DECISION

Fair Work Act 2009
s.789GV - Application to deal with a dispute under Part 6-4C

Wilfred Lam

v

Mobile Technology International Pty Ltd
(C2020/6282)

COMMISSIONER WILSON MELBOURNE, 20 AUGUST 2020

Application to deal with a dispute in relation to JobKeeper.

[1] On Friday, 14 August 2020, Mr Wilfred Wei Ngong Lam applied under s.789GV of the *Fair Work Act 2009* (the Act) for the Commission to deal with a dispute about the operation of Part 6-4C of the Act (Coronavirus Economic Response). The Respondent is his employer, Mobile Technologies International Pty Ltd (MTI) which is a subsidiary of A2B Australia Ltd.

[2] After receiving the application and in accordance with the Commission's timeliness benchmarks for dealing with JobKeeper disputes, attempts were made to list the matter for a conciliation conference on Saturday, 15 August 2020. However, those endeavours were unsuccessful owing to the fact that the Respondent was unable to be contacted. The matter was the subject of an unsuccessful conciliation before me on Monday, 17 August 2020 and a hearing took place on Wednesday, 19 August 2020. In preparation for the hearing the parties were afforded an opportunity to provide such written material as they wanted the Commission to take into account in making its decision. Further, the Commission issued Orders of its own motion for the production of certain documents from each party. While neither party provided any written submissions or witness statements each provided documents in response to the document production Orders.

[3] Mr Lam represented himself in the hearing and MTI was represented by Mr Holger Philipp A2B Australia's Head of People and Culture and Mr Darren Borg MTI's Chief Operating Officer.

[4] Having identified that Mr Lam's employer is MTI which in turn is a subsidiary of A2B Australia Ltd it needs to be noted that the parent company has been involved in many stages of the decision-making about Mr Lam. Because of the circumstances of this matter it is necessarily the case that, in this decision at least, references to MTI must be interpreted as also being references to A2B Australia Ltd and vice versa.

[5] For the reasons set out below I am satisfied that the JobKeeper enabling stand-down direction given to Mr Lam was authorised by the Act, but that the direction is unreasonable in all the circumstances and that consultation required by the Act was not undertaken by MTI or

its parent company. As a consequence, the direction is set aside, and a substitute Order made by the Commission pursuant to s.789GV(4). Again, for the reasons of the intertwined nature of MTI and A2B Australia Ltd the Order is operative on both entities. Consistent with the note in s.789GV(2) the Commission also expresses an opinion and makes a recommendation in relation to the disposition of an unresolved part of the dispute.

BACKGROUND

[6] The Applicant, Mr Lam, is employed by MTI in a customer support role in its Melbourne-based Australia/New Zealand Support Team (the Support Team). The company's work is to provide and maintain equipment used in the taxi and other transport industries. Mr Lam's role is to assist with and resolve customer enquiries. As might be expected the operations both of MTI and its parent company, A2B Australia Ltd, have been severely impacted by the economic effects of the COVID – 19 pandemic. On 27 March 2020, A2B Australia Ltd wrote to all employees, including those within MTI, advising them there would be challenges ahead and that it would shortly be standing down employees across its business.

[7] Mr Lam's application relates to a stand-down direction given to him on 7 August 2020 as well as being motivated by the effects on him of the progressively more restrictive Victorian Government obligations which, in his analysis, required him to work from home other than in limited circumstances. His application is also motivated by his belief that even if he could be required to attend MTI's premises for work, he should not be required to do so because of issues related to his health.

[8] In late June 2020, Mr Lam made a request to work from home which was subsequently refused even though his local manager, Mr Borg, MTI's Chief Operating Officer recommended approval of the application. Consistent with what he was informed by Mr Borg on 31 July 2020, Mr Lam started working from home but was told a few days later that more senior managers had refused his work from home application.

[9] On 7 August 2020, Mr Lam completed a JobKeeper Employee Nomination Notice which confirmed his eligibility to be in receipt of JobKeeper payments from MTI because of his employer's participation in the scheme and that he agreed to be nominated as an eligible employee. He was also issued on the same date with a stand-down notification, in the form of a letter to him from Andrew Skelton, Chief Executive Officer and Managing Director of MTI's parent company, A2B Australia Ltd. MTI argue that the issuing of the stand-down notification is not connected with the company's consideration of his work from home application.

