[2021] FWC 1788 [Note: The Deputy President's determination is quashed insofar as it concerns the payment of any compensation to Mr Govender - refer to Full Bench decision dated 3 August 2021 [2021] FWCFB 4508 and further Full Bench decision dated 31 August 2021 [2021] FWCFB 5389]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Kevin Govender
v
ERGT Australia Pty Ltd
(U2020/11820)

DEPUTY PRESIDENT BINET — PERTH, 31 MARCH 2021

Application for an unfair dismissal remedy.

[1] On 1 September 2020, Mr Kevin Govender **(Mr Govender)** filed an application (**Application**) pursuant to section 394 of *Fair Work Act 2009* (Cth) (**FW Act**) with the Fair Work Commission (**FWC**) alleging he was unfairly dismissed by Wellparks Holdings Pty Ltd trading as ERGT Australia **(ERGT)**.

[2] On 23 September 2020, Mr Steven Heathcote of APX Law (**Mr Heathcote**) contacted the FWC by email advising the FWC that he was acting on behalf of ERGT and foreshadowing filing a *Form F3 – Employer's Response to unfair dismissal application* (**Form F3 Employer Response**) on behalf of his client, alleging that Mr Govender's dismissal was a case of genuine redundancy (**Jurisdictional Objection**). In the same correspondence Mr Heathcote informed the FWC that his client refused to participate in conciliation with a staff conciliator.

[3] On 30 September 2020 ERGT Australia filed a Form F3 Employer Response.

[4] The Application was allocated to me and listed for a conference to explore the possibility of a conciliated outcome or to make arrangements for the determination of the Application.

[5] On 23 October 2020, Mr Heathcote informed Chambers that he was not available on the listed date of the Conference. On 23 October 2020 Mr Heathcote was asked if ERGT wished to participate in the Conference. Mr Heathcote informed Chambers that his client was happy to forgo participating in conciliation.

[6] In light of this, the Application was listed for a Hearing in Perth at 10:00am on Friday 22 January 2020 (**Hearing**).

Procedural Matters

[7] On 6 November 2020, my Chambers issued directions for the filing of materials in advance of the Hearing (**Directions**). The Directions required the parties to file and serve

outlines of submissions, signed and dated witness statements, copies of authorities and any documentary evidence on which they relied.

[8] The Directions required Mr Govender to file his materials with respect to the merits of the Application no later than 4pm on Friday 13 November 2020 and his materials in response to the Jurisdictional Objection no later than 4pm on Friday 20 November 2020. The Directions required ERGT to file their materials with respect to the Jurisdictional Objection no later than 4pm on Friday 13 November 2020 and its materials in relation to the merits of the Application no later than 4pm on Friday 20 November 2020.

[9] The Directions also invited parties seeking to be represented by a lawyer or paid agent at the Hearing to file in the FWC and serve on the other party written submissions no later than 4pm on Friday 13 November 2020. The Directions specified that any submissions, with respect to representation, should address the provisions of section 596(2) of the FW Act.

[10] The Directions further outlined that if a party sought to object to a request for representation, a submission setting out their objections should be made in writing to Chambers, by no later than 4pm on Friday 20 November 2020.

[11] The Directions also required the parties to file an Agreed Statement of Facts and a Digital Court Book, by no later than 4pm on Friday 27 November 2020.

[12] On Friday 13 November 2020, in accordance with the Directions, Mr Govender filed his materials with respect to the merits of the Application.

[13] ERGT's materials, due on 13 November 2020, were filed late. The witness statement which was filed was unsigned and stated to be subject to revision. Mr Heathcote indicated that a finalised and signed statement would be filed by the middle of the following week. The signed statement was not filed the following week and was only provided in a signed form as a part of the Digital Court Book, which was eventually filed on Tuesday 1 December 2020.

[14] Later the same day an application by Mr Heathcote for leave to represent ERGT at the Hearing was also filed late.

[15] On 13 November 2020, Mr Govender wrote to Chambers opposing the granting of permission to ERGT for leave to be represented and opposing the admission of the ERGT materials which were filed late. On 18 November 2020, Mr Govender provided expanded reasons for his opposition to the granting of leave to be represented and requested that the Application be determined by way of Determinative Conference rather than by way of Hearing.

[16] On 20 November 2020, in accordance with the Directions, Mr Govender filed his materials in response to the Jurisdictional Objection.

[17] On 20 November 2020 ERGT filed submissions in relation to the merits of the Application. It is not clear whether the ERGT submissions were served by Mr Heathcote on Mr Govender, therefore they were forwarded to Mr Govender by Chambers.

[18] On 23 November 2020, the parties were informed that the Application would be heard and determined by way of Determinative Conference (**Conference**).

[19] On 26 November 2020, the parties were informed by Chambers that ERGT's application for leave to be represented had been refused because I was not satisfied that the requirements in section 596(2) of the FW Act had been satisfied.

[20] Mr Govender provided a draft Statement of Agreed Facts and his portion of the Digital Court Book to Mr Heathcote on 25 November 2020, in advance of the filing due date of 4pm on 27 November 2020.

[21] A revised Statement of Agreed Facts was not provided by Mr Heathcote to Mr Govender until 10am on the day the Statement of Agreed Facts was due to be filed and it appears no copy of the Digital Court Book was provided before the due date for filing the Digital Court Book.

[22] The parties were therefore granted an extension until 4pm Monday 30 November 2020 to file both the Statement of Agreed Facts and the Digital Court Book. The Digital Court Book, incorporating the Statement of Agreed Facts, was eventually filed at 3:58pm on Tuesday 1 December 2020.

[23] On 16 December 2020, Mr Heathcote wrote to Chambers requesting that I review my decision to refuse to grant leave to ERGT to be represented at the Conference. On 17 December 2020 Mr Govender was invited to respond to Mr Heathcote's further submissions in relation to granting leave to ERGT to be represented at the Conference.

[24] I had intended to review the further submissions of both parties and inform the parties of the outcome of my deliberations in advance of the Conference. However, on 17 December 2020 Mr Heathcote filed an appeal against, and sought stay orders in relation to, Chambers email of 26 November 2020.

[25] On 18 December 2020 Mr Govender filed submissions in response to Mr Heathcote's further submissions on the granting of leave.

[26] On 22 December 2020 in the decision of [2020] FWC 6947 I provided my reasons for refusing to grant leave to ERGT to be represented at the Hearing.

[27] On 20 January 2021 in the decision of [2021] FWCFB 268 a Full Bench of the FWC determined that ERGT's application for leave to be represented should be refused.

[28] Shortly before the Conference commenced on 22 January 2021 Mr Heathcote handed my Associate a *Form F54 – Notice that lawyer or paid agent has ceased to act for a person* (**Form 54**) advising that APX Law (of whom Mr Heathcote is the sole Director, sole shareholder and Principal) had ceased to act for ERGT. Mr Heathcote informed my Associate that he had been employed by ERGT and that he would seek to appear at the Conference in the capacity of an employee of ERGT, and therefore he did not require leave to represent ERGT at the Conference.

[29] Given the timing of the filing of the Form 54 and his purported engagement as an employee of ERGT coincided so closely with the handing down of the Full Bench's decision refusing ERGT leave to be represented I became concerned that the arrangement was intended to circumvent the decision of the Full Bench and was contrary to the intention of the FW Act.

I therefore exercised my powers pursuant to section 590 of the FW Act to inform myself, and as such directed both Mr Heathcote and Mr Millar to give evidence under oath as to the history and nature of the arrangements between ERGT, Mr Heathcote and APX Law.

