REASONS FOR DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Boyan Bizoev
v
NODE Energy Services Pty Ltd T/A NODE Energy Services
(U2021/5559)

DEPUTY PRESIDENT BOYCE SYDNEY, 30 AUGUST 2021

Application for an unfair dismissal remedy – jurisdictional objection – genuine redundancy – application dismissed.

Introduction

[1] This Decision was made on an *ex-tempore* basis on transcript. In publishing these Reasons, I have taken the opportunity to revise, make additions to, and/or amend same in accordance with the principles stated by Kirby J in *Ex Tempore Judgments - Reasons on the Run* (1995) 25 UWALRev 213 (at 229-230, including the authorities cited therein), and the New South Wales Court of Appeal in *Bar-Mordecai v Rotman & Ors* [2000] NSWCA 123 (at [193]-[195], including the authorities cited therein).

[2] On 25 June 2021, Mr Boyan Bizoev (**Applicant**) filed a Form F2 with the Fair Work Commission (**Commission**), being an application for an unfair dismissal remedy (**Application**). By way of that Application, the Applicant claims that he was dismissed from his employment with NODE Energy Services Pty Ltd T/A NODE Energy Services (**Respondent**), and that his dismissal was "unfair" within the meaning of Part 3-2 of the *Fair Work Act 2009* (**Act**). The Applicant commenced his employment with the Respondent on 9 December 2019. He was notified of his dismissal on 3 June 2021, which took effect the next day. At the time of his dismissal, the Applicant was a casual employee as defined by s.384(2)(a) of the Act.

[3] In the Form F3 Employer Response filed with the Commission, the Respondent asserts that *firstly*, the Applicant has not been dismissed unfairly, and, *secondly*, that the Applicant's dismissal was a case of "genuine redundancy" within the meaning of s.389 of the Act. The Respondent also submits that it complied with the Small Business Fair Dismissal Code in dismissing the Applicant.

[4] The only issue before the Commission in these proceedings is whether the Applicant's dismissal was a case of genuine redundancy. The Applicant's case is effectively that his job is still required to be performed, that the operational requirements of the Respondent's enterprise do not support his role no longer being required to be performed, and/or further or

in the alternative, the Applicant could have reasonably been redeployed into an alternative position within the Respondent's business.

[5] At the hearing, the Applicant appeared for himself, and Ms Elizabeth Maina, Director, appeared for the Respondent.

Legislation

[6] Section 389 of the Act defines the meaning of "genuine redundancy" under the statutory scheme. It is to be read in conjunction with section 385 of the Act, which provides that a person can only be unfairly dismissed if the Commission is satisfied that each of the matters under section 385 have been established:

> "**385 What is an unfair dismissal**
>
> A person has been *unfairly dismissed* if the FWC is satisfied that:
>
> (a) the person has been dismissed; and
>
> (b) the dismissal was harsh, unjust or unreasonable; and
>
> (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
>
> (d) the dismissal was not a case of genuine redundancy.
>
> Note: For the definition of *consistent with the Small Business Fair Dismissal Code*: see section 388."

[7] The definition of Small Business Code is under section 388 of the Act:

> "**388 The Small Business Fair Dismissal Code**
>
> (1) The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.
>
> (2) A person's dismissal was *consistent with the Small Business Fair Dismissal 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 Small Business Fair Dismissal Code in relation to the dismissal."

[8] Section 389 of the Act provides the statutory definition as to what qualifies as a "genuine redundancy":

> "**389 Meaning of genuine redundancy**
>
> (1) A person's dismissal was a case of genuine redundancy if:

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

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

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

(a) the employer's enterprise; or

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

[9] In view of s.389, and for the purposes of the Commission being satisfied that a dismissal was a case of genuine redundancy, there are three questions that need to be answered:

(a) Was the Applicant's job no longer required to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise?

(b) Did the Respondent comply with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy?

(c) Would it have been reasonable in all the circumstances for the Applicant to have been redeployed within the Respondent's enterprise, or an associated entity of the Respondent?

[10] I make two findings on the evidence at this point. Firstly, the employer has no associated entities that the Applicant could have been redeployed into. Secondly, no modern award or enterprise agreement covers or applies to the Applicant or the Respondent in respect of the Applicant's employment with the Respondent. Neither of these matters are disputed by the parties. It follows that I need not consider or make findings in relation to s.389(1)(b) of the Act when determining whether the Applicant's dismissal was for reasons of genuine redundancy.

Was the Applicant's job no longer required to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise?

[11] Sub-section 389(1)(a) of the Act provides that a person's dismissal was a case of genuine redundancy if the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise.

