On 10 April 2019, Mr Grant Baldwin (**Applicant**) lodged an application for an unfair dismissal remedy with the Fair Work Commission (**Commission**) by filing a Form F2. The Applicant claimed he had been unfairly dismissed by his former employer, Kev Baldwin Wholesale Confectionary Pty Ltd (**Respondent**), on 22 March 2019.

[2] On 14 May 2019, the Respondent emailed a scanned copy of a Form F3 to the Commission, in which the Respondent denied that the Applicant had been unfairly dismissed. Further, the Respondent raised a jurisdictional objection, being that the dismissal was a case of genuine redundancy.

[3] On 20 May 2019, the Commission held a conciliation conference in order to provide the parties an opportunity to resolve their dispute by way of agreement. The parties were unable to settle their dispute.

[4] On 2 August 2019, I held a hearing in Newcastle on both the jurisdictional objection and the substantive claim. The Applicant appeared for himself. Ms Jane *McConville* (FiveSeven Consulting Pty Ltd) appeared for the Respondent (with permission).

[5] Having considered the parties' submissions, and the evidence provided prior to and during the hearing, I have determined that the Applicant's dismissal was a case of genuine redundancy. The upshot of that finding is that the Commission is without power to hear or

determine the Applicant's claim for unfair dismissal. My reasons for that decision are as follows.

### **Applicant's Evidence**

[7] The Applicant tendered a single witness statement, being his own witness statement.<sup>1</sup> The Applicant also tendered a bundle of documents, most of which he refers to in his witness statement.<sup>2</sup>

[8] The Applicant gave evidence that he was employed by the Respondent on 1 July 2016. For 20 years prior to this date, however, the Applicant says he contracted his services to the Respondent.

[9] From August 2016, the Applicant says several of the administration duties he had been performing (both as a contractor and then employee) were reallocated to other employees, as well as Mr Gregory Bunt (Director, Respondent) and Mrs Danielle Bunt (Shareholder, Respondent). Further, and from February 2017, the Applicant says that Mr Bunt assumed the Applicant's duties in relation to his dealing with suppliers, ordering stock, receipting, and pricing of goods.

[10] In this regard, the Applicant tendered a number of text messages between Mr or Mrs Bunt and himself during the period between October 2017 and October 2018:

- a) a text message from Mr Bunt to the Applicant on 31 October 2017, in which Mr Bunt directs the Applicant to refrain from ordering stock that week;
- b) a text message from Mr Bunt to the Applicant on 29 November 2017, in which Mr Bunt directs the Applicant to amend the payroll for staff who had worked the weekend prior;
- c) a text message from Mr Bunt to the Applicant, in which Mr Bunt directs the Applicant to provide Mrs Bunt access to the credit card and investment accounts, so that Mrs Bunt can print statements when required;
- d) a text message from Mr Bunt to the Applicant on 12 January 2018, in which Mr Bunt queried the Applicant on the quantity of stock ordered by the Applicant;
- e) a text message from Mr Bunt to the Applicant on 7 May 2018, in which Mr Bunt sought to confirm that the Applicant had ordered stock for an upcoming event; and
- f) a text message from Mr Bunt to the Applicant on 27 October 2018, in which Mr Bunt notes that the Applicant had paid two separate invoices twice, and a direction to resolve the double payments.

[11] Further, the Applicant attested to several verbal exchanges between Mr and/or Mrs Bunt and himself:

- a) on 5 October 2018, the Applicant was questioned as to why he was paying creditors before the debts were due;

- b) on 8 October 2018, Mrs Bunt directed the Applicant to pay outstanding invoices that Mrs Bunt had left on the Applicant's desk; and
- c) on 30 October 2018, Mr Bunt "*berated*" the Applicant while the Applicant was preparing stock in the warehouse. Specifically, the Applicant says Mr Bunt questioned a quote prepared by the Applicant and issued to a customer.

[12] In addition to his administrative duties, the Applicant gives evidence that he was responsible for warehousing and deliveries, namely:

- a) a text message from Mr Bunt to the Applicant on 28 September 2017, in which Mr Bunt inquired as to when the Applicant was going to finish loading two delivery trucks;
- b) a direction from Mrs Bunt to the Applicant on 26 October 2018, whereby the Applicant was required to spend the working day preparing stock in the warehouse;
- c) a conversation between the Applicant and Mrs Bunt on 29 October 2018, in which the Applicant informed Mrs Bunt that he would not be able to complete his delivery duties that week because of a workplace injury;
- d) a direction from Mr Bunt to the Applicant on 6 November 2019, where Mr Bunt directed the Applicant to train a new casual employee on delivery runs;
- e) a direction from Mr Bunt to the Applicant on 15 November 2018, in which the Applicant was required to train another new casual employee on delivery runs;
- f) a direction by Mr Bunt on 20 November 2018, in which the Applicant was required to train another casual driver.

[13] The Applicant tendered a document "Daily Attendance record for Grant Baldwin" ("**Attendance Record**").<sup>3</sup> The document suggests that the Applicant was (for the period between 30 August 2018 to 20 November 2018) primarily engaged in delivery duties or performing duties in the warehouse.

[14] On 22 October 2018, the Applicant injured his knee whilst working in the warehouse. The Applicant obtained a Work Cover certificate relating to that injury, that specified he only carry out "light duties". The Applicant then lodged a Worker's Compensation claim regarding this injury.

[15] Despite his light duties, the Applicant claims he was still directed by Mrs Bunt on at least one occasion (around 26 October 2018) to carry out labouring duties in the warehouse.

[16] On 29 October 2019, the Applicant says that he provided the Respondent with an updated Work Cover certificate relating to his knee injury. The Applicant says that Mrs Bunt took issue with the Applicant's inability to perform deliveries that week, and was concerned about the cost of paying a casual driver to replace him.

[17] On 31 October 2019, the Applicant says he was “*locked-out*” of the Respondent’s online banking platform that he used in the course of his duties. He says that he spoke with the bank and was informed that his authority to access that account had been revoked. Further, the Applicant says he was not able to access his emails (or other files) on his work computer.