[10] Mr Lam's dispute with MTI centres on his belief that he has been treated differently to other employees working in the same team, and unfairly so, because he made an unsuccessful home-based work application, and because he declined to perform work from the company's premises, believing that to be both inconsistent with the Victorian Government COVID-19 Stage 4 Restrictions as well as being a risk to his health and safety, heightened because of a medical condition. MTI deny each of these contentions.

LEGISLATIVE FRAMEWORK

[11] A dispute may be brought to the Commission in the circumstances set out in s.789GV, which is within Part 6 – 4C (Coronavirus Economic Response). Most particularly, s.789GV

empowers the Commission to "deal with a dispute about the operation of this Part". In this regard the Commission may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion, or by arbitration.

[12] Part 6 – 4C provides not only for the mechanisms for dealing with a dispute, but also for employer payment obligations (Division 2), and for certain actions to be taken by employers to manage the work of eligible employees. Division 3 of the Part provides for a "JobKeeper enabling standdown"; Division 4 for the "Duties, location and days of work"; and Division 5 for "Taking paid annual leave".

[13] Division 6 provides for "Rules relating to JobKeeper enabling directions", which include an obligation to consult with an eligible employee about a proposed JobKeeper enabling direction.

[14] The definitions with s.789GC provide that a "JobKeeper enabling direction means a direction authorised by section 789GDC, 789GE or 789GF".

[15] Section 789GDC(1) of the FW Act provides:

> **"789GDC Jobkeeper enabling stand down**
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> (1) If:
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> (a) after the commencement of this section, an employer of an employee gave the employee a direction (the *JobKeeper enabling stand down direction*) to:
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> (i) not work on a day or days on which the employee would usually work; or
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> (ii) work for a lesser period than the period which the employee would ordinarily work on a particular day or days; or
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> (iii) work a reduced number of hours (compared with the employee's ordinary hours of work); during a period (the JobKeeper enabling stand down period); and
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> (b) when the JobKeeper enabling stand down direction was given, the employer qualified for the JobKeeper scheme; and
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> (c) the employee cannot be usefully employed for the employee's normal days or hours during the JobKeeper enabling stand down period because of changes to business attributable to:
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> (i) the COVID-19 pandemic; or
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> (ii) government initiatives to slow the transmission of COVID-19; and

(d) the implementation of the JobKeeper enabling stand down direction is safe, having regard to (without limitation) the nature and spread of COVID-19; and
(e) the employer becomes entitled to one or more JobKeeper payments for the employee:

(i) for a period that consists of or includes the JobKeeper enabling stand down period; or

(ii) for periods that, when considered together, consist of or include the JobKeeper enabling stand down period;

the JobKeeper enabling stand down direction is authorised by this section."

[16] In deciding the application before me it is also relevant to consider whether any such direction was unreasonable in all the circumstances and whether it was the subject of required consultation. The matters of reasonableness and consultation are deal with in s.789GK and s.789GM which are in the following terms:

"**s.789GK Reasonableness**

A JobKeeper enabling direction given by an employer to an employee of the employer does not apply to the employee if the direction is unreasonable in all of the circumstances.

Note: A direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have."

"**s.789GM Consultation**

(1) A JobKeeper enabling direction given by an employer to an employee of the employer does not apply to the employee unless:

(a) the employer gave the employee written notice of the employer's intention to give the direction; and

(b) the employer did so:

(i) at least 3 days before the direction was given; or

(ii) if the employee genuinely agreed to a lesser notice period--during that lesser notice period; and

(c) before giving the direction, the employer consulted the employee (or a representative of the employee) about the direction.

(2) The regulations may require that a notice under paragraph (1)(a) must be in a prescribed form.

(3) Subsection (1) does not apply to a JobKeeper enabling direction (the ***relevant direction***) given by an employer to an employee of the employer under a particular section of this Part if:

(a) the employer previously complied with paragraphs (1)(a), (b) and (c) in relation to a proposal to give the employee another direction under that section; and

(b) in the course of consulting the employee (or a representative of the employee) about the proposal, the employee (or the representative of the employee) expressed views to the employer; and

(c) the employer considered those views in deciding to give the relevant direction.

(4) An employer must keep a written record of a consultation under paragraph (1)(c):

(a) with an employee of the employer; or

(b) with a representative of an employee of the employer."

CONSIDERATION

[17] I consider three issues in turn; whether Mr Lam has been given a JobKeeper enabling stand-down direction authorised by s.789GDC; whether such direction was unreasonable in all the circumstances; and whether it was the subject of the consultation required by s.789GM.

Has there been an authorised JobKeeper enabling stand-down direction?

