



# DECISION

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

**Samuel McClelland**

v

**Kamori Australia Pty Ltd T/A Lone Pine Koala Sanctuary**  
(U2020/4814)

COMMISSIONER SIMPSON

BRISBANE, 16 JULY 2020

*Termination of employment – whether position still required – whether consultation process genuine – whether other positions suitable for redeployment – whether dismissal a genuine redundancy.*

[1] On 15 April 2020, Mr Samuel McClelland filed an application under s.394 of the *Fair Work Act 2009* (the Act) for an unfair dismissal remedy against Kamori Australia Pty Ltd T/A Lone Pine Koala Sanctuary (Lone Pine).

[2] On 6 May 2020, Lone Pine filed a Form F3 – Employer response to unfair dismissal application. In its Form F3, Lone Pine objected to the application on the basis that the dismissal was a case of genuine redundancy under s.389 of the Act and therefore, Mr McClelland was not able to pursue an unfair dismissal application.

[3] The matter did not proceed to conciliation as Lone Pine sought for the jurisdictional objection to be heard in the first instance. The matter was allocated to me and I held a Directions hearing on 28 May 2020. At the Directions hearing, directions were settled (and later issued) for the filing of evidence and submissions by the parties and for the matter to be heard as a telephone hearing on 13 July 2020.

[4] Mr Dan Chen of NB Lawyers appeared for Lone Pine and Mr Zaccaria Casagrande of Industrial Relations Claims appeared for Mr McClelland. Both parties were granted leave to be represented in the matter. Mr McClelland filed material in the form of a written submission and witness statements from himself<sup>1</sup> and Mr Julian Lam,<sup>2</sup> former employee, in relation to the merits of his application on 18 June 2020. Lone Pine filed material in relation to its jurisdictional objection in the form of written submissions.<sup>3</sup>

[5] Lone Pine filed a further written submission<sup>4</sup> and witness statements from Mr Robert Friedler, General Manager,<sup>5</sup> and Ms Shardae Eynon, Retail and Event Manager,<sup>6</sup> in response to Mr McClelland's material on merits.

[6] Mr McClelland filed supplementary submissions<sup>7</sup> and supplementary witness statement.<sup>8</sup>

## BACKGROUND

[7] Mr McClelland was employed as a retail worker under *Amusement, Events and Recreation Award 2010* by Lone Pine. Ms McClelland commenced employment with Lone Pine in July 2015.

[8] Lone Pine operates a wildlife sanctuary in Fig Tree Pocket, Queensland and generates revenue from visitors by way of admission fees, purchases of souvenirs and food and drink from the onsite cafes. Mr McClelland said he performed a range of duties in various sections of Lone Pine, from kitchen work through to information technology (IT) work. At the time his position was made redundant, Mr McClelland said he held the role of retail and event supervisor as well as photography head of section.

[9] Lone Pine submitted that approximately 65% of its visitors are international tourists. In February 2020, due to the COVID-19 pandemic, travel and border restrictions were introduced by various overseas governments. In March 2020, Australia's borders were closed to all non-citizens and non-residents of Australia. Lone Pine submitted that due to the reduction in international tourists, by March 2020 its monthly revenue was reduced by approximately 60%.

### *March 2020*

[10] Lone Pine submitted that to address the issue of declining visitors, adjustments were made to the rosters throughout March 2020 to keep all staff members employed. Mr McClelland accepted that he had noticed declining number of visitors in the February March period, and accepted that international visitors were a significant proportion of visitors. Mr McClelland accepted that Lone Pine tried to provide continuing employment in February and March 2020.

[11] Mr Robert Friedler gave evidence on behalf of Lone Pine. Mr Friedler stated on 24 March 2020, he received email correspondence from the Department of Agriculture and Fisheries. This correspondence included the following:

“Animal interactions should be stopped if the activity involves a keeper holding the animal for customers to pat or stroke, or requires a keeper to maintain close proximity to a customer interacting with the animals. These situations would not meet current social distancing recommendations.”

[12] Mr Friedler said that Lone Pine allows for visitors to hold a koala for a photograph, with a keeper maintaining close proximity during the interaction. Due to the above restriction, this activity provided by Lone Pine was unable to continue as it was not compliant with social distancing restriction.

