DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Vilija Burneikis
v
NGS Super Pty Limited
(U2023/4734)

DEPUTY PRESIDENT BOYCE SYDNEY, 25 AUGUST 2023

Application for an unfair dismissal remedy – whether dismissal was a case of genuine redundancy – job no longer required to be performed by anyone – redundancy a result of changes in operational requirements – modern award consultation obligations not enlivened – no requirement to consult about redundancy – consultation adequate even if modern award consultation obligations did apply – redeployment not reasonable in all of the circumstances – objection regarding genuine redundancy upheld – application dismissed

Introduction

[1] Ms Vilija Burneikis (**Applicant**) has 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 asserts that her dismissal by NGS Super Pty Limited (**Respondent**) was "unfair" within the meaning of Part 3-2 of the *Fair Work Act 2009* (**Act**).

[2] The Respondent says that the Applicant's dismissal cannot be unfair as it was a case of "genuine redundancy" (within the meaning of s.389 of the Act), and that the Applicant's (unfair dismissal) Application must therefore be dismissed (rejected).

[3] I observe that a dismissal for reasons of "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 a dismissal is a case of genuine redundancy as defined under s.389 of the Act, then the dismissal cannot be unfair (per s.385(d) of the Act). The question of whether a dismissal is a case of genuine redundancy must be determined first, or prior to any determination as to whether an employee's dismissal was unfair (per s.396(d) of the Act). If a dismissal is found to be a genuine redundancy, the Commission has no jurisdiction to thereafter determine that a dismissal is fair or unfair, i.e. that is the end of the matter.

[4] Following the receipt of submissions and evidence in accordance with directions made, I held a hearing to resolve the Respondent's genuine redundancy objection.

[5] At the hearing, the Applicant represented herself, and Mr *Brendan Tynan Davey*, Head of Legal and Governance, appeared for the Respondent.

Relevant law

[6] Section 385 of the Act qualifies a claim for unfair dismissal:

> **"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.
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> Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388."

[7] Before the Commission can consider issues of harshness, etc, s.396(d) of the Act requires that the Commission decide whether the dismissal was a case of genuine redundancy:

> **"396 Initial matters to be considered before merits**
>
> The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:
>
> (a) whether the application was made within the period required in subsection 394(2);
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> (b) whether the person was protected from unfair dismissal;
>
> (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
>
> (d) whether the dismissal was a case of genuine redundancy."

[8] Section 389 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 of the Act, there are three questions that need to be answered:[1]

(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 of the circumstances for the Applicant to have been redeployed within the Respondent's enterprise, or an associated entity of the Respondent?

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? (s.389(1)(a))

[10] Sub-section 389(1)(a) of the Act provides that a person's dismissal is a case of genuine redundancy if the person's employer no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise. These words have long been used and applied in industrial tribunals and courts as a practical definition of redundancy.[2]

[11] 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".

[12] The basis upon which "operational requirements" can be said to give rise to change is extremely broad. A change in operational requirements does not only arise where a business has excess labour, is running over budget, unprofitable, losing customers, or down on revenue/s. As Lee J stated in *Nettlefold v Kym Smoker Pty Ltd*[3] (**Nettlefold**), the phrase "operational requirements" encompasses change arising from both internal and external factors, including via the consideration of matters (over the short, medium and/or longer terms) such as "the past and present performance of the [business], the state of the market in which [the business] operates, steps that may be taken to improve the efficiency of the [business] by installing new processes, equipment or skills, or by arranging for labour to be used more productively, and the application of good management to the undertaking".[4] Indeed, changes to operational requirements might arise because an efficient and/or profitable business proposes or desires to become even more efficient and/or profitable.