[18] Resolution of this question requires consideration of s.789GDC(1). The context of the application before me is that only s.(1)(c) requires consideration and that if the direction conforms with that subsection then it will be an authorised direction.

[19] I am satisfied that in Mr Lam's case, the letter to him from Mr Skelton dated 7 August 2020 serves as a "JobKeeper enabling standdown direction" given under s.789GDC, with the letter advising Mr Lam of the following:

"Dear Wilfred

Temporary Work Arrangement – Stand down

As we have communicated to you previously, our communities are facing a truly unprecedented situation. The global coronavirus pandemic is affecting the normal experience of our families, our businesses and our communities and the situation is continuing to evolve locally and across Australia.

A number of critical factors have impacted on our usual business activities including recent public health announcements, and announcements by State and Federal governments on what business activities can and cannot continue.

Due to the Stage 4 lockdown restrictions now in place in Victoria we have conducted a further review of our operations and had to make some difficult decisions on actions we now must take to ensure the continued viability of our business, and to preserve as many of our people and roles that we can. This will impact on many people and roles in our team – and we ask for your understanding and co-operation at this very challenging time.

Your role is ***not*** redundant, and we do not want you to leave the business. However, consistent with the *Fair Work Act 2009* (Cth), we confirm the decision to stand you down from your role as we do not have the ability to usefully deploy you into another area within the business.

This means that from today's date, 7 August 2020, you will be stood down from work. You are eligible for the JobKeeper allowance (being $1500 per fortnight). During this time, you will continue to accrue service for the purposes of the National Employment Standards, but you will not be paid your usual remuneration. We deeply regret not having more time to consult with you about the changes being made and we are very conscious of the impact of our decision on you.

You are able to look for alternative work if you prefer, so long as it would not conflict with any obligation you continue to owe to the business.

Paid Leave

You retain your right to apply for paid leave as normal, and we encourage you to consider utilising any accrued but unused annual leave you may have available to you at this time. We are also happy to discuss payment of these entitlements at half-pay with you, if this is your preference.

We also encourage you to review your ability to access the various forms of financial assistance through myGov, Centrelink and your superannuation account, as may be applicable to you.

Next steps

At this time, we are uncertain when we will be able to return our workers to their usual jobs and functionality. However, we will continue to provide you updates in relation to our business, and how COVID-19 and the current stage 4 lockdown restrictions in Victoria is affecting its operations. Obviously, we want to return you to work as soon as we can.

We will continue to communicate with you throughout this period via your work email and as such please check your work email regularly.

Employee Assistance Program

I recognise that this is a very difficult time and I therefore I remind you that you continue to have access to our Employee Assistance Program (EAP) provider. This is a confidential counselling service at no cost to you. You can access this service by calling [number omitted].

Please do not hesitate to contact People and Culture at any stage if you would like to discuss this matter further.

Yours sincerely

Andrew Skelton Managing Director & CEO"

[20] The direction given to Mr Lam, and set out above, is stated as being motivated by the Respondent no longer having "the ability to usefully deploy you into another area within the business". While this is perhaps not the most precise wording that could have been used, the communication as well as the surrounding circumstances is not inconsistent with the requirements of s.789GDC(1)(c) to the effect that Mr Lam "cannot be usefully employed for the employee's normal days or hours" etc.

[21] Mr Lam strongly contests that contention and its consequence for him, namely that he would be stood-down from work, to zero hours, and be remunerated entirely by the $1500 per fortnight JobKeeper scheme payment (Mr Lam's salary is about $51,000 per year, or about $1,961 per fortnight, with small call-out payments being made in addition to that amount). It follows that Mr Lam's application to the Commission under s.789GV is a dispute which may be brought since it is a dispute about the operation of Part 6 – 4C. The dispute may be characterised as the contention by Mr Lam that the JobKeeper enabling stand-down direction is not authorised by s.789GDC(1)(c) for the reason it is not the case that he "cannot be usefully employed for the employee's normal days or hours" etc, or that it is not a reasonable direction.