[30] Mr Heathcote's evidence was that on or around November 2020 Mr Heathcote and ERGT developed a strategy in response to my decision not to grant ERGT leave to be represented at the Conference. The plan or strategy was that:[1]

a. ERGT would request that I review my decision to refuse it leave to be represented; and
b. if that request was unsuccessful then ERGT would appeal my decision to refuse it leave to be represented.

[31] Mr Heathcote also says that in December ERGT discussed with him what they could do to avoid the possibility of being denied legal representation, and it was suggested that ERGT could engage Mr Heathcote directly not as a legal practitioner, but as a human resource practitioner. [2]

[32] Mr Heathcote confirmed that such an arrangement was not entered into at that time.

[33] Mr Heathcote says that after the Full Bench handed down its decision on 20 January 2021 declining ERGT leave to be represented at the Conference he met with Mr James Miller ERGT's General Manager – Organisational Performance (**Mr Miller**) for lunch and Mr Miller indicated to him that he wished to engage Mr Heathcote to prepare and articulate the case for ERGT. [3]

[34] At 5.30pm on 21 January 2021 Mr Miller wrote to Mr Heathcote offering him casual employment. Mr Heathcote says that the offer of casual employment was to do 'this kind of work into the future'.[4]

[35] The letter backdates the commencement of employment to December 2020 as follows:

> *"To reflect the discussions, we had back in December 2020 and the work you have carried out for us since that time we have agreed to a commencement date of your employment of December 21st 2020."*

[36] The letter provides that:

> "Your employment will be on a casual basis, as required. As a casual employee, there is no guarantee of ongoing or regular work."

[37] In an email sent at 12.05am on Friday 22 January 2021 (the day of the Hearing) Mr Heathcote accepted the offer of casual employment and stated that:

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[1] Transcript of 22 January 2021 at PN 55

[2] Ibid.

[3] Ibid.

[4] Ibid.

"I think that we've learned that there are problems with the conventional approach to securing the kind of professional help that you sometimes need, but you don't need every day.

…

Your approach has the benefit of obviating the need to seek permission to be represented. You don't need permission for ERGT staff to stand as its advocate.

The added benefit is that you don't have to go through the exercise of applying for permission. That exercise takes time and, when it's done externally, and it adds to cost."

[38] When giving oral evidence Mr Heathcote revealed that:

"For my part I'm better off financially if my law firm represents ERGT"[5]

[39] Mr Heathcote acknowledged during the Conference that: [6]

"The arrangement - and I appreciate what you've said, Deputy President, about this having the appearance of a way of getting around a decision that ERGT didn't like. In one sense that has possibly got some truth to it …"

[40] Mr Miller's evidence was that ERGT had been a client of APX Law for over ten years. When asked whether he proposed to engage Mr Heathcote as a casual employee on any further occasions his evidence was that:

"Well, as I've learned through this process, there are these circumstances in which you're theoretically not allowed to, or being prevented from being represented by an external party. And to me it didn't seem to make sense that I couldn't get external representation of someone who was capable through a law firm or through a solicitor's office, or whoever is skilled and capable of doing that work, yet I would have someone inside my business with that skill and capability and they could come along and represent us anyway."

[41] Mr Heathcote asserts that ERGT have merely identified a skill set which it lacked internally and employed an appropriately skilled person. However, the evidence is that ERGT were acutely aware of the lack of skill set in November and the person whom they wished to provide that skill set. However, no formal offer of employment was made at that time. Rather ERGT continued to engage Mr Heathcote's law firm as it had for the previous decade. It appears that this arrangement may well have continued, but for the failure of the strategy to have the decision to refuse to grant leave reversed.

[42] Given that the evidence is that the engagement as a casual employee is less lucrative for Mr Heathcote, there was certainly no incentive for him to agree to perform the work as a casual employee when if he had been granted leave he could have done so via his firm on a more lucrative basis.

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[5] Ibid PN 82

[6] Ibid PN 55

[43] The issue of an individual who otherwise acts as a barrister or solicitor appearing as an employee of a party was considered by Higgins J, sitting as President of the Commonwealth Court of Conciliation and Arbitration, in *Waterside Workers Federation v Commonwealth Steamship Owners' Association* (1914) 8 CAR 53. The relevant facts of the matter were that Mr Schrader of the law firm Sly and Russell had agreed to be employed by the NSW Stevedoring Company (a party to the proceedings) for £1 per week on the basis that he would whenever requested represent the company before any Wages Board or Court of Arbitration and cross-examine witnesses. Higgins J ruled:

> *"To fancy that he acts for this client - a valuable client, no doubt - for £52 per year, I think rather absurd. Mr Schrader's experience and qualifications would certainly entitle him to more than £1 per week, and I am convinced that but for his legal skill he would not be called 'assistant secretary.' I treat this as an obvious evasion of the section, and I shall have, unwillingly, to decline to hear Mr Schrader."*[7]

[44] A similar issue was dealt with by the High Court in *R v Kelly; Ex parte The Commonwealth Public Service Clerical Association* (1955) 92 CLR 10. The statutory provision under consideration was section 19 of the *Public Service Arbitration Act 1920-1952*, which provided: '*No person or organization shall in any proceeding under this Act be represented by counsel or solicitor*'. The factual issue was whether the general secretary of the Association, who was also a barrister, was permitted to appear for the Association under the section. The Court said:

> *"In Waterside Workers Federation v Commonwealth Steamship Owners' Association (1914) 8 CAR 53, Higgins J as President of the Arbitration Court construed the words of prohibition as not excluding from the operation of the earlier or positive part of the section an officer or employee because he was qualified as a barrister or solicitor. That means that the words of prohibition referred only to representation by counsel or solicitor in his professional capacity. At the same time his Honour made it clear that the relation of the person who is a barrister or solicitor to the party whom he represented before the court as officer or employee must be in truth and reality that of an officer or employee and that a colourable employment or appointment would not do."*[8]

[45] In *Stephen Fitzgerald v Woolworths Limited* [2017] FWC 2797 the Full Bench of the FWC cited these decisions and considered their application to the current statutory representation regime stating as follows:

> *"We have earlier referred to the decisions in Waterside Workers Federation v Commonwealth Steamship Owners' Association 33 and R v Kelly; Ex parte The Commonwealth Public Service Clerical Association34, which support the proposition that contrivances and colourable activities which seek to evade statutory limitations upon the right of appearance of legal practitioners in industrial tribunals should not be permitted. As explained in Warrell v Fair Work Australia, the policy considerations underlying s.596 include that Commission proceedings should be conducted efficiently with as little formality as possible and in a manner that is fair and just. Those policy*

[7] *Waterside Workers Federation v Commonwealth Steamship Owners' Association* (1914) 8 CAR 53, 60 – 61.

[8] *R v Kelly; Ex parte Commonwealth Public Service Clerical Association* 92 CLR 10, 14.

considerations may be vitiated if lawyers are permitted effectively to direct or substantially influence the conduct of proceedings on behalf of a party without permission having first been obtained from the Commission in accordance with s.596. The maxim of statutory interpretation that what is prohibited directly cannot be done indirectly (quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud), applied to s.596, would tell against an overly narrow interpretation and application of the provision which permits its statutory purpose to be defeated or circumvented. The practice of parties using "shadow lawyers" which has apparently developed, to the extent that it involves lawyers engaged by a party in a matter attending and being involved in the conduct of a hearing without actually engaging in oral advocacy, should not we consider be regarded as falling outside the scope of operation of s.596." [footnotes omitted]

[46] The offer of casual employment was not made to Mr Heathcote until after the Full Bench decision refusing leave was handed down. It appears that until that point Mr Heathcote prepared the materials which were filed on behalf of ERGT in his capacity as a Director of APX Law. Indeed, the materials were forward to Chambers from the email of APX Law on an email with a footer containing the business details of APX Law.