[13] It equally follows that modifications to a business that might be said to be required or necessary, because of changes to operational requirements, are extremely varied and broad. In other words, the nature and extent of any modifications to a business flowing from changes in its operational requirements are essentially matters of managerial discretion. Such discretion might be exercised to make changes that are, in the opinion of the relevant managerial decision-maker, required or necessary. The fact that others, for example, an employee, customer, shareholder, or stakeholder affected by a decision, or an unaffected member of the public, might consider a particular decision to be bad, or wrong, or consider that another alternative and better (or more appropriate) decision ought to have been made, is not to the point.[5] Persons in managerial roles (in the for-profit, or not-for-profit, sectors) are tasked with the responsibility to make decisions in respect of how a business is run to achieve stability and/or growth over the short, medium and/or longer terms. It is certainly not the role of the Commission to stymie or interfere with operational decisions made on a bona fide basis within the extremely broad bounds of managerial discretion. As was stated by Vice President Hatcher (as his Honour then was) in *Low v Menzies Group of Companies*[6]:

> "It is not the function of the Commission, in determining whether a dismissal is a case of genuine redundancy, to form a view about the merits of the decision to make a position redundant. Whether it was objectively fair or justifiable to decide to abolish a position is beside the point, as long as the employer acted as it did because of changes in its operational requirements."[7]

[14] 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". Relevantly, the test is not whether the person's *duties* or *responsibilities* (or some of them) survive or remain. Rather, the test is whether the whole of the *job* previously performed by an

employee (unmodified) still exists.[8] Focus is to be placed upon the *job*, not the duties involved in that *job*, or the individual performing that *job* (or a new/modified job). Importantly, as broadly stated in *Dibb v Commissioner of Taxation*[9], an employee may still be genuinely made redundant when there are aspects of the employee's duties still being performed by another employee, or other employees.[10]

[15] The selection of, or the process of selection, of an individual for redundancy is not a relevant consideration in determining whether a dismissal is a case of genuine redundancy under s.389 of the Act (see *UES Int'l v Leevan Harvey* [2012] FWAFB 5241, at [27]).

[16] The Respondent conducts an industry superannuation fund for teachers in non-government education and community organisations.[11]

[17] The Applicant was employed by the Respondent between 7 March 2005 and 15 May 2023.

[18] At the time of her dismissal, the Applicant was employed in the role of Graphic Design Manager (**GDM role**), and was the only graphic designer employed by the Respondent. The principal function of the GDM role was to design and produce communications for the Respondent's members and employers.[12]

[19] In March 2023, to fulfill what the Respondent considered to be the changing needs of its business, the Respondent made a decision to outsource its graphic design work, as well as other digital design activities moving forward. As a result of this decision, the Respondent determined that it no longer required the GDM role to be performed by anyone. No other roles at the Respondent were affected by this decision.[13]

[20] Post the cessation of the Applicant's tenure at the Respondent, it has not replaced the GDM role, and has engaged an external graphic design agency to perform relevant graphic designer work on a retainer basis.[14]

[21] The Applicant challenges the Respondent's assertions that it no longer required the GDM role to be performed by anyone because of operational reasons. The Applicant asserts that the GDM role was still required to be performed in the Respondent's workplace. As best as I can understand it, the Applicant says that:

a) her work in the GDM role, as at April / May 2023, was "busier than ever";[15] and

b) it has always been the case that digital functions have been outsourced in the Respondent's workplace, and the outsourcing of these digital functions have never been part of the GDM role workload.[16]

[22] In response to these contentions, Mr Luke Jansson, Head of People & Culture, points out that the Applicant appears to have a misunderstanding as to the Respondent's digital team and digital function:

> "… I would like to clarify that the 'digital function' and 'digital team' referred to by Ms Burneikis [the Applicant], is a separate team contained within the broader 'experience'

team. The work of that 'digital function' is separate from NGS Super's decision to outsource the graphic design function as part of the move away from physical marketing materials and future reliance on more digital content, as outlined in item 5 of my 10 July Statement. Within the digital team, there are three roles; digital manager (Phil Towers), digital optimisation specialist, and digital producer. These roles do not design digital content, but rather build and maintain NGS Super's digital footprint by delivering optimised digital experiences (website, mobile app, social media, email, advertising, search engine, etc.) and provide data-driven insights to the wider business on user experience and activity."[17]