[22] MTI's case is that its business has deteriorated to such an extent as a result of the COVID-19 pandemic that it can no longer sustain the work of the 6 people employed in its Melbourne based Australia/New Zealand Support Team, of whom Mr Lam is one, as well as it being that case that the employment of others throughout the company has been impacted. It argued that its business continued to deteriorate and was being severely impacted by the most recent Victorian Government Restrictions. MTI's submissions about the current employment arrangements of people in the Support Team include that all are JobKeeper eligible employees with three working their standard hours and three (including Mr Lam) being under some form of stand-down direction. The arrangements for those latter employees are as follows:

- Roy Burgess – is otherwise a part-time employee, whose hours were reduced to 15.2 hours per week, to be worked on two days of the week; the direction was dated 13 May 2020 and came into effect on 18 May 2020;

- Geetha Sunderarajan – is a new employee, who commenced in June, and was reduced from her contracted hours to 22.8 hours per week, to be worked on three days of the week; the direction was dated 17 June 2020 and came into effect on 1 July 2020;

- Wilfred Lam (the Applicant in this matter) – is otherwise a full-time employee, and was reduced to zero hours; the direction was dated 7 August 2020 and came into effect on the same day.

[23] The Respondent's submissions included that its business had been significantly impacted since March 2020 and that it had been progressively responding to its worsening trading situation not only in relation to the MTI Support Team but other parts of the business as well. As the effects of the pandemic progressed it put in place contingency plans to respond to its needs. In particular it wanted to ensure it gave priority to the continued engagement of its best employees. For that reason, it assessed employees not only in the Support Team but elsewhere in accordance with a "Stand Down Selection Matrix" which assigned numeric scores to each of six criteria. I do not have detailed material before me as to how this matrix was either developed or applied and there is no evidence that either was the subject of consultation with employees generally or Mr Lam in particular.

[24] The Respondent then used the matrix to decide who would be affected by stand-down or other measures.

[25] In the case of the Support Team, MTI has so far not stood-down its three employees assessed in accordance with the matrix to be higher scored than others and the stand-down directions which have been given to the three employees indicated above are a reflection of their individual performance weighting. Ms Sunderarajan had the lowest score, which is to be expected for someone who is the newest employee to the team. Mr Lam had the second lowest score, followed by Mr Burgess. MTI argued that the different arrangements which have been entered into for these three employees is a product both of how it saw its needs when the decision was taken, as well as the employee's relative performance. In the case of Mr Lam his hours were reduced to zero and not to an interim point as a result both of a worsened trading position in early August, as well as because of MTI's performance assessment of him.

[26] Mr Lam submitted that the stand-down direction was motivated because he had made a request on 29 June 2020 to work from home. Mr Borg, the MTI Chief Operating Officer advised the following day, 30 June 2020 that he was considering the request. Later, on 31 July 2020, Mr Borg advised him that he could start working from home which he did. Then, on 4 August 2020, a human resources person from A2B Australia Ltd contacted him and advised that his working from home application had been rejected. His response to A2B Australia Ltd was to say that since he was already working from home and the Victorian Stage 4 Restrictions had started, his view was that he must continue to work from home in conformity with the restrictions.[1] Mr Lam contended in his originating application that since starting to work from home he has performed mostly the same tasks as if he was working in the office, drawing the conclusion that there is no shortage of work.[2] Mr Lam also submitted he had been treated differently to other employees who were not stood-down at all or only partially so, arguing he is currently the only employee to have been stood down in the Support Team and that it was not caused by genuine lack of work but was a punitive action because he is working from home and refuses to return to the company's premises due to safety concerns.[3]

[27] MTI reject the proposition that its decision in relation to the stand-down direction was connected with its rejection of Mr Lam's home-based work application. There is no direct evidence on the subject that would lead me to find the two are connected.

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[1] *Form F13A Application for the Commission to deal with a JobKeeper dispute (Coronavirus economic response),* 14 August 2020, item 2.2.

[2] Ibid, item 3.1

[3] Ibid.

[28] The relief Mr Lam seeks from the Commission as a result of his application to deal with the JobKeeper dispute is for him to be "reinstated", that is to be provided with meaningful work, and to continue to work from home.[4]

[29] In considering the application of s.789GDC(1) to the circumstances of this matter, I note that there is no dispute that paragraphs (a), (b), (d) and (e) apply. The issue for determination is whether the mandatory requirement of section 789GDC(1)(c) has been made out. In this regard, the Commission as constituted by Deputy President Anderson has made the following findings (per: *Allan Jones v Live Events Australia Pty Ltd* [2020] FWC 3469), with which I concur:

> "[37] The normal canons of construction apply to the interpretation of section 789GDC(1)(c). These require the ordinary meaning of words used by the parliament to be adopted having regard to statutory context and purpose.
>
> [38] The objects in section 789GB are relevant. Part 6-4C has been inserted by the parliament as a temporary measure to facilitate (amongst other purposes) the retention of employment relationships, the avoidance of redundancies and the continued engagement of employees in productive work available within the economy.
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> [39] These objects require Part 6-4C to be interpreted according to the language used within a framework that is responsive to employer and employee circumstances whilst the temporary legislative measure applies. Those circumstances include the reality of imprecise and changeable economic impacts of the pandemic as public health measures wax and wane, and as business conditions (actual and forecast) vary.
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> [40] Whilst section 789GDC(1)(c) applies, along with section 789GDC as a whole, to a moment in time (that time being when the stand down direction is given) the overall business context applying at that time is relevant and informs whether conditions precedent to the issuing of a Jobkeeper enabling stand down direction exist. I apply this purposive approach, within the framework of the language used by the parliament, in determining this matter."