[13] Mr Friedler said that based on the Department's recommendation, it was likely Lone Pine would no longer require any photography roles to be performed by anyone, as the role involved close interaction between wildlife and visitors. Accordingly, as Mr McClelland was principally responsible for photography, Mr Friedler said that Mr McClelland's role could no longer be safely performed given its non-compliance with social distancing recommendations.

[14] On 26 March 2020, the Australian Federal Government imposed measures which effectively prevented Lone Pine from opening. Lone Pine submitted that no further visitors were permitted to attend Lone Pine. Mr McClelland said in his evidence he was not aware of this.

[15] On 27 March 2020, Lone Pine submitted that a definite decision was made to revise its structure to take into consideration the measures imposed by the Federal Government. It was determined that Lone Pine's retail operations would be most affected on the basis staff provided services attending to visitors. Lone Pine submitted that staff members engaged to care for wildlife (keepers) and maintain enclosures or premises were less affected by the measures imposed, given that the wildlife still needed to be cared for.

[16] Mr McClelland, as the head of photography, was engaged in Lone Pines retail operations and was identified as an affected staff member. Evidence in the course of the hearing established that while Mr McClelland worked in a range of areas in retail services in the course of his employment, he was primarily engaged as a co-ordinator of photography for approximately a month prior to 27 March 2020. The evidence was also to the effect that a Sarah Hemming performed a coordinating role in retail which included photography, but only worked one day per week.

[17] Mr Friedler said there was no photography work being performed at the moment. Mr Friedler did not accept Ms Hemming was in charge of Mr McClelland and said their roles were different. Mr Friedler said prior to COVID-19 the photography role was very busy with customers queuing up, and he said he expressed to Mr McClelland on several occasions his core role was photography. Mr Friedler accepted Mr McClelland had performed other roles in retail in his previous employment at Lone Pine and had performed some IT tasks.

[18] Ms Sharda Eynon, Retail and Event Manager, gave evidence on behalf of Lone Pine. Ms Eynon said in her oral evidence that Mr McClelland mainly worked in photography but on busy days offered help to others. Ms Eynon accepted that Mr McClelland had performed some IT jobs. Ms Eynon said the whole photograph section was now closed. Ms Eynon said of the work still being performed, it is cleaning or painting.

### *Consultation*

[19] Ms Eynon stated that between 5:00 pm to 10:00 pm on 27 March 2020, she attempted to call as many affected staff members as possible. In her oral evidence she said she called approximately 15 employees.

[20] During phone discussions with affected staff members, Ms Eynon stated that she told them of the potential changes being made by Lone Pine and answered any questions staff had to the best of her ability. Staff were also advised a letter would be provided and that if they wanted to provide any feedback regarding the proposed change, they could reach out to Ms Eynon and provide their feedback in writing.

[21] Ms Eynon stated that by the time she contacted Mr McClelland on the 27 March 2020, he was already aware that Lone Pine was to be issuing letters advising of the changes. Ms Eynon submitted that she informed McClelland that he would also be receiving a letter, and that if he had any views, he was welcome to email her to provide his views in writing. Ms

Eynon stated Mr McClelland informed her during this discussion that he wanted to provide his views directly to Mr Friedler, to which she advised that he was welcome to do so.

[22] Ms Eynon submitted that at no stage during her discussion with Mr McClelland on 27 March 2020 did she say a decision had already been made by Lone Pine. Ms Eynon also stated that she recalled Mr McClelland stating he had already advised other staff members on how to make a claim with Centrelink for JobSeeker payments.

[23] Ms Eynon sent an email to Mr McClelland at 11:19 pm on 27 March 2020. Attached to the email was a letter dated 27 March 2020. The body of the email is as follows:

“Dear Samuel,

It is with regret that due to unprecedented circumstances surrounding COVID-19 and state and federal government restrictions we have made changes to your employment. Please see the attached letter.

Kind regards,

Shardae Eynon”.

[24] In her written witness statement, Ms Eynon conceded that the wording used in her email is confusing as it suggested change had already been made. Ms Eynon submitted that there had been no changes made by Lone Pine on 27 March 2020, and that she had been instructed by Mr Friedler to seek the views of affected staff members from 27 March 2020 until 30 March 2020. Ms Eynon said in her oral evidence the wording in the covering letter was her error, and it was intended to just refer employees to the attached letter. This evidence was consistent with the evidence of Mr Friedler concerning what Ms Eynon had been asked to do.

