



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Robert Walter McInnes

v

WGC Crane Group Pty Ltd
(U2022/9475)

DEPUTY PRESIDENT EASTON

SYDNEY, 17 AUGUST 2023

Application for an unfair dismissal remedy – genuine redundancy – proposal by employee that his position be made redundant – business case considered and approved by the employer – alleged coercion – alleged sham redundancy – employee’s position was redundant – no sham – requirements of s.389 met – complete defence – application dismissed.

[1] Mr Robert McInnes worked as a part-time Business Development Manager in the business he used to own. He was good at his job and his employer, WGC Crane Group Pty Ltd, wanted him to work full-time in an expanded role. In response to what Mr McInnes believed to be pressure from the employer to return to full-time employment, Mr McInnes suggested that the employer make him redundant instead. WGC Crane considered Mr McInnes’ proposal, decided that there was a business case for redundancy and terminated Mr McInnes’ employment on the date essentially suggested by Mr McInnes, being 2 September 2022.

[2] On 23 September 2022 Mr McInnes made an application to the Fair Work Commission under s.394 of the *Fair Work Act 2009* (Cth) (**FW Act**) for a remedy, alleging that he had been unfairly dismissed from his employment with WGC Crane. Mr McInnes seeks reinstatement to his former position.

[3] WGC Crane argued that Mr McInnes’ dismissal was a genuine redundancy. Mr McInnes argues that the redundancy was a sham.

[4] For the reasons set out below I find that Mr McInnes’ dismissal was a case of genuine redundancy within the meaning of s.389 of the FW Act, and therefore that Mr McInnes’ claim cannot proceed.

Background

[5] Mr McInnes commenced employment with WGC Crane in 2019 when his business was purchased. WGC Crane is one of group of companies within the Marmon Crane Services in Australia group. The Marmon group is in turn part of the Berkshire Hathaway Companies group whose headquarters is in the United States of America.

[6] Mr McInnes' written contract of employment records his full-time salary to be \$150,000 per annum, plus superannuation and a fully maintained commercial vehicle. The contract includes a "one-off bonus payment of \$1,000,000 payable on the fifth anniversary of [Mr McInnes'] employment" subject to certain conditions. The contract included a "Confidentiality Deed Poll" and "Restraint Deed Poll".

[7] Mr McInnes was engaged as the Business Development Manager for WGC Crane's Project Division. WGC Crane operates a "taxi hire style service for cranes." The project division consists only of "crawler cranes", which are typically hired out for longer term contracts. The Project Division was the best performing division in the WGC business. WGC Crane said that as the cranes in the Project Division were mobilised, meaning as Mr McInnes became more successful in his work, there was a reduced need for business development in that division.

[8] In 2019 Mr McInnes' personal circumstances changed and Mr McInnes became a part-time employee, earning \$97,500 per annum to work a 26-hour week (approximately \$72 per hour).

[9] WGC Crane agrees that Mr McInnes was good at his job – one witness described him as "a strong asset in the team." In fact in some ways Mr McInnes was too good for his job.

[10] By 2021 WGC Crane was asking Mr McInnes to return to full-time employment and to expand Mr McInnes' role to develop business across the whole of WGC Crane.

[11] Mr McInnes resisted WGC Crane's requests that he return to full-time work and in February 2021 a compromise of sorts was reached where Mr McInnes would continue working part-time but would move to join the National Business Development Team.

[12] In June 2022 Mr Vernon Abraham commenced working as the General Manager for WGC Crane. Mr Abraham's written statement provided the following account of the changes to Mr McInnes' role that he sought to bring about:

"As the Project Division was working so well, and all the cranes were basically out working I did not think there was a need for business development role in that division.

The key driver for this change was a broader strategic need to develop the NSW business at a more general level. As the Projects Division was operating well, Mr McInnes was underutilised. It was my view that someone of his experience and seniority would be better placed in a broader, senior business development function rather than working solely within the Projects Division.

I thought that the business would be better served if Mr McInnes were moved to another role. In July 2022 I had a discussion with Mr McInnes about moving from the Project Division into a full-time business development role to support the rest of the New South Wales business. The salary for the role was approximately \$160,000 pa.