[18] On 20 November 2018, the Applicant says he had a verbal altercation with Mr Bunt, in which Mr Bunt allegedly called the Applicant a “*pathetic individual*”, and that Mr Bunt expressed regret about getting into business with the Applicant’s family.

[19] Later that same day, the Applicant saw his treating General Practitioner to discuss ongoing pain relating to his knee injury. The Applicant also discussed stress and anxiety that he claimed was a result of his treatment by Mr and Mrs Bunt. The General Practitioner provided the Applicant with a medical certificate, as well as an updated Work Cover certificate for the knee injury. The Applicant was instructed not to attend work for several days pursuant to this certificate.

[20] On 26 November 2018, the Applicant saw his treating General Practitioner and was provided with a Work Cover certificate backdated to 20 November 2018, stating he was suffering from work-induced stress and anxiety. The Applicant then lodged a Worker’s Compensation claim regarding this injury.

[21] On 18 March 2019, the Applicant says he received an email from the Respondent advising him that the Respondent was looking into the operational and administrative functions of the business, and that a number of redundancies would likely follow as a result.

[22] On the same day, the Applicant says he received a letter notifying him that his position may be affected, and he was to attend a meeting on 20 March 2019 to discuss the changes and options going forward. The Applicant says he did not attend that meeting. He says he had been advised by his psychologist not to have any direct contact with the Respondent.

[23] On 21 March 2019, the Applicant says he received an email from Mr Bunt. The Applicant says that email acknowledged the Applicant had neither attended the meeting nor provided any “*feedback*” regarding the proposed restructure.

[24] On 22 March 2019, the Applicant says he was notified that his employment with the Respondent had been terminated.

[25] In **cross-examination** by Ms *McConville*, the Applicant gave the following evidence:

- a) the Applicant accepted the proposition that Mr and Mrs Bunt, as shareholders, have a had a duty to act in the best interest of the Respondent, and that restructuring the workforce in order to improve efficiencies and overheads would be acting in the best interests of the Respondent;<sup>4</sup>
- b) the Applicant accepted that, despite his role being titled “*Manager*”, he was never employed in a position of authority (insofar that he made decisions on behalf of the Respondent or could sign contracts on behalf of the Respondent). At most, the Applicant was able to sign cheques on behalf of the Respondent because he was a signatory to the financial accounts.<sup>5</sup> I put it to the Applicant that he was a manager only in title, and that he was in fact a delivery driver and/or

warehouseman. The Applicant agreed to that proposition.<sup>6</sup> When showed a copy of the proposed organisational chart prepared by the Respondent, the Applicant asserted that he should have fallen under “driver/warehouse or warehouse team”, as it appeared on that chart;<sup>7</sup>

- c) the Applicant reiterated that the administrative duties he was carrying out prior to 1 July 2017 had been redirected to other persons within the Respondent, and that this reallocation of duties happened before Mr Bunt became director;<sup>8</sup>
- d) the Applicant accepted that he received a letter on 18 March 2019 informing him of the proposed restructure, and that this letter afforded the Applicant an opportunity to provide feedback (be it in person or in writing) by 20 March 2019, but the Applicant chose not to provide such feedback. The Applicant explains his decision to refrain from engaging with the Respondent (and specifically Mr and Mrs Bunt) was that he had been advised not to have any contact with them by his psychologist on or around 23 January 2019.<sup>9</sup> I asked the Applicant why he did not communicate the medical advice he had received, and why he had engaged in no communication with the Respondent for nearly two months regarding his condition. The Applicant explained he thought it would have been “reasonable” to expect that the insurer would have advised the Respondent of his position, and that he was just following the medical advice he had been given;<sup>10</sup>
- e) the Applicant said that the Respondent did not make him aware of any vacancies during the consultation process.<sup>11</sup> However, the Applicant reiterated his evidence-in-chief that he had become aware that the Respondent had advertised a position in the warehouse, being that of a casual delivery driver/warehouseman.<sup>12</sup> The Applicant said that he was doing the advertised job prior to his knee injury.<sup>13</sup> That said, the Applicant also acknowledged he was simultaneously doing account management duties such as paying accounts and managing promotional claims. The Applicant’s evidence was that he performed a variety of duties split between administrative and labouring in the warehouse, and as time progressed, he spent more and more time performing the latter;<sup>14</sup>
- f) the Applicant accepted that other staff members also performed warehouse duties “when required”,<sup>15</sup> and
- g) the Applicant admitted that he remained unfit for work up until the day of the hearing, and even if he had not been terminated, he would neither have attended the workplace, nor performed any duties.<sup>16</sup>

## **Respondent’s Evidence**

### *Evidence of Mr Bunt*

[26] Mr Bunt made one witness statement in these proceedings, which attached and referred to several documents.<sup>17</sup> There was no objection to the tendering of the witness statement or accompanying materials.

[27] In or about April and May 2016, Mr Bunt says he was approached by the Applicant on behalf of his father, Mr Kevin Baldwin, to consider purchasing shares in the Respondent’s

enterprise. Mr Bunt says that he understood Mr K Baldwin was considering retirement and wanted to sell his business.

[28] Having considered the proposal, Mr Bunt said he began working as a delivery driver for the Respondent on 10 August 2017.

[29] On 23 August 2019, Mr Bunt said that he and Mrs Bunt executed a loan agreement in the sum of \$1,475,000.00 to obtain a controlling stake in the Respondent's business. From that time, and throughout 2018, Mr Bunt says he assumed more management responsibilities in order to address concerns regarding the Respondent's financial viability.

