



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Kunwar Lakhan

v

United Petroleum Pty Ltd T/A United Petroleum
(U2020/6188)

DEPUTY PRESIDENT CLANCY

MELBOURNE, 15 SEPTEMBER 2020

Application for an unfair dismissal remedy.

[1] Mr Kunwar Lakhan has applied to the Fair Work Commission (the Commission) under s.394 of the *Fair Work Act 2009* (the Act) for an unfair dismissal remedy, having been dismissed from his employment with United Petroleum Pty Ltd T/A United Petroleum.

Procedural History

[2] Mr Lakhan lodged his *Form F2 – Unfair Dismissal Application* (Form F2) via the Commission’s Online Lodgment System on 5 May 2020. The Form F2 was subsequently served on United Petroleum and a *Form F3 – Employer Response to application for an Unfair Dismissal Remedy* (Form F3) was received by the Commission on 22 May 2020.

[3] In its Form F3, United Petroleum objected to Mr Lakhan’s unfair dismissal application on the basis that the dismissal was a genuine redundancy.

[4] A conciliation held on 27 May 2020 did not resolve the matter and material was then filed and served according to Directions which required amendment.

[5] On 6 July 2020, United Petroleum filed its material in respect of its objection comprising:

- Outline of Submissions;
- Witness Statement of Mr David Szymczak, Chief Operating Officer; and
- Document List with four attachments.

[6] On 13 July 2020, the following was filed on behalf of Mr Lakhan:

- Outline of Argument;
- Outline of Argument – Objections;
- Witness Statement of Mr Lakhan; and
- Document List with 14 attachments.

[7] On 21 July 2020, reply material was received from United Petroleum comprising:

- Outline of Submissions on Merits;
- Witness Statement of Mr Andrew McLean, General Counsel;
- Second Witness Statement of Mr Szymczak; and
- Document List with eight attachments.

[8] Upon the matter being allocated to me, I conducted a mention hearing. I granted both parties permission to be represented by lawyers and sought their views on whether the matter should proceed by way of determinative conference or formal hearing. After consideration of the requirements of s.399(1) of the Act, I determined it would be appropriate for the matter to be dealt with by way of a hearing. Mr Lakhan's lawyer subsequently gave notice of his ceasing to act on the day before the hearing.

[9] During the hearing on 11 August 2020, the following witnesses gave evidence and were cross-examined:

- Mr Lakhan on his own behalf;
- Mr Szymczak, on behalf of United Petroleum; and
- Mr McLean, on behalf of United Petroleum.

Background

[10] Mr Lakhan commenced employment with United Petroleum on 28 May 2018. His contract of employment, signed on 21 May 2018, described his position as a Retail Store Specialist for Victoria with a remuneration package comprising:

- \$80,000.00 per annum base salary (gross);
- \$7,600.00 superannuation;
- \$11,000.00 car allowance;
- \$1,200.00 phone allowance;
- A laptop computer provided by United Petroleum; and
- A fuel card.

[11] The contract of employment set out duties and responsibilities as Retail Store Specialist (at clause 1.7) as follows:

“You will:

- (a) exercise the powers and discretions, hold the responsibilities and perform the duties and tasks as are conferred, delegated or specified by the company from time to time;
- (b) perform those responsibilities and duties honestly and in a proper and efficient manner;
- (c) use your best endeavours to promote and enhance the interests, business, profitability, growth and reputation of the company;
- (d) not intentionally do anything that is or may be harmful to the company;
- (e) report to the company promptly, or to such person as the company from time to time determines, at all reasonable times, all information and explanations as required in connection with matters relating to your employment or the business of the company; and

(f) comply with all lawful and reasonable directions given to you by the company.”

[12] United Petroleum relies on a Position Description dated May 2018 that describes the Retail Store Specialist role, including its purpose, accountabilities, key selection criteria, required qualifications and experience, and a Company overview.¹ While Mr Lakhan denies ever seeing this Position Description prior to these proceedings, his evidence was that he was performing the Retail Store Specialist role from August 2019 and was required to drive profitability by improving shop operating standards, sales performance and visual merchandising for a designated region with approximately 15 stores.²

[13] Mr Szymczak referred to a Retail Board meeting of United Petroleum Board (comprising the Director, himself and other senior executives responsible for the management of retail operations for United Petroleum) held on 25 March 2020, at which ongoing risks to the business due to the COVID-19 pandemic were discussed. He said there was discussion about the structure of the business, placing compliance auditors and area managers in “one team” and rebuilding the Operations team.³ The Board Pack for that meeting also noted the future area manager role was being “re-scoped” and the retail operations structure was “underway”. Mr Szymczak said that at this time there were grave concerns about what was happening and what lay ahead.