[47] Had the offer of casual employment been made to Mr Heathcote before the decision of the Full Bench had been handed down, that would be consistent with the submission that it was a strategy to fill an identified gap. Rather the following evidence suggests that the engagement of Mr Heathcote occurred in order to circumvent the decision to refuse ERGT leave:

a. The evidence is that the engagement of Mr Heathcote as an employee of ERGT on a casual basis was part of a strategy formulated in November 2020 to deal with the refusal of leave.

b. No formal offer of employment was made until after the decision of the Full Bench was issued.

c. The offer of employment is only on a casual basis.

d. The offer of casual employment is on a zero hours basis.

e. The offer of employment provides no guarantee of future work.

f. The offer was only accepted in the early hours of the morning of the day of the Conference.

g. The acceptance of the offer of employment clearly identifies that the purpose of the employment is to overcome the problem of leave not being granted.

h. The employment is at a lower rate of renumeration than Mr Heathcote would otherwise receive.

[48] Based on the evidence before me, as at the date of the Conference, it appeared to me that the appointment of Mr Heathcote as a casual employee on a zero-hour contract the night

before the Conference to present ERGT's case at the Conference was an effort to overcome, work around or subterfuge the limitations on the granting of leave set out in the FW Act.

[49] Section 589 of the FW Act provides that:

> *"589 Procedural and interim decisions*
>
> *(1) The FWC may make decisions as to how, when and where a matter is to be dealt with.*
> *(2) The FWC may make an interim decision in relation to a matter before it.*
> *(3) The FWC may make a decision under this section:*
> *(a) on its own initiative; or*
>
> *(b) on application.*
>
> *(4) This section does not limit the FWC's power to make decision"*

[50] In the exercise of my powers under section 589 of the FW Act, to make decisions as to how a matter is to be dealt I informed Mr Heathcote that he would not be permitted to be heard in relation to the matter at the Conference. Mr Heathcote queried whether he would be permitted to assist Mr Miller. Consistent with the decision in *Stephen Fitzgerald v Woolworths Limited* [2017] FWC 2797, I informed Mr Heathcote that he should not sit at the Bar Table but could remain in the public gallery if he chose to do so. The Conference was adjourned to allow Mr Miller to gather his thoughts and commenced shortly thereafter.

[51] As neither party were legally represented, at the outset of the Conference I outlined to the parties the process for presenting their respective cases.

[52] At the Conference Mr Govender represented himself. He gave written and oral evidence on his own behalf.

[53] At the Conference ERGT was represented by Mr Miller. Mr Miller provided written and oral evidence on behalf of ERGT.

[54] A Digital Court Book containing the submissions, evidence and authorities relied upon by the parties was jointly tendered by the parties and marked as the only exhibit.

[55] Final written submissions were filed on behalf of Mr Govender on 19 February 2021. Final written submissions were filed by ERGT on 5 February 2021.

[56] In reaching my decision, I have considered all the submissions made, and the evidence tendered by the parties even if not expressly referred to in these reasons for decision.

Background

[57] ERGT is a safety and emergency response training provider employing approximately 200 employees. ERGT has training facilities in Perth, Melbourne and Darwin. ERGT also run

training centres for Esso Australia and the Australian Defence Force. ERGT administers their services from offices located in Jandakot, Western Australia.[9]

[58] Mr Govender is a qualified chartered accountant.[10] He commenced employment as an accountant with ERGT on 29 May 2012 reporting to the Financial Controller. At the time of his appointment the Financial Controller was Ms Sophie Mickel (**Ms Mickel**).

[59] Ms Mickel left the business in 2018 and was eventually replaced by Mr Paul Cutler (**Mr Cutler**).[11]

[60] Mr Govender performed duties of the Financial Controller during the period between the departure of Ms Mickel and the appointment of Mr Cutler.[12]

[61] Mr Govender says that he approached Mr Miller about applying for the role of Financial Controller before Mr Cutler was appointed but was denied the opportunity to apply for or be trained for the role.[13]

[62] Around five years ago Mr Govender was asked to take responsibility for the payroll function, and subsequently did. ERGT subsequently employed a payroll officer on a casual basis around September 2018 and responsibility for the performance of payroll duties were removed from Mr Govender. Mr Miller says that Mr Cutler informed him that the payroll duties were removed from Mr Govender because Mr Govender had indicated that he did not want to perform payroll functions. To the contrary Mr Govender says that the responsibilities were only ever allocated to him on a temporary basis and were removed as intended. Mr Cutler did not give evidence at the Conference.

[63] It is not entirely clear when, however the parties agree that at some point in his employment Mr Govender expressed concern that his rate of pay was not appropriate. ERGT commissioned an external evaluation of the role. Mr Govender says that he was satisfied with the outcome of the evaluation and the issue was ‘put to rest’.[14]

[64] Due to growth in the business the ERGT Board commissioned the accounting firm McMillans Pty Ltd (**McMillans**) to conduct an independent review of ERGT’s financial and reporting arrangements.[15]

[65] McMillans completed the review in late 2019 and recommended that ERGT:[16]

a. simplify some processes through automation in administrative areas;

b. change the payroll system and accounting system;

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[9] Digital Court Book, 38 – 40 (*‘DCB’*).

[10] Ibid 26.

[11] Ibid 38 – 40.

[12] Ibid 11.

[13] Ibid 11.

[14] Ibid 12.

[15] Ibid 38 – 40.

[16] Ibid.

c. introduce analysis reporting tools like Power BI and Futurli; and

d. restructure staffing within the Accounts department.

[66] Mr Miller was responsible for implementing McMillans' recommendations on behalf of the Senior Leadership Team. The simplification of processes, changes to software systems and the introduction of reporting tools were implemented first. [17]

[67] Mr Miller then restructured the accounting department by removing the positions of Finance Controller and Accountant and replacing them with the positions of: [18]

a. Finance Manager; and

b. Book Keeper/Finance Co-Ordinator.

[68] Mr Cutler was informed that his role of Finance Controller was to be made redundant and he was offered a short-term project role.

[69] Mr Miller says he considered whether Mr Govender would be suitable for either of the new roles and decided that he was not. Mr Miller's view was that Mr Govender did not have the experience or ability to perform in a leadership role, was not good at building cross functional relationships and did not have sufficient analytical skills. [19]

[70] Mr Miller says that he knew that Mr Govender was not interested in a bookkeeping position, which included responsibility for payroll and had a salary $10,000 less than his current rate of pay. Mr Miller says that he knew this because Mr Govender had previously complained that he was not being paid enough and indicated that he did not want to take responsibility for payroll. [20]

[71] On Wednesday 12 August 2020 Mr Cutler and Mr Miller met with Mr Govender. At the meeting Mr Miller informed Mr Govender that, as a result of the review, Mr Govender's duties were to be distributed between two new roles, Financial Controller and Book Keeper, and that Mr Govender's position as Accountant was being made redundant. [21]

[72] Mr Miller says that Mr Govender was shocked and upset and indicated that he wanted to leave the business immediately without working his notice period. Mr Miller asked Mr Govender if he would help with the handover and continue working for the duration of his notice period. Mr Miller allowed Mr Govender to take the rest of the day off to consider this request. [22]

[73] Mr Govender did not attend the workplace on Thursday 13 August 2020.[23]

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[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] Ibid 25, 38 – 40.