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

> "1547 Paragraph 389(1)(a) provides that a person's dismissal will be a case of genuine redundancy if his or her job was no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise. Enterprise is defined in clause 12 to mean a business, activity, project or undertaking.
>
> 1548 The following are possible examples of a change in the operational requirements of an enterprise:
>
> · a machine is now available to do the job performed by the employee;
>
> · the employer's business is experiencing a downturn and therefore the employer only needs three people to do a particular task or duty instead of five; or
>
> · the employer is restructuring their business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists".

[13] Further, it has been held that 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". It has also been held that:

> "what is critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organisation, any duties left to discharge. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant".[ii]

[14] Put another way, the test is not whether the person's *duties* survive. The test is whether the *job* previously performed by an employee still exists.[iii] Hence an employee's position can be made redundant when their role is split between other employees within the same workplace, or their duties are assigned to other employees, such that the employer downsizes its head count and overheads. Considerations of a job no longer being required to be performed are not an analysis of the duties still being required to be performed by others.

[15] I also point out that in relation to changes in the operational requirements of an employer's enterprise or business, such changes include reasons of economic, technological, structural or similar change, to all or any part/s of a business. In other words, an employer need not be losing money or running at a loss in order for it to be in a position to make changes in its operational requirements or its business. Once an employer is able to establish that it has bona fide reasons that it (as the employer) considers require changes to its business, it is not for an employee, or the Commission, to further inquire or engage in an analysis as to whether such changes were appropriate, logical, reasonable or necessary. Nor is it the role of the Commission to determine whether a relevant employee was or was not fairly or appropriately chosen, or otherwise selected, for redundancy. Just like the owner of a property can make changes or alterations to his or her house, that in his or her opinion are appropriate or required, an employer can also make changes to its operations or business, that in its opinion are appropriate or required.

Would it have been reasonable in all the circumstances for the Applicant to have been redeployed within the Respondent's enterprise, or an associated entity of the Respondent?

[16] Sub-section 389(2) of the Act provides that a person's dismissal cannot be a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within the employer's enterprise, or an associated entity of the employer.

[17] In my view, the correct interpretation of subsection 389(2) remains as stated in *Ulan Coal Mines Limited v A. Honeysett & Ors*:[iv]

> "[26] [Subsection 389(2)] must be seen in its full context. It only applies when there has been a dismissal. An employee seeking a remedy for unfair dismissal cannot succeed if the dismissal was a genuine redundancy. In other words, if the dismissal is a case of genuine redundancy the employer has a complete defence to the application. Section 389(2) places a limitation on the employer's capacity to mount such a defence. The defence is not available if it would have been reasonable to redeploy the employee. The exclusion poses a hypothetical question which must be answered by reference to all of the relevant circumstances.
>
> …
>
> [28] … [T]he question posed by s.389(2), whether redeployment would have been reasonable, is to be applied at the time of the dismissal. If an employee dismissed for redundancy obtains employment within an associated entity of the employer some time after the termination, that fact may be relevant in deciding whether redeployment would have been reasonable. But it is not determinative. The question remains whether redeployment within the employer's enterprise or the enterprise of an associated entity would have been reasonable at the time of dismissal. In answering that question a number of matters are capable of being relevant. They include the nature of any available position, the qualifications required to perform the job, the employee's skills, qualifications and experience, the location of the job in relation to the employee's residence and the remuneration which is offered".
>
> (emphasis added)

Consideration

[18] Ms Maina appeared in these proceedings on behalf of the Respondent. She is the Director/Principal of the Respondent and tendered a witness statement in these proceedings. She was also cross-examined extensively by the Applicant.

[19] I found Ms Maina to be a credible witness, who answered questions upfront and frankly. She did not seek to avoid any of the questions that were put to her and answered questions consistent with the evidence set out in her witness statement.

[20] Having regard to Ms Maina's evidence as to the refocused (changed) operational requirements of the business, the change in the projects being worked upon by the business (some ending, and some beginning), and the path that she desired the Respondent to take into the future, I accept as a straightforward proposition that Respondent had bona fide operational

reasons for determining that it no longer required the Applicant's job to be done by anyone (i.e. even if some of the Applicant's duties still existed, but were redistributed to other employees).

[21] I note that the Applicant asked Ms Maina various questions going to the financial state of the Respondent being favourable, such that the Respondent would not be making a loss if it kept him in his role, either permanently, or for longer. Ms Maina answered these questions by stating that the Respondent need not have been experiencing a downturn in work, have its accounts "in the red", or be otherwise losing money, for it to be in a position to determine that it no longer required the Applicant's job to be performed by anyone (and to make him redundant). Ms Maina pointed out that it is enough that she determined (i.er. in her own opinion as a Director, on behalf of the Respondent) that the Applicant could no longer be usefully or productively employed. Ms Maina also gave evidence that whilst continuing to employ the Applicant would not result in the Respondent's business making a loss, his continued employment would be an on-going and unnecessary cost that the Respondent did not need to maintain merely so as to keep the Applicant in its employment.