[14] Mr Szymczak said that by mid-April 2020, United Petroleum was experiencing plummeting sales in fuel and other retail operations, which lead to a decision to restructure its retail management. Fuel sales were said to be 50% down in terms of litres sold, which had an even more dramatic change in terms of revenue due to falling fuel prices.⁴ This lead to the decision to restructure the retail management of United Petroleum, with all the area manager roles in Victoria and most nationally, including Mr Lakhan’s, being made redundant. Mr Lakhan was informed of this on 17 April 2020 during a telephone call from the Executive General Manager – Retail at the time, Mr Joe Barberis. A letter from Mr Barberis confirming that Mr Lakhan’s position had been made redundant was issued, stating as follows:

“Dear Kunwar,

**Restructure of United Retail Operations Group in response to
current business environment and future operating needs**

We are working through unprecedented times. We have the challenge of a significant market contraction and the need to change our operating model to adapt to the environmental conditions and ensure we are set up for the future needs of the business. We have undertaken a significant review of our Retail business and operating model.

Based on these factors, we have made the difficult decision to reduce and restructure our workforce to align with the reduction and change in business activity.

¹ Attachment 2 to Exhibit R2, DCB at p.116.

² Transcript PN 360-361, PN 364-369 and PN 377.

³ DCB at 125 and 126.

⁴ Transcript PN 291-292.

As a result of this review we are hereby notifying you that your job has been made redundant as at close of business today 17th April 2020.

In these times as both our workforce model is contracting in size and as we streamline and change the scope and focus of the three (3) streams of the Retail field and support teams, we have very few other suitable alternative redeployment opportunities.

Based on these factors, we have no other option than to proceed with these difficult changes at this time.

Calculation and provision of Termination Pay and Entitlements

Next week you will receive an estimate of your final entitlements made up of any applicable retrenchment payment, leave entitlements and notice period via your personal e-mail. Please ensure your current up to date personal contact details are provided to Human Resources and Payroll so we can contact you.

Please ensure any United assets or tools of trade you in possession of are returned. Your final payment of entitlements will be subject to you having returned all company assets and no breaches of your employment agreement in this interceding period. the acting Retail lead for your state will be in touch to arrange the return of company assets.

Next Steps

We appreciate these are difficult times. Next week you will receive confirmation of your entitlements and you should arrange to return any company equipment.

In the event you see or become aware of a possible opportunity within the company please don't hesitate to contact me to discuss.

Once these steps are completed your retrenchment will be processed by payroll and completed accordingly.

I would like to take this opportunity to remind you of your ongoing responsibilities under your employment agreement.

I appreciate your cooperation during this period and I wish you ever success for the future.”⁵

[15] Mr Barberis also sent an email on 18 April 2020 to the United Petroleum retail team, confirming the reduction in area managers, which stated as follows:

“Dear Retail Team,

As many of you will know we have reduced the numbers of Area Managers in Victoria, SA, NSW and WA.

⁵ Attachment 3 to Exhibit R2, DCB at p92.

These changes are the result of the challenging business environment, an ongoing review of our Retail Operations and the need to restructure the business. Many people across the Retail team, in both the field and head office, have also been impacted in different ways and I recognise there are pressures on all of us. We will continue to evaluate the business needs and in the event there are other changes we will communicate them to you.

With yesterday's changes we must all be supportive of the smaller teams in the field and look for smart ways of using technology to get things done and avoid demands that are time consuming or unproductive.

I thank Donna, Max, Moneeb, Ravinder, Michael and Gavin (in WA) for their state leadership and the entire Retail Team for managing the current workloads. Abdul, Yatish, Chris Cole and I stand ready to assist you as/when you need support.”⁶

[16] Mr Lakhan was provided with his termination payment on or about 28 April 2020, which included four weeks payment in lieu of notice and four weeks severance pay.⁷

[17] Mr Lakhan said the question of whether the redundancy was genuine first arose for him on or about 16 May 2020 when he was made aware of a United Petroleum job advertisement for a “Retail Operations Specialist” in Melbourne. Amongst the documents he produced to the Commission was a copy of the advertisement said to have been posted on *LinkedIn* on or about 19 May 2020.⁸ Mr Lakhan claims this job advertisement detailed exactly the same description of the role from which he was made redundant.