[30] From 15 August 2018, Mr Bunt says he became the sole director of the Respondent. Further, Mr Bunt says that at the time of this appointment he "*was tasked with responsibility for the making of appropriate business decisions to ensure the financial sustainability*" of the Respondent. To that end, Mr Bunt says he "*commenced making significant changes to [the Respondent's] operations*". Mr Bunt says he and Mrs Bunt "*attended the warehouse on a regular basis and observed the administration and operations of [the Respondent]*". Mr Bunt says that Mrs Bunt "*implemented some minor changes resulting in a reduction of overtime performed by staff and assisted with profitability*".

[31] From his observations, Mr Bunt says that "*it became apparent that there was a need to review our employment structure to assist with business improvement*" and, as such, he engaged FiveSeven Consulting Pty Ltd (**FiveSeven**) to review, *inter alia*, the "*structure of the business/organisation*" and "*workforce planning and compliance*".

[32] Mr Bunt says that FiveSeven conducted an audit in December 2018 and provided its report and recommendations in January 2019. A copy of that report was attached to Mr Bunt's statement (**FiveSeven Report**).

[33] Mr Bunt says that the FiveSeven Report recommended the Respondent review "*workforce efficiency*". On 25 January 2019, Mr Bunt says that he and Mrs Bunt met with FiveSeven advisers who presented them with an "*improvement plan*". A copy of that plan was attached to Mr Bunt's statement (**FiveSeven Plan**).

[34] Mr Bunt says that the FiveSeven Plan included an action to "*clarify all roles and responsibilities across the business*" with the following activities:

- a) review all positions in the business;
- b) undertake a casual conversion audit;
- c) develop functional organisation chart;
- d) create position descriptions; and
- e) provide templates for employment contracts.

[35] On 8 February 2019, Mr Bunt says he met with Mrs Bunt to "*undertake a review of the operational requirements of the organisation*", which he says included:

- a) a review of all positions to identify the key roles and responsibilities required to fulfil the objectives of the company;
- b) a review and assessment of each department within the company: warehouse and truck drivers; sales; operations and administration; office roles and customer service;
- c) a review of current organisation structure and recommendations for improved efficiencies;
- d) creating a draft organisational chart; and
- e) creating draft position descriptions.

[36] Mr Bunt says that a revised organisational chart was produced as an outcome of the review. A copy of that revised organisation chart was attached to his statement (**Revised Organisation Chart**). Specifically, Mr Bunt says that the Revised Organisation Chart “*identified six (6) roles would be impacted by the changes*”. Further, Mr Bunt says that “*a number of functions that were no longer required or that could be re-allocated to other persons or roles*” — that is, “*the tasks that had previously been performed by Grant were capable of being outsourced or undertaken by*” himself.

[37] Mr Bunt says that he decided to proceed with the recommended restructure and did so in his capacity as the sole director of the Respondent.

[38] On 18 March 2019, Mr Bunt says that all employees were notified of the proposed restructure and any impacted employees were invited to attend and participate in a consultation process.

[39] Mr Bunt acknowledged that the Applicant was away from the workplace due to his purported workplace injuries. Mr Bunt says that he was advised of this when Mrs Bunt contacted the insurer, EML, and the rehabilitation provider.

[40] On Monday 18 March 2019, Mr Bunt says he sent the Applicant an email requesting his attendance at a consultation meeting on Wednesday 20 March 2019. Mr Bunt says the Applicant neither responded to that email, nor attended the scheduled meeting.

[41] On 21 March 2019, Mr Bunt says he sent the Applicant further correspondence requesting feedback by 22 March 2019. Again, Mr Bunt says that the Applicant did not respond to that correspondence.

[42] On 22 March 2019, Mr Bunt says that he met with Mrs Bunt and at least one person from FiveSeven. In that meeting, he reviewed all feedback from the consultation process. Mr Bunt says he was satisfied that the Respondent had taken “*all the correct steps to notify the Applicant of the meeting and the request for feedback*”.

[43] Further, Mr Bunt says he was “*comfortable*” with FiveSeven’s advice that there were significant efficiency gains to be achieved by making the Applicant’s role redundant.

[44] Mr Bunt says that re-deployment of the Applicant was considered, with regard to the following:

- a) there were no vacant positions within the Respondent's administration function, given the Respondent would be making one of those roles redundant;
- b) *"there were no vacant positions within sales or driver teams, and some of the casual drivers were working on reduced hours"*;
- c) *"ad hoc casual hours were available within the warehouse team, but those hours were insufficient to justify even a permanent part time role"*; and
- d) the Applicant had physical restrictions due to his knee injury, which *"seriously limited his capacity to work in the warehouse in any event"*.

[45] Mr Bunt says that he concluded that there were no real redeployment options for the Applicant, and that his employment would need to be terminated on the ground of redundancy.

[46] On the afternoon of that same day, Mr Bunt says he sent a letter regarding *"Termination of Employment due to Genuine Redundancy"* to the Applicant. A copy of that letter was provided to the Commission and reads as follows (**Termination Letter**):

*"I refer to the letter to you dated 18 March 2019, and the workplace meeting that had been scheduled for 20 March 2019, that you did not attend.*

*I now write to confirm the outcome of the recent review by Kev Baldwin Wholesale Confectionery ("KBWC") of its operational requirements in the Operations and Administration function and what this means for you. On the information available, the decision has been made to make your position in redundant.*

*I note that you did not provide any suggestions or feedback during the consultation process for consideration in making the decision of outcome.*

*As a result of the final decision, the position you currently hold has been made redundant. This has been a difficult decision and is not a reflection on your performance or the contribution you have made to the organisation to date. As there are currently no suitable redeployment options available across the business, this means that your employment will terminate.*

*In line with the terms of employment outlined in your employment contract Fair Work Act 2009, you are entitled to three (3) weeks' notice; your age and length of service with the organisation has been taken into account in this regard. Your last day of employment will be today, Friday, 22 March 2019.*

*In addition, due to your employment ending because of genuine redundancy, you will also be paid a redundancy payment equivalent to six (6) weeks' pay in accordance with the Fair Work Act 2009. You will also be paid your accrued leave entitlements and any outstanding wages in your final pay.*

*The total gross entitlement owing to you as at 22 March 2019 is outlined in the attached table.*

*I remind you of your obligations regarding confidentiality and the requirement that you not divulge to another person, facility or company, any information relating to KBWC, its employees or its clients, or any of the commercial, including financial, information of KBWC which you may have acquired in the course of your engagement with KBWC.*

*Lastly, I ask that you please return to Greg, no later than 29 March 2019 all property belonging to KBWC in your possession, custody or control, including, but not limited to intellectual property, keys, data storage devices, security access passes, documents, diaries, records and papers, equipment, computer information and programs and all copies of such items.*

*If you require a Statement of Service or would like to access Outplacement Support to assist you with preparing for your next role, please contact Greg by 29 March 2019.*

*On behalf of KBWC, I sincerely thank you for the contribution you have made to the company and wish you well with your future endeavours.*

*Yours sincerely,*

*Greg Bunt*

...”