During that discussion, Mr McInnes told me that he would rather be made redundant. Mr McInnes said that he was an owner of the business, and he did not want to move into that role.

Mr McInnes indicated that he was capable of a senior manager role, and that he would like my role, or Mr Stephen Rogers' (Mr Rogers, the WGC CEO) role.

There were no senior management roles available, and there were no other sideways roles available outside of the one that I had already offered. During the conversation Mr McInnes did not mention part-time/full-time split to me, just that he didn't want a role that was not a senior management role."

[13] It seems that Mr McInnes' indication to Mr Abraham that he "would rather be made redundant" was no idle statement.

[14] On 22 July 2022 Mr McInnes sent an email to Mr Abraham in the following terms:

"Hi Vernon,

Just following up on our conversation, I'm confirming I'm not looking to take a full time offer at this stage and understand you need to free up the budget to get someone into my role fulltime.

So there is no misunderstanding, my position is if the business is willing to look at a redundancy for my position I'll take it so that everyone can move forward.

I'm happy to look at making the 3rd September my last day of work on this basis.

Can you also please look at the possibility of keeping my current phone number as part of my exit?"

[Emphasis added]

[15] Approximately twenty minutes later Mr Abraham replied by email:

"Hi Rob,

Will push this through. Will let you know about the number but wouldn't think it is a problem.

Week Starting 22nd August and Week starting 29th august could you please work out a schedule for us to meet key clients?

Thanks."

[16] Mr McInnes' email of 22 July 2022 caused WGC Crane to actively consider whether Mr McInnes' position could in fact be redundant. Mr Abraham describes his consideration as follows:

“It was not my plan for Mr McInnes' role to be made redundant, and it was not considered until he pushed for that to occur. Once I received the email from Mr McInnes on 22 July 2022, I contacted Mr Frank Minervini (Mr Minervini, the Human Resources Director) and Mr Rogers to see if a redundancy could be offered to MR McInnes.

After a review of the Project Division business, it was decided that the business development manager role could be made redundant. In effect, the Projects Division could be looked after by Nick Naverette who was a Manager.

I understand that Mr Minervini informed Mr McInnes of the redundancy and processed it. I was not involved in this process.

Since Mr McInnes' employment has come to an end, the role of business development manager has not been filled and there are currently no plans to open the role up in the Project Division.

I understand that Mr McInnes has since identified a number of other roles that would have been suitable for him to move into. Based on my conversations with Mr McInnes I do not consider these roles would have been suitable as he only wanted to move into senior management roles.

Further, other available roles were full time roles and I understand that Mr McInnes did not have an interest in full time work.

It was his unwillingness to move to a full-time role that led him to ask for his redundancy. Therefore, no other roles within the organisation would meet his work expectations.”

[17] Mr Minervini described WGC Cranes' considerations as follows:

“In light of the Applicant's request, I had a discussion with Craig and Vernon as to how best manage the Applicant's request having regard to the business' requirement in the business development space.

What was arrived at was the following:

- (a) the Applicant's role could be removed as an overhead to the existing business development capabilities with the creation of a new business development role in NSW;
- (b) the duties undertaken by the Applicant could be reassigned to Nick Naverette who was the Business Development Manager QLD. Given the success of the existing operations, realigning the Applicant's existing business development duties to Nic would be a reasonable consolidation of the existing function; and
- (c) any residual funding could be re-assigned to establish an administrative role in Western Australia to assist with tendering work.

Ultimately, in my discussions with Craig, it was resolved that a separate business development role dedicated to the Respondent's projects division was not needed given the need for a broader strategic business development role in NSW.

Accordingly, the realignment of the business development capabilities to facilitate the Applicant's request to take a redundancy as opposed to mobilising into a full time NSW business development manager role was regarded as feasible.

I understand there was consideration as to other roles the Applicant may be redeployed to. However, at the time of the Applicant's dismissal, no part time roles existed either within the Respondent's operations or its related entities.

Given the Applicant's position that he did not want to take on a full-time role, including the role in NSW, there were no other reasonable deployment opportunities.”