[22] Ibid 38 – 40.

[23] Ibid 11.

[74] Mr Miller says that by Friday 14 August 2020, he had formed the view that Mr Govender 'wasn't in the headspace to continue working his notice period' and issued a letter confirming the termination of Mr Miller's employment would be effective from 14 August 2020.[24]

[75] Mr Govender submits that his dismissal was unfair and seeks an order for reinstatement plus continuity of service and backpay.[25]

Is Mr Govender protected from unfair dismissal?

[76] An order for reinstatement or compensation may only be issued if Mr Govender was unfairly dismissed and Mr Govender was protected from unfair dismissal at the time of his dismissal.

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

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

b. one or more of the following apply:

- a modern award covers the person;
- an enterprise agreement applies to the person in relation to the employment;
- the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the *Fair Work Regulations 2009* (Cth) (**FW Regulations**), is less than the high income threshold.

[78] There is no dispute, and I am satisfied, that ERGT is a national system employer with more than fourteen employees. ERGT is not, therefore, a small business for the purposes of the FW Act. The minimum employment period if an employer is not a small business is six months. It is not in dispute, and I find, that Mr Govender was an employee who commenced employment with ERGT on 29 May 2012 and was dismissed on 14 August 2020.[26] There is no dispute, and I am satisfied, Mr Govender has completed the minimum employment period.

[79] The high income threshold as at the date the Application was filed was $153,600. There is no dispute, and I am satisfied, that Mr Govender's annual rate of earnings, and such other amounts worked out in relation to him in accordance with the FW Regulations was $83,150.88[27] and that this amount is less than the high income threshold.

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[24] Ibid 38 – 40.

[25] Ibid 26.

[26] Ibid 11.

[27] Ibid 7.

[80] In addition, the *Wellparks Holdings Pty Ltd Collective Agreement 2009* (**Agreement**) applied to Mr Govender's employment with ERGT.

[81] Consequently, I am satisfied that Mr Govender was protected from unfair dismissal.

Was the Application made within the period required?

[82] Section 394(2) of the FW Act requires that the Application be made within twenty one days after the dismissal took effect.

[83] It is not disputed, and I find, that Mr Govender was dismissed from his employment on 14 August 2020 and made the application on 1 September 2020. I am therefore satisfied that the Application was made within the period required in section 394(2) of the FW Act.

Was Mr Govender unfairly dismissed?

[84] Section 385 of the FW Act provides that a person has been unfairly dismissed if the FWC is satisfied that:

a. the person has been dismissed;

b. the dismissal was harsh, unjust or unreasonable;

c. the dismissal was not consistent with the Small Business Fair Dismissal Code (**SBFD Code**); and

d. the dismissal was not a case of genuine redundancy.

Was Mr Govender dismissed?

[85] Section 386(1) of the FW Act provides that a person has been dismissed if the person's employment was terminated at the employer's initiative or the person resigned from their employment but was forced to do so because of conduct, or a course of conduct, engaged in by their employer.

[86] Section 386(2) of the FW Act sets out circumstances where an employee has not been dismissed, none of which are presently relevant.

[87] There was no dispute, and I find, that Mr Govender's employment with ERGT was terminated at the initiative of ERGT. I am therefore satisfied that Mr Govender has been dismissed within the meaning of section 385 of the FW Act.

Was Mr Govender's dismissal consistent with the Small Business Fair Dismissal Code?

[88] Section 388 of the FW Act provides that a person's dismissal was consistent with the SBFD Code if:

a. immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and

b. the employer complied with the SBFD Code in relation to the dismissal.

[89] It was not in dispute, and I find, that ERGT was not a small business employer within the meaning of section 23 of the FW Act at the relevant time, having in excess of fourteen employees.

[90] As ERGT is not a small business employer within the meaning of the FW Act, I am therefore satisfied that the SBFD Code does not apply to Mr Govender's dismissal.

Was Mr Govender's dismissal a case of genuine redundancy?

[91] ERGT submits that Mr Govender's dismissal was a case of genuine redundancy. Mr Govender disputes this.

[92] Section 389 of the FW Act defines the meaning of 'genuine redundancy' as follows:

> ***"389 Meaning of genuine redundancy***
>
> *(1) A person's dismissal was a case of genuine redundancy if:*
>
> *(a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and*
>
> *(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.*
>
> *(2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:*
>
> *(a) the employer's enterprise; or*
>
> *(b) the enterprise of an associated entity of the employer."*

Was Mr Govender's job no longer required to be performed?

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

[94] Mr Govender submits that the FWC cannot be satisfied that there was no operational requirement for his job to no longer be performed because the duties which he performed were and are still required by the business to be performed.

[95] ERGT submits that Mr Govender's role of Accountant was no longer required to be performed by anyone for operational reasons. Those operational reasons were that the duties

of Mr Govender's position were redistributed between the positions of Book Keeper and Financial Controller to better suit the needs of the organisation.

[96] The FW Act does not define the term 'operational requirements'. It is a broad term that permits consideration of many matters, including the state of the market in which the business operates and the application of good management to the business.[28] Some examples of changes in operational requirements include a downturn in trade that reduces the number of employees required and the employer restructuring the business to improve efficiency, including the redistribution of tasks done by a particular person between several other employees, thus resulting in the persons job no longer existing.[29]

[97] A job involves 'a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employer's organisation, to a particular employee"' Where there has been a reorganisation or redistribution of duties, the question is whether the employee has any duties left to discharge. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant.[30]

[98] An employee may still be genuinely made redundant when there are aspects of the employee's duties still being performed by other employees.[31] The test is whether the previous job has survived the restructure or downsizing, rather than a question as to whether the duties have survived in some form.[32]

[99] The onus is on the employer to prove that, on the balance of probabilities, the redundancy was due to changes in operational requirements.[33]

[100] I am satisfied that Mr Govender's role as Accountant was no longer required by ERGT to be performed by anyone because:

a. the duties of his position were redistributed between the positions of Book Keeper and Financial Controller to better suit the needs of the organisation; and

b. other duties previously performed by Mr Govender were automated or no longer required.

[101] I am therefore satisfied ERGT no longer required Mr Govender's role as Accountant to be performed by anyone because of changes in the operational requirements of ERGT's enterprise.

Did ERGT comply with any consultation obligations?

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

[29] Explanatory Memorandum, Fair Work Bill 2008, [1548].

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

[31] *Dibb v Commissioner of Taxation* [2004] FCAFC 126, [43] – [44].

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

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

[102] At the time of Mr Govender's dismissal the Agreement applied to his employment with ERGT.

[103] The Agreement does not contain any obligation for ERGT to consult with affected employees before making employees redundant.

Was redeployment reasonable in all the circumstances?

[104] For the purposes of section 389(2) of the FW Act the FWC must consider 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 employee. There must be an appropriate evidentiary basis for such a finding.[34]

[105] The word redeployed in section 389(2) of the Act should be given its ordinary and natural meaning, which is to transfer to another job, task or function.[35]

[106] ERGT submits that redeployment was not reasonable in the circumstances because there were no roles for Mr Govender in the restructured business or any related entities. Mr Govender disputes this.

[107] ERGT says that there were only two roles to which Mr Govender could be redeployed. Either the newly created Financial Controller position or the role of Book Keeper.