[47] Mr Bunt acknowledged that he was not aware of a written employment contract having been made between the Applicant and the Respondent.

[48] As to the Applicant’s role, Mr Bunt says that the Applicant “*worked within with the management and operational function of the business*”. Mr Bunt says that role included:

- a) managing employees;
- b) payroll;
- c) finance Management (Accounts payable/receivable); and
- d) contact for Suppliers.

[49] In **cross-examination** by the Applicant, Mr Bunt gave the following evidence:

- a) Mr Bunt accepted that the Applicant performed delivery and/or warehousing duties, and had the requisite skills to perform both roles, but qualified his evidence by saying the Applicant was only required to perform these roles on an ad-hoc basis, and as a “*fill-in*” for other staff when needed,<sup>18</sup>
- b) When asked what duties the Applicant was performing from August 2018 onwards, Mr Bunt said (in summary) “*paying super, the PAYG, payroll tax, paying bills doing claims, driver’s runs, rep runs*”.<sup>19</sup> Mr Bunt admitted there were

not business records to confirm what duties the Applicant was doing at that time, however; Mr Bunt could only attest to this by way of oral evidence (and as confirmed by Mrs Bunt).<sup>20</sup> Further, Mr Bunt confirmed the extent of the Applicant's administrative duties were purely process-based (insofar that the Applicant only transferred money where necessary);<sup>21</sup>

- c) As to the Applicant carrying out delivery and/or warehousing duties, Mr Bunt reiterated that the Applicant was only carrying out these duties on an ad-hoc, "fill-in" basis, and to supplement other staff who were away on leave.<sup>22</sup> Further, Mr Bunt said that he would not have employed the Applicant into those roles on a full-time basis because of issues he had with the Applicant's attitude and the way he interacted with others.<sup>23</sup> That said, Mr Bunt said those factors were not part of the consideration in making the Applicant's role redundant;<sup>24</sup>
- d) However, Mr Bunt agreed there was no real difference between someone performing duties on a fill-in or full-time basis in terms of capability;<sup>25</sup>
- e) Mr Bunt did not agree that the "Weekly Roster of Duties" (being a roster for a week's period) tendered by the Applicant was an accurate record of the Applicant's weekly duties;<sup>26</sup> and
- f) Despite Mr Bunt's assertion as to what duties the Applicant did or did not carry out, Mr Bunt repeatedly conceded that he did not know exactly what role the Applicant was performing.<sup>27</sup> Mr Bunt admitted that neither the audit, nor the FiveSeven Report or FiveSeven Plan, specifically looked at defining the Applicant's role prior to or following the changes in the business.<sup>28</sup> Instead, Mr Bunt and FiveSeven "*took an overall view of the picture and how we [the Respondent] could save some dollars*". It was from this approach that Mr Bunt concluded the Respondent did not need two managers.<sup>29</sup>

### Evidence of Mrs Bunt

**[50]** Mrs Bunt made one witness statement in these proceedings, which attached and referred to several documents.<sup>30</sup> There was no objection to the tendering of the witness statement or accompanying materials.

**[51]** On 15 August 2018, Mrs Bunt says that the Respondent transferred a majority of its total shareholdings to a unit trust known as Danbri Investment Trust, which Mrs Bunt says she is the trustee of. Mrs Bunt also says that, on the same day, she commenced attending (on a regular basis) the Respondent's workplace, where she could observe the running of the warehouse and office.

**[52]** Mrs Bunt says that she was able to observe the working habits of the Applicant — namely that the Applicant "*would often arrive at work between 10-11am and go straight to his office where he would remain for most of the day, except when he was required to attend the warehouse*". Mrs Bunt says she was "*aware*" that the Applicant's duties "*included paying invoices, dealing with Head Office, paying wages and supplier claims*".

**[53]** Mrs Bunt confirms that the Applicant injured his knee on 22 October 2018, and that this injury was the subject of a worker's compensation claim. Mrs Bunt says that the

Applicant continued to perform his administrative duties, and was directed to carry out “light” duties when required to work in the warehouse. Mrs Bunt says that those duties and directions were in line with the requirements specified on the Applicant’s Work Cover certificate. Further, Mrs Bunt refutes the Applicant’s claim that her direction to work in the warehouse packing showbags was a direction contrary to the Applicant’s Work Cover certificate at that time.

[54] Mrs Bunt says that the Applicant alleged that she and Mr Bunt bullied and harassed the Applicant. Mrs Bunt acknowledges the Applicant lodged a workers’ compensation claim for same on 20 November 2018. Mrs Bunt says the Applicant did not return to the workplace after he lodged the claim for bullying and harassment.

[55] Mrs Bunt says that having observed the administration and operations of the Respondent, she took the view that there was a need to review the employment arrangements. Mrs Bunt confirms that she sought out the assistance of FiveSeven. Specifically, Mrs Bunt confirms that that FiveSeven audited the business, produced the FiveSeven Report as a result, and that FiveSeven made a number of recommendations — one of which included a review of the Respondent’s workforce efficiencies.