[30] The same decision notes that s.789GDC(1)(c) directs attention to "the employee" (in this instance, Mr Lam) and not employees as a whole and that the "Jobeeper enabling stand down period" covers a future period which necessarily may require reasonable forecasts.[5]

[31] The business conditions relied upon by MTI for its decision to provide Mr Lam with a JobKeeper Employee Nomination Notice and to then stand him down with reference to his JobKeeper scheme eligibility include those set out in the correspondence to him from A2B's Andrew Skelton dated 7 August 2020 as well as the submissions summarised above. Taken collectively, those submissions would lead to a conclusion that MTI's business, at least in respect of the Support Team has been progressively winding back to such a point that it no longer requires as much work to be done by the team as it once did.

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[4] Ibid, item 3.1.

[5] *Allan Jones v Live Events Australia Pty Ltd* [2020] FWC 3469, [41].

[32] There is no formal evidence before me on this subject, either of a financial or business metric nature. The lack of that formal evidence causes me concern inasmuch as the requirement of the Act for a stand-down direction is that the employee "cannot be usefully employed for the employee's normal days or hours" because of matters associated with the pandemic.

[33] Nonetheless I must take into account that by definition A2B Australia Ltd and MTI have been very greatly affected by the pandemic, along with many other Australian businesses, since they are in receipt of subsidies from the JobKeeper scheme which has well-known and significant entry thresholds. It would be an overly technical approach for me to take the view that because there was a lack of formal evidence about the factors leading to Mr Lam's stand-down it meant that the direction given could not conform with the threshold requirements within s.789GDC(1)(c). At the least there has been a decline in business sufficient to trigger eligibility for the JobKeeper scheme. It would also be a fantasy to think that the Victorian Stage 4 Restrictions would not further shrink the taxi and related transport industries upon which MTI is reliant for its business.

[34] I also take into account that the removal of Mr Lam's hours from the Support Team would appear to be a reduction of around 20% from the total number of available hours in July. A reduction of that level would likely not be an unreasonable further response by MTI in the context of its business model together with the obvious further effects of the then yet-to-be-instituted August Victorian Government Stage 4 Restrictions.

[35] These things together allow the finding that the stand-down direction given to Mr Lam was "authorised" for the reason it conformed with threshold set out in s.780GDC(1)(c), which is not to say that the direction was, for the purposes of s.789GK, reasonable in all the circumstances.

Was the direction unreasonable in all the circumstances?

[36] A JobKeeper enabling direction, which includes a stand-down direction, does not apply to an employee if it is unreasonable in all the circumstances.

[37] After consideration of the direction given to Mr Lam, his circumstances and the matters relied upon by MTI, I am unable to find that it was reasonable, and therefore find it was unreasonable in all the circumstances.

[38] The Objects of Part 6 – 4C are instructive in my decision:

> "**s.789GB Object**
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> The object of this Part is to:
>
> (a) make temporary changes to assist the Australian people to keep their jobs, and maintain their connection to their employers, during the unprecedented economic downturn and work restrictions arising from:
>
> (i) the COVID-19 pandemic; and

(ii) government initiatives to slow the transmission of COVID-19; and

(b) help sustain the viability of Australian businesses during the COVID-19 pandemic, including by preparing the Australian economy to recover with speed and strength after a period of hibernation; and

(c) continue the employment of employees; and

(d) ensure the continued effective operation of occupational health and safety laws during the COVID-19 pandemic; and

(e) help ensure that, where reasonably possible, employees:

(i) remain productively employed during the COVID-19 pandemic; and

(ii) continue to contribute to the business of their employer where it is safe and possible for the business to continue operating."