[18] By 8 August Mr McInnes’ last day of employment was confirmed to be 2 September 2022. However there was no apparent agreement on the full redundancy package Mr McInnes was to receive. On 16 August 2022 Mr McInnes sent an email in the following terms:

“Hi Vernon,

I'm just catching up on some emails after my trip and saw this below.

Can you please clarify how this will work? Is it a straight redundancy or is it a VR you are asking me to take up? Is there any level of inducement involved with me taking up this option in lieu of placement in other roles, etc?

Are there any documents I'm required to sign?

As per our discussions I can see the business would like me out of the way and am happy to work in to achieve a mutually beneficial outcome, however I would like a little bit more information around this please.”

[19] Mr McInnes’ employment ended on 2 September 2022 as agreed.

[20] Mr McInnes was paid three weeks’ pay in lieu of notice despite more than five weeks passing between his email of 22 July 2022 and the end of his employment, plus an additional eight weeks’ redundancy payment and all outstanding leave entitlements. Mr McInnes’ termination payments received concessional tax treatment as a redundancy payment.

More background

[21] There was evidence of other factors at play that took Mr McInnes’ employment out of the usual realm.

[22] Mr McInnes was a senior manager and paid accordingly.

[23] Mr McInnes relied on a long-standing tension between himself and the CEO, Mr Stephen Rogers. Mr Rogers did not give evidence. In 2020 and 2021 Mr Rogers made several attempts to change Mr McInnes from part-time employment back to full-time employment. Mr Roger's last attempt was in February 2021. On that occasion Mr Rogers apparently prepared a Deed of Release as an "amicable way ... to mutually move forward."

[24] In March 2021 Mr Rogers backed down and sent an email to Mr McInnes indicating that he would support Mr McInnes staying in the business under the current part-time arrangements, on certain stated provisos.

[25] Mr McInnes was a part-owner of premises leased to WGC Crane. The lease was up for renewal on 1 May 2022. The other part-owner of the property, Mr Marc Sergi, was also an employee of WGC Crane for a time.

[26] There was a suggestion in the evidence that the American owners of WGC Crane decided at some earlier point that they did not want to extend their business dealings with "anyone named Sergi."

[27] In April 2022 there was disputation about the lease negotiations and Mr McInnes and Mr Sergi allege that Mr Rogers told them in the lease negotiations that if they wanted to "push the lease" that they needed to "reconsider [their] positions as leaders in the WGC business."

[28] Both Mr McInnes and Mr Sergi understood Mr Rogers' words to be a threat. Mr Sergi resigned his employment at or around this time, citing Mr Rogers' threat as a contributing factor.

[29] The evidence indicates that in relation to earlier matters of disagreement between Mr McInnes and WGC Crane, Mr McInnes was able to advance or protect his position and was not pushed around by WGC Crane. In 2020 and 2021 Mr McInnes was able to stand firm against Mr Roger's efforts to make him full-time. In 2022 Mr McInnes was able to forge an outcome that left WGC Crane unhappy with its lease.

[30] These events suggest that it would have been difficult for WGC Crane to coerce Mr McInnes to ask for redundancy unless Mr McInnes was prepared to leave.

Consideration

[31] Mr McInnes alleges that the redundancy was a sham. The first thing to say is that if it was a sham, it was a sham that Mr McInnes encouraged and was happy to participate in.

[32] Mr McInnes said that he had no intention to leave employment prior to meeting with Mr Abraham in June 2022. On Mr McInnes' version, Mr Abraham met with him and told him that he had no option but to move to a full-time position. He said he was "offered a full-time role that the company knew I was not in a position to accept due to the arrangements with my children. The business was fully aware of this, as I had forfeited \$1 million bonus for the purpose of securing part-time employment."

[33] If Mr McInnes' fears were correct, and WGC Crane was intending to remove him from the business, then it was a high-risk strategy for WGC Crane – in fact so high risk it was almost irrational. By trying to force Mr McInnes to work full-time, WGC Crane risked the possibility that Mr McInnes would agree (and therefore WGC Crane would be stuck with him full-time) and risked the possibility of losing three days of work from Mr McInnes to have him work five days. This theory almost make sense if Mr McInnes' departure was retribution for the deal on the lease.