[25] Turning to the letter attached to the email, the letter outlined the changes and informed that these would result in his position being made redundant. It is necessary to set this letter out in full:

“Dear Samuel McClelland,

**RE: Consultation regarding your role**

1. Lone Pine Koala Sanctuary (the Sanctuary) has continued to monitor the measures taken by the Federal Government to contain the spread of COVID-19. As you may be aware, further restrictions were announced (effective from 12:00am Thursday 26 March 2020) in relation to Zoo and wildlife centres which are intended to limit gatherings of people. Given the Sanctuary is considered an amusement park, this means the Sanctuary is unable to continue its normal operations until such time the restrictions are lifted.
2. The abrupt stoppage of the Sanctuary's normal operations means the Sanctuary must take measures to ensure it is able to remain financially viable and can continue to provide resources for the care of its wildlife. This means the Sanctuary

may be required to make your role redundant on the basis it is no longer required to be performed by any employee (due to the new government restrictions).

3. The Sanctuary has attempted to take measures to ensure its valued staff members are provided meaningful employment. These include measures such as reducing rostered hours to ensure staff could remain employed. Nonetheless, it is now impractical for the Sanctuary to take any further measures given it has been directed by the government to cease its operations.
4. Whilst the Sanctuary had hoped to hold discussions with you in person, it is now impractical to hold discussions in person on the basis it may expose staff members to work health and safety risks (i.e. possible transmission of COVID-19).
5. Prior to any definite decision being made by the Sanctuary in relation to your role, you are invited to provide your views on how the Sanctuary can avoid or reduce the adverse effects of a potential redundancy. You are invited to provide any views you may have to Ms Shardae Eynon [contact details redacted] no later than 5:00pm Monday 30 March 2020.
6. The Sanctuary looks forward to your feedback. Please let us know of anything we can do to assist you during this difficult time.

Yours faithfully

Robert Friedler  
General Manager  
Lone Pine Koala Sanctuary”

**[26]** Mr McClelland accepted that the first paragraph of the letter explained that Lone Pine could not operate from Thursday 26 March. Mr McClelland confirmed that he read the letter on the evening of 27 March. Mr McClelland accepted the difficulty of maintaining his photography role at this time but maintained he could have continued to work on safe operating procedures or IT issues.

**[27]** Mr McClelland accepted he received a phone call from Ms Eynon on the evening of 27 March around 7 pm. Mr McClelland disputed that Ms Eynon said to him that he had an opportunity to provide his views. He said he did not say he wanted to speak to Mr Friedler in the course of this phone conversation but gave evidence to the effect that he told Ms Eynon that he had already sent Mr Friedler a text message about the possibility of performing IT shifts. He said he thought he sent the text on 25 or 26 March.

**[28]** Mr McClelland accepted that the fifth paragraph of the letter of 27 March 2020 invited him to provide his views by 5pm 30 March by email to Ms Eynon, and he accepted that he did not respond to this offer. He accepted the letter provided an opportunity to respond if he wished. Mr McClelland accepted his substantive role at the time of termination was the coordinator of photography role however he said he covered other shifts.

**[29]** On 29 March 2020, Ms Eynon emailed all staff requesting them to return their uniforms. The email is as follows:

“Hello Team,

I am just emailing you to all if you can safely return your uniforms to us as soon as possible, Emily will be here on Monday and Otto will be here on Tuesday. Please keep safe in these times, hope to see you again soon.”

[30] Ms Eynon stated that some staff members returned their uniforms to Lone Pine and took the opportunity to ask her and her colleague some further questions. It is Ms Eynon’s recollection that most questions were in regard to when Lone Pine would be reopening, and if they could be reemployed as soon as Lone Pine reopened.

[31] Lone Pine determined that discussion would not be had in person on the basis that it was required to ensure, so far as reasonably practicable, the health and safety of its employees. Lone Pine’s decision to refrain from in person discussion was also based on the significant increase in new COVID-19 cases at the time. Mr McClelland said in his oral evidence in person discussions did occur when employees came to the workplace.

[32] Lone Pine submitted that genuine consideration was given to the feedback provided by affected staff members. On 3 April 2020, Lone Pine made the decision to make approximately 30 retail roles redundant, and a further 16 roles (such as administrative roles), redundant, as the positions were no longer required to be performed due to changes to Lone Pine’s operational requirements.