[39] The Full Bench has found there is "support [for] a construction of the expression "unreasonable in all the circumstances" in s.789GK as meaning or at least encompassing a direction that is inequitable, unfair or unjustifiable having regard to the object in s.789GB and the respective circumstances of the employer and the employee".[6]

[40] Several important things may be drawn from the Objects and the operation of the Part. There is a desirability and policy intention for the things set out within the Part and its administration to assist with the maintenance and recovery of Australian businesses and perhaps by corollary to not impede those things. For employees there is a desirability of ensuring their continued employment so far as is reasonably possible, as well as to ensure they remain productively employed and able to contribute to their employer's business.

[41] The submission made by MTI is to the effect that it put in place a process by which the deterioration in its business could be responded to by making progressive decisions about standing down people, not in one tranche, but step-by-step in accordance with the reduction in business as that became clear. It wanted also to make sure that its best people were available to its clients and those best people would be preferred in its decision-making about who would be stood down or by how much. However uncritical acceptance of that submission would entirely overlook that in Mr Lam's case what MTI has put in place does not continue his employment, with him having no work to do and being sent home. The direction also does not allow him to remain productively employed or contributing to MTI's business. While his employment, of course, continues contractually he has no work to do now and no prospect of work to do for several weeks, possibly until the end of September or even beyond.

[42] In a situation in which three of the six employees working in the Support Team appear to have had no reduction in their hours at all and a further two employees have had only a minor reduction, with Mr Lam being the only person who has had a reduction to zero hours, MTI plainly has not developed a direction in accord with the Objects of the Part, insofar as they encourage employee's continued employment, remaining productively employed and able to contribute to their employer's business.

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[6] *Transport Workers' Union of Australia v Prosegur Australia Pty Limited* [2020] FWCFB 3655, [34].

[43] MTI's reliance upon the Stand Down Selection Matrix as justification for its decision-making about Mr Lam, as well as his differential treatment is insufficiently established by MTI as being sound and defensible.

[44] There is no evidence on the subject of Mr Lam's actual performance or why he was assessed in the recorded manner and certainly none which would suggest that Mr Lam has been the subject of a disciplinary procedure or performance management. The gradations used by MTI are insufficiently developed to allow a finding there is a case for differential treatment for Mr Lam. In this regard it is noted that the element on which Mr Lam is assessed as having the greatest difference to others, is entitled "performance in present job". On that criterion Mr Lam is assessed as being someone whose "performance meets most of the objectives". On its own, such hardly speaks to someone who is a poor performer, or who should be treated appreciably differently to others.

[45] In giving the direction it has MTI also leaves itself open for the accusation Mr Lam has levelled but not established – that what has occurred to him is a punishment for having pushed as hard as he did to work from home.

[46] The reduction of Mr Lam's hours to zero when two others have not been reduced beneath 15 hours per week and three have not been affected at all, is in itself an unreasonable decision on the part of MTI.

Was the direction the subject of the required consultation?

[47] A JobKeeper enabling direction does not apply to an employee unless the statutorily required consultation has taken place.

[48] There is no evidence that MTI complied with the obligations of s.789GM with all the circumstances leading to the conclusion that there was no meaningful attempt by MTI to do so.

[49] The section is by no means opaque or unclear. It is quite specific about the consultation which must take place. Relevant to Mr Lam are four obligations as set out in the section in order for there to be a positive finding that the requisite consultation took place:

- He must have been given written notice of MTI's intention to give the direction it gave and there is no evidence that such ever was given;
- There is a need to give written notice of intent at least three days prior to the direction being given unless there was genuine agreement to a lesser period;
- There must have been consultation with the employee or their representative about the direction; and
- A written record must be kept by the employer of the required consultation.

[50] There is no evidence that any of these things took place. Mr Lam denies that he was ever given prior notice of the direction and MTI conceded that such might be the case. No written record of consultation has been provided to the Commission.

CONCLUSION, ORDERS AND RECOMMENDATION

[51] In summary while I am satisfied that the JobKeeper enabling stand-down direction given by MTI to Mr Lam was an authorised direction for the purposes of s.789GDC(1), I am also satisfied that the direction was unreasonable in all of the circumstances (s.789GK) and that the requirements set out in s.789GM were not complied with by MTI.