[18] There was a statement in the advertisement that United Petroleum was one of the fastest growing independent companies in Australia. As to this, Mr Szymczak said by this time its sales “were hit very hard and there was a contraction” and that the person from within United Petroleum who placed the advertisement was clearly incompetent. Mr Szymczak said the advertisement should never have included this statement and he asked for it to be removed because United Petroleum was not and would not be recruiting for the role of Retail Operations Specialist.⁹ The advertisement does not appear to have been taken down until the time of the conciliation of Mr Lakhan’s unfair dismissal application on 27 May 2020.

[19] Mr Lakhan said he then saw another job advertised on *Seek* on 25 May 2020 by Altitude Recruitment. He said it was for a “Food Trainer” but the title for the position was outlined in the advertisement as a “Retail Trainer – Food/QSR”.¹⁰ Mr Lakhan said that although United Petroleum was not mentioned he believed it to be the employer and therefore, he applied for this position using his son’s name. Mr Lakhan said this led to him receiving a call from Mr Dom Mallawarachy, which in turn resulted in his son being offered an interview in another role. Mr Lakhan said he was told by Mr Mallawarachy that he (his son) would be more suitable for this other role.

⁶ DCB at p128.

⁷ DCB at p94.

⁸ DCB at p51.

⁹ Transcript PN 256.

¹⁰ DCB at p52.

[20] On 27 May 2020, the telephone conciliation in Mr Lakhan's unfair dismissal application took place.

[21] On 3 June 2020, Mr Lakhan had a telephone conversation with Mr McLean at approximately 1.00pm. Mr McLean's evidence was that the purpose of the phone call was to see whether the parties could reach an agreement to resolve Mr Lakhan's unfair dismissal application and to this end, he conveyed on behalf of United Petroleum an offer to re-employ Mr Lakhan in a newly created role. Mr McLean denies that he offered Mr Lakhan his "old position back with the same salary, but under a different title" on the basis that Mr Lakhan's former position no longer existed, and said that the offer made was for reinstatement in a newly created role.

[22] Mr Lakhan however asserted that Mr McLean offered to reinstate his old job and the result of the phone call was that Mr Lakhan advised Mr McLean that he would consider the offer made, with further information. Mr Lakhan did not however mention to Mr McLean in that conversation that he had applied for what he thought was a role with United Petroleum in his son's name.¹¹

[23] Later, at 3.30pm on 3 June 2020, Mr Lakhan received an email from Ms Scarlet Harris, Talent Acquisition Specialist for United Petroleum. This email referred to the position of Retail Operations Specialist VIC for United Petroleum and confirmed an interview to be held with Mr Szymczak at 8.30am on 4 June 2020.¹²

[24] Mr Lakhan did not attend the interview and nor did he raise it at any stage with Mr Szymczak. His evidence was "I didn't turn up for the interview because my purpose was not to go for an interview. My purpose was to find out how deliberately a group of people have been redundant and then has been re-hired for the new position under new pay scale".¹³

[25] At 12.16pm on 4 June 2020, Mr Lakhan emailed Mr McLean, making no mention of having applied for the other role in his son's name or the interview, but stating:

"Hi Andrew

Thanks for your call yesterday and offer made to reinstate my redundant job, as discussed, would you please email me new offer letter with position and job description so that I can get back to you soon before joining the company back.
and off course the contract you ask me to sign that I'll be taking my unfair redundancy claim back from FWC.

Regarding paid out made, money has been used as I was out of job since 17th April'20. I have always been an asset for company and will be in future; anyone in company can warrant this.

I am happy to start fresh with no amount owing if you agree.

I'll wait for your response with joining date."

¹¹ Transcript PN 533.

¹² DCB at p54.

¹³ Transcript PN 401.

[26] On Monday 8 June 2020, Mr McLean sent Mr Lakhan a position description for the role of Retail Site Re-Set Officer.¹⁴ Mr McLean’s covering email stated as follows:

“Good Morning.

Please find attached the position description for the new role of Retail Site Re-Set Officer.

As you will note that this more of a directed and hands on role.

Please read the attached position description and advise if you are interested in the role.

I have been instructed that if you accept the role then you will be required to repay the redundancy payment.”¹⁵

[27] Mr Lakhan alleges this position description included all of his former obligations and performance requirements, together with some additional obligations.

[28] Mr McLean says he then referred the matter to Ms Jill Murray in United Petroleum’s human resources department so that she could provide Mr Lakhan with the requisite paperwork.

[29] On 18 June 2020, Mr Lakhan received an email from Ms Murray attaching terms of repayment of the redundancy. The email stated as follows:

“Hi Kunwar,

Thanks for your patience and your time on the phone this afternoon.