[33] Mr Friedler submitted that during the consultation period, he considered whether Mr McClelland could be redeployed into an IT role, as he had previously performed IT duties on a limited basis. However, at the time of Mr McClelland’s dismissal, there was another staff member employed to perform a number of IT related duties and Lone Pine’s operational requirement did not require further IT assistance.

[34] At 4:27 pm on 3 April 2020, Mr Eynon sent an email to Mr McClelland. Attached to the email was a letter dated 3 April 2020, explaining his employment would be terminated. It stated as follows:

“Dear Samuel McClelland,

**RE: Termination of your employment**

1. Lone Pine Koala Sanctuary (**the Sanctuary**) refers to it previous letter dated Friday 27 March 2020 inviting you to provide yours views on how the Sanctuary can avoid or reduce the adverse effects of a potential redundancy. The Sanctuary wishes to thank you for your ongoing cooperation during this unprecedented and difficult period of time.
2. The Sanctuary confirms it has given genuine consideration to your feedback and the views you have expressed. Whilst the Sanctuary values your feedback and views, the reality of the circumstances means there are limited measures that can be taken to improve the operations of the Sanctuary (until the government restrictions are lifted).

3. The Sanctuary has attempted to identify redeployment opportunities, however no such opportunities exist at this stage due to the restrictions on the Sanctuary's operations.
4. Regrettably, this means the Sanctuary wishes to inform you that your employment is terminated by way of redundancy effective immediately from the date of this letter. The Sanctuary confirms it does not require your role to be performed by any other staff member of the Sanctuary.
5. We wish to emphasise this was not an easy decision for the Sanctuary to make and the decision is no way reflective of your performance or conduct. We appreciate the contributions you have made towards the Sanctuary's success.
6. You will receive all entitlement in accordance with the provisions of your employment contract and relevant legislation.
7. The Sanctuary kindly requests you return any company property which may be in your possession to Ms Sharda Eynon, as soon as practicable. If you need to make arrangements to return company property, please contact Sharda via [contact details redacted].
8. It is requested you continue to abide by your contractual and implied post-employment obligations of confidentiality and good faith.
9. The Sanctuary wishes you well during this difficult period and would like to take this opportunity to thank you for your service to date.

Yours faithfully

Robert Friedler  
General Manager  
Lone Pine Koala Sanctuary"

[35] Mr McClelland accepted that there were other redundancies in addition to his own at the time of his termination.

[36] Mr McClelland drew the Commission's attention in his supplementary statement to a recent job advertisement published by Lone Pine on 2 July 2020. The advertisement includes the following:

"We are currently seeking casual staff for our food and beverage team, and retail team."

[37] Mr McClelland referred to Lone Pine's written submissions that describe his role in Lone Pine's "retail operations, specifically photography" and submitted that the job advertisement Lone Pine is seeking to fill is precisely the same position.

[38] Mr Friedler said that he was not aware of this advertisement, however if it was on the website it was an error and no new staff had been employed at Lone Pine, and hours had only been given to existing employees.

[39] Mr Julian Lam gave evidence that following receipt of a letter from Ms Eynon no further consultation occurred and he was terminated on 3 April. He confirmed he read the letter he received from Ms Eynon on 27 March. He accepted the letter provided an opportunity to raise issues with Ms Eynon by 5pm 30 March, and said he did not respond to the letter but accepted he had an opportunity to respond.

[40] Mr Friedler was asked about two other employees “Alex” and “Louis” who continued to work for Loan Pine. Mr Friedler said “Alex” has been working one day per week and “Louis” three days, and they are performing low level working such as moving furniture or cleaning whereas Mr McClelland was engaged at level 4. Mr Friedler was also asked about another employee named “Jack”, and Mr Friedler said he had worked in the food section and did one shift last week.

[41] The evidence was to the effect that the café had remained open however 30 employees have lost their jobs and there are approximately one fifth of the number of customers according to Mr Friedler. Mr Friedler accepted that Loan Pine received the JobKeeper subsidy for some remaining staff however Loan Pine decided to make positions redundant rather than move to JobKeeper for all staff as it had a view the situation was more serious than others had thought and it would be three years before tourists (who make up a large percentage of customers) would be allowed to return to Australia in previous numbers. Mr Friedler’s evidence was to the effect that Loan Pine was down to nine staff and in 30 years at Lone Pine he had never seen this.