[52] The Commission's powers in such situation are broad and are as set out in s.789GV. Those powers may be exercised in accordance "with a broad discretion which is constrained only by: (1) the need to have regard to the object of Part 6-4C in s.789GB; (2) the achievement of the purpose of s.789GV to deal with and resolve the dispute at hand; and (3) the requirement in s.789GV(7) to take into account fairness between the parties concerned".[7]

[53] In relation to these elements I have already considered the Objects of Part 6 – 4C and take the view that those matters are instructive for a conclusion that the direction given to Mr Lam was unreasonable in all the circumstances. Particular to the matters set out within s.789GV I am satisfied that there is a dispute between the parties about the operation of the part which requires the intervention of the Commission. I consider that such intervention requires not only the Orders set out below, but also the expression of an opinion and the making of a recommendation, as noted in s.789GV(2). In relation to the matter of fairness between the parties, being the subject of s.789GV(7), I consider that it would be unfair to Mr Lam to not proceed to intervene in the direction given so far and that such intervention will not lead to unfairness to MTI.

[54] Because I am satisfied that a direction of some kind is appropriate to be given to Mr Lam in respect of the hours to be worked by him and within the context of the material before the Commission about MTI's business conditions the Commission will, pursuant to s.789GV(4) set aside the JobKeeper enabling direction given so far to Mr Lam and substitute it with another.

[55] As recorded above, the outcome of the direction given by MTI to Mr Lam would be to reduce the overall hours in the Support Team by around 20%. If that is considered to be the company's business need such as it stood at the start of August then taking into account the need for any direction given to Mr Lam to be consistent with the Objects of the Act as referred to by me above to be equitable, fair or justifiable, I consider that such objective could be achieved through an approach which balanced the need for a reduction of hours in the Support Team across each or most members of the team. That is, matters of equity and fairness would suggest that such reduction as needs to occur within the team be evenly spread or at least be spread more evenly than would be achieved by MTI's direction, taking into account that different members of staff may have different skill sets which could well be the basis upon which there is a differential reduction in hours.

[56] The dispute before me though is in respect of Mr Lam and without hearing from the other team members it would not be desirable and may not be possible for Orders to be made by the Commission as a result of this process to directly impact on those other people. It would be up to MTI as a consequence of this decision and the Orders flowing from it to determine what it does in respect of the other directions given to other members of the

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[7] *Transport Workers' Union of Australia v Prosegur Australia Pty Limited* [2020] FWCFB 3655, [36].

Support Team. MTI may choose to consult with them about a further change to their hours, but that is a matter for it to decide.

[57] Taking into account that two of the six employees have already had their hours reduced by some level and that it may be unfair to them to suffer a further reduction in their hours and also that MTI's business conditions may well continue to be under pressure for some time or may even deteriorate further, my consideration of this matter is that an appropriate Order would be for Mr Lam to have his hours reduced by 25%. Although I have referred to MTI's apparent objective being to take a further 20% of hours out of the Support Team, and a reduction in Mr Lam's case of 25% is demonstrably more than the objective, I consider the greater reduction may be warranted both to deal with MTI's need to give some priority to employees with different skill sets, as well as to not unfairly further reduce the hours of the two employees who have already had an hours reduction.

[58] It is unclear from the material provided to me what Mr Lam's weekly ordinary hours of work were, however on the presumption that the maximum weekly ordinary hours were 38, this would mean that his weekly hours would be reduced to 28.5. As a consequence, the Commission will issue the following Orders in respect of Mr Lam's application in this matter:

1. This Order applies to and binds the Applicant in matter number C2020/6282, Mr Wilfred Wei Ngong Lam, his employer, Mobile Technologies International Pty Ltd and its parent company A2B Australia Ltd.

2. The JobKeeper enabling direction given to Mr Lam in the correspondence to him from Andrew Skelton, Managing Director and CEO of A2B Australia Ltd, dated 7 August 2020 is set aside and substituted with a direction that Mr Lam work a reduced number of hours compared with his ordinary hours of work, with the reduced number being 28.5 hours per week.

3. This Order comes into effect on 20 August 2020 and ceases to have effect after 11:59 PM 27 September 2020.

[59] A matter which has not been resolved through this decision because the subject was not formally before me, but which was nonetheless alluded to at several stages by Mr Lam is whether or not he should be permitted to perform any or all of his ordinary hours of work from home. As has been recorded above, Mr Lam unsuccessfully endeavoured to be approved to work from home. Having had his direct manager, Mr Borg, advise him that he could, such decision was later overturned by more senior executives within the company, including the Chief Executive Officer, Mr Skelton. The basis of the refusal is set out in the material before the Commission as follows:

> "Wilfred's request to work from home was rejected on the following basis as his job cannot be properly performed if he works from home.
> • His role has front line call responsibilities, if he is not in the office, he will not be able to answer any calls from our service phone lines.
> • To test any of the technology we provide, he will not have access to the equipment needed to achieve these tests.
> • [omitted] we would prefer not to add more risk by having our staff accessing key technology from insecure environments.