[108] ERGT submitted that it was reasonable for it not to offer Mr Govender the Financial Controller role because Mr Govender[36]:

a. was not qualified for that role;

b. lacked the leadership qualities required for that role; and

c. had demonstrated an unwillingness and inability to perform in a senior role.

[109] ERGT further submitted that it was reasonable for it not to offer Mr Govender the Book Keeper role because Mr Govender:[37]

a. never expressed an interest in that role;

b. had previously complained he was not paid enough, and he was therefore unlikely to accept a $10,000 pay cut; and

c. was not willing to perform the duties that were integral to the role.

[110] Mr Miller's evidence is that prior to the meeting on 12 August 2020 he considered whether Mr Govender would be suitable for either of these roles and decided that he was not. Mr Miller's view was that Mr Govender did not have the experience or ability to perform in a

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[34] *Technical and Further Education Commission T/A TAFE NSW v Pykett* [2014] FWCFB 714

[35] Ibid [25].

[36] *DCB* (n 9), 29.

[37] Ibid.

leadership role.[38] Mr Miller also said that Mr Govender had previously indicated a lack of willingness to perform certain duties and a tendency to procrastinate in performing his duties. Mr Miller therefore considered Mr Govender was unsuitable for the role of Financial Controller.[39]

[111] While ERGT also submitted that Mr Govender was not qualified for the role of Financial Controller. They did not lead any evidence in this regard and this was not directly put to Mr Govender in cross examination.

[112] Mr Miller says that he knew that Mr Govender would not be interested in the Book Keeper role because it included responsibility for payroll and he was aware, from Mr Cutler, that Mr Govender had previously indicated that he was not interested in performing payroll duties.[40] Mr Miller also says that Mr Govender had previously indicated that his career aspirations were much higher than his current role.[41]

[113] Mr Miller says that he also knew that Mr Govender would not be interested in the book keeping position because the role of Book Keeper attracted a salary of $10,000 less than Mr Govender's current rate of pay and Mr Govender had previously complained that he was not being paid enough in his position as Accountant.[42] Mr Miller concedes that he never asked Mr Govender whether he would accept a pay cut.[43]

[114] Mr Govender asserts that he has the necessary qualifications, skills and experience to perform either of the Financial Controller or Bookkeeper roles.[44]

[115] In relation to the role of Financial Controller, Mr Govender points out that he performed duties of the Finance Manager around 18 months earlier when Ms Mickel became unwell. He says that for a period of eight months he supervised the Finance team, while still meeting month-end and year-end deadlines.[45]

[116] Mr Govender acknowledges that he had previously expressed concern that his rate of pay for his role as an Accountant was not appropriate. However, he says that ERGT commissioned an external evaluation of the role which he was satisfied with and the issue had been 'put to rest'. He says that it is therefore untrue to say that he was dissatisfied with his salary.[46] Relevantly he also says that in April 2020 he, as well as other ERGT employees, agreed to a 15% decrease in salary to assist ERGT weather the impact of the COVID 19 Pandemic.[47]

[117] While Mr Govender concedes that the role of Book Keeper would have been a demotion, he says that given the impact of the COVID 19 Pandemic on job opportunities, that

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[38] Ibid 38 – 40.

[39] Transcript of 22 January 2021 at PN 172.

[40] *DCB* (n 9), 38 – 40.

[41] Transcript of 22 January 2021 at PN 173.

[42] *DCB* (n 9), 38 – 40.

[43] Transcript of 22 January 2021 at PN 296.

[44] *DCB* (n 9), 23.

[45] Ibid.

[46] Ibid 12.

[47] Transcript of 22 January 2021 at PN 289.

had he been offered the choice between a pay cut and dismissal he would have accepted the reduction in pay associated with the appointment to the role of Book Keeper rather than face unemployment.[48]

[118] Mr Govender rejects the assertion that he would have declined the role of Book Keeper because its inherent duties included responsibility for payroll. Mr Govender points out that he was never provided with a job description for the role in order for him to determine whether or not he was prepared to perform the duties required by the role. He disputes whether in fact the Book Keeper role would have included any payroll functions given that ERGT had been separately advertising externally and internally for a payroll officer.[49] He also points out that he performed payroll functions for at least five years and says that he did so on the understanding that he would do so on a temporary basis. He says that the removal of the payroll functions from him was consistent with the plans of the business rather than because he was incapable or unwilling to perform the duties.[50]

[119] In determining whether redeployment would have been reasonable a number of matters may be relevant, including[51]:

a. whether there exists a job or position or other work to which the employee can be redeployed;

b. the nature of any available position;

c. qualifications required to perform the job;

d. the employee's skills, qualifications and experience;

e. the location of the job in relation to the employee's residence; and

f. the remuneration which is offered.

[120] For redployment, the employee should have the skills and competence required to perform the role to the required standard either immediately or within a reasonable period of retraining.[52]

[121] On the evidence before me it is unclear what the precise duties of the new roles were to be. No job description, job advertisement or contract of employment was tendered for either role. Limited oral evidence was provided to this effect.

[122] The evidence of Mr Miller appears to suggest that the scope of the positions are still evolving. For example, he explained that the recommendation by McMillans to create a new role of Book Keeper was later abandoned in favour of creating two positions entitled Finance Co-Ordinators. ERGT filled one of those roles with an existing employee who had previously held the position of Accounts Payable and the other with the individual who was previously

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[48] *DCB* (n 9), 13, 23 – 24.

[49] Ibid 23; Transcript of 22 January 2021 at PN 369.

[50] Transcript of 22 January 2021 at PN 243.

[51] [2020] FWC 5432,[36].

[52] Ulan Coal 2 at [28] & [34] – I'm not sure what case you're talking about here

engaged as a casual payroll officer with a proposal that both would be cross trained so that they could perform each others duties.[53]

[123] Given the lack of evidence with respect to the precise duties of the potential redeployment roles there is limited evidence to support ERGT's assertion that Mr Govender did not possess the necessary skills, qualifications or experience to perform the new roles.

[124] There appears little doubt that Mr Govender would have accepted the role of Financial Controller had it been offered to him. He had previously performed duties of the Finance Manager and had previously expressed to Mr Miller a desire to progress in his career.

[125] The evidence is that Mr Govender is a chartered accountant. ERGT have not demonstrated how Mr Govender was unqualified for the role Financial Controller. Mr Miller says that concerns existed as to Mr Govender's relationship building skills and his analytical skills. There is limited objective evidence tendered as to how these deficiencies manifested themselves in the workplace, there was only Mr Millers assertion that they did. Mr Govender's direct supervisor, Mr Cutler, did not give evidence as to Mr Govender's performance or his assessment of Mr Govender's skill set based on his direct experience with Mr Govender. No performance reviews identifying any deficits in Mr Govender's skills or performance were tendered. No job description was provided for the role of Financial Controller against which Mr Govender's skill set might be compared.

[126] However, even in the absence of a position description, it appears to be undisputed that the role of Financial Controller would have been a promotion from Mr Govender's existing position and likely to require enhanced analytical and relationship building skills. Evidence that Mr Miller gave in relation to the unheeded guidance he had given Mr Govender to proactively improve his standing with stakeholders suggested that Mr Govender might not have responded to coaching in a timely manner. The limited evidence before me narrowly supports a finding that redeployment to the role of Financial Controller would not have been reasonable on the grounds that Mr Govender did not possess the necessary skills and was some way off acquiring them, even with assistance and training.