## **CONSIDERATION – GENUINE REDUNDANCY**

[42] Section 385 provides:

### **“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.”

[43] Section 396 says as follows:

### **“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.”

[44] As is made clear from the above provisions of the Act I must determine whether the termination of the Applicant was a genuine redundancy before considering the merits.

[45] Section 389 provides:

**“389 Meaning of genuine redundancy**

(1) A person’s dismissal was a case of genuine redundancy if:

(a) the person’s employer no longer required the person’s job to be performed by anyone because of changes in the operational requirements of the employer’s enterprise; and

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

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

(a) the employer’s enterprise; or

(b) the enterprise of an associated entity of the employer.”

*Was the Applicant’s job no longer required?*

[46] Lone Pine submitted Mr McClelland’s role in its retail operations, specifically photography, is no longer required to be performed by anyone.

[47] In advancing its position, Lone Pine submitted that due to the possibility that COVID-19 may spread as a result of physical contact between koalas and guests, the obvious impracticability of sanitising a koala, and the restrictions still in place for international travellers, it is unlikely that Mr McClelland to be required to be performed by anyone for an indefinite period of time.

[48] Mr Friedler gave evidence that it is the view of Lone Pine that its operational requirements will not return to pre-COVID-19 levels until some time in 2023, due to the change in international visitors. This view, Mr Friedler stated, was reached after taking into consideration, amongst other times, the opinion of the International Air Transport Association.

[49] A document was submitted by Lone Pine to support this position.

[50] Mr McClelland disputed that Lone Pine no longer required his job to be performed by anyone. Mr McClelland argued that some retail staff members were not dismissed and have continued working for Lone Pine since April 2020, performing photography and IT jobs. Mr McClelland also submitted that he has become aware since his termination in April 2020, Lone Pine has re-hired a member of staff called Travis to work in the Riverside Café. Mr McClelland contended that he had regularly performed duties at the Riverside Café.

[51] The test under s.389(1)(a) of the Act is whether or not the Employer made the decision it no longer required the position to be performed due to a change in operational requirements for its enterprise. It is well established that an employee may still be genuinely made redundant when there are aspects of the employee's duties being performed by other employees.<sup>9</sup>

[52] I am satisfied on the basis of the evidence that while Mr McClelland had performed a range of roles in his years of employment at Lone Pine including retail and IT functions, his primary role at the time of termination was the photography coordinator role, and this role was clearly gone. The evidence also establishes that many of the other retail roles formerly performed by Mr McClelland are also gone.

[53] I am satisfied on the evidence that Lone Pine no longer required Mr McClelland's role to be performed by anyone due to operational requirements.

*Did the Respondent comply with any obligations in a modern award or enterprise agreement that applied to the employment to consult about redundancy?*

[54] It is an agreed fact that Mr McClelland is covered by the *Amusement, Events and Recreation Award 2010* (the Award).

[55] Clause 24 of the Award sets out the consultation requirements and reads as follows:

**“27. Consultation about major workplace change**

27.1 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.

27.2 For the purposes of the discussion under clause 27.1(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.

27.3 Clause 27.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

27.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under 27.1(b).

27.5 In clause 27 significant effects, on employees, includes any of the following:

- (a) termination of employment; or
- (b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or
- (c) loss of, or reduction in, job or promotion opportunities; or
- (d) loss of, or reduction in, job tenure; or
- (e) alteration of hours of work; or
- (f) the need for employees to be retrained or transferred to other work or locations; or
- (g) job restructuring.

27.6 Where this award makes provision for alteration of any of the matters defined at clause 27.5, such alteration is taken not to have significant effect."

**[56]** Lone Pine submitted that it complied with the consultation requirements of the applicable Award.

**[57]** In addition to the evidence outlined above, Lone Pine submitted that it remained open to the suggestions of its affected employees, despite understanding that the government restrictions imposed on 26 March 2020 meant it would be difficult to avoid roles in its retail operation becoming redundant. Lone Pine submitted that it did not breach its consultation obligations merely by forming a view redundancy were a likely outcome and relied on *CFMMEU v BHP Coal Pty Ltd*,<sup>10</sup> where the following was noted:

"All that is necessary is that a genuine opportunity to be heard about the nominated subjects be extended to those required to be consulted before any final decision is made. That genuine opportunity entails furnishing such information about the occasion for consultation as is reasonably necessary for the making of suggestions in respect of the subject for consultation and being receptive to any resultant suggestions. It does not mean that one cannot approach consultation with a particular outcome in mind, only that one's mind not be unduly fixed."