> • Wilfred in his own request to work from home acknowledged that he cannot perform all his duties from home.
> • Finally, the office space at Mulgrave has been assessed and as we maintain compliance with our HR directives in relation to sanitisation, social distance etc it complies with the relevant government standards."[8]

[60] Mr Lam's application for home-based work records that he wanted to be able to work from home because of "Medical Reasons. Increased risk to COVID-19 due to on-going medication".[9] Mr Borg's recommendation for approval noted there was some knowledge at least of Mr Lam's reliance on his health for making that application when he commented; "Wilfred's request to work from home during the spike in COVID-19 infections is for health reasons. Once the COVID-19 risk is reduced, he will resume work from the MTI office."[10]

[61] While I make no findings in relation to Mr Lam's contention that MTI's stand-down direction and its form stemmed from his application for home-based work, the subject of whether he can work from home must be regarded as a live issue in relation to the implementation of any stand-down direction.

[62] In preparation for these proceedings Mr Lam was issued with an Order by the Commission for the production of documents relating to his medical condition and medications with which he complied. However, for the reason that neither party relied upon his medical condition in the hearing those documents were neither provided to the Respondent nor relied upon by me for the purposes of this decision. As a result I make no findings about his condition and whether or not it is safe for him to attend for work at MTI's premises; however based upon what the parties have said to me I consider that the contentions of each will continue to be a live and unresolved issue in implementation of the Order I will make.

[63] For his part Mr Lam considers that there is a degree of heightened risk for him attending for work at MTI's premises; for MTI's part it considers there to be insufficient work to provide for him at home, taking into account its need for information security as well as the provision of equipment. MTI also contended that attendance for work at its premises is both in conformity with the Victorian Government's COVID-19 Regulations as well as having been in some way authorised by the authorities (while noting that I have no evidence of such authorisation).

[64] Not only is it the case that the medical matters relied upon by Mr Lam have not formed part of the hearing before me, but it is also the case that, absent evidence about what his condition and medications actually mean in terms of his occupational health and safety, it is impossible for me to resolve whether his fears about attending the workplace are reasonably founded. It is possible that Mr Lam is overstating his concern about attending at the workplace, just as it is possible that MTI is overstating its submission that it has received clearance from the Victorian authorities for people to work from its premises.

[65] I am also concerned that MTI appear to be taking a "one size fits all" approach to its consideration of whether Mr Lam ought to be required to work from its premises. It appears

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[8] *Documents produced by the Respondent in response to the Commission's Order to Produce Documents,* p.27.

[9] Ibid, p.21.

[10] Ibid, p.26.

not to have considered or weighed to any meaningful extent whether there is a heightened risk for Mr Lam because of his circumstances.

[66] As a result of these considerations I express the opinion that it would be desirable for there to be conversations between Mr Lam and Mr Borg about the capacity for him to perform work from home. For such conversations to be productive Mr Lam will need to disclose directly to his employer the material he holds about his medical condition and medications, which in turn will require MTI to then seek advice about whether those things reasonably indicate a greater risk profile for Mr Lam which it should then ameliorate. As a result, I recommend that within seven days of the date of this decision there be:

1. Consultation between Mr Lam and MTI and/or its parent company A2B Australia Ltd about whether he is able to perform any or all of his duties from home, with such consultation to be informed by the exchange of information by each party. Information that should be exchanged as a minimum is:

    a. information about Mr Lam's medical conditions and medication;

    b. an outline of the duties that could be performed by Mr Lam from home and any equipment or security preconditions that would be required of Mr Lam by MTI in order for him to work from home.

2. In the consultation, the parties should genuinely endeavour to agree the terms upon which Mr Lam's 28.5 hours per week may be worked by him for the duration of the Order given by the Commission;

3. In the event that the above consultation does not bring the parties to an agreed position, and after the expiry of seven days from the date of this decision, either party may approach the Commission under the current matter for further conciliation, or further or alternative Orders;

4. The file in this matter will be closed 14 days after the date of this decision should the Commission not be requested by either party for further conciliation or further or alternative Orders in relation to the subject matter of this Recommendation.

[67] An Order and Recommendation consistent with the matters recorded above will be issued at this same time as the publication of this decision.

COMMISSIONER

Appearances:

Mr. W Lam for himself

Mr. H. Philipp and *Mr D. Borg* for the Respondent

Hearing details:

2020.
Melbourne (via video):
19 August.

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<PR721941>