[34] The email sent on 22 July 2022 uses the words “**if the business is willing to look at a redundancy for my position**” to leave open the possibility that WGC Crane was not prepared to make Mr McInnes' position redundant. This is not consistent with Mr McInnes' suggestion that he was coerced or that he had no alternative but to suggest a redundancy package.

[35] The 22 July 2022 email also referred to a conversation between Mr McInnes and Mr Abraham and reiterated that Mr McInnes would prefer to be made redundant. The email raises specific matters about redundancy that do not appear to have been previously discussed, such as the end date of the employment. In other words, Mr McInnes' email added to the conversation about redundancy and provided a concrete proposal.

[36] Mr McInnes did not attempt to retract the agreement he had made with WGC Crane after 22 July 2022.

[37] It is significant that throughout the proceedings WGC Crane only praised Mr McInnes' work and emphasised the value of Mr McInnes' work to its business. WGC Crane was critical of Mr McInnes welching on the agreement that he be made redundant, but that's a different story.

[38] Mr Abraham gave evidence that he was new to the General Manager role, had sought out Mr McInnes to discuss Mr McInnes' role, had no intention of making him leave his employment, and instead wanted to talk with Mr McInnes about ways that WGC Crane could use his skills, expertise, and contacts more effectively.

[39] Mr McInnes assumed that Mr Abraham was sent by Mr Rogers to force Mr McInnes to return to full-time or force him out of the business.

[40] Mr Abraham's evidence was cohesive, reasonable and reliable. He was candid in admitting gaps in his knowledge of Mr McInnes' work history arising out of Mr Abraham being new to the business in July 2022. I accept his evidence regarding his intentions towards Mr McInnes.

[41] In all the circumstances I am not satisfied that the redundancy was in fact a sham.

[42] Mr Abrahams openly stated that prior to 22 July 2022 it was not his plan that Mr McInnes' position would be made redundant. However Mr Abrahams and Mr Minervini both gave evidence of their deliberations after receiving the email from Mr McInnes:

- (a) WGC Cranes decided that it no longer required Mr McInnes' job to be done by anyone. Mr Abraham decided that "the Projects Division could be looked after by Nick Naverette who was a Manager". He also said that the role of business development manager has not been filled and there are currently no plans to open the role up in the Project Division;
- (b) the redundancy was prompted by Mr McInnes and no further consultation was required with him in that regard; and
- (c) Mr McInnes did not have an interest in full-time work. No other part-time roles were identified into which Mr McInnes could have been deployed.

Genuine Redundancy

[43] Genuine redundancy is a complete defence to an unfair dismissal application (per *Ulan Coal Mines Limited v Honeysett and others* (2010) 199 IR 363, [\[2010\] FWAFB 7578](#) at [26]). If the dismissal was a case of genuine redundancy as defined in s.389 of the FW Act, then the dismissal cannot be an unfair dismissal under s.385:

“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.”

[Emphasis added]

...

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.”

[44] Section 389 requires a series of stepped findings (per *Pankratz v Regional Housing Limited* [2013] FWC 1259 at [6]-[9]):

- (a) firstly, whether the Applicant's job is redundant;
- (b) secondly whether the employer complied with any applicable consultation obligations under a modern award or agreement; and
- (c) thirdly whether it would have been reasonable to redeploy the Applicant in another role.

[45] There must be an appropriate evidentiary basis for the Commission's findings and the relevant facts are usually peculiarly within the knowledge of the employer respondent rather than the dismissed employee.

[46] There was no suggestion that Mr McInnes' employment was covered by a modern award or an agreement that imposed consultation obligations.

[47] I am satisfied that each of the elements of s.389 have been established:

- (a) firstly, Mr McInnes' job was redundant;
- (b) secondly, there were no applicable consultation obligations under a modern award or agreement; and
- (c) thirdly, it would not have been reasonable to redeploy Mr McInnes in another role.

[48] I have separately made an order that Mr McInnes' application is dismissed ([PR765313](#)).



DEPUTY PRESIDENT

[2023] FWC 2062

Appearances:

Mr *R McInnes*, Applicant
Mr *J Parkinson* of Kingston Reid for the Respondent

Hearing details:

2023.
Sydney (By Video using Microsoft Teams)
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