**[58]** Lone Pine submitted that all feedback received from affected employees between 27 March 2020 and 30 March 2020 was given genuine consideration by Lone Pine prior to its final decision. Lone Pine provided examples to support its contention that genuine

consideration was given to feedback provided by affected employees. This included keeping its Riverside Café open for trading on the basis to its close proximity to the entrance of Lone Pine's premises and could continue to provide take-away food and drink. This would allow Lone Pine to keep employees working in the Riverside Café employed.

**[59]** Mr McClelland disputed that Lone Pine complied with the consultation requirements of the Award. Mr McClelland submitted that by the time Lone Pine provided affected employees the letter dated 27 March 2020, Lone Pine had already made a definite decision to introduce major changes. Accordingly, Mr McClelland contended that Lone Pine did not engage in genuine discussion with employees in which the employee is able influence the decision matter. Mr McClelland referred to the well-established principles regarding an employer's obligations to consult in advancing his position on the matter.<sup>11</sup>

**[60]** Further, Mr McClelland submitted that Lone Pine's efforts to consult fell short of the requirements under the Award. Mr McClelland contended that the consultation procedure implemented by Lone Pine by way of issuing a letter on 27 March 2020 was in actuality "a vapid and contrived attempt by the Respondent to appear to have implemented such consultation." This is demonstrated, according to Mr McClelland, by the following matters:

- As early as 16 March 2020, Lone Pine commenced to make changes to the staffing arrangements without any consultative input from the affected staff;
- As early as 21 March 2020, Lone Pine had unilaterally commenced a reduction of shifts and continued to do so until 27 March 2020 but throughout that period did not seek any consultative input from its staff;
- On 25 March 2020, Lone Pine temporarily closed;
- On 29 March 2020, Lone Pine requested all staff to return their uniforms.

**[61]** In *CEPU v QR Limited*,<sup>12</sup> Justice Logan said in relation to the content of the obligation to consult, that:

- A key element is that the party to be consulted is given notice of the subject upon which views are being sought before any final decision is made or course of action is embarked upon.
- There is a consequential requirement for the affording of a meaningful opportunity to present those views although what will constitute such an opportunity will vary according to the nature and circumstances of the case.
- A right to be consulted is a valuable right but is not a right of veto

**[62]** The evidence establishes that Lone Pine provided notice in writing pursuant to Award obligations, and employees were provided a clear opportunity to respond by raising any matters they wished that may have mitigated the impact on them. The letter of 27 March provided a means to raise issues by return email to Ms Eynon, and a timeframe up until 5pm on 30 March. I am satisfied the consultation period was sufficient and both Mr McClelland and Mr Lam confirmed they understood they could have responded but both elected not to.

[63] Mr McClelland argues that the decision had already been made, however I am satisfied that the restrictions placed on the manner of consultation because of COVID-19, do not point to Lone Pine's mind being closed, but the reality of dealing with both the restrictions imposed on Lone Pine by COVID-19 itself, and as determined by government. Whilst the facts pointed to the inevitability of major changes having to occur, the facts do not establish Lone Pine's consultation was not genuine.

*Was it 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?*

[64] The remaining issue that requires consideration is whether it would have been reasonable in all the circumstances for Mr McClelland to have been redeployed.

[65] As already detailed above, Lone Pine submitted that consideration was given to redeploying Mr McClelland into an IT role, however there were no vacant IT positions at the time of his dismissal.

[66] Mr McClelland submitted that Lone Pine failed to discharge its obligations to explore opportunities for redeployment and referred to Lone Pine's written submissions in which it was said that "the consultation process included keeping its Riverside Café open for trading." Mr McClelland submitted that he had, from time to time, worked in this part of the business and could have been deployed to in some capacity.