[23] Similarly, Ms Melissa Adam, Chief Experience Officer, gives the following evidence:

"… I repeat what I've said at paragraph 10 of my 10 July Statement and confirm that the management of regulatory documents was moved out of the 'experience' team and into the 'strategy' team. The project management of the regulatory documents sits within the strategy team but the graphic design work, was to be outsourced. This task did not require a full time employee as work was required on 'key events' at a maximum of three times a year. Further, as there were no vacancies in the 'strategy' team at the time of Ms Burneikis' redundancy, or anticipated in the future, there was no availability for redeployment there."[18]

…

"I disagree that the termination of the retainers referred to in paragraph 11 of the Applicant's Submissions increased Ms Burneikis' workload or deprived Ms Burneikis of the opportunity of training or downtime. The termination of these retainers (Fuji and Wellcom) had no effect upon Ms Burneikis' work as they predated my time at NGS Super and nonetheless would have been replaced by other retainers with service providers such as Dave Clarke, who currently better services the need of the 'experience' and in particular the 'digital' teams."[19]

[24] In *Christina Adams v Blamey Community Group*[20], the Full Bench of the Commission stated:

"…it is necessary to state at the outset that consideration of whether the employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the enterprise does not involve a merits review of the employer's decision to make the person's job redundant. It is not to the point that it may have been open to the employer to make a different operational decision which may have allowed the relevant employee's job to be retained. As was stated in *Low v Menzies Property Services Pty Ltd*, "Whether it was objectively fair or justifiable to decide to abolish a position is beside the point, as long as the employer acted as it did because of changes in its operational requirements." What s.389(1)(a) requires is for findings of fact to be made as to whether, firstly, the employer has made the decision that the relevant employee's job is no longer required to be performed by anyone and, secondly, whether that decision was made because of changes in the operational requirements of the enterprise. …"[21]

[25] Having regard to the case law set out in this decision, and the evidence and submissions of the parties, I make the following findings:

a) The Respondent made an operational (or business) decision that it no longer required the GDM role to be performed by anyone. Whilst the GDM role was made up of graphic design work and other administrative or associated tasks, the focus for the purposes of making the GDM role redundant was the graphic design work aspect of the role.

b) The Respondent, through its evidence tendered in the proceedings, has explained the operational reasons as to why it determined that it no longer required the GDM role to be performed by anyone.

c) None of the Applicant's evidence or submissions undermine the *bona fide* basis upon which the Respondent's decision to make the GDM role redundant has been made.[22] Again, the fact that an employee (such as the Applicant) might consider a particular decision to be bad, or wrong, or consider that another alternative and better (or more appropriate) decision ought to have been made, is not to the point.

d) Significantly, Ms Adam, as one of the two decision-makers at the Respondent who made the ultimate decision to make the GDM role redundant,[23] has given evidence in these proceedings, and had that evidence tested by way of cross-examination at hearing. The testing of Ms Adam's evidence has not resulted in it being undermined or altered.

[26] All in all, I find that the evidence discloses that the Respondent had genuine operational reasons to make changes to its business, and that such changes (as determined on a *bona fide* basis by the Respondent) resulted in the GDM role (i.e. the Applicant's job) no longer being required to be performed by anyone. I thus find that the Respondent has satisfied s.389(1)(a) of the Act.

Did the Respondent comply with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy? (s.389(1)(b))

[27] The statutory requirement under s.389(1)(b) requires a finding of fact, whereby the section "is not made out unless the various requirements of the relevant consultation clause are demonstrably discharged by the employer".[24]

[28] No enterprise agreement applied to the Applicant's employment with the Respondent.

[29] The Applicant asserts that the *Banking, Finance and Insurance Award 2020* (**Award**) covered and applied to her at the time of her dismissal. This is disputed by the Respondent, who says that the Applicant's employment was not covered by any modern award. There was no substantive argument made before me by either party as to the coverage and application of the Award. Rather than resolve the issue of Award coverage and application, I have decided to proceed on the basis that the Award did cover and apply to the Applicant at the time of her dismissal.