[127] There is no evidence to suggest that Mr Govender did not have the necessary skills, experience and qualifications to perform the Book Keeper role. He was not offered this role solely because of assumptions made by Mr Miller about Mr Govender's preferences.[54] I am not satisfied that these assumptions were properly founded.

[128] The evidence suggests that Mr Govender would have been likely to be prepared to accept a salary reduction to secure his employment given that he accepted a temporary salary reduction in response to the difficulties the company was facing during the early stages of the COVID 19 Pandemic downturn. Furthermore, the evidence of Mr Govender that ERGT were separately advertising for a payroll officer at the time he was made redundant brings into doubt ERGT's assertion that the key aspect of the Financial Coordinator's role would have been payroll duties.

[129] ERGT submit that Mr Govender should have applied for the role of Book Keeper or Financial Controller or that he should have disputed that he was unsuitable for the role at the

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[53] Transcript of 22 January 2021 at PN 149 – PN 166, PN 233.

[54] Ibid PN 296.

meeting held on 12 August 2020. The evidence suggests that the conclusion that he was considered unsuitable for either role was presented to Mr Govender as a fait accompli at the meeting held on 12 August 2020, and that in fact he was given no real opportunity to express an interest in the roles or respond to the reasons for which ERGT considered redeployment was not reasonable. For example Mr Miller admits that he never asked Mr Govender if he would accept the salary reduction associated with appointment to the role of Book Keeper he merely assumed that to be the case. In fact the evidence was that there was no discussion as to the salary which would attach to either position.

[130] In the absence of genuine consultation with Mr Govender on or before he was retrenched, Mr Miller had no basis to presume that his views about Mr Govender's preferences would remain true in the face of Mr Govender confronting the alternative of the unemployment queues in the midst of a worldwide pandemic.

[131] As cautioned by Commissioner Ryan in *Iryna Margolina v Jenny Craig Weight Loss Centres Pty Ltd* [2011] FWA 5215 at [30]:

> *"Prudence would suggest to any employer that an employer should not presume to know how a redundant employee will react to an offer of redeployment to a lower paid position. Prudence would also suggest to an employer that even if the employer has no modern award or enterprise agreement obligation to consult an employee about a redundancy that the employer should consult with the employee. It appears that Prudence was not employed by the Respondent."*

[132] In the circumstances, I am satisfied that it would have been reasonable for ERGT to offer Mr Govender redeployment in the role of Book Keeper, notwithstanding the duties of the role and its lower renumeration. In the prevailing economic environment and in light of his prior decision to accept a temporary pay cut to retain employment I believe it probable that Mr Govender would have accepted the appointment.

[133] In light of ERGTs failure to offer Mr Govender the role of Book Keeper, I find that Mr Govender's dismissal was not a case of genuine redundancy within the meaning of section 389 of the FW Act.

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

Was the dismissal harsh, unjust or unreasonable?

[135] Having been satisfied of sections 385(a),(c) -(d) of the FW Act, I must consider whether I am satisfied the dismissal was harsh, unjust or unreasonable.

[136] The ambit of the conduct which may fall within the phrase 'harsh, unjust or unreasonable' was explained in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 465 by McHugh and Gummow JJ as follows:

> *".... It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably*

> *have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."*

[137] Section 387 of the FW Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

a. whether there was a valid reason for the dismissal related to the applicant's capacity or conduct (including its effect on the safety and welfare of other employees); and

b. whether the applicant was notified of that reason; and

c. whether the applicant was given an opportunity to respond to any reason related to the capacity or conduct of the applicant; and

d. any unreasonable refusal by the employer to allow the applicant to have a support person present to assist at any discussions relating to dismissal; and

e. if the dismissal related to unsatisfactory performance by the applicant – whether the applicant had been warned about that unsatisfactory performance before the dismissal; and

f. the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

g. the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

h. any other matters that the FWC considers relevant.

[138] Normally I would be under a duty to consider each of these criteria in reaching my conclusion.[55] However, being satisfied that dismissal occurred because of a change in the operational requirements of ERGT, the consideration of the matters specified in sections 387(a), (b) and (c) are neutral, unless in the circumstances another valid reason is identified. No other valid reason was identified by ERGT.[56]

[139] However, for completeness I set out my consideration of each below.

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

[140] In order to be a valid reason, the reason for the dismissal should be "sound, defensible or well founded" and should not be 'capricious, fanciful, spiteful or prejudiced'.[57] However,

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

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

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

the FWC will not stand in the shoes of the employer and determine what the FWC would do if it was in the position of the employer.[58]

[141] Mr Govender was dismissed because of changes to the operational requirements of ERGT, not because of his capacity or conduct. I have therefore regarded this as a neutral factor in my consideration as to whether Mr Govender's dismissal was harsh, unjust or unreasonable.

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

[142] Notification of a valid reason for termination must be given to an employee protected from unfair dismissal before the decision is made to terminate their employment,[59] and done so in explicit,[60] plain and clear terms.[61]

[143] In *Crozier v Palazzo Corporation Pty Ltd*[62] a Full Bench of the Australian Industrial Relations Commission dealing with similar provision of the *Workplace Relations FW Act 1996* stated the following:[63]

> *"**[73]** As a matter of logic procedural fairness would require that an employee be notified of a valid reason for their termination before any decision is taken to terminate their employment in order to provide them with an opportunity to respond to the reason identified. Section 170(3)(b) and (c) would have very little (if any) practical effect if it was sufficient to notify employees and give them an opportunity to respond after a decision had been taken to terminate their employment. Much like shutting the stable door after the horse has bolted."*

[144] Mr Govender was notified on Wednesday 12 August 2020, at a meeting with Mr Cutler and Mr Miller, that his position was redundant and that he would be dismissed [64] On 14 August 2020 Mr Govender was issued with a letter confirming the termination of his employment by way of redundancy, effective from 14 August 2020.[65]

[145] I am satisfied that Mr Govender was notified of the reasons for his dismissal in explicit, plain and clear terms.

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

[146] An employee protected from unfair dismissal should be provided with an opportunity to respond to any reason for their dismissal relating to their conduct or capacity. An

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

[59] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151 [73].

[60] *Previsic v Australian Quarantine Inspection Services* Print Q3730 (AIRC, Holmes C, 6 October 1998).

[61] Ibid.

[62] (2000) 98 IR 137.

[63] Ibid 151 [73].

[64] *DCB* (n 9), 25, 38 – 40.

[65] Ibid 38 – 40.

opportunity to respond is to be provided before a decision is taken to terminate the employee's employment.[66]

[147] The opportunity to respond does not require formality and this factor is to be applied in a common sense way to ensure the employee is treated fairly.[67] Where the employee is aware of the precise nature of the employer's concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements.[68]

[148] Mr Govender was not provided with an opportunity to respond to any reason for his dismissal related to his capacity or conduct at the time of his dismissal, because ERGT believed that it was a case of genuine redundancy and they were not required to provide such an opportunity.

[149] I have therefore regarded this as a neutral factor in my consideration as to whether Mr Govender's dismissal was harsh, unjust or unreasonable

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

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

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

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

[152] Mr Govender says that he was not informed of the 12 August 2020 meeting in advance and that therefore he was denied the opportunity to have a support person present.[69]

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

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

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[66] *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137, 151 [75].

[67] *Royal Melbourne Institute of Technology v Asher* (2010) 194 IR 1, 14 – 15 [26] quoting Wilcox CJ in *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7.

[68] *Gibson v Bosmac Pty Ltd* (1995) 60 IR 1, 7 (Wilcox CJ).

[69] *DCB* (n 9) 25.