[67] In *Ulan Coal Mines Ltd v Honeysett*,<sup>13</sup> a Full Bench of the Commission said:

"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 the 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 role, the employee's skills, qualification and experience, the location of the job in relation to the employee's residence and the remuneration which is offered".<sup>14</sup>

[68] The Full Bench continued in relation to the reasonableness of redeployment:

"Of course the job must be suitable, in the sense that the employee should have the skills and competence required to perform it to the required standard either immediately or with a reasonable period of retraining. Other considerations may be relevant such as the location of the job and the remuneration attaching to it".<sup>15</sup>

[69] In *Technical and Further Education Commission T/A TAFE NSW v Pykett*,<sup>16</sup> the Full Bench of the Commission held that:

"For the purposes of s.389(2) the Commission must find, on the balance of probabilities, that there was a job or a position or other work within the employer's enterprise (or that of an associated entity) to which it would have been reasonable in all the circumstances to redeploy the dismissed employee. There must also be an appropriate evidentiary basis for such a finding."<sup>17</sup>

[70] I am satisfied on the basis of the evidence that whilst a far smaller workforce has survived redundancy and has continued to perform a narrower range of tasks, there were no vacant positions available for Mr McClelland to be redeployed into. The indisputable evidence is that there has been a significant reduction in the size of the workforce. It appears the nub of Mr McClelland's argument on redeployment is not that a vacant position remained for him to be redeployed into, but more that he should have been offered redeployment into other casual work, in preference to other casuals retaining the work that remained to be performed. That is not the test.

[71] The evidence does not establish any alternative and available vacant positions, and on that basis, it cannot be said it would have been reasonable in all of the circumstances to redeploy Mr McClelland within the employers enterprise.

## CONCLUSION

[72] In advancing his argument, Mr McClelland submitted that rather than terminating his employment, Lone Pine ought to have considered temporarily standing him down without pay, and subsequently done all thing necessary to facilitate him receiving the JobKeeper payment. Mr Friedler made clear the reason Lone Pine made the decision to make positions redundant was based on its view that it would be in the order of three years before Australia would be in a position to allow the return of significant numbers of international visitors on which Lone Pine so heavily relies.

[73] In any event, as I indicated in the course of the hearing, for the purposes of the jurisdictional objection the Commission is concerned with whether the job was still required because of changes the employer has decided to make, and not with whether the employer's decision to make certain operational changes is a good or bad decision.

[74] I am satisfied that Lone Pine has established that each of the requirements of s.389 were met by it, and therefore its jurisdictional objection is made out and on that basis the application is dismissed.

  
  
COMMISSIONER

### *Appearances:*

*Mr Zac Casagrande of Supportah Ops Pty Ltd T/A IR Claims appearing for the Applicant*  
*Mr Daniel Chen of NB Lawyers appearing for the Respondent*

### *Hearing details:*

2020,  
Brisbane:  
July 13

Printed by authority of the Commonwealth Government Printer

<PR720999>

---

<sup>1</sup> Statement of Samuel McClelland dated 18 June 2020 Exhibit 1.

<sup>2</sup> Statement of Julian Lam dated 18 June 2020 Exhibit 2.

<sup>3</sup> Respondents submissions on Jurisdiction 18 June 2020.

<sup>4</sup> Further Respondents submissions 2 July 2020.

<sup>5</sup> Statement of Robert Friedler 2 July 2020 Exhibit 4.

<sup>6</sup> Statement of Shardae Eyron 2 July 2020 Exhibit 5.

<sup>7</sup> Applicants supplementary submission 2 July 2020.

<sup>8</sup> Supplementary witness statement of Samuel McClelland dated 2 July 2020.

<sup>9</sup> *Jones v Department of Energy and Minerals* [1995] IRCA 292 (16 June 1995), [(1995) 60 IR 304 at p. 308 (Ryan J)]; cited in *Ulan Coal Mines Limited v Howarth and others* [2010] FWAFC 3488 (Boulton J, Drake SDP, McKenna C, 10 May 2010) at para. 17, [(2010) 196 IR 32].

<sup>10</sup> [2016] FCA 1009, paragraph [60].

<sup>11</sup> *TVW Enterprises Ltd v Duffy and Others* (1985) 60 ALR 687, *CPSU, Community and Public Sector Union v Vodafone Network Pty Ltd* (Print PR911257), 14 November 2001); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v QR Limited* [2010] FCA 591, *Collie v Metropolitan Caloundra Surf Life Saving Club Inc* [2014] FWC 4565; *Piper v Pacific Coast Contractors Pty Ltd T/A Hope Estate Wine Group*[2014] FWC 2891.

<sup>12</sup> [2010] FCA 591, 11 June 2010.

<sup>13</sup> [2010] FWAFC 7578.

<sup>14</sup> *Ibid*, at [27].

<sup>15</sup> *Ibid*, at [34].

<sup>16</sup> [2014] FWCFB 714.

<sup>17</sup> *Ibid*, at [36].