[56] As to how the review was undertaken, Mrs Bunt said:

*“The review focused on creating an operational structure that was based on the positions required to meet Baldwins functional needs and financial limitations. In this process, FiveSeven worked with Greg and I to undertake this activity by focussing on the “roles” of the business rather than the “people” in those roles”.*

[57] Mrs Bunt said this exercise resulted in the creation of a revised organisational chart with changes predominately to the operations and administration functions of the business. Mrs Bunt also says that the review identified a number of functions that were no longer required, or that could be re-allocated to other persons or roles. In particular, Mrs Bunt says that tasks that had previously been performed by the Applicant were capable of being outsourced or undertaken by Mr Bunt.

[58] As to the process taken in regard to restructure, consultation, and redundancy, Mrs Bunt’s evidence largely concurs with that of Mr Bunt, and so does not need to be repeated.

[59] However, Mrs Bunt did give evidence as to the steps she undertook to contact the Applicant in circumstances where he had been away from work on account of alleged bullying. On this point, Mrs Bunt says:

*“As Grant was absent from work at that time because of his alleged workers compensation injury (which was denied – see above), I telephoned both EML (Baldwins’ workers compensation insurer) and Grant’s rehabilitation provider, in order to notify them of the process being undertaken and ascertain whether there were any barriers to him being able to participate in the consultation process. Both EML and the rehab provided indicated there was no issue with us communicating with Grant about these issues”.*

[60] In **examination-in-chief** by Ms McConville, Mrs Bunt gave the following additional evidence:

- Prior to the restructure, Mrs Bunt’s “observations” of the business was that “*there was a large amount of overtime, that there was no real job description for anybody, that occupational health and safety was lacking ... it wasn't really operating efficiently*”;<sup>31</sup>
- Mrs Bunt said that, from those observations, she understood the Applicant’s duties to be “*paying wages, superannuation, payroll tax, invoices, ordering stock, and just in charge of the day to day running of [the Respondent]*”;<sup>32</sup>

### **Relevant law regarding a genuine redundancy**

[62] Section 385 of the Act qualifies a claim for unfair dismissal:

#### **“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.”

[63] Before the Commission can consider issues of harshness, etc, sub-para.396(d) of the Act requires the Commission decide whether the dismissal was a case of genuine redundancy:

#### **“396 Initial matters to be considered before merits**

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

- (a) whether the application was made within the period required in subsection 394(2);
- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- (d) whether the dismissal was a case of genuine redundancy.”

[64] Section 389 provides the statutory definition as to what qualifies a 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.”

**[65]** In view of s.389 of the Act, and for the Commission to be satisfied that the matter was not a genuine redundancy, there are three questions that need to be answered:

- a) Was the job performed by the Applicant no longer required to be performed by anyone?
- b) Did the Respondent comply with any obligation in a modern award that applied to the employment to consult about the redundancy?
- c) Would it have been reasonable in all the circumstances for the Applicant to be redeployed within the Respondent’s enterprise?

**[66]** I will now consider these questions in turn.

*Was the job performed by the Applicant no longer required to be performed by anyone?*

**[67]** Subparagraph 389(1)(a) of the Act provides that a person’s dismissal was a case of genuine redundancy if 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.

**[68]** These words have long been used and applied in industrial tribunals and courts as a practical definition of redundancy.<sup>33</sup> The *Explanatory Memorandum to the Fair Work Bill 2008* provides examples as to when a dismissal will be a case of genuine redundancy:

“1547 Paragraph 389(1)(a) provides that a person’s dismissal will be a case of genuine redundancy if his or her job was no longer required to be performed by anyone because of changes in the operational requirements of the employer’s enterprise. Enterprise is defined in clause 12 to mean a business, activity, project or undertaking.

1548 The following are possible examples of a change in the operational requirements of an enterprise:

- a machine is now available to do the job performed by the employee;
- the employer's business is experiencing a downturn and therefore the employer only needs three people to do a particular task or duty instead of five; or
- the employer is restructuring their business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists."

(emphasis added to highlight relevance)

[69] It has been held that a job involves "a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employees' organisation, to a particular employee".<sup>34</sup> It has also been held that:

"what is critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organisation, 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".<sup>35</sup>

[70] Plainly, the foundational issue in this case is characterising the Applicant's job at the time of his dismissal. I say foundational because any consideration under s.389(1)(a) is necessarily predicated upon determining what job was being performed at the time of dismissal before determining whether that job was no longer required due to changes in operational requirements.

[71] Both parties agree that the Applicant's role was never properly defined (save for his title being "Manager"). As to what duties the Applicant performed, however, the parties took very divergent views.

[72] In summary, the Applicant submitted that he was a manager of nothing. Instead, he put that his primary duties consisted of working in the warehouse and undertaking delivery runs. Further, he submitted that any administrative or "managerial" duties that he may have once been responsible for had been taken away from him throughout the course of 2018, as these responsibilities were slowly redistributed to other persons (including Mr Bunt). At the time of his termination (or at least, at the time he left the workplace due to his purported workplace injury), the Applicant had few administrative duties and instead primarily undertook the warehouse or delivery tasks previously described.

[73] In support of that position, the Applicant relies upon his witness statement, oral testimony, and his documentary evidence (which include the text messages referred to above at [10], the Attendance Record, and the Weekly Roster.

[74] As far as the veracity of the Attendance Record can assist, this document is not an actual business record. It a document prepared by the Applicant, and is more akin to diary

notes than that produced in the course of business operations. Having regard to its proper status, I do not accept the document as a reliable record of either where the Applicant was working, or what duties he was carrying out, and so I will not take it into account when determining what role the Applicant actually performed.

[75] The Weekly Roster is, however, a business record, and does assist in assessing the Applicant's duties. That said, it is an example of only one week and is but a snapshot in time. On its own, the record does not go so far as to conclusively demonstrate what duties the Applicant was employed to perform, or what duties he was carrying out at the time of his dismissal. At its highest, it gives limited credence to his witness evidence.