As discussed, I have attached an agreement with the terms for repayment of your severance payment. Have a read through this, and I will be back in touch with you in the morning on the phone to answer any questions you might have. As soon as we have this matter agreed to, we will be able to get you a contract over and get you on boarded to recommence work.

Separately, as discussed, you would not be recommencing with a new probation period, your originally commencement date would be maintained for the purposes of length of service.”

[30] The attached agreement referred to was in the form of a letter to Mr Lakhan dated 16 June 2020.¹⁶ This letter outlined a requirement that Mr Lakhan repay the four weeks of redundancy pay he had received on 29 April 2020. It also included the statement “You have verbally agreed to recommence employment with the United Petroleum business in your

¹⁴ DCB at p57 and 131.

¹⁵ DCB at p129.

¹⁶ DCB at p61.

former position of Retail Stores Specialist that was previously made redundant and removed from the business structure.”

[31] Mr Lakhan did not agree to the offer made by United Petroleum nor the terms attached to it and claims that at no point did United Petroleum attempt to negotiate with him in relation to his period of unemployment, the annual leave used during his stress leave and whether redundancy pay could be retained to compensate him for lost wages.

Consideration

[32] There is no dispute between the parties, and I am satisfied, in relation to three of the four matters referred to in ss.396(a)-(d) of the Act, as follows.

[33] Firstly, Mr Lakhan’s application was made within the 21-day period required by s.394(2) of the Act (s.396(a) of the Act).

[34] Secondly, there is no dispute that Mr Lakhan is a person protected from unfair dismissal as defined by s.382 of the Act in that he is an employee who has completed a period of employment of at least the minimum employment period, and the sum of his annual rate of earnings and such other amounts is less than the high income threshold (s.396(b) of the Act).

[35] Thirdly, as to whether this matter involves a dismissal that was consistent with the Small Business Fair Dismissal Code (s.396(c) of the Act), it was not in dispute and I find that United Petroleum is not a small business employer within the meaning of s.23 of the Act, having 15 or more employees at the relevant time. As such, I am satisfied that the Small Business Fair Dismissal Code does not apply.

[36] As to the fourth matter, under s.396(d) of the Act the Commission must decide before dealing with the merits of any unfair dismissal remedy application whether the dismissal was a case of genuine redundancy. Further, under s.385(d) of the Act, one of the requirements for an unfair dismissal is that it “*was not a case of genuine redundancy*”.

[37] Section 389 of the Act defines genuine redundancy as follows:

- “(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.”

Section 389(1)(a)

[38] United Petroleum submits that the definition of genuine redundancy in s.389(1)(a) of the Act is made out on the facts as it made a decision to restructure due to changed operational requirements, under which a number of positions were no longer required. It says that Mr Lakhan’s position, along with all of the “Area manager” positions in Victoria, and most nationally, were identified as being no longer required and consequently were made redundant. I observe that the term “Area manager” and “Retail Store Specialist” appear to have been used interchangeably within United Petroleum.

[39] In *Christina Adams v Blamey Community Group*,¹⁷ the Full Bench of the Commission stated:

“... it is necessary to state at the outset that consideration of whether the employer no longer required the person’s job to be performed by anyone because of changes in the operational requirements of the enterprise does not involve a merits review of the employer’s decision to make the person’s job redundant. It is not to the point that it may have been open to the employer to make a different operational decision which may have allowed the relevant employee’s job to be retained. As was stated in *Low v Menzies Property Services Pty Ltd*, “Whether it was objectively fair or justifiable to decide to abolish a position is beside the point, as long as the employer acted as it did because of changes in its operational requirements.”¹⁸ What s.389(1)(a) requires is for findings of fact to be made as to whether, firstly, the employer has made the decision that the relevant employee’s job is no longer required to be performed by anyone and, secondly, whether that decision was made because of changes in the operational requirements of the enterprise. If there was an ulterior motive for the decision - that is, if the *real* reason for the decision did not genuinely relate to any change in operational requirements, whatever the ostensible reason may have been - then it will not be possible to make the second finding of fact. However once these findings of fact are made, the element of the genuine redundancy definition contained in s.389(1)(a) is satisfied and no further inquiry is necessary.”¹⁹

[40] In the Form F2, Mr Lakhan raised the allegations of discriminatory and racist behaviour, together with allegations of targeted bullying behaviour from senior management and asserted they lay behind the decision of United Petroleum to manage him out of his employment. He also alleged there had been a deficient redundancy process and a failure to discuss and consider redeployment.