[30] Clause 28 of the Award relevantly requires consultation after an employer "makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees". The phrase "significant effects" is relevantly defined to include "termination of employment".

[31] The consultation requirements under clause 28 of the Award are conditional upon the relevant change being a "major" one that is likely to have "significant effects on employees". Determination of whether a change falls within this definition appears to be one of fact and degree. As White J said in *Port Kembla Coal Terminal Ltd v CFMMEU*[25]:

> "I do not regard a simple comparison between the number of employees to be terminated, and the number of the employees in its workforce overall … as being necessarily conclusive of the question of whether a change is "major". Much may depend on the circumstances of a given case including, for example, the seniority and importance of the employees … , the extent to which … employees work in an integrated or disconnected manner; the consequences for the continuing employees of the redundancies and consequent terminations, as well as other matters".[26]

[32] It has been said that reference to the plural "employees" rather than "employee" in similarly worded clauses does not capture individual redundancies on the basis that individual redundancies do not constitute a "major change" to the Respondent's operations that impact upon a collective of employees.[27]

[33] In this case, there was only one redundancy (i.e. the Applicant's role). I do not accept, on the evidence before me, in the circumstances of this case, that s.389(1)(b) of the Act is enlivened for consideration in these proceedings. In this regard, I find that, on the terms of clause 28 of the Award, by reference to the case law set out in this decision:

(a) The redundancy of the Applicant's role in the Respondent's business:

- was not a "major change" (i.e. the work performed by the Applicant was outsourced); and

- did not have "significant effects" upon the Respondent's remaining employees on an individual or collective basis (i.e. there is no evidence of any effects let alone significant effects flowing to any of the Respondent's employees arising from the redundancy of the Applicant's role with the Respondent. Whilst some existing employees might pick up an additional administrative or other task, this would not constitute any change or effect of significance).

(b) The Respondent has satisfied its Award obligations as to consultation concerning the Applicant's redundancy in that no Award consultations obligations arise for determination in these proceedings (i.e. because the threshold criteria (major change and/or significant effects) under clause 28 of the Award have not been satisfied on the evidence before me as matters of fact).

[34] The Applicant made extensive submissions asserting a failure by the Respondent to consult with her (or consult with her appropriately) in respect of its decision to make her role redundant. The Respondent engaged with these submissions, and took the position that even if the Award did cover and apply to the Applicant at the time of her dismissal, and even if her dismissal (redundancy) was a "major change" that had "significant effects" upon other employees, the Respondent nonetheless and in any event complied with the consultation requirements under clause 28 of the Award.

[35] Notwithstanding my finding that the Respondent has satisfied its Award obligations as to consultation concerning the Applicant's redundancy in that no Award consultations obligations arise for determination in these proceedings, I will in any event consider whether the Respondent has complied with clause 28. The facts in this regard are in my view properly reflected in the Respondent's submissions, which read:

> "NGS Super made a definite decision about the proposed redundancy on 9 March 2023.
>
> The proposed meeting to advise Ms Burneikis of the outsourcing and her redundancy was scheduled to take place on 16 March 2023, but this was delayed initially because Ms Burneikis was unwell and subsequently because of a cyber security incident affecting NGS Super.
>
> On 20 April 2023, NGS Super met with Ms Burneikis. In that meeting, Ms Melissa Adam, Chief Experience Officer, and Mr Luke Jansson, Head of People and Culture:
>
> a. gave notice of the changes to Ms Burneikis, being that:
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> i. a decision had been made to outsource the graphic design work;
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> ii. as a result, the Graphic Design Manager role was no longer required; and
>
> iii. Ms Burneikis' employment would be terminated by reason of redundancy if no alternative role could be found for her;
>
> b. discussed with Ms Burneikis the introduction of the changes, the expected impact on her employment and other matters likely to affect her. This occurred by:
>
> i. explaining the likely effect of the decision (if no suitable redeployment was found), would mean her employment would be terminated;
>
> ii. giving Ms Burneikis opportunities to ask questions about the changes and to discuss them;
>
> iii. encouraging Ms Burneikis to take time to consider the information and to reconvene at a later date to discuss further, including after she had reviewed the letter handed to her at the meeting which summarised the matters discussed;