[76] The Respondent's position is that the Applicant was employed within the administrative function of the business as a "Manager", and that the Applicant acted as a "point of authority" within the business, including financial delegation. Consistent with this, the Applicant acknowledges that his duties included applying for credit, completing direct debits, and acting as the businesses nominated contact person (until late 2018).

[77] The Respondent conceded that the Applicant performed warehousing and/or delivery duties. However, the Respondent's position was that the Applicant only performed these duties on an ad hoc basis and as a means to "fill in" for other employees who were unable to perform such duties. Further, the Respondent submits that the Applicant was carrying out these duties as a means to accommodate the restrictions imposed by the Applicant's Work Cover certificate. In addition, the Respondent notes that the Applicant was performing these duties at the Applicant's own initiative and discretion; the Respondent says he was not doing so at the direction of Mr or Mrs Bunt.

[78] The apparent difficulty in determining the Applicant's job is an issue of the Respondent's own making. If the Respondent clearly defined the Applicant's role at the time that he transitioned from contractor to employee in 2016, then much of the resulting confusion would have been ameliorated. The Respondent was a small family-run business at that time, though, and so it may be expected that it would not have implemented a rigid workforce structure when the role was based on familial relationships.

[79] The same excuse does not apply to the FiveSeven Review, however. It ought to be expected that a specialist consultant would have, in the first instance, attempted to clearly define the duties and jobs of each staff member once it became aware that no such definition was available. FiveSeven did not take that approach. Instead, the consultancy took the word of two persons who (by their own evidence) had a limited understanding of the exact duties of employees. The risks in this approach are obvious — if a person is presumed to be responsible for one job, when they are in fact employed to do another, and they are made redundant on the incorrect presumption, then the employer runs the risk of executing a redundancy that falls afoul of the genuine redundancy provisions of the Act.

[80] As such, it falls on the Commission to properly characterise the Applicant's job. In my opinion (and I have not been referred to an authority on this point), proper characterisation of a person's job within the meaning of the Act is a question of fact, and is established by evidence of the duties expected of, and performed by, that person.

[81] I do not accept the Applicant's submissions regarding his administrative duties (or alleged lack thereof). His own witness and documentary evidence demonstrates he was still

carrying out administrative tasks relating to paying accounts as late as October 2018. That he was taking direction from Mr or Mrs Bunt in relation to those tasks is not the point. A lack of autonomy and authority does not mean he was not responsible for those duties. Whilst he may have once had dominion over such decision-making at time when the Respondent was still a family-run business in 2016, he nevertheless was still responsible for executing part of the administration function of the business until he left the workplace due to his injuries in 2018 (and there is nothing to suggest he would not have continued to carry out that function, the restructure notwithstanding).

[82] However, I equally do not accept the Respondent's submissions regarding the Applicant's warehousing and delivery duties. The Applicant was clearly responsible for ensuring that show bags were packed and delivered because he spent a considerable amount of time executing those duties. Again, the fact that Mr or Mrs Bunt's intended the Applicant operate as a "fill-in" does not mean those duties did not make up part of the Applicant's job. Mr and Mrs Bunt directed the Applicant to carry out these tasks. They both witnessed him carrying out these tasks. The Respondent cannot deny, and I cannot accept, a submission to the contrary. Instead, I accept that the Applicant was executing these duties with enough regularity to say that they formed part of his role.

[83] In summary, and in the Applicant's circumstances, the title "Manager" is a misnomer. Based on the evidence before me, I find that, at the time of the Applicant's termination, he had duties in relation to financial and customer accounts, warehouse stocking, and delivery duties. On that basis, I turn to consider whether Respondent no longer required anyone to perform that job because of changes in the operational requirements of the business.

[84] I accept that the Respondent had legitimate reasons underpinning its decision to restructure the business. There can be no doubt that the Respondent's enterprise was loosely structured prior to the restructure. If clarity, efficacy, and cost saving could be brought about by redefining employees' functions at large, then such a decision would fall squarely within legitimate managerial prerogative. On the evidence, the Respondent's decision falls within the Act's contemplation of "changes in the operation requirements of the employer's enterprise".

[85] I also accept that the Respondent redistributed the Applicant's financial and administrative duties to Mr Bunt, Mrs Bunt, and other employees. The organisational chart has resulted in a clearer structure of the business and the staff required to fill the roles the Respondent has decided are necessary. Further, the witnesses evidence of the Respondent makes clear that other employees are performing the Applicant's prior duties, and I have no reason to conclude otherwise.

[86] The Applicant is left with his warehousing and delivery duties. Had he been able to attend the workplace then he could still have performed these duties. But those duties only make up part of the Applicant's overall function within the business. Alone, those duties do not go to the essence of the Applicant's function within the Respondent's enterprise. It is important to note that the test is whether the job, not the duties, survive the restructure.<sup>36</sup> Put in the proper language, the Applicant's job is redundant because the Respondent no longer requires any one person to perform the total of his duties. Subparagraph 389(1)(a) of the Act is therefore satisfied in this case.

*Did the Respondent comply with any obligation in a modern award that applied to the employment to consult about the redundancy?*

**[87]** Both parties submitted that the Applicant was award-free. However, given that I have found that the Applicant was (in part) performing a delivery job, he would have been covered by the *Road Transport and Distribution Award 2010 (Transport Award)*. Relevantly, sub-cl.9.1 of the Transport Award states:

“9.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

- (a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and
- (b) discuss with affected employees and their representatives (if any):
  - (i) the introduction of the changes; and
  - (ii) their likely effect on employees; and
  - (iii) measures to avoid or reduce the adverse effects of the changes on employees; and
- (c) commence discussions as soon as practicable after a definite decision has been made”.

**[88]** Further, “significant effects” is defined in sub-cl.9.5 to include “termination of employment”. In addition, I note cl.9.2 to 9.4:

“9.2 For the purposes of the discussion under clause 9.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

- (a) their nature; and
- (b) their expected effect on employees; and
- (c) any other matters likely to affect employees.