[41] While I accept the evidence of Mr Szymczak that despite the performance issue raised, the significant operational issues arising from the COVID-19 pandemic overtook this in priority and neither the performance concerns, nor Mr Lakhan’s illness, played any part in the reasons for his termination by way of redundancy, I consider it is nonetheless understandable, given the timeline of subsequent events, that Mr Lakhan became sceptical about the underlying basis for his dismissal. His position is:

¹⁷ [2016] FWCFB 7202.

¹⁸ [2014] FWC 7829 at [16].

¹⁹ [2016] FWCFB 7202 at [14].

- His job was being advertised less than one month after he was dismissed;
- Through the job application lodged in his son's name, he was offered an interview for what was his old job; and
- United Petroleum offered him his old job back.

[42] Mr Lakhan submits that the fact that the job offered had a different title to that which he had held is immaterial because the description of the tasks to be performed in it were the same. Moreover, he contends that the position description included the same tasks with some additional responsibilities.

[43] However, having regard to the approach outlined by the Full Bench in *Christina Adams v Blamey Community Group*, I am satisfied United Petroleum made the decision that Mr Lakhan's job of Retail Store Specialist was no longer required to be performed by anyone. United Petroleum identified that all such Retail Store Specialist positions in Victoria, and most nationally, were no longer required. Specifically, Mr Szymczak gave evidence that six Retail Store Specialist positions (including Mr Lakhan's) and the Victorian State Manager position were made redundant with effect on either 17 April 2020 or 8 May 2020²⁰ and Mr Lakhan identified two additional employees who were also made redundant.

[44] I am also satisfied that the decision was made because of changes in the operational requirements of United Petroleum. In this respect:

- a) I have noted the state of the United Petroleum retail business had been discussed at the Retail Board meeting on 25 March 2020. It is apparent at that time that thought was being given to the structure of the business and the role of Area managers.
- b) Mr Szymczak gave unchallenged evidence regarding the 50% drop in petrol sales during April 2020 and I accept his additional evidence that:
 - i. many United Petroleum stores were struggling with profitability due to low sales;
 - ii. there was a great deal of pressure on the business to reduce rents to dealers and to provide extra support;
 - iii. United Petroleum was trying to reset their shops to have items that they thought that consumers would want to buy during the COVID-19 pandemic; and
 - iv. a large number of employees were either stood down completely or partially because their work "just needed to cease."
- c) I also accept the evidence from Mr Szymczak that United Petroleum had decided it needed to do things quite differently by moving away from the structure whereby it had engaged the area representatives called Retail Store Specialists who were responsible for the sales, standards and operations of between 15 and 30 stores,

²⁰ Transcript PN 148 Exhibit R4.

and decided instead to manage its stores via financial and other audits conducted from its Head Office.

[45] Further, notwithstanding the *LinkedIn* advertisement and subsequent reference to it by Ms Harris, I observe that the position of Retail Operations Specialist has not been filled since the dismissal of Mr Lakhan on 17 April 2020.²¹ Nor has the position of Retail Store Specialist been restored. As noted above at [43], it would seem at least three other employees holding the position of Retail Store Specialist have been retrenched since then²² and Mr Lakhan identified two additional employees who were also made redundant.²³

Section 389(1)(b)

[46] Mr Lakhan submits he was provided with no particulars of the restructuring of the business and asserts that United Petroleum did not consult with him regarding either the nature of the restructure or why he was made redundant.

[47] United Petroleum submits, and I accept, that Mr Lakhan's position was managerial in nature and not subject to award coverage. Further, I note that no enterprise agreement applied to Mr Lakhan's employment. As such, there were no applicable modern award or enterprise agreement obligations requiring United Petroleum to consult with Mr Lakhan about the redundancy. Therefore the considerations in s.389(1)(b) do not fall for determination.

Section 389(2)

[48] Section 389(2) of the Act places a limitation on United Petroleum's defence to Mr Lakhan's unfair dismissal application that his dismissal was a case of genuine redundancy. It states that 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. As was noted by the Full Bench in *Ms Deborah Hallam v Sodexo Remote Sites Australia Pty Ltd (Hallam)*,²⁴ s.389(2) places no obligation on an employer to redeploy, or to do everything possible to achieve a redeployment outcome. Further, as was noted in *Hallam* and other Full Bench authorities,²⁵ this exception is applied at the time of dismissal.

[49] In the context of this case, s.389(2) operates so that the dismissal of Mr Lakhan, if otherwise a case of genuine redundancy under s.389(1), will not be so if it would have been reasonable in all the circumstances for him to have been redeployed within United Petroleum's enterprise, or within an enterprise of an associated entity of United Petroleum at the time of his dismissal on 17 April 2020.

[50] When looking at the question of redeployment, the Full Bench of the Commission in *Hallam* considered whether there were any job vacancies either open or in contemplation at the time of the dismissal.