> *employee the opportunity to have a support person present when they are considering dismissing them."*[70]

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

[155] I therefore find ERGT did not unreasonably refuse to allow Mr Govender to have a support person present at discussions relating to his dismissal.

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

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

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

[157] Sections 387(f) and (g) of the FW Act look at factors that might have impacted on the ability of the employer to follow a fair process in effecting a dismissal. Whether the employer was a small business or a larger employer will be relevant. For example, a small business may not have the same resources on hand as a larger business which may employ managers or specialist human resources staff. Where an employer is substantial and has dedicated human resources personnel and access to legal advice, there will likely be no reason for it not to follow fair procedures.[71]

[158] ERGT employs 200 employees in locations in several states across Australia. Mr Miller, according to his witness statement, has a Bachelor of Business in Human Resource Management and Industrial Relations from Charles Stuart University. He has been part of the senior management team of ERGT since 2014.

[159] ERGT is not a small business and did not lack dedicated human resource management specialists or expertise. According to Mr Miller, ERGT has had an on-going relationship with APX Law for at least a decade, so presumably ERGT also had access to external legal advice.

[160] Neither the size of ERGT or the absence of human resource expertise provide an explanation for the deficiencies in the process which was followed in Mr Govender's dismissal.

[161] I therefore consider this factor is a neutral consideration in determination whether the dismissal was harsh, unjust or unreasonable.

What other matters are relevant?

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[71] *Jetstar v Meetson-Lemkes* (2013) 239 IR 1, 21 – 22 [68].

[71] *Jetstar v Meetson-Lemkes* (2013) 239 IR 1, 21 – 22 [68].

[162] Section 387(h) requires the FWC to take into account any other matters that the FWC considers relevant. Although section 387 identifies matters that the FWC must take into account in deciding how to exercise its discretion, the discretion conferred in section 387(h) is otherwise expressed in general, unqualified terms. Of course, the discretion conferred must be exercised judicially, that is to say not arbitrarily, capriciously or so as to frustrate the legislative purpose. Further, the discretion is also confined by the subject matter, legislative context and purpose.[72]

[163] In exercising the discretion, guidance can be drawn from section 381 of the FW Act. Section 381 provides that:

> ***"381 Object of this Part***
>
> *(1) The object of this Part is:*
>
> *(a) to establish a framework for dealing with unfair dismissal that balances:*
>
> *(i) the needs of business (including small business); and*
>
> *(ii) the needs of employees; and*
>
> *(b) to establish procedures for dealing with unfair dismissal that:*
>
> *(i) are quick, flexible and informal; and*
>
> *(ii) address the needs of employers and employees; and*
>
> *(c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.*
>
> *(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.*
>
> *Note: The expression "fair go all round" was used by Sheldon J in in re Loty and Holloway v Australian Workers' Union [1971] AR (NSW) 95"*

[164] ERGT submit that I should take into account that Mr Govender was dismissed because ERGT believed that it was not reasonable to redeploy him. For the reasons outlined earlier in this decision I am not satisfied that this conclusion was reasonable in the absence of putting each of those matters directly to Mr Govender and providing him with a genuine opportunity to respond before determining that it was not reasonable to redeploy him.

[165] Mr Govender submits that I should take into account that:

a. He has the necessary qualifications, skills and experience to perform either the Finance Manager or Book Keeper roles;

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[72] [2020] FWC 6475.

b. He performed duties of the Finance Manager for around eight months when Ms Mickel became unwell and payroll duties for a period of five years;

c. No clear evidence of the precise duties of the new roles was provided to him before his dismissal or in the proceedings to allow him to demonstrate that ERGT's misgivings about his suitability for the role were misplaced;

d. Concerns about his salary had been resolved and he had recently demonstrated a willingness to accept a salary reduction to preserve his employment; and

e. Given the impact of the COVID-19 pandemic on job opportunities he would have accepted the reduction in pay and change in duties associated with appointment to the role of Book Keeper rather than face unemployment.

[166] If Mr Govender had a clear understanding of what the new roles involved and a genuine opportunity to address ERGT's concerns about his suitability for redeployment he may not have convinced ERGT of his suitability for redeployment to the role of Financial Controller. However, on the balance of the evidence before me, I am satisfied that Mr Govender did have the necessary qualifications, skills and experience to perform the Book Keeper role and in the uncertain circumstances which existed at the time of his dismissal would have accepted redeployment to the Book Keeper role rather than face the unemployment queue in the midst of a pandemic.

[167] Having considered all of the other matters raised by the parties, I have reached the view that these matters weigh in favour of a finding that Mr Govender's dismissal was unfair.

Conclusion

[168] I am satisfied that Mr Govender's dismissal was not a case of genuine redundancy within the meaning of section 389 of the FW Act because reasonable opportunities for his redeployment existed but were not properly explored.

[169] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that, overall, the dismissal of Mr Govender was unreasonable because he could have been redeployed, and harsh because of the impact of losing his employment in the midst of a pandemic. Accordingly, I find that Mr Govender's dismissal was unfair within the meaning of the FW Act.

Remedy

[170] Having found that Mr Govender was protected from unfair dismissal, and that his dismissal was harsh and unreasonable, it is necessary to consider what, if any, remedy should be granted to him.

[171] Mr Govender has sought the remedy of reinstatement. Firstly, the position in which Mr Govender was employed immediately before his dismissal no longer exists in that the duties have been restructured and now reside in roles filled by other employees. There is no evidence before me that there are any other vacant positions with terms and conditions of employment that are no less favourable than those which applied to Mr Govender at the time

of his dismissal to which he might be redeployed. I am therefore satisfied that an order for reinstatement is not appropriate.

[172] Section 390(3)(b) of the FW Act provides that the FWC may only issue an order for compensation if it is appropriate, in all of the circumstances. A compensation remedy is designed to compensate an unfairly dismissed employee in lieu of reinstatement for losses reasonably attributable to the unfair dismissal, within the bounds of the statutory cap on compensation.[73]

[173] Having regard to all of the circumstances of the case, including the fact that Mr Govender has suffered financial loss as a result of his unfair dismissal, I consider that an order for payment of compensation to him is appropriate. It is necessary therefore for me to assess the amount of compensation that should be ordered to be paid to Mr Govender. In assessing compensation, I am required by section 392(2) of the FW Act to take into account all the circumstances of the case including the specific matters identified in paragraphs (a) to (g) of section 392(2) of the FW Act.

[174] I will use the established methodology for assessing compensation in unfair dismissal cases which was set out in *Sprigg v Paul Licensed Festival Supermarket,*[74] which has been applied and elaborated upon in the context of the current FW Act by Full Benches of the FWC in a number of cases.[75] The approach to calculating compensation in accordance with these authorities is as follows:

> Step 1 - Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment (remuneration lost).
>
> Step 2 - Deduct monies earned since termination.
>
> Step 3 - Discount the remaining amount for contingencies.
>
> Step 4 - Calculate the impact of taxation to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.
>
> Step 5 - Apply the legislative cap on compensation.

What remuneration would Mr Govender have received, or would have been likely to received, if he had not been dismissed (s 392(2)(c))?

[175] Like all calculations of damages or compensation there is an element of speculation in determining an employee’s anticipated period of employment, because the task involves an assessment of what would have been likely to happen in the future had the employee not been dismissed.

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[73] *Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015 FWCFB 3512, 17.

[74] (1998) 88 IR 21.

[75] *Tabro Meat Pty Ltd v Heffernan* [2011] FWAFB 1080; *Read v Golden Square Child Care Centre* [2013] FWCFB 762; *Bowden v Ottrey Homes Cobram* [2013] FWCFB 431.