9.3 Clause 9.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer’s interests.

9.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 9.1(b)”.

**[89]** Given the Applicant was covered by the Transport Award then consultancy requirements under cl.9 are enlivened by a restructure resulting in termination of employment. In the circumstances of this case, the question posed by sub-para.389(1)(b) of the Act is whether the Respondent complied with cl.9 of the Transport Award (irrespective of whether the Respondent turned its mind to this requirement or not).

[90] The Respondent notified the Applicant of the changes, and the impact they would have on him, in writing, on 18 March 2019. I come to that conclusion having regard to the letter sent to the Applicant on the same date (and supplied in evidence of both parties). To that end, cl.9.1(a) and .9.2 of the Transport Award are satisfied.

[91] In this matter, particular consideration needs to be given to cl.9.2(b). Consultation should be meaningful and not merely perfunctory.<sup>37</sup> This is especially true when the language of the Transport Award requires the employer to “discuss” any “measures to avoid or reduce the adverse effects of the changes on employees”. That discussion would be grounded on an opportunity to genuinely consider and implement such measures put forward by an employee. This is the meaning of the requirement in cl.9.4.

[92] The Transport Award is silent, however, on circumstances where the opportunity to discuss the proposed changes is afforded but that opportunity is not taken up by the affected employee. Surely, an employee who fails to partake in discussions genuinely offered cannot say the statutory requirements have not been met. The period in which such discussion is required cannot be open ended, or at the sole behest and convenience of an employee.

[93] The Applicant admits that he was aware of the opportunity to discuss the proposed changes. The Applicant also accepts that he chose not to engage in those discussions. The Applicant says that choice was founded on medical advice that he was not to have any contact with Mr or Mrs Bunt while he was recovering from his workplace injury. The Applicant did not produce any conclusive documentary evidence to that effect, however, and I do not accept his oral evidence on this point. It is highly unlikely that the Applicant was advised not to have *any* (as opposed to limited) contact with Mr and/or Mrs Bunt — especially in circumstances where the Applicant’s employment was at risk of ending.

[94] Being that it was more likely that the Applicant was to have *limited* engagement with Mr and Mrs Bunt, the Applicant could have sent a brief reply by email or text message seeking an alternative date or means of discussing the proposed changes. However, the Applicant sat on his hands and said absolutely nothing in response.

[95] It is curious, and nonetheless significant, that the Applicant was able to engage with Mr and Mrs Bunt on the day of the hearing and carry out cross-examination of them both. He never raised an issue in being in their presence on the day. He did not suggest he had been told by a medical practitioner that engaging in arbitration would be to the detriment of his health. He did not say that his condition had changed between the time he was told to attend the consultation discussions, and the day of the hearing. It appears to me that the Applicant is able to engage with Mr and Mrs Bunt. However, he chose not to engage with them on the day of the consultation discussions.

[96] The fact that the discussions did not actually occur does not mean that the Respondent failed to discharge its onus under cl.9 of the Agreement. I find that a reasonable and genuine effort was made to involve the Applicant in the decision to restructure, and to solicit his feedback on the effect it would have on him. By remaining silent, the Applicant chose not to give that feedback. Nonetheless, the opportunity alone satisfies the requirements of subpara.389(1)(b) of the Act.

Would it have been reasonable in all the circumstances for the Applicant to be redeployed within the employer's enterprise?

[97] Despite my findings on sub-s.389(1), regard must still be had to sub-s.389(2) of the Act. This consideration must still be determined, because even though the Respondent no longer required the Applicant's job to be performed by anyone, and the Respondent met its consultation requirements under the Transport Award, the Applicant's dismissal will nonetheless fall outside the genuine redundancy provisions if it would have been reasonable in all the circumstances for the Applicant to be redeployed within the Respondent's enterprise.

[98] The highest, binding interpretation of sub-s.389(2) remains that stated in *Ulan Coal Mines Limited v A. Honeysett & Ors*:<sup>38</sup>

“[26] [Subsection 389(2)] must be seen in its full context. It only applies when there has been a dismissal. An employee seeking a remedy for unfair dismissal cannot succeed if the dismissal was a genuine redundancy. In other words, if the dismissal is a case of genuine redundancy the employer has a complete defence to the application. Section 389(2) places a limitation on the employer's capacity to mount such a defence. The defence is not available if it would have been reasonable to redeploy the employee. The exclusion poses a hypothetical question which must be answered by reference to all of the relevant circumstances.

...

[28] ... [T]he question posed by s.389(2), whether redeployment would have been reasonable, is to be applied at the time of the dismissal. If an employee dismissed for redundancy obtains employment within an associated entity of the employer some time after the termination, that fact may be relevant in deciding whether redeployment would have been reasonable. But it is not determinative. The question remains whether redeployment within the employer's enterprise or the enterprise of an associated entity would have been reasonable at the time of dismissal. In answering that question a number of matters are capable of being relevant. They include the nature of any available position, the qualifications required to perform the job, the employee's skills, qualifications and experience, the location of the job in relation to the employee's residence and the remuneration which is offered.”

(emphasis added)

[99] The Respondent submits that Mr Bunt considered the following factors when considering redeployment:

- a) there were no vacant positions within the administration function, and the Respondent made one of these people redundant in any event;
- b) there were no vacant positions within sales or driver teams, and some of the casual drivers were working on reduced hours;
- c) ad hoc casual hours were available within the warehouse team, but those hours were insufficient to justify a permanent part time role; and

- d) Mr Baldwin had some physical restrictions due to a previous workplace injury to his knee, which seriously limited his capacity to work in the warehouse in any event.

[100] I accept Mr Bunt's evidence on a), c) and d). However, his point on b) is not authentic. The Applicant produced an advertisement for a full-time delivery driver and warehouse packer, which was posted by the Respondent on 29 April 2019.

[101] The proximity between the dismissal and the date this role was advertised necessarily means that there was at least one vacant position within the driver team that the Applicant might have been considered for.