²¹ Transcript PN 166.

²² Exhibit R4.

²³ Transcript PN 202 - 206.

²⁴ [2017] FWCFB 6847 at [20].

²⁵ *Ulan Coal Mines Ltd v Honeysett* [2010] FWAFB 7578 at [28]; *Technical and Further Education Commission T/A TAFE NSW v L. Pykett* [2014] FWCFB 714 at [35].

[51] In *Ulan Coal Mines Ltd v Honeysett*,²⁶ the Full Bench of Fair Work Australia stated that the exclusion in s.389(2) poses a hypothetical question which must be answered by reference to all of the relevant circumstances. The Full Bench in that case made the following observation:

“...if an employee is terminated for redundancy but subsequently employed within an entity related to the employer, that might be an indication that the employee could have been reemployed at the time of the termination. But this will not always be the case. Subsequent employment within an associated entity may occur because circumstances have materially altered since the termination. For example, vacancies may have arisen.”²⁷

[52] In *Technical and Further Education Commission TAFE NSW v L. Pykett (TAFE NSW)*,²⁸ the Full Bench of the Commission, considered s.389(2) in the following way:

“[36]...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. Such an interpretation is consistent with the ordinary and natural meaning of the words in the subsection; the Explanatory Memorandum and Full Bench authority. We acknowledge that the facts relevant to such a finding will usually be peculiarly within the knowledge of the employer respondent, not the dismissed employee. If an employer wishes to rely on the ‘genuine redundancy’ exclusion then it would ordinarily be expected to adduce evidence as to the following matters:

- (i) that the employer no longer required the dismissed employee’s job to be performed by anyone because of changes in the operational requirements of the employer’s enterprise;
- (ii) whether there was any obligation in an applicable modern award or enterprise agreement to consult about the redundancy and whether the employer complied with that obligation; and
- (iii) whether 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 employer.

[37] The evidence in relation to (iii) would usually include canvassing the steps taken by the employer to identify other work which could be performed by the dismissed employee.”

[53] As noted above, while it is understandable that Mr Lakhan became and remains sceptical about the sequence of events, the issue of the other jobs being advertised by United Petroleum had simply not arisen at the time he lodged his unfair dismissal application on 5

²⁶ *Ulan Coal Mines Ltd v Honeysett* [2010] FWAFB 7578.

²⁷ *Ibid* at [29].

²⁸ [2014] FWCFB 714.

May 2020. I have noted the 17 April 2020 date of dismissal was at a time which Mr Szymczak described as a very busy, dramatic and difficult time for United Petroleum.²⁹ There was no evidence before me that there were any open job vacancies at the time of Mr Lakhan's dismissal. As outlined above at [44], Mr Szymczak gave evidence that a large number of employees were either stood down completely or partially because their work "just needed to cease." Mr Szymczak also gave evidence that there were no opportunities for redeployment within United Petroleum or any of its related bodies corporate³⁰ and that the role of Retail Site Reset Officer was not available to be filled at that time.³¹ Further, Mr Szymczak's evidence under cross examination was that in the period following Mr Lakhan's termination until at least the date upon which the advertisement for a Retail Operations Specialist appeared on *LinkedIn*, no one had performed the tasks Mr Lakhan had performed. His answer to Mr Lakhan's specific question in this regard was:

"...what we did was - the retail financial auditors, to the extent they needed to, would escalate things to head office, to either Mr Persad or Quitaris. Really, the things that you did were no longer done."³²

[54] The evidence given was that once the COVID-19 restrictions were initially relaxed after Mr Lakhan's termination, the sales performance of United Petroleum improved "dramatically". Mr Szymczak said it was thought at that time that the business was "out of the woods" and there was a need to hire more people.³³ United Petroleum decided it needed to manage its stores via financial and other audits and this audit process would be supported by Retail Site Reset Officers, whose role would involve:

- a) being sent to a site that had a very poor audit or was known to be operationally poor and armed with all the necessary details, they would work at the site until it was back up to standard;
- b) dealing with the reasons for the poor performance – the response might require a change of operator, the provision of extra training or an action plan to ensure the required standards were maintained;
- c) taking control of a site and operating it temporarily, if it was decided that the site operator was failing and a company operator was needed.

[55] Mr Szymczak said United Petroleum decided it required this role of Retail Site Reset Officer to be a "hands-on" role of a retail fixer who would go and fix a site with a problem and bring it back up to standard, whether that be by cleaning it, re-merchandising it, stocking it or providing training, as opposed to the business management role undertaken by the Area Managers/Retail Store Specialists.