[22] As to whether the Applicant's job still exists, Ms Maina evidence was that the Applicant was primarily employed to undertake scripting, and that this was the substantive work that he performed throughout his employment with the Respondent, particularly in relation to one large project that lasted around 18 months (which had come to an end).

[23] The Applicant for his part challenged his redundancy on the basis that his duties, responsibilities, and KPIs, were much broader than just scripting (as reflected in his written employment contract). The Applicant also submitted that his duties, responsibilities and KPIs have been expressed in his employment contract extremely vaguely, and that he never understood that his role was all about scripting (nor did he ever have a discussion with Ms Maina prior to being employed to that effect). Whilst one might accept the Applicant's position as to these matters, he misses the point. It is hardly exceptional that the description and scope of the duties in an employment contract will be different to actual duties performed. Even where an employee has a very broad range of duties or responsibilities on paper, the employer may legitimately direct an employee to only perform a particular task/s. In effect, a job may become not what is written on paper, but what is undertaken, such that when a decision as to redundancy arises, the focus will be upon what work was being performed, rather than by referring back to words on paper and exploring the scope of same.

[24] Ms Maina also gave evidence that her opinion concerning the meaning of "project delivery tools" (being a term contained in the Applicant's employment contract) is known in the Respondent's workplace, and was known to the Applicant, as essentially encompassing scripting. She considered it nonsense to suggest otherwise, especially having regard to the discussions she says she had with the Applicant prior to his employment commencing, as well as by reference to the work that was actually performed by the Applicant during his employment with the Respondent.

[25] It does not appear to be in dispute between the parties that 80 to 90 per cent of the Applicant's work at the Respondent involved scripting. Ms Maina's evidence was that given the changes in the needs of the Respondent's business, and the cessation of a recent large project requiring scripting (at least to the level that was performed by the Applicant), she determined that the Applicant's role (defined by what he actually did, as opposed to what was written in his employment contract) was no longer required.

[26] The Applicant also submits that because two new employees were hired in March and April 2021 and commenced around the time that the Applicant was made redundant, he could have been redeployed or otherwise offered those roles, but he was never considered for, or consulted about, same. In response, Ms Maina gave evidence that the decision to make those new hires occurred in March and April 2021 respectively, because two other employees had left the business at about those times. She points out that the new hires were recruited and offered employment in March and April 2021, prior to the decision to make the Applicant's role redundant. The fact that the new hires commenced employment with the Respondent at around the time that the Applicant was made redundant is not to the point (i.e. they were recruited months prior, and had to work out notice at their previous employers, prior to commencing work with the Respondent).

[27] Ms Maina' evidence was that the new hires were "Power Systems Engineers", whilst the Applicant was employed as a "Power Systems Controller". Whilst she accepted that the Applicant had the necessary qualifications and experience to perform the role of Power Systems Engineer, such qualifications and experience were not the only requirements for the new roles. What the Respondent required was a qualified and experienced Power Systems Engineer, who also had specific experience in "distribution skills". The Applicant did not have any such experience, nor did any other employee in the Respondent's business (hence why Ms Maina decided to go to the market for the new hires). Further, the Respondent did not have the ability or the time to train an existing employee to enable them to acquire a distribution skill set.

Findings

[28] Having regard to the evidence and submissions of the parties, I make the following findings:

(a) As at the time that the Respondent made the decision to dismiss the Applicant, the Applicant's role with the Respondent was genuinely no longer required to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise (s.389(1)(a) of the Act).

(b) As at the time that the Respondent made a decision to dismiss the Applicant for reasons of redundancy, there were no available or suitable positions at the Respondent's enterprise that the Applicant could have reasonably (in all the circumstances) been redeployed into (s.389(2) of the Act).

Conclusion

[29] On the basis of the foregoing findings, I conclude that the Applicant's dismissal was a case "genuine redundancy" within the meaning of s.389 of the Act.[v] I note that it is unnecessary for me to determine whether or not the Respondent has complied with the Small Business Fair Dismissal Code (i.e. a finding as to "genuine redundancy" is a complete defence to an unfair dismissal claim).

[30] It follows that the Commission has no jurisdiction to hear or determine the Applicant's unfair dismissal claim. The Application filed by the Applicant is dismissed by way of Order [PR732959].

DEPUTY PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR733165>

---

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

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

[iii] *Kekeris v A. Hartrodt Australia Pty Ltd* [2010] FWA 674 (Hamberger SDP), at [27].

[iv] [2010] FWAFB 3488.

[v] In reaching my decision in this matter, I have also had regard to s.381 of the Act, which requires the Commission to apply a "fair go all round".