[102] However, the delivery role appears to have been the only role available. Just because it was available, though, does not mean the Applicant could have been redeployed into that job.

[103] The Applicant submitted that he would have been able to perform the duties required of that position. The Respondent disagreed, and I am inclined to disagree as well. The Applicant's evidence was that he was unable to attend the workplace to perform any duties at the time of his dismissal. He did not provide evidence of when he may be able to return, or what duties he could perform upon that return, and there is no suggestion that the Respondent was aware of that date either. It would not have been reasonable to redeploy an employee into a role they were unable to perform due to on-going, open-ended, incapacity.

[104] I reject the Applicant's submissions that there was a role reasonably open for his redeployment. In the absence of evidence to the contrary, I find that sub-s.386(2) of the Act is not enlivened.

## Conclusion

[105] I note that the Applicant submitted that Mr and Mrs Bunt were motivated to terminate the Applicant's employment because of his involvement as a shareholder in the business and his familial ties to the Respondent's business prior to Mr and Mrs Bunt buying into the shareholding scheme. I have hereinto not mentioned the Applicant's submissions on this point because the position was neither made out on the evidence, nor relevant to my task in determining the jurisdictional issue before me.

[106] What is clear is that the Applicant is aggrieved at having been exited from a business that was once owned and operated by his father. His grievance clearly stems from that decision and the methods employed by the Respondent throughout the redundancy process. While I note the Applicant's frustrations and disappointment with the outcome, careful analysis of the evidence put by the parties demonstrates that the Respondent's decision to make the Applicant's job redundant is a genuine one within the meaning of the Act.

[107] For the reasons stated above, I find that the Commission is without jurisdiction to hear the Applicant's claim for unfair dismissal. The application is *dismissed*. An order to that effect will issue in due course.



DEPUTY PRESIDENT

*Appearances:*

The Applicant appeared for himself.

Ms Jane *McConville* appeared for the Respondent.

*Hearing details:*

1 August 2019 in Newcastle, New South Wales

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- <sup>1</sup> Exhibit A1.
  - <sup>2</sup> Exhibit A2.
  - <sup>3</sup> Ibid.
  - <sup>4</sup> Transcript PN101 to PN102.
  - <sup>5</sup> Transcript PN109 to PN112, and PN142 to PN149.
  - <sup>6</sup> Transcript PN207.
  - <sup>7</sup> Transcript PN285.
  - <sup>8</sup> Transcript PN133.
  - <sup>9</sup> Transcript PN151 to PN169.
  - <sup>10</sup> Transcript PN170 to PN173.
  - <sup>11</sup> Transcript PN189 to PN192.
  - <sup>12</sup> Transcript PN193 to PN195.
  - <sup>13</sup> Transcript PN204.
  - <sup>14</sup> Transcript PN207 to PN216.
  - <sup>15</sup> Transcript PN218.
  - <sup>16</sup> Transcript PN294 to PN296.
  - <sup>17</sup> Exhibit R3.
  - <sup>18</sup> Transcript PN336 to PN362.
  - <sup>19</sup> Transcript PN433.
  - <sup>20</sup> Transcript PN434 to 435, and PN480 to PN484.
  - <sup>21</sup> For example, see: Transcript PN452.
  - <sup>22</sup> Transcript PN348, PN351 to PN354, PN461, PN487, .
  - <sup>23</sup> Transcript PN686.
  - <sup>24</sup> Transcript PN686.
  - <sup>25</sup> Transcript PN689.

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<sup>26</sup> Transcript PN574.

<sup>27</sup> For example, see Transcript PN455 and PN577.

<sup>28</sup> Transcript PN574.

<sup>29</sup> Transcript PN692.

<sup>30</sup> Exhibit R4.

<sup>31</sup> Transcript PN710.

<sup>32</sup> Transcript PN711.

<sup>33</sup> *Ulan Coal Mines Limited v Henry Jon Howarth & Ors* [2010] FWAFB 3488 at [15] (Boulton J, Drake SDP, and McKenna C), citing *R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Cooperative Limited* (1977) 16 SASR 6; *Termination, Change and Redundancy Cases* (1984) 8 IR 34 and (1984) 9 IR 115; *Short v F.W. Hercus Pty Limited* (1993) 40 FCR 511.

<sup>34</sup> *Jones v Department of Energy and Minerals* (1995) 60 IR 304 at 308 (Ryan J), cited with approval in *Ulan Coal Mines Limited v Henry Jon Howarth & Ors* [2010] FWAFB 3488 at [15] (Boulton J, Drake SDP, and McKenna C).

<sup>35</sup> *Jones v Department of Energy and Minerals* (1995) 60 IR 304 at 308 (Ryan J), cited with approval in *Ulan Coal Mines Limited v Henry Jon Howarth & Ors* [2010] FWAFB 3488 at [17] (Boulton J, Drake SDP, and McKenna C). See also: *Dibb v Commissioner of Taxation* (2004) 136 FCR 388; [2004] FCAFC 126 at [43]-[44] (Spender, Dowsett, and Allsop JJ).

<sup>36</sup> *Vicky Kekeris v A. Hartrodt Australia Pty Ltd T/A a.hartrodt* [2010] FWA 674 at [27] (SDP Hamberger).

<sup>37</sup> There is a longstanding line of authority that predates the current legislation: *c.f.*, *PKIU v Federal Capital Press of Australia Ltd* (Print L3885, 17 June 1994); *Construction, Forestry, Mining and Energy Union v Newcastle Wallsend Coal Company Ltd* (1988) 88 IR 202. These authorities consider s.170 of the *Workplace Relations Act 1996*. However, as noted by the Full Bench in *Ventyx Pty Ltd* [2014] FWCFB 2143 at [45] to [46], the *Fair Work Act 2009* does not impose the same consultation provision in legalisation. Instead, regard ought to be had to the wording of the particular instrument under consideration.

<sup>38</sup> [2010] FWAFB 7578 (Giudice J, Hamberger SDP, and Cambridge C).