[56] Mr Szymczak also gave evidence that:

²⁹ Transcript PN161.

³⁰ Exhibit R2 at paragraph [5].

³¹ Transcript PN 169.

³² Transcript PN 196.

³³ Transcript PN 268.

- the Retail Site Reset Officer position was not available to be filled at the time of Mr Lakhan’s redundancy but arose and was available to be filled at about the time when the position description for it was produced in June 2020;³⁴
- the Retail Site Reset Officer position was a different job to that which Mr Lakhan had performed and at the time it was created, Mr Lakhan had already lodged his unfair dismissal application;³⁵ and
- it was and remains very difficult for United Petroleum to plan and contemplate recruitment during periods of significant community restrictions and this is again the case during the Stage 4 lockdown arrangements currently in place in Victoria, where its volume was down 39% on usual figures as at the date of the hearing.³⁶

[57] Mr Lakhan challenges United Petroleum’s assertions, relying on the following:

a) As noted at [17] above, United Petroleum HR had placed a job advertisement on *LinkedIn* in mid-May 2020 for the position of “Retail Operations Specialist” and describing United Petroleum as one of the fastest growing independent companies in Australia.

As to this, I accept Mr Szymczak’s evidence that this advertisement was posted at a time when company sales had been hit “very hard” and in fact had contracted and that no such position was on offer. Mr Szymczak described the person from within United Petroleum who placed the advertisement as “clearly incompetent” and I accept his evidence that the wrong advertisement had been posted³⁷ and that the advertisement should never have included the statement regarding growth.

b) On 3 June 2020, Ms Harris of the United Petroleum HR team invited Mr Lakhan’s son to interview for the position of Retail Operations Specialist on 4 June 2020.

This seems to have been another error on behalf of United Petroleum’s HR team but I have noted and accept Mr McLean’s evidence regarding the dialogue between himself and Mr Lakhan at that time. Mr McLean was charged with the task of trying to negotiate the resolution of Mr Lakhan’s unfair dismissal claim. His evidence was direct and unshaken in cross-examination. It is supported by his email to Mr Lakhan dated 8 June 2020 and I do not consider the fact that United Petroleum was seeking at that time to settle the unfair dismissal claim on terms that involved re-employing Mr Lakhan means that the dismissal cannot fall within the meaning of a genuine redundancy as defined in s.389 of the Act.

I have also noted that Mr Lakhan applied for the position of “Retail Operations Specialist” in the name of his son and then would appear to have assumed the identity of his son in his telephone conversation with Mr Mallawarachy, during which an interview was offered. Mr Lakhan also chose to conceal from Mr McLean during their

³⁴ Transcript PN 169-171.

³⁵ Transcript PN 263.

³⁶ Transcript PN 268.

³⁷ Transcript PN 166 and PN 289.

conversation at approximately 1.00pm on 3 June 2020 the fact that he had applied for the position of “Retail Operations Specialist” in the name of his son. Had Mr Lakhan revealed this, I consider it unlikely Ms Harris would have sent her email to Mr Lakhan’s son at 3.30pm later that day to confirm the arrangements for an interview with Mr Szymczak on 4 June 2020. Mr Lakhan did not attend that interview and he also elected not to reveal his son’s job application in his subsequent email correspondence with Mr McLean. Having withheld this information from United Petroleum at the time, the criticism Mr Lakhan now makes about the actions of Mr McLean and Ms Harris is less than compelling.

c) Thirdly, with Mr McLean having sent Mr Lakhan the position description for the Retail Site Reset Officer role when conveying United Petroleum’s offer to resolve the unfair dismissal claim, Ms Murray of HR then sent Mr Lakhan the letter dated 16 June 2020 which outlined the requirement as part of that offer that Mr Lakhan repay the four weeks of redundancy pay he had received on 29 April 2020 and included the statement, “You have verbally agreed to recommence employment with the United Petroleum business in your former position of Retail Stores Specialist that was previously made redundant and removed from the business structure.”

As to this, I note this position was not what Mr McLean offered and Mr Szymczak said that while he considered the letter was referring to the position of Retail Site Reset Officer, the letter was poorly written and he neither approved its form nor saw it before it was sent to Mr Lakhan. While I accept the 16 June 2020 letter demonstrates a lack of attention to detail and/or another breakdown in communication within United Petroleum, I wonder whether Ms Murray would have made reference to the position of “Retail Stores Specialist” in the letter of 16 June 2020 had Mr Lakhan revealed to United Petroleum that he had applied for the position of “Retail Operations Specialist” in the name of his son when negotiations about his possible return commenced on 3 June 2020.