iv. providing additional paid leave to Ms Burneikis in the interim, to all her non-work time to consider the redundancy decision and her response;

v. discussions about attempts (albeit unsuccessful) to find a role to which Ms Burneikis could be redeployed; and

c. commenced these discussions with Ms Burneikis as soon as was practicable, after a definite decision had been made(noting the slight delay in commencing these discussions given the circumstances outside of NGS Super's control as noted in paragraph 25 above).

On 20 April 2023, during the consultation meeting, NGS Super provided a letter to Ms Burneikis which set out in writing:

a. the nature of the changes, including:

i. the reasons for and decision to outsource the graphic design work;

ii. that the changes were not a reflection on Ms Burneikis' performance;

b. their likely effect on Ms Burneikis, including:

i. that her employment would be terminated if she could not be redeployed (which was unlikely);

ii. that she would be paid her statutory entitlements including pay in lieu of notice, redundancy pay, accrued annual leave and long service leave; and

c. other matters likely to effect Ms Burneikis, including:

i. the number for NGS Super's confidential Employee Assistance Program if Ms Burneikis' needed some support;

ii. to thank her for her contribution; and

iii. to say she could contact Mr Jansson if she had any further questions.

NGS Super attempted to arrange a second meeting with Ms Burneikis to allow her the opportunity to raise any additional questions or comments resulting from the consultation meeting or the letter, regarding her redundancy. However, after some delay due to Ms Burneikis being unwell, NGS Super received a letter from Ms Burneikis on 8 May 2023, raising several issues about the redundancy and advising that her preference was to not meet in person for any additional meetings.

On 15 May 2023, after taking the time to consider the comments Ms Burneikis raised regarding her redundancy on 8 May 2023, NGS Super sent an email to Ms Burneikis

> attaching a letter that responded to the issues she had raised and that also confirmed the redundancy decision and that Ms Burneikis' employment would be terminated as a result."[28]

[36] The Applicant attacks the Respondent's efforts to consult her as being inadequate, procedurally deficient, absent procedural fairness or natural justice, and/or just going through the motions.

[37] Consultation under clause 28 of the Award necessitated the Applicant being told or put on notice that her employment was in jeopardy due to redundancy. It also required her to be given an opportunity to consider this likely or potential outcome, and to provide 'feedback' in respect of same. In this case, I find that the evidence discloses that the Respondent has satisfied its obligations as to consultation (under clause 28 of the Award) in respect of the Applicant's redundancy, i.e. she was put on notice about her redundancy, she was given time to consider same, and she provided feedback (including in writing). Further, there is simply no evidence whatsoever that any further consultation, or any further consideration of the issues raised by the Applicant, would have achieved any different result.

[38] In her evidence and submissions, the Applicant has sought to intermingle (or mix together) issues going to s.389(1)(b) of the Act, with issues under s.389(2) of the Act. I have previously pointed out the difficulty with such an approach:

> "… Sections 389(1)(b) and 389(2) are separate and individual limbs. Different issues arise in respect of relevant findings to be made as to compliance or non-compliance with each limb. Whilst non-compliance with one limb gives rise to a redundancy not being genuine under s.389 of the Act, it will not always (or even usually) be the case that a failure to consult will mean that redeployment would have been reasonable. Indeed, in many cases, no matter how much consultation could or should have occurred, there was never a reasonable basis for redeployment."[29]

Would it have been reasonable in all the circumstances for the Applicant to have been redeployed within the Respondent's enterprise? (s.389(2))

[39] 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 of the circumstances for the person to have been redeployed within the employer's enterprise, or an associated entity of the employer. The Respondent in this matter does not have any associated entities.

[40] The highest binding interpretation of s.389(2) remains that stated in *Ulan Coal Mines Limited v A. Honeysett & Ors*[30] (***Honeysett***):

> "[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.
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> …
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> [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 sometime 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)

[41] It can been seen from the foregoing extract from *Honeysett*, that the reasonableness of redeployment for the purposes of s 389(2) of the Act is to be assessed as at the time of the relevant dismissal.[31] Further, in assessing the reasonableness of redeployment, it is necessary to identify the 'position' to which the employee could have been redeployed,[32] and determine whether that position or other work is, for want of a better term 'the right fit' (or reasonable) for both the employer and the employee. To be clear, one does not search for duties, tasks or responsibilities that may exist to be performed. Rather, the focus is upon an available standalone 'position' that it would have been reasonable (in all of the circumstances) to redeploy a relevant employee into as at the time of his or her dismissal.

[42] Section 389(2) of the Act does not:

a) interfere with the right or ability of an employer to require that the selection criteria (as to skills, qualifications or experience) for a relevant vacant position be met by an employee seeking to be redeployed;

b) require an employer to fit a square peg into a round hole. In other words, simply because a vacant position exists at the time of an employee's dismissal (redundancy), does not mean that an employer is required to bend, twist, ignore, delete, water down or otherwise amend selection criteria to so as to enable the redeployment (of such redundant employee) to occur;

c) create an obligation upon an employer to redeploy an employee into a role that the employer does not accept is suitable (i.e. because the employee does not hold the requisite skills, qualifications and/or experience that the employer requires). Indeed, such an obligation could hardly be said to be reasonable; or

d) create an obligation upon an employer, or otherwise require an employer, to create a standalone role for an employee that does not already exist, e.g. by

> pulling duties and tasks, or strands of duties and tasks, together to create a position (permanent or supernumerary). This is so, no matter no matter how long a relevant employee might have been employed by the employer.

[43] The conclusion of the Full Bench in *Teterin v Resource Pacific Pty Ltd t/a Ravensworth Underground Mine*[33], as to the interaction between s.389(2) and s.385(d) of the Act, are also worth drawing attention to, as follows:

> "The manner in which the Deputy President expressed his conclusions may be justified by reference to s.385(d), which requires that for a person to have been unfairly dismissed, the Commission must be satisfied that the dismissal was *not* a case of genuine redundancy. It must follow that the applicant in an unfair dismissal case bears the risk of failure if the state of satisfaction required by s.385(d) cannot be reached. If the Deputy President considered the evidence insufficient to allow him to determine whether redeployment was reasonable under s.389(2), then (there being no issue with respect to the s.389(1) matters) he could not be satisfied that the dismissals were not genuine redundancies, meaning that the applications before him had to be dismissed."[34]

[44] Similarly, in *Jain v Infosys Ltd*[35], the Full Bench said:

> "… in the context of the question whether a dismissal was an unfair dismissal in which there is also agitated whether the dismissal was a case of genuine redundancy, to the extent that there is a legal onus of proof or something analogous thereto, it rests with the applicant in the sense that the applicant bears the risk of failure if the satisfaction required by s.385 including paragraph (d) is not reached."[36]

[45] The Applicant submits that she should have been redeployed to the Strategy / Product Team of the Respondent's business. She says that this redeployment would have been reasonable because of the Applicant's skills, experience, and the actual duties she undertook in the GDM role (which were not fully understood or appreciated by the Respondent, and extended beyond just graphic design tasks). Further, over the 18 years that the Applicant has been employed by the Respondent, she has always adapted as the Respondent (including its business operations) have changed and evolved (i.e. there is no reason as to why the Applicant could not simply adapt again). The Applicant also says that she had no relevant qualifications for the GDM role, but adapted to it, and could do the same for any other redeployment position.[37]

[46] However, the Applicant has failed to identify any specific role or roles that, at the time of her dismissal, were available (vacant) for her redeployment (i.e. beyond the assertion that the GDM role ought not have been made redundant in the first place, or that she should have been simply redeployed to perform other available work across the Respondent's business or in the Strategy / Product Team). In my view, this is fatal to the Applicant's contention that the Respondent has failed to comply with s.389(2) of the Act. In other words:

a) How can the Commission assess whether or not it would have "been reasonable in all the circumstances for [an employee] to be redeployed" into another role at an employer's enterprise (at the time of his/her dismissal) when the employee has not identified exactly what the relevant role or standalone position (or asserted lost opportunity) was?

and

b) How can an employer be held to a redeployment requirement or standard when the relevant employee pressing for such a requirement or standard to be observed has not identified the specific role or roles to which such requirement or standard applies?

[47] The short answer to both of the foregoing questions is that it is not for the Commission to speculate as to redeployment options. A vacant position, at the time of an employee's redundancy, that would have been reasonable in all of the circumstances (objectively considered) for redeployment, either exists or it does not, and its existence is a matter for evidence. In this case, there is simply no evidence that there was in fact a vacant independent standalone role or position available in the Respondent's business (in any of its work divisions), at the time of the Applicant's dismissal, for the Applicant to be redeployed into.

[48] Mr Jansson has given extensive evidence as to the roles that were available at the Respondent (at or about the time of the Applicant's dismissal),[38] and why redeployment of the Applicant into the Respondent's Strategy Team was not possible (or reasonable).[39] Relevantly, Mr Jansson states:

> "None of these roles were suitable for Ms Burneikis, who does not have any formal qualifications and whose experience is limited to traditional graphic design activities. In particular, the Content and Communications Editor was a role which was required to primarily draft articles and content for communications pieces and the Digital Optimisation Specialist role was primarily a data analytics role to review and compile marketing data into a format where trends could be identified and engagement could be tracked. Ms Burneikis did not have the skills or experience to perform either of these roles – either immediately or even after a short period of training.
>
> In the Meeting, I explained to Ms Burneikis that we had considered redeployment within NGS Super and found that there were no available roles for which she had the skills or experience to perform. We asked Ms Burneikis to provide any suggestions regarding redeployment, initially by 28 April 2023 however this date was later extended to 8 May 2023**.** Ms Burneikis was aware of current roles available at NGS Super at the time of the Meeting via the online Workplace intranet job board. When a new role is posted to the job board all employees receive an email notification directing them to the job board. As noted above, I did not believe Ms Burneikis to be suitable for any roles advertised as none were within her particular skill or experience sets, but she nonetheless had an opportunity to apply for these roles if she believed she could be redeployed. We did not receive any applications or interest from Ms Burneikis for redeployment to any roles advertised at NGS Super."[40]

[49] The foregoing evidence of Mr Jansson was confirmed by the Applicant herself during her cross-examination at the hearing.[41]

[50] Having regard to the case law set out in this decision, and the evidence and submissions of the parties, I am unable to accept that the evidence discloses that it would have been

reasonable in all of the circumstances for the Applicant to have been redeployed within the Respondent's enterprise. I thus find that the Respondent has satisfied s.389(2) of the Act.

Other matters

[51] The Applicant makes various claims as to what she submits are the 'real' reasons for her dismissal (disguised by the Respondent as a redundancy). I do not accept that the evidence supports these so-called 'real' reasons for the Applicant's dismissal. Further, given my findings that the Respondent has satisfied the requirements of s.389 of the Act, it follows that the Applicant has failed to satisfy me that her dismissal was 'not' a case of genuine redundancy (s.385(d)). In other words, it is both unnecessary and inappropriate for me to make findings as to the Applicant's claims as to the 'real' reason/s for her dismissal in circumstances where her claim as to unfair dismissal, as a matter of law, can no longer proceed any further.

Summary of findings

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

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

(b) The Respondent has satisfied its obligations as to consultation (s.389(1)(b) of the Act).

(c) The Respondent has complied with the requirements of s.389(2) of the Act in that there is no evidence that it would have been reasonable in all of the circumstances to have redeployed the Applicant in its enterprise.

(d) In view of (a) to (c) above, the dismissal of the Applicant is a case of "genuine redundancy" within the meaning of s.389 of the Act.

Conclusion

[53] The Applicant's dismissal is not one to which the Commission has the power to interfere with under the Act. Her Application is therefore *dismissed*. An order to this effect will follow the publication of this decision.

DEPUTY PRESIDENT

Appearances:

The Applicant (Ms *Vilija Burneikis*) appeared for herself.

Mr *Brendan Tynan Davey*, Head of Legal and Governance, appeared for the Respondent.

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[1] *Pankratz v Regional Housing Limited* [2013] FWC 1259, at [6]-[9].
[2] *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.
[3] (1996) 69 IR 370.
[4] Ibid, at 373.
[5] *Christina Adams v Blamey Community Group* [2016] FWCFB 7202, at [14].
[6] [2014] FWC 7829.
[7] Ibid, at [16]. Cited with approval in *Adams v Blamey Community Group* [2016] FWCFB 7202, at [14].
[8] *Kekeris v A. Hartrodt Australia Pty Ltd* [2010] FWA 674, at [27].
[9] [2004] FCAFC; (2004) 136 FCR 388.
[10] Ibid, at [43]-[44].
[11] Exhibit R1, Jansson Statement, 10 July 2023, at [6].
[12] Ibid, at [7]-[11]. Exhibit R2, Adam Statement, 10 July 2023, at [5]-[6].
[13] Exhibit R1, Jansson Statement, 10 July 2023, at [3]-[5], [12]-[14], [18]. Exhibit R2, Adam Statement, 10 July 2023, at [7]-[13].
[14] Exhibit R1, Jansson Statement, 10 July 2023, at [42]. Exhibit R2, Adam Statement, 10 July 2023, at [25]-[27].
[15] Transcript, PN298-PN300.
[16] Applicant's Submissions, 17 July 023, at [7]-[11]. Exhibit A1, Applicant's Statement, 17 July 2023, at [22]-[24].
[17] Exhibit R3, Jansson Statement, 24 July 2023, at [6]. Transcript, PN167.
[18] Exhibit R4, Adam Statement, 26 July 2023, at [2].
[19] Ibid, at [6].
[20] [2016] FWCFB 7202.
[21] Ibid, at [14].
[22] See, for example, Transcript, PN298-PN300.
[23] Transcript, PN70-PN71.
[24] *Maxwell v Bardrill Corporation Ltd* [2015] FWC 4019, at [40]-[41].
[25] (2016) 248 FCR 18; [2016] FCAFC 99.
[26] Ibid at [499].
[27] *Tsiftelidis v Crown Melbourne Limited* [2016] FWCFB 4675, at [33].
[28] Respondent's Submissions, 10 July 2023, at [24]-[29], footnotes omitted.
[29] *Peter Davison v DHL Supply Chain (Australia) Pty Ltd* [2021] FWC 4573, at [48].
[30] [2010] FWAFB 3488; (2010) 199 IR 363.
[31] See also *Technical and Further Education Commission v Pykett* [2014] FWCFB 714 (2014) 240 IR 130, at [35].
[32] Ibid, at [34], [36], [38]–[40].
[33] [2014] FWCFB 4125; (2014) 244 IR 252.
[34] Ibid, at [31(2)]. See also at [26].
[35] [2014] FWCFB 5595.
[36] Ibid, at [35].

[37] Applicant's Submissions, 17 July 023, at [7]-[8], [20]-[21]. Exhibit A1, Applicant's Statement, 17 July 2023, at [22]-[24]. Transcript, PN112-PN115.
[38] Exhibit R1, Jansson Statement, 10 July 2023, at [25]-[26].
[39] Exhibit R3, Jansson Statement, 24 July 2023, at [2]-[3]. See also Exhibit R4, Adam Statement, 26 July 2023, at [2].
[40] Exhibit R1, Jansson Statement, 10 July 2023, at [27]-[28].
[41] Transcript, PN193-PN206 and PN219-PN226, PN244-PN248, PN262-PN268.