[176] The position, I have determined, it would have been reasonable, in all of the circumstances, for ERGT to have redeployed Mr Govender into was the role of Book Keeper. The evidence was that the Book Keeper position would be paid an annual salary of $10,000 less than the role of Accountant which according to ERGT's *Form F3 – Employer Response to Unfair Dismissal Application*[76] attracted a salary of $83,150.88 per annum.

[177] The evidence is that a number of employees including Mr Govender agreed to a temporary salary reduction to assist ERGT deal with the impact of COVID. The period for which the temporary salary reduction applied or continues to apply is not in evidence before me. For the purposes of calculating compensation I have presumed that the period to which Mr Govender agreed for a salary reduction in his role as Accountant he would have agreed applied to the role of Book Keeper.

[178] The remuneration Mr Govender would have been likely to have received if he had not been dismissed is therefore $73,150.88 per annum less the temporary salary cut agreed to assist ERGT deal with the impact of COVID.

[179] I am satisfied, on the balance of probabilities, that if Mr Govender had not been dismissed on the grounds of redundancy on 14 August 2020, his employment would have continued with ERGT for another six months. My reasons are as follows:

- Mr Govender had been employed by ERGT since 2012.
- Notwithstanding evidence that from time to time he viewed job search sites for other roles, given he had not successfully applied for any other roles in the past, it appears unlikely that he would have left employment with ERGT in the short term unless he secured a more senior or more lucrative role as an Accountant elsewhere.
- His evidence at the Conference was that despite his best endeavours he has been unable to secure a role as an Accountant since his dismissal.
- The current uncertainty in the business sector and the negative impact of that uncertainty on the state of the job market is likely to persist for at least six months from the anniversary of his dismissal.

What remuneration has Mr Govender earned (s392(2)(e)) or is he reasonably likely to earn since his dismissal? (s 392(2)(f))

[180] Upon termination ERGT paid Mr Govender the equivalent of eighteen weeks' pay in the form of 14 weeks severance pay, in accordance with clause 41.3 of the Agreement, and four weeks pay in lieu of notice, pursuant to clause 40.1 of the Agreement. This payment was made at the rate Mr Govender was receiving in his position as an Accountant. In monetary terms, these payments amount to $40,427.03 in total.

[181] I should deduct from the amount of compensation the four weeks' notice payment paid to Mr Govender in the amount of $8983.78.

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[76] *DCB* (n 9), 7.

[182] I will not deduct the fourteen weeks' severance payment paid to Mr Govender. Severance payments are not remuneration. Severance payments serve a different purpose. The purpose of severance pay is to compensate an employee for matters such as the trauma associated with the termination of employment, the loss of non-transferable credits such as sick leave, the loss of security and seniority, lower job satisfaction and diminished social status and conditions.[77]

What is the effect of an order for compensation on the viability of ERGT? (s 392(2)(a))

[183] No submission was made on behalf of ERGT that any particular amount of compensation would affect the viability of ERGT's enterprise. My view is that no adjustment is required on this account.

What impact, if any, should Mr Govender's length of service have? (s 392(2)(b))

[184] Mr Govender was employed by ERGT for more than eight years. My view is that Mr Govender's period of service with ERGT does not justify any adjustment to the amount of compensation.

What efforts has Mr Govender made to mitigate his loss? (s 392(2)(d))

[185] Noting that Mr Govender was paid four weeks' notice and fourteen weeks' redundancy totalling an eighteen week period from the date of his dismissal, Mr Govender did not suffer any economic loss.

[186] The evidence of Mr Govender is that he has made efforts to obtain alternative employment following his dismissal on 14 August 2020. Not unsurprisingly in the current environment, Mr Govender has not yet been able to obtain alternative employment.

Are there any other relevant matters? (s 392(2)(g))

[187] It is necessary to consider whether to discount the remaining amount for "contingencies". This step is a means of taking into account the possibility that the occurrence of contingencies which might have brought some change in his earning capacity or earnings.[78] Positive considerations which might have resulted in advancement and increased earnings are also taken into account.

[188] Any discount for contingencies should only be applied in respect to an anticipated period of employment that is not actually known, that is a period that is prospective to the date of the decision. Namely the period between the date of this decision until 14 August 2021.

[189] In all of the circumstances, my view is that it is appropriate to apply a discount to the amount of compensation for contingencies of 10%.

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[77] [2020] FWC 6475.

[78] Ellawala v Australian Postal Corporation Print S5109, [36].

[190] Save for the matters referred to in this decision, my view is that there are no other matters which I consider relevant to the task of determining an amount for the purposes of an order under subsection 392(1) of the FW Act.

Should the amount of compensation be reduced because of misconduct? (s 392(3))

[191] Section 392(3) provides that if the FWC is satisfied that the misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order by an appropriate amount on account of the misconduct.

[192] Mr Govender did not commit any misconduct, so this factor is not relevant to the assessment of compensation in this case.

Prohibition on compensating for shock, distress or humiliation (s 392(4))

[193] Section 392(4) provides that a compensation order must not include a component for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal. In accordance with section 392(4) of the Act, the amount of compensation I have calculated does not include a component for shock, humiliation or distress.

Consideration of the impact of taxation

[194] I have considered the impact of taxation. I will express the compensation sum in a gross amount with a direction that ERGT withhold taxation in accordance with the law.

Applying the compensation cap (s 392(5))

[195] Pursuant to section 392(5) the amount ordered by the FWC for any order of compensation must not exceed the lesser of half the amount of the high income threshold immediately before the dismissal, and the total amount of remuneration received by the person during the 26 weeks immediately before the dismissal.

[196] The high income threshold immediately before the dismissal was $153,600. Half the high income threshold is therefore $76,800.

[197] The amount Mr Govender earned in the twenty six week period before his dismissal was $41,575.44 less the amount he agreed to forego to assist ERGT to deal with the impact of COVID.

[198] The amount I propose to order is less than the high income threshold and less than the total amount of renumeration received by Mr Govender during the 26 weeks immediately before his dismissal.

Should the compensation be paid by way of instalments? (s 393)

[199] No application has been made to date by ERGT for any amount of compensation awarded to be paid in the form of instalments.

Conclusion with respect to compensation

[200] In my view, the application of the *Sprigg* formula does not, in this case, yield an amount that is clearly excessive or clearly inadequate. Accordingly, my view is that there is no basis for me to reassess the assumptions made in reaching my conclusion as to the appropriate amount of compensation to be awarded to Mr Govender.

Conclusion

[201] Having considered each of the matters specified in section 387 of the FW Act, I am satisfied that, overall, the dismissal of Mr Govender was unreasonable because he could have been redeployed, and harsh because of the impact of losing his employment in the midst of a pandemic. Accordingly, I find that Mr Govender's dismissal was unfair within the meaning of the FW Act.

[202] For the reasons I have given, my view is that a remedy of compensation in favour of Mr Govender is appropriate in the circumstances of this case.

Further Directions

[203] The parties are directed to provide to Chambers within seven days of the date of this decision details of the period in relation to which Mr Govender agreed to the temporary reduction in his salary so that the compensation sum can be calculated.

[204] Upon provision of this information an Order will be issued.

DEPUTY PRESIDENT

Appearances:
K. Govender for the Applicant.
J. Miller for the Respondent

Hearing details:
2021.
Perth.
January 22.

Final written submissions:
Respondent, 5 February 2021.
Applicant, 19 February 2021.

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