[58] Overall, I found Mr Lakhan to be a less compelling witness than Mr McLean, whose evidence was direct and unshaken, and Mr Szymczak, who was prepared to make unflattering concessions about functioning of United Petroleum management. Mr Lakhan initially tried to reconstruct the reason why he made his unfair dismissal application, had to be pressed on the sequencing of certain significant events, was less than forthright in having applied for a role in his son’s name and was cagey when it came to revealing details regarding his JobKeeper payments and workers’ compensation claim.

[59] On the evidence before me, I am satisfied that at the time of Mr Lakhan’s dismissal there was a genuine redundancy within the meaning of s.389(1) of the Act and that the circumstances in s.389(2) did not exist. I am satisfied the position of Retail Site Reset Officer was not in contemplation at the time of Mr Lakhan’s dismissal. Things altered dramatically for United Petroleum as the COVID-19 pandemic initially took hold. Its sales of fuel fell dramatically during the first period of community lockdown. Its offering to consumers changed in order to meet differing demand. Its need for employees changed in terms of both numbers and roles. I am persuaded that United Petroleum conceived of the Retail Site Reset Officer role once it had assessed what this changed operating environment held. While no more than a month or so had passed since the time of Mr Lakhan’s dismissal when United Petroleum settled upon the new role, I am satisfied the circumstances for United Petroleum had changed by then and I accept this can be explained by the fact that the market in which it

operates has fluctuated appreciably in the wake of COVID-19 requiring it to quickly adapt and refocus its operations.

Conclusion

[60] This is an unfortunate case. The COVID-19 pandemic has produced a volatile operating environment for United Petroleum and triggered the circumstances that lead to Mr Lakhan's dismissal. While he lodged his unfair dismissal application complaining of a deficient redundancy process, a failure to discuss and consider redeployment and alleging discriminatory and racist behaviour, together with targeted bullying from senior management, it is understandable that Mr Lakhan became sceptical about the basis for his dismissal after he had lodged his claim, when he became aware of the job advertisement on *LinkedIn* in mid-May 2020. However, for the reasons outlined above, I am nonetheless persuaded on the evidence before me that Mr Lakhan's dismissal was a case of genuine redundancy within the meaning of s.389 of the Act.

[61] I will conclude by making this observation. Mr Lakhan could have again been working for United Petroleum but the parties squandered the opportunity they had to resolve their differences and start afresh through nothing other than their own short-sightedness and folly.

[62] In this regard, I note that as part of its offer to re-employ Mr Lakhan, United Petroleum insisted on recovering the four weeks of redundancy pay it made to Mr Lakhan when he was dismissed, which totalled \$6,153.85 gross. The offer of re-employment with this condition was made to Mr Lakhan approximately 7 weeks after his dismissal.

[63] I further note that Mr Lakhan had received a net payment of \$14,169.79 when he was dismissed, inclusive of the four weeks of redundancy pay. Therefore, even if the \$6,153.85 gross redundancy payment had been repaid, Mr Lakhan would still have retained \$8,015.94 gross. Mr Lakhan also claimed a \$3,000 gross payment through the JobKeeper scheme through his directorship of a company subsequent to his termination and this payment appears to have been received by that company on 16 June 2020. Therefore, even if he had repaid the \$6,153.85 redundancy component, Mr Lakhan could have received and retained a gross sum of \$11,015.94 for the 7-week period from Friday 17 April 2020 – Friday 5 June 2020. That total sum of \$11,015.94 equates to just over 7 weeks' gross wages. Therefore, if Mr Lakhan had agreed to the offer of re-employment at the time it was made, it would appear there would have been minimal, if any, wage loss incurred and Mr Lakhan would have had his previous commencement date recognised³⁸ and been re-employed on his previous salary.³⁹

[64] Unfortunately, instead of seeking to compromise on a reasonable basis at that time and resuming the employment relationship between them, both parties dug in, proceeded to retain lawyers and have consequently incurred costs in pursuing and defending this application.

[65] I have found Mr Lakhan's dismissal was a case of genuine redundancy within the meaning of s.389(1) of the Act and that the circumstances in s.389(2) did not exist. This is a complete defence to the unfair dismissal application that Mr Lakhan has made and I therefore must dismiss it. An order to this effect will be issued with this decision.

³⁸ DCB at p60.

³⁹ Transcript PN 90.



DEPUTY PRESIDENT

Appearances:

K Lakhani on his own behalf.

R Millar of Counsel on behalf of United Petroleum Pty Ltd.

Hearing details:

2020.

Melbourne (via Microsoft Teams):

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