



DECISION

Fair Work Act 2009
s.394—Unfair dismissal

David Kelly

v

“Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU)
(U2023/2477)

DEPUTY PRESIDENT EASTON

SYDNEY, 12 OCTOBER 2023

Application for an unfair dismissal remedy – genuine redundancy – special projects officer – employer decision to make co-ordinator role on project redundant – job made redundant during a project – because of a change in operational requirements – project not delivering anticipated benefits – alleged ‘real’ reason for making position redundant – reasonable to redeploy to another position – other position available – employer’s reasons for not redeployment were reasonable – genuine redundancy is a complete defence – application dismissed.

Introduction and Overview

[1] On 24 March 2023 Mr David Kelly made an application to the Fair Work Commission under s.394 of the *Fair Work Act 2009* (Cth) for a remedy, alleging that he had been unfairly dismissed from his employment with the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU). Mr Kelly seeks reinstatement to his former position.

[2] At the time of his dismissal Mr Kelly was employed as a Special Projects Officer. His primary responsibility was to co-ordinate a project in the Heating, Ventilation and Air-Conditioning (HVAC)/Sheetmetal industry sector. Mr Kelly’s work on the HVAC project included preparatory steps for multi-employer bargaining.

[3] By February and March 2023 Mr Kelly and others were working very long days. Mr Kelly thought that they had made significant progress, but that the project was poorly resourced. In his last weeks of his employment Mr Kelly advocated for a significant increase in resources for the project.

[4] Mr Cory Wright is the State Secretary of the NSW/ACT Branch of the AMWU. Mr Wright made the decision to hire Mr Kelly and also made the decision to dismiss him.

[5] Mr Wright did not share Mr Kelly's view that the HVAC project had made significant progress. In March 2023 Mr Wright decided that the return on the AMWU's diminishing resources could be improved if Mr Kelly's role coordinating the project was abolished and instead two organisers were hired on delegation out of the sheetmetal or a similar industry.

[6] Mr Kelly's employment was terminated on 7 March 2023. Mr Kelly alleges that the 'real' reason he was dismissed was because Mr Wright is unstable, or because Mr Wright acted capriciously or spitefully for reasons unknown.

[7] Mr Kelly sought reinstatement and said he could re-establish a working relationship with Mr Wright because "it's a trade union, it's tough, you sort out your differences, you shake hands and you move on. A union is a totally political organisation and is different to other organisations."

[8] For the reasons that follow I find that Mr Kelly's dismissal was a case of genuine redundancy and his application must be dismissed.

Evidence in the Applicant's case: Mr Kelly

[9] In March 2021 Mr Kelly commenced employment with the AMWU. Before his employment with the AMWU Mr Kelly worked as a union official for approximately 30 years, primarily employed by the Construction Forestry Maritime Mining Energy Union (CFMMEU).

[10] Mr Kelly was initially employed by the AMWU as a Work Health and Safety Officer. In this role his duties were to provide information and support to union organisers regarding workplace health, welfare and safety. Mr Kelly said his duties broadened within the first six months and that he played a mentoring role to union organisers, advising them and assisting them in their organising duties generally.

[11] From time-to-time Mr Kelly visited workplaces where, he said, he was "basically working as an organiser." Sometime in late 2021 Mr Kelly's title was changed to "Safety and Industrial Official." He said "I was nominally called an official not an officer, in order to not to be confused with an industrial officer of the AMWU."

[12] In August 2022 Mr Kelly's title was changed to "Special Projects Coordinator" after discussions with the State Secretary Mr Wright.

[13] Later on he was referred to as a "Special Projects Officer." Mr Kelly said "in discussing this change in title ... with Mr Wright, it was recognised that I needed somehow to be distinguished from other officials and provide me a more senior title because I was dealing with government agencies and political figures."

[14] In a memo sent by Mr Kelly to Mr Wright on 5 September 2022, Mr Kelly described the “primary roles and duties” of his position. Mr Wright did not respond to the memo. The memo included the following:

“Primary roles and duties

1. Training

- Carry-out the compulsory organiser Right of Entry training – for both the federal and industrial relations and NSW (and potentially ACT) work health and safety permits
- Carry-out on-site training of officials in the use of Right of Entry powers and procedures
- Undertaking any other training as directed

2. Project – Construction Industry: Building, Mechanical and Civil sectors

- Sheetmetal/Aircon sector
- Sydney Metro/Tunnel and associated works, including fabrication yards and subcontractors
- Metal and engineering projects in Port Kembla, principally number 5 blast furnace re-line and associated work
- Manildra Starches in Bomaderry (ongoing metal/engineering projects) and associated work
- Tallawarra Power-station/hydrogen gas plant and associated work

3. General organiser advice and assistance

- As requested through team leads”

[15] The evidence about Mr Kelly’s role is relevant to the question of whether his “job” was made redundant and also to the question of whether it would have been reasonable to redeploy Mr Kelly to an alternative position as an organiser.

[16] The HVAC campaign began in earnest in around November 2022 and Mr Kelly said the campaign had five objectives:

- (a) to eliminate sham contracting and the illegitimate use of “ABN taxation systems in the industry;”
- (b) to get all workers into union enterprise agreements and thereby lift rates of pay to industry standards;
- (c) to prepare for multi-employer bargaining in the sector in anticipation of changes to the *Fair Work Act 2009* (Cth) (**FW Act**);
- (d) to update training packages and to develop a process to establish trade qualifications for skilled workers; and
- (e) to educate workers, the employers and major building companies about the AMWU’s objectives.

[17] Mr Kelly said that in or around August 2022 he was tasked with the responsibility of coordinating the HVAC campaign. Other personnel were assigned to the campaign however Mr Kelly said “the HVAC campaign was extremely poorly resourced and required us all to work hours well above what is reasonable.”

[18] Mr Kelly described the campaign as “far from complete, perhaps 50% complete” at the time of his dismissal, and said of his workload generally:

“From all this I think it reasonable to say I was extremely busy with a wide-ranging number of significant tasks to do.

The truth is that I believe I was sacked, unceremoniously, on the whim of the NSW State Secretary Mr Cory Wright.”

[19] Mr Kelly said that the HVAC campaign faltered in early February 2023 when Mr Steve Murphy, the National Secretary of the AMWU, announced a multi-employer bargaining plan in conjunction with the head of the HVAC Employer Manufacture and Installation Association. Mr Kelly said he contacted Mr Murphy at this time to advise that the campaign was likely to fail due to Mr Wright’s lack of attention to the campaign.

[20] On or about 7 February 2023 a meeting was arranged with employer representatives. Mr Kelly said that Mr Wright was expected to be in attendance at the meeting but did not attend. He said that the employer representatives were “furious and demanded to see Mr Murphy.”

[21] Mr Kelly said that one to two weeks later he was contacted by an employer representative who was angry at the “seeming stalling of the multiemployer campaign.” Another meeting was arranged and, Mr Kelly said, Mr Wright was expected to attend but chose to attend only by telephone.

[22] After this meeting Mr Kelly was invited to a meeting with Mr Wright and the Assistant State Secretary, Ms Robyn Fortesque. This meeting took place on or around 16 February 2023 and Mr Kelly went through the campaign details and provided an update. At the end of the meeting Mr Wright proposed a further meeting on 22 February 2023 however this meeting did not happen because Mr Kelly was called away on that day to another safety dispute on-site.

[23] Mr Kelly prepared a memorandum detailing the status of the campaign, dated 3 March 2023, and sent it to Mr Wright and Mr Murphy. In the memorandum Mr Kelly made recommendations about next steps and in relation to personnel said:

“I think we need to urgently discuss potentially upskilling another three or four Branch officials to assist with the campaign and later, to help out in the sector when required. I believe the Branch needs additional officials trained to deal with urgent problems arising when Steve or I are absent or are otherwise caught up. This would allow the Branch to, when necessary, quickly bulk up numbers and then scale back down.”

[24] Mr Kelly said he received an immediate response to his memorandum from Mr Wright, being an email inviting Mr Kelly and another, Mr Steve Isberg, to attend a meeting on 7 March 2023. Mr Kelly said “I thought that the meeting would be about the campaign but it appears, however that Mr Wright planned to terminate my employment on that day.”

[25] Mr Kelly said that early in the morning on 7 March 2023 he received a phone call from Mr Royce Coffey. Mr Coffey told him that he had just held discussions with Mr Wright in Newcastle and that Mr Wright was heading down to Sydney to sack Mr Kelly.

[26] Later in the morning on 7 March 2023 Mr Kelly met with Mr Wright and Mr Isberg as planned and spoke for approximately 15 minutes about Mr Kelly's memorandum and the HVAC campaign. According to Mr Kelly:

“At this point Mr Wright asked to meet him alone and Steve [Isberg] left us to go to site. Once Steve left the room, Mr Wright then told me ‘that my role was being made redundant and my employment would be terminated effective immediately.’ He handed me a letter at that point. I wasn't able to focus well on the letter and simply told Mr Wright that he was making a huge mistake and that the entire campaign would collapse and the membership would be adversely affected.

I also told him that I had arranged a lot of important meetings for that day and for the rest of the week on building sites as well as in the vehicle industry. I asked if I could attend them and close issues out. He said ‘no,’ despite my telling him that some meeting participants were traveling some three hours that day to meet with me that morning and our members at [a site] were relying heavily on my attending site to help them.”

[27] The letter of termination given to Mr Kelly said the following:

“Organisational restructure

As discussed with you in our meeting today, the Branch has recently conducted a review of its operational requirements. Having regard to this review and the financial position of the Branch, the Union has formed the view that a restructure is necessary, and your specialist role is no longer required to be performed.

Part of the process that we have gone through in conducting our review is to consider whether we have any suitable alternative positions available for you. Unfortunately, we have not been able to identify any suitable available positions at this time. Accordingly, your employment will terminate due to redundancy as of close of business today.

You will be paid your entitlements in lieu of notice and you are otherwise required to return your entry permits, passes and any other items in your possession belonging to the Union by close of business today.

You will appreciate that these issues are extremely sensitive. As a result, we require you to keep the contents of our discussions and this letter, absolutely confidential. In particular, we require that you do not discuss these issues with any other staff, officers or officials of the Union.

We appreciate the role you have played in assisting the Union carry out its projects and wish you all the best for your future endeavours.

In Unity.”

[28] Mr Kelly said that he was offered a “settlement” in the meeting on 7 March 2023, being notice of termination, leave entitlements and an additional 18 weeks’ salary. Mr Kelly said he did not agree to the terms proposed by Mr Wright. The next day Mr Kelly received an email from Mr Wright indicating that he would receive 5.7 weeks’ pay rather than the 18 weeks’ redundancy pay.

[29] One week after he was dismissed Mr Kelly became aware of a memo issued by Mr Wright advertising three union organiser positions. He said “given my skills and experience, I believe I would be suitable for any of these roles, and in fact I was performing basic organising duties in addition to my more senior activities.”

[30] In response to evidence suggesting that he had made comments that were critical of the AMWU’s proposed national organising strategy, Mr Kelly’s said “the AMWU is a large, diverse and robust working-class organisation, not a cult. It is expected within the AMWU, as in all unions that members, including me, to have opinions and express them frankly.”

[31] Mr Kelly’s central argument is that his dismissal was not a genuine redundancy but instead:

- (a) Mr Wright acted on an impulse to sack Mr Kelly, for reasons unknown to Mr Kelly, and did so absent from any assessment or consideration of the operational requirements of the AMWU; and/or
- (b) Mr Wright’s feelings towards Mr Kelly inexplicably turned sour in or around August or September 2022; and/or
- (c) Mr Wright’s spite remains the only logical explanation for Mr Kelly’s termination; and/or
- (d) the reason for termination was Mr Wright’s capriciousness and instability alone.

[32] None of the evidence given by Mr Kelly directly includes any other instance of Mr Wright acting impulsively, spitefully, capriciously or the like towards him.

[33] In cross-examination Mr Kelly said:

- (a) he didn’t know whether Mr Wright had any animosity towards him, although he said “Cory Wright sometimes has animosity but other times he thought I was the best thing on earth;”
- (b) in late 2022 and early 2023 most of Mr Kelly’s work time was spent on the HVAC campaign;
- (c) Mr Kelly, Mr Isberg and Mr Coffey did some pre-work for the campaign between August and November 2022 and then worked “non-stop through the jobs” from November 2022 onwards. From September 2022 through to February 2023 Mr Kelly did work on recruiting new members in the HVAC sector;
- (d) Mr Kelly’s belief, based on member records, was that there were approximately 180 members in the HVAC sector at the start of the campaign, which was thought to be about 30% of the potential number of members in the sector;
- (e) Mr Kelly was told that approximately 100 members were signed up during the campaign, but did not know whether Mr Wright’s contrary figure of 60 new members was correct or not;
- (f) Mr Kelly’s view, expressed in his memorandum dated 3 March 2023, was that more resources needed to be deployed to the HVAC campaign;

- (g) the notion that Mr Wright was unhappy that Mr Kelly was asking for more resources when three organisers spent six months to recruit only 60 new members, was “surprising”;
- (h) he was not shy about putting to Mr Wright or Mr Murphy that the campaign needed more resources;
- (i) sometimes Mr Wright was unstable and sometimes he was very rational and easy to deal with, and sometimes he acted capriciously. Despite these views Mr Kelly could re-establish a working relationship with Mr Wright because “it’s a trade union, it’s tough, you sort out your differences, you shake hands and you move on. A union is a totally political organisation and is different to other organisations”; and
- (j) one of his “fatal flaws” in life is dealing with computers.

Evidence in the Applicant’s case: Mr Royce Coffey

[34] Mr Royce Coffey provided two written statements in support of Mr Kelly’s case. Mr Coffey worked as an organiser for the AMWU for 17 months between October 2021 and February 2023 and worked closely with Mr Kelly.

[35] Mr Coffey referred to a proposed safety blitz in the HVAC industry schedule for 15 November 2022:

“On 14 November 2022 I met with Cory Wright and asked if he was going to approve the blitz which had been planned to begin the next day. Cory snapped at me and said words to the effect of “I’m not going to fucking disrupt the branch and put anymore organisers on the campaign.” He continued to rant in a raised voice about how he was unhappy with the running of the campaign and accused David Kelly and I of doing our own thing around, including, oddly “doing fishing expeditions around Sydney” and not communicating with him.

I responded to Cory by explaining that I felt frustrated and did not know who to take direction from as David Kelly was the only person showing any direction but that David Kelly was only a senior organiser. Cory responded by calling David Kelly and telling him he was unhappy with the campaign and did not know what was going on. After Cory had hung up on David Kelly, he said words to the effect of: “you fucking go down there with him tomorrow but the others are not working on it!” before abruptly walking out of the room.”

[36] Mr Coffey estimates that during his employment (to February 2023) well over 100 new members were recruited in the HVAC campaign.

[37] In his first statement Mr Coffey referred to receiving text messages from Mr Wright on the day Mr Kelly was dismissed. Mr Coffey does not appear to have replied to any of them. He said that at 1:01pm Mr Wright sent a message saying “Got a job offer for you.” Mr Coffey said in his statement that he was not interested in the job and did not reply to Mr Wright’s offer. In his first statement Mr Coffey does not refer to speaking to Mr Wright on that day in the morning.

[38] In his second statement Mr Coffey said he met with Mr Wright at his house in the morning of the day Mr Kelly was dismissed. Mr Coffey described the following interaction with Mr Wright:

“CW: “You’re not going to like what I’m going to do today”
RC: “What are you going to do?”
CW: “I’m going to sack Dave.”
RC: “No...no... He has done so much good for our union.”
CW: “It’s happening. I’m doing it. I should have done it a long time ago.”
RC: “Well fuck off! That way!”
At that point my wife entered the room and Cory left.”

[39] One-week later Mr Coffey advocated for Mr Kelly and described the following conversation he had with Mr Wright on 15 March 2023:

“On 15 March 2023 I contacted Cory, in an effort to get Dave reinstated and to get the HVAC campaign back up and running. Among other things, Mr Wright told me “I’m going to wipe the others out.” I actually think he said “I’m going to wipe those cunts out”, but I didn’t bother to record every time he swore at me during the conversion. Mr Wright was referring to the officials and staff of the Union that he perceived were not loyal to him. I attach and mark as RC5 a copy of my diary entry describing the conversation where this comment was made to me by Cory Wright.”

[40] Mr Coffey’s diary entry said:

“Met with Cory Wright to try and salvage sheet metal campaign. He would not reinstate Dave Kelly to help the other organisers, stated he would wipe the others out.”

[41] Mr Coffey observed Mr Kelly working 12-14 hours days by 2023 and thinks it is “absolutely ludicrous” of Mr Wright to state that the HVAC project did not require further coordination or that Mr Kelly’s role was no longer needed in this context.

Evidence in the Applicant’s case: Ms Jacqueline Carovska

[42] Ms Jacqueline Carovska is a union official of the AMWU. Ms Carovska knew Mr Kelly through mutual friends in the union movement and suggested his appointment.

[43] In 2023 Mr Carovska stood for election for the role of Assistant Secretary of the NSW branch. Ms Carovska ran against Ms Fortesque but was not successful.

[44] Mr Carovska said that she previously had a good relationship with Mr Wright and that they had been friends for a long time. She said that Mr Wright previously offered her the Assistant Secretary role but “releged on that offer.” Ms Carovska said her friendship with Mr Wright deteriorated when she made known her plans to run for election against Ms Fortesque.

[45] Ms Carovska said she received a phone call from Mr Wright in September 2022, presumably when they were still friends, and Mr Wright told her that he wanted to sack Mr Kelly because “he said he believed that Mr Kelly was a bad influence and that he had poisoned Royce [Coffey].”

[46] More significantly, Ms Carovska said she spoke to Mr Wright in February 2023 about Mr Kelly’s employment:

“One morning in February of this year, I walked past Mr Wright’s office and said ‘hello’ to diffuse tensions, Mr Wright then asked if I wanted to go for a walk and talk. We spent time talking about the situation with the election, at some point he then raised with me that he was planning to sack Mr Kelly. I told him I wouldn’t support that decision. I also said that Mr Kelly was part of the solution and not the problem. Mr Wright did not give me any reason he just stared at me.”

Evidence in the Applicant’s case: Mr Nathan Everson

[47] Mr Everson is employed with the AMWU as a Rail Industry Co-ordinator. Mr Everson said that Mr Kelly offered guidance and support and understands the philosophical foundations that underpin working class politics. Mr Everson said he learnt a lot more from Mr Kelly in the brief time he was with the AMWU than any other official and feels privileged to have had the opportunity to work with him.

Evidence in the Respondent’s case: Mr Cory Wright

[48] Mr Cory Wright has worked for the AMWU in different capacities since 2008. In 2020 he was appointed to the vacant position of State Secretary of the NSW and ACT Branch of the AMWU. In May 2023 he was elected to the same position.

[49] Mr Wright said that the AMWU is dealing with significant challenges. Australian manufacturing has been in structural decline for many years, with obvious implications for the AMWU’s potential and actual membership. In the six years from 2017, the AMWU’s membership has dropped from 62,225 to around 48,476. He said, this has a significant impact on revenue, budgets and the ability to employ people and “it has required me to continually look for ways to become more efficient so that we make sure there is maximum return on the spending of members’ money.”

[50] Mr Wright said that employment “on delegation” means the engagement of members to work as an Organiser for a period and then to return to their trade or occupation. Organisers employed on delegation are paid by the Branch for the period. Some organisers employed on delegation convert to permanent full-time officials or officers. Mr Wright also said that there are cases where the branch would hire organisers in a more conventional way but that such cases are the exception rather than the rule. Mr Wright estimated that almost three quarters of the organisers employed by the AMWU started on delegation.

[51] Mr Wright said the AMWU is a rank and file led union where the members are in control of the decision-making processes. Because of this, the AMWU generally tries to work cooperatively rather than confrontationally with employers.

[52] Mr Wright said that throughout his employment the NSW branch has allocated resources to a safety unit that has responsibility for Work Health and Safety (WHS) and workers compensation functions. When Mr Wright became State Secretary in 2020 he took oversight of the safety unit. At this time in the Safety Unit the AMWU employed a Workers Compensation Officer (Mr Alan Mansfield), a WHS Officer (Mr David Henry) and Ms Carovska as an organiser with responsibility for supporting officials across the branch in WHS entry permit applications.

[53] In late 2020 Ms Carovska asked to move back into a role with more organising work because she did not enjoy the narrow focus of the safety role and wanted more contact with members and involvement in industrial disputation and bargaining. Mr Wright said that Ms Carovska recommended Mr Kelly to fill the health and safety role.

[54] In March 2021 Mr Wright met with Mr Kelly and discussed the possibility of him coming to work in the health and safety unit on a temporary fixed term basis. In this discussion Mr Kelly referred to his involvement in various ‘blues’ in the construction industry, and that he had significant experience supporting workers in the formation of WHS structures and supporting WHS disputes. Mr Wright recalled forming the view that Mr Kelly met the criteria for the role of a WHS officer, that Mr Kelly’s approach to organising was not the same as the AMWU’s approach, and that Mr Kelly would need “oversight and monitoring to ensure he met the identifiable differences in expectations of working at the AMWU contrasted against his previous experience.”

[55] On 26 March 2021 Mr Kelly was appointed to the position of NSW Safety Officer for a fixed term period of three months. The fixed term nature of the appointment is recorded in the written Letter of Delegation Appointment. In this role Mr Kelly was responsible for WHS Entry Permit training, providing advice to the leadership for potential strategies for WHS intervention to support members, assisting the organising team with WHS disputes, and reviewing and providing suggestions regarding internal procedures.

[56] In June 2021 Mr Kelly’s fixed term role was extended for 12 months and he was regraded from Level 3 to Level 4. In August 2021 Mr Kelly’s hours were reduced from full-time to 20 hours per week (five days per week at four hours per day) at his request. Hours were then increased in September 2021 to 32 hours per week over four days, again at Mr Kelly’s request.

[57] In late 2021 Mr Kelly was assigned to support Mr Coffey on the Snowy Hydro 2.0 project in relation to safety matters.

[58] Mr Wright said that it was necessary for him to regularly seek feedback from officials and staff on the progress of projects and of Mr Kelly’s contributions. He said “feedback over Dave’s employment was inconsistent. Some officials would report enjoying Dave’s approach to safety inspections, others indicated they found it inappropriate.”

[59] Mr Wright gave evidence of a number of complaints made about Mr Kelly’s conduct when assisting other organisers. It is not necessary to describe or consider these complaints in any detail. The fact that there were complaints and concerns is relevant to the reasonableness

of redeploying Mr Kelly to an organisers position, however the veracity of each individual complaint is not.

[60] In about April 2022 the employment of Mr Kelly and seven other employees was converted from fixed-term to ongoing permanent employment. Mr Wright said that he did not make the decision to change the employment status of these employees lightly because, he said, of the financial implications for the AMWU.

[61] In May 2022 Mr Kelly was appointed to the role of Health and Safety Officer on an ongoing basis. Later on Mr Kelly's title was changed again to Special Projects Officer at Mr Kelly's request.

[62] Mr Wright said that in his interactions with Mr Kelly he "recognised his effectiveness to agitate disputes on-site" but that Mr Kelly proved somewhat problematic in keeping on track and keeping to agreed targets. Mr Wright said it was necessary to consistently redirect Mr Kelly's work.

[63] Mr Wright said that in mid-2022 Mr Kelly, Mr Coffey and Ms Isberg were asked to map opportunities across construction and feed in industries across the greater Sydney area.

[64] In September 2022 Mr Kelly provided a memo with an update on the HVAC campaign, estimating that there was a potential for 1000 new members in the industry. Mr Wright interviewed two delegates in or around November 2022, and thought that each would be suitable for the project on delegation. However both candidates declined to take the roles offered to them and the two vacant positions were kept open.

[65] Mr Wright said he met with Mr Kelly and Ms Fortesque on 16 February 2023 to discuss the progress of the HVAC campaign. Mr Wright said that at the meeting he told Mr Kelly that he needed an update on how many workers were engaged on each of the projects and what mapping was on hand "so that we could make decisions about where we place our resources and about next steps of the project."

[66] Later on the same day Mr Wright met with Mr Kelly, Mr Isberg and Mr Coffey to prepare for the meeting with the HVAC employers the following day. Mr Wright said he was aware of the agenda for the meeting. Mr Wright said he was unable to attend the meeting on 17 February 2023 because he was ill. Mr Murphy attended and Mr Wright caught up with Mr Murphy, Mr Isberg and Mr Kelly after the meeting and discussed, he said, the status of membership, the AMWU's approach to bargaining and next steps for the campaign. Mr Wright said that over the course of the project he regularly met with Mr Murphy because the project had national significance.

[67] By February 2023 Mr Wright began to form the view that the project could not continue resourcing Mr Kelly's coordinator role. He said that the NSW Branch is "structured and budgeted to run at a general rule of 800 members to an organiser, with some considerations for geographical size and location." Mr Wright said that in February 2023 the AMWU had approximately 240 members in sheet metal companies.

[68] Mr Wright gave the following evidence in chief in relation to his decision to make Mr Kelly's role redundant:

“As a part of my role, there is a constant review of the budget. This means I am constantly considering the resourcing of the Branch, including organiser numbers. I regularly talk to Steve Murphy about those issues. There is a National Conference scheduled for around August 2023 where the Conference would consider and hopefully adopt the proposed national budget.

On or around 1 March 2023 I met with Robyn. During the meeting we discussed the status of the campaign and the branch's financial position. I decided that Dave's role was no longer required to be performed by anyone, particularly so having regard to the financial position of the Branch. I considered the following information:

- (a) the information that had been provided to me about the status of the campaign;
- (b) the contribution Dave's role made to our overall organising and other objectives weighed against the cost the role;
- (c) our February Budget, which showed that our financial position had continued to decline;
- (d) the December National membership outcomes and weekly membership movement, which showed that our membership had continued to decline;
- (e) the status of work across the branch; and
- (f) the fact that the higher level coordination/employer liaison work on the campaign which had been Dave's focus could and would be done by me and/or Steve Murphy.

With falling income (for reasons including our declining membership) and increasing expenditure, I considered that the union needed to do what it could to reduce operate on a lean structure with prioritisation given to growth. I determined that maintaining Dave's employment would not best promote those objectives and that the remaining parts of the work he was doing role could be performed by others, including myself.”

[69] In support of this evidence Mr Wright provided a copy of the AMWU's February budget and membership data.

[70] At this time there were two vacancies – the two delegate positions for the HVAC project that were not filled in November 2022. Mr Wright said he considered Mr Kelly for these vacant positions but decided neither position was appropriate because the positions were “on delegation,” which carried the expectation that whoever took on the positions would eventually return to industry. More significantly, Mr Wright said he formed the view that Mr Kelly was not well suited to an ongoing organiser position based on the feedback he had received from other officials and employers.

[71] On 6 March 2023 Mr Wright sent a call-to-arms style email to AMWU organisers about multi-employer agreements. The email included the following:

“... We will be putting on periods of delegation in the coming months to assist us with this campaign, it’s going to be fun and exciting work – so if you’ve got some delegates who have shown merit and the ability to organise workers within their workplace and they’d like to come in and have a crack, please identify them to your leads or directly with me and we will work on getting them released to come in and give us a hand.

This is a big opportunity for our members, and we want to make the most of it.”

[72] On 7 March 2023 Mr Wright met with Mr Kelly and Mr Isberg to discuss the campaign progress. Mr Wright said he raised with Mr Kelly and Mr Isberg that he needed to make some decisions about the ongoing nature of the project and asked for specific information about how many potential members work at the sites identified on the mapping sheets. Mr Kelly and/or Mr Isberg replied that it was challenging to identify exactly how many workers were on each site due to the nature of the work and the movements of workers between jobs.

[73] Mr Wright said he then asked to speak to Mr Kelly separately and he then said to Mr Kelly that “now was the time to raise any further matters regarding the campaign that [Mr Wright] should consider.” Mr Wright said that Mr Kelly said that the AMWU needed to be more visible on-site and that they needed to promote the union by methods such as stickers and branding.

[74] Mr Wright then paused the meeting and sought legal advice from the Branch Legal Officer. In his written statement he described the second part of his meeting with Mr Kelly as follows:

“I had previously drafted a letter regarding the decision. While I had drafted the letter beforehand, I had not yet made the decision. I wanted to keep an open mind in the event that Dave [Kelly] or Steve [Isberg] had raised matters I had not taken into consideration. I then returned to the meeting room. Words to the following effect were said:

CW: Dave I’ve considered the status of the project and decided to make your role redundant.

DK: I’ve got meetings planned today – should I attend them?

CW: No if you could provide me the details I’ll get onto it and sort it out.

DK: Well mate we discussed at the start you just let me know when you want me to go. I told you when you thought I’d made my contribution to let me know and I’ll move on. You’ll have no problem from me moving forward, I think you’d agree I was a good official and made a good contribution. I do think you’re making a mistake; Isberg isn’t capable of running this and you’ll likely get a reaction from the bosses.

We discussed the amount of his redundancy payment – I recall informing him we would get the final calculations for him to check today but the payment was around \$18K.

During that conversation I handed a letter confirming this his employment would be terminated by way of redundancy effective immediately.

Dave then asked if he could go and get a haircut and would then come back to sort out his mobile phone and some other matters. I agreed and waited for him to return.”

[75] The terms of the termination letter are reproduced at paragraph [27] above. Mr Wright and Mr Kelly made amicable arrangements regarding Mr Kelly’s car and mobile phone.

[76] Much was made in Mr Kelly’s evidence about the advertisement for three organiser positions placed by the AMWU one week after Mr Kelly’s position was redundant. Mr Wright said that the day after Mr Kelly was dismissed Mr Moore (an organiser in the Granville team) “went off work indefinitely” and on Monday 13 March 2023 Mr Isberg went off work and made a workers compensation claim. Mr Wright said:

“The advertisement was for 3 fixed termers and it was circulated internally on or around 13 March 2023. I decided to again use fixed term employment due to the dire financial position of the branch and the ongoing decline of membership. I decided on the 12-month term because of the concern of being unable to attract decent candidates for shorter term engagements.

In the end, the union hasn’t filled fill any of the three advertised positions. We couldn't get the 2 preferred delegates to come off the job, Sean Moore returned after 2 weeks off work and Steve Isberg also returned to work shortly after as well. Several external persons applied but they were all deemed unsuitable.”

[77] In answer to specific matters raised in the evidence filed for Mr Kelly, Mr Wright also said:

- (a) Mr Coffey had told him that the reason for his resignation in February 2023 was that he needed to pursue higher pay than what the union could offer, and that he wanted to be paid for overtime. Mr Coffey obtained employment, according to Mr Wright, straight away with Downer at the Molycop plant in Newcastle;
- (b) Mr Wright spoke with Mr Coffey on the morning that Mr Kelly was dismissed (7 March 2023). Mr Wright said that he told Mr Coffey that he was going to make Mr Kelly redundant, that he was looking for two delegates to come onboard for the campaign and that he was hopeful that Mr Coffey would take on the delegation for a fixed term and then go back [to his employment];
- (c) In the same conversation Mr Coffey told Mr Wright that he thought that Mr Wright was making a mistake making Mr Kelly redundant because “Dave had taught him a lot and he was close to him...” Mr Coffey thought that Mr Murphy (National Secretary) “wasn’t up to taking over the work.” Mr Wright said he expressed his disagreement and the conversation ended shortly after;
- (d) the first time Mr Wright said he learned that Mr Kelly was Ms Carovska’s election “campaign manager” was in the afternoon after he had dismissed Mr Kelly; and
- (e) Mr Kelly’s role in mentoring organisers “occurred organically to some degree” but was not under Mr Wright’s directional request.

[78] In answer to the proposition that Mr Kelly could have been redeployed as an AMWU organiser, Mr Wright said:

- (a) Mr Kelly would not be a good fit as an organiser;
- (b) Mr Kelly's approach to organising is not well aligned with the organising philosophy of the AMWU. Mr Kelly's approach to disputation is different to the AMWU's approach;
- (c) Mr Wright had received a number of complaints from organisers and employers about Mr Kelly's aggressive approach;
- (d) Mr Wright thought that Mr Kelly's aggressive approach caused concern regarding the AMWU's relationships with employers and Mr Kelly's relationship with colleagues, but that "this was not an insurmountable issue for someone employed as a health and safety officer or special projects officer, and in some ways was an advantage in those roles;" and
- (e) Mr Wright thought that Mr Kelly was highly independent and fixed in his ways and tended to go about the job in the way he saw fit. Mr Wright said "in my view, based on my dealings with him and things reported to me by other organisers, [Mr Kelly] would not willingly accept that he should be directed in his day-to-day work by another organiser;"
- (f) Mr Wright did not accept that Mr Kelly had a wide-ranging number of significant tasks to do at the time of his dismissal. Mr Wright said "the tasks that [Mr Kelly] refers to were either already completed, not his sole responsibility or taken on by other officials in the union;"
- (g) the proposed 18-week settlement "did not happen." The termination payment did not require Mr Kelly's agreement and "there was no reason to offer any settlement;"
- (h) the demand by HVAC employer representatives that Mr Kelly be returned to his position is not necessarily an endorsement for Mr Kelly from a union point of view; and
- (i) Mr Wright is "unsurprised" about the support for Mr Kelly's reinstatement. Mr Wright said that each of the officials identified as supporting Mr Kelly have all identified as supporters of Ms Carovska's challenge for the Assistant Secretary position and that "they have been at odds with my support for and the re-election of Ms Fortesque."

[79] Mr Wright also gave evidence about the appropriateness of reinstating Mr Kelly to his employment with the AMWU, relying on certain incidents either occurring after the employment ended, or incidents that came to Mr Wright's attention after the employment ended.

[80] In cross-examination Mr Wright said:

- (a) union membership is generally in decline. On some projects there has been fluctuations in growth in membership but overall membership has declined;
- (b) union revenue has correspondingly declined and money is tight;
- (c) it was Mr Wright's decision alone to hire the Mr Kelly, although he sought advice from Mr Murphy, Ms Carovska and Ms Fortesque at the time;
- (d) decisions on hiring and firing are his as the State Secretary, and he decided to increase Mr Kelly's salary and change his position during his employment;
- (e) Mr Kelly was competent in his job;
- (f) the work health and safety training that the Mr Kelly had been engaged to provide was completed in 2022, including training on right of entry provisions;

- (g) the Mr Kelly did preparatory work on multi-employer bargaining in the HVAC sector but Mr Wright and Mr Murphy conducted the negotiations;
- (h) the projected increase in membership from the HVAC campaign had not been realised;
- (i) financial reports of the AMWU provided in answer to an Order for Production show that the branch is financially in decline and “living beyond its means;”
- (j) salaries and expenses for a number of union officials are paid for by “off budget” income or “off-budget” resources, meaning resources and monies from grants and special-purpose funds. The off-budget income is not guaranteed; and
- (k) after the Mr Kelly was dismissed:
 - i) Mr Wright has taken up the advocacy work for predominantly South American employees in the HVAC sector;
 - ii) the ongoing direct support for membership on site is now provided by Mr Isberg; and
 - iii) Mr Wright is performing the ongoing work in relation to sham contracting including liaison with the NSW government.

Evidence in the Respondent’s case: Mr Steven Murphy

[81] Mr Steven Murphy is the National Secretary of the AMWU. Mr Murphy was previously employed as an Organiser, the Assistant State Secretary and then State Secretary of the NSW Branch.

[82] Mr Murphy met Mr Kelly and Ms Carovska for coffee prior to Mr Kelly commencing employment. Mr Murphy thought that Mr Kelly was knowledgeable around health and safety and seemed to be a likeable person. Mr Kelly told Mr Murphy that he had been out of the union movement for a while and was transitioning to retirement. Mr Murphy made some enquiries about Mr Kelly’s time at the CFMMEU and those to whom he spoke expressed a level of caution about employing Mr Kelly.

[83] Mr Murphy spoke with Mr Wright in June 2021 when Mr Wright was considering a 12-month extension to Mr Kelly’s fixed term contract. Mr Wright told Mr Murphy “I don’t know if there’s 12 months’ work in it, I will give him a 12-month appointment. It will lead into EBA discussions.”

[84] Mr Murphy recalled attending a meeting with HVAC employers at short notice in February 2023 because Mr Wright was sick. He attended for approximately 15 minutes and recalls that the discussion focused on licencing but was “circular and disorganised.”

[85] Mr Murphy arranged for a second meeting with HVAC employers and raised with them, he thought perhaps for the first time, the possibility of multi-employer bargaining. Mr Murphy took the lead on those discussions and he advised the meeting that Mr Wright would probably lead the negotiations for NSW.

[86] Mr Murphy was under the impression that Mr Kelly was “in semi-retirement mode and around to pass on skills to organisers before moving on [to retirement].” In late February or early March 2023 Mr Kelly had said to him that he was just there to “fill a gap and when it’s done I will leave.”

[87] Mr Murphy also gave evidence about events and conversations that took place after Mr Kelly was dismissed that were relevant to the appropriateness of reinstating Mr Kelly.

Evidence in the Respondent's case: Ms Robyn Fortesque

[88] Ms Robyn Fortesque is the Assistant State Secretary of the NSW Branch and has been involved with the AMWU and predecessor unions since around 1990. Ms Fortesque provided a witness statement and was not required for cross-examination.

[89] Ms Fortesque said that the AMWU has been dealing with declining membership since the 1990s and as a consequence the union leadership have to be very careful about budgeting and the allocation of resources, including in respect of organising efforts, and it is something that is constantly monitored and scrutinised.

[90] The National Office prepares weekly detailed reports about organisers and variations in membership growth which feed into decision-making about resourcing and budgeting. Ms Fortesque has been regularly involved in meetings and discussions about such issues.

[91] Mr Wright asked Ms Fortesque about Mr Kelly before he was employed. Ms Fortesque saw Mr Kelly's role as "project-based and different to a normal organisers position."

[92] Ms Fortesque met with Mr Wright and Mr Kelly on 16 February 2023 to discuss the HVAC campaign.

[93] Ms Fortesque said that she met with Mr Wright on 1 March 2023:

"... and we discussed and agreed that it was a good time for the union take on some delegates 'on delegation' again to work on the sheet metal project. We discussed ending Mr Kelly's role and bringing in delegates 'on delegation' to work on the project."

[94] Ms Fortesque expressed the view that "the size of the [HVAC] industry, potential membership and actual membership numbers did not support more than the organiser resources allocated at the time." Ms Fortesque did not think that the HVAC project was poorly resourced.

[95] In relation to Mr Kelly's suitability to work as an organiser, Ms Fortesque observed that:

- (a) workers in manufacturing tend not to move around from site to site. Therefore as a union the AMWU has to be considered in its approach to organising sites because "the workers have to live with any consequences"; and
- (b) officials in manufacturing need to be able to negotiate and mediate with delegates and manage expectations around what is realistically achievable. Union membership in manufacturing tends to be more organic, meaning that members actively join and remain members of the union rather than conscripts who passively join.

Evidence in the Respondent's case: Ms Victoria Harper

[96] Ms Victoria Harper provided a witness statement and was not required for cross-examination. Ms Harper is an organiser in the NSW/ACT Branch and started working for the AMWU as an organiser in around September 2015.

[97] Ms Harper gave evidence about Mr Kelly's conduct and involvement at three particular worksites. She described an incident where Mr Kelly was called in to assist a member in relation to a WHS matter and afterwards the member asked Ms Harper not to have Mr Kelly represent that member again.

[98] In another incident Mr Kelly sent an email denigrating a HR Manager with whom Ms Harper and Mr Kelly were dealing. By mistake Mr Kelly sent the email to the HR manager. Mr Kelly then had to apologise to the HR manager.

[99] In another incident at a different workplace Mr Kelly was "very confrontational," and after the meeting four members resigned from the union.

Evidence in the Respondent's case: Mr Brad Pigeon

[100] Mr Brad Pigeon is the Lead Organiser for the Newcastle Region. Mr Pigeon provided a witness statement but was not required for cross-examination.

[101] Mr Kelly assisted Mr Pigeon on workplace health and safety issues on specific sites and he and Mr Kelly also liaised about Mr Coffey's availability. Mr Coffey was an organiser in Mr Pigeon's region.

[102] Mr Pigeon was critical of what he thought was Mr Kelly's confrontational and unstructured 'turn up [on site] and see what happens' approach to his work.

Evidence in the Respondent's case: Ms Linda Lehman

[103] Ms Linda Lehman is the Branch Videographer. Ms Lehman provided a witness statement in which she described an incident in October 2022 where Mr Kelly was alleged to have made disparaging comments in a group workshop session "directed at no one in particular" and was being "sarcastic and not constructive."

Excluded evidence

[104] It is necessary to make some observations about the chequered history of this matter and the interlocutory skirmishes that saw certain evidence excluded.

[105] Before any evidence was filed the AMWU applied by motion to have the proceedings bifurcated and have the Commission determine the AMWU's genuine redundancy defence as a threshold question prior to any hearing on merits. I declined this application because the issues raised by Mr Kelly in challenging his redundancy were heavily interwoven with the issues going to merit. As such there was likely to be significant overlap and potential duplication in the evidence.

[106] Mr Kelly filed his evidence in chief on 19 May 2023. The AMWU applied by motion to have significant portions of this filed material struck out and sought to have their interlocutory application determined prior to the AMWU filing its evidence in chief.

[107] In his filed evidence Mr Kelly and other witnesses made allegations of union election-related skulduggery reminiscent of *Loty v Holloway* [1971] AR (NSW) 95. Mr Kelly's application was also the subject of newspaper articles before any evidence was filed.

[108] The AMWU's application was unusual and required me to make determinations about the relevance and admissibility of portions of the filed evidence at a relatively early stage of the proceedings. In order to give both parties a fair opportunity to prepare and present their case the threshold for the relevance of the disputed evidence was extremely low. In other words, I was not prepared to strike out any portion of the filed evidence if there was a possibility that the evidence could be relevant to a matter in issue in the proceedings.

[109] Some of the disputed evidence related to the contested election for the Assistant State Secretary position. The voting period for the election commenced on 29 March 2023 and finished on 26 April 2023. Mr Kelly did not include in his filed statement any evidence of him taking any active part in the contested election prior to his dismissal, nor did any of Mr Kelly's other witnesses. Mr Kelly's initial outline of submissions did not allege that Mr Wright acted capriciously towards Mr Kelly because of any matter connected to the contested election.

[110] I decided to exclude significant portions of Mr Kelly's filed material. Much of the excluded material described events that allegedly took place after Mr Kelly was dismissed. Some of the excluded material referred to Federal Court proceedings that are still on foot and raised allegations that are being pursued in the Court. Most of the material attacked Mr Wright and contained allegations of Mr Wright acting adversely towards people other than Mr Kelly. Much of this evidence attacking Mr Wright was general if not vague, but nonetheless malicious.

[111] Mr Kelly argued that the material should not be excluded because it is equivalent to tendency evidence. Essentially the argument put was that I should allow Mr Kelly to lead evidence of Mr Wright's alleged mistreatment of others in unconnected circumstances, because that will support Mr Kelly's submission that Mr Wright mistreated him. As the AMWU argued, Mr Kelly's submission asks the Commission to interrogate Mr Wright's character and dealings with others as part of some kind of roving inquiry into whether he is the kind of person who might have treated Mr Kelly unfairly.

[112] A journalist attended that procedural hearing and I made a confidentiality order over the matters discussed.

[113] The AMWU filed its evidence on 15 June 2023. The AMWU's evidence included positive statements about Mr Wright's character and leadership.

[114] In his reply evidence filed on 22 June 2023, and in evidence in chief at the hearing, Mr Kelly and other witnesses tried to lead evidence in "response" to the positive evidence about Mr Wright. Much of this evidence was excluded for the same reasons.

[115] After the hearing concluded and my decision was reserved, an article appeared in a newspaper indicating that the AMWU had commissioned an inquiry into allegations of bullying against Mr Wright. The article referred to a report prepared by a barrister that made certain recommendations.

[116] Mr Kelly asked the Commission to make an Order under s.590 that the AMWU produce a copy of the barrister's report and any documents made or considered by the barrister.

[117] In asking for the Order for Production Mr Kelly did not seek leave to re-open his case. Nor did Mr Kelly provide any evidence that connects his case with the inquiry undertaken by the barrister. Section 590 allows the Commission to inform itself in relation to a matter before it by, amongst other things, making an order requiring a person to provide copies of documents or records. Mr Kelly could not explain how this power was engaged when the hearing had concluded and Mr Kelly had not sought leave to reopen his case. Mr Kelly's request was denied.

Consideration – Genuine Redundancy

[118] 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:

(1553) the person has been dismissed; and

(1553) the dismissal was harsh, unjust or unreasonable; and

(1553) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(1553) **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

(1553) A person's dismissal was a case of genuine redundancy if:

(1553) 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

(1553) 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:

(1553) the employer's enterprise; or

(1553) the enterprise of an associated entity of the employer.”

[119] 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]).

[120] The explanatory memorandum to the FW Act includes the following informative summary:

“Clause 389 – Meaning of genuine redundancy

1546. This clause sets out what will and will not constitute a genuine redundancy. If a dismissal is a genuine redundancy it will not be an unfair dismissal.

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.

1549. It is intended that a dismissal will be a case of genuine redundancy even if the changes in the employer’s operational requirements relate only to a part of the employer’s enterprise, as this will still constitute a change to the employer’s enterprise.

1550. Paragraph 389(1)(b) provides that it will not be case of genuine redundancy if an employer does not comply with any relevant obligation in a modern award or enterprise agreement to consult about the redundancy. This does not impose an absolute obligation on an employer to consult about the redundancy but requires the employer to fulfil obligations under an award or agreement if the dismissal is to be considered a genuine redundancy.

1551. Subclause 389(2) provides that a dismissal is not 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 within the enterprise of an associated entity of the employer (as defined in clause 12).

1552. There may be many reasons why it would not be reasonable for a person to be redeployed. For instance, the employer could be a small business employer where there is no opportunity for redeployment or there may be no positions available for which the employee has suitable qualifications or experience.

1553. Whether a dismissal is a genuine redundancy does not go to the process for selecting individual employees for redundancy. However, if the reason a person is selected for redundancy is one of the prohibited reasons covered by the general

protections in Part 3-1 then the person will be able to bring an action under that Part in relation to the dismissal.”

[Emphasis added]

[121] I am required to decide whether the dismissal was a case of genuine redundancy before considering the merits of the application (per s.396).

[122] Section 389 requires a series of stepped findings: firstly, whether the Applicant’s job is redundant; secondly whether the employer complied with any applicable consultation obligations under a modern award or agreement and thirdly whether it would have been reasonable to redeploy the Applicant in another role (see *Pankratz v Regional Housing Limited* [2013] FWC 1259 at [6]-[9]).

[123] 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. Therefore, if an employer wishes to rely on the ‘genuine redundancy’ exclusion then they would ordinarily be expected to adduce evidence that they no longer required the dismissed employee’s job to be performed by anyone because of changes in the operational requirements, that they met their consultation obligations and that it would not have been reasonable in all the circumstances to redeploy the dismissed employee (*Technical and Further Education Commission T/A TAFE NSW v Pykett* (2014) 240 IR 130, [2014] FWC 714 at [36]).

[124] As the Full Bench said in *Adams v Blamey Community Group* [2016] FWC 7202 at [14] (**Adams**), the process does not involve a merits review of the employer’s decision to make a position redundant:

“Insofar as Ms Adams’ appeal challenged the findings made by the Senior Deputy President in relation to s.389(1)(a), 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. If there was an ulterior motive for the decision – that is, if the *real* reason for the decision did not genuinely relate to any change in operational requirements, whatever the ostensible reason may have been – then it will not be possible to make the second finding of fact. However once these findings of fact are made, –the element of the genuine redundancy definition contained in s.389(1)(a) is satisfied and no further inquiry is necessary.”

[125] There are practical limits on the material that will need to be put by employers, as there are limits in the other matters heard by the Commission, to avoid defeating the intent of the genuine redundancy exclusion – in this regard an employer need only satisfy the Commission on the balance of probabilities (*Kieselbach and Amity Group Pty Ltd*, [PR973864](#) at [34]-[36]).

Consideration – the issues for determination

[126] Unsurprisingly, Mr Kelly attacked each limb of the AMWU’s genuine redundancy defence. Although the authorities refer to the Commission making three stepped findings, I have considered the issues for determination in the following sequence:

- (a) Was Mr Kelly’s job made redundant for operational reasons, which requires consideration of:
 - 1) What was Mr Kelly’s “job”?
 - 2) Did the AMWU decide that it no longer required Mr Kelly’s job to be done by anybody?
 - 3) Was Mr Kelly’s job redundant “because of changes in the operational requirements of the employer’s enterprise”?
- (b) Did the AMWU comply with any applicable consultation requirements, which requires consideration of:
 - 1) whether a modern award or enterprise agreement applied to Mr Kelly’s employment?
 - 2) If so, did that instrument impose any obligation to consult about the redundancy;
 - 3) If so, did the AMWU comply with those obligations?
- (c) Would it have been reasonable in all the circumstances to redeploy Mr Kelly within the AMWU’s enterprise, which requires consideration of:
 - 1) Were there any vacant positions into which Mr Kelly could have been redeployed?
 - 2) Would it have been reasonable to redeploy Mr Kelly to any such vacant position?

Consideration - Was the Applicant’s “job” made redundant for operational reasons?

What was Mr Kelly’s job?

[127] Section 389(1)(a) of the FW Act refers to an employer making a decision about an employee’s “job”. A job involves “a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employees’ organisation, to a particular employee” (per *Ulan Coal Mines Limited v Henry Jon Howarth and others* (2010) 196 IR 32, [\[2010\] FWAFB 3488](#) at [17] citing *Jones v Department of Energy and Minerals* (1995) 60 IR 304 at 308).

[128] On any view of the evidence, Mr Kelly’s job at the time he was dismissed was to co-ordinate the HVAC campaign and, to a lesser degree, assist organisers on WHS matters. These functions, duties and responsibilities fitted comfortably under the position title of Special Projects Officer.

[129] In my view Mr Kelly’s “job” was akin to a supernumerary position. There were suggestions in the evidence that Mr Kelly understood that his work in the AMWU would only last as long as his specific skills or experience were required. Mr Murphy quotes Mr Kelly saying he was just there to “fill a gap” and that he would leave “when it’s done.” In Mr Wright’s evidence it is clear that he tied Mr Kelly’s ongoing engagement to specific projects or programmes required by the AMWU from time to time, which aligns with suggestions that one of Mr Kelly’s key roles was to pass on his experience to more junior organisers.

[130] Mr Kelly was employed into the Safety Unit to undertake specific projects on matters such as WHS right of entry training and the like. By 2023 those projects were completed.

[131] Although Mr Kelly visited some worksites, he appears to have only done so to assist other organisers. He was not, for example, assigned to a territory or an industry as other organisers are. Noting that he was described by some organisers as their "mentor", the evidence only goes so high as to say that in the course of his duties he performed some functions performed by organisers.

[132] The evidence universally recognises that Mr Kelly acted as the coordinator of the HVAC project. Mr Kelly prepared a paper on the viability of the project in September 2022. Around this time Mr Wright asked some tough questions about the resources required and the potential returns for the project. From then on Mr Kelly was required to provide weekly reports on the project. Mr Kelly was directly answerable to the State Secretary about the project and when the project was again closely scrutinised in February 2023, Mr Kelly was called upon to provide a further comprehensive update in early March 2023.

[133] Mr Kelly did a significant amount of preparatory work for the proposed multi-employer bargaining however he did not participate in any of the bargaining itself. At the time of his dismissal he was nonetheless performing a coordinator's role for the HVAC project.

Did the AMWU decide that it no longer required Mr Kelly's job to be done by anybody?

[134] Mr Kelly said his workload at the time he was dismissed was "already bursting at its seams." Mr Kelly and Mr Coffey thought the HVAC project was significantly under-resourced. Mr Coffey thought it "absolutely ludicrous" of Mr Wright to state that the HVAC project did not require further coordination.

[135] Mr Kelly said the AMWU still required Mr Kelly's job to be performed and that "any suggestion as to a downturn or improved efficiency by absorption of these duties to another person's duties is not persuasive." I do not accept this submission.

[136] The test is not whether the functions or duties themselves continue, but whether the "job" itself survives (*Kekeris v A. Hartrodt Australia Pty Ltd* [2010] FWA 674 cited in *Ulan Coal Mines Limited v Henry Jon Howarth and others* (2010) 199 IR 363, [2010] FWAFB 3488 at [18]). What is said to be critical for the purpose of identifying a redundancy is whether the employee has any duties left to discharge after the re-organisation. If there is no longer any function or duty to be performed by that employee, his or her "job" is redundant (*Jones v Department of Energy and Minerals* (1995) 60 IR 304 at 308).

[137] I accept that Mr Kelly was working very long days and was diligently committed to the HVAC project and that his dedication to his work should be recognised. However, it is clear to me that Mr Wright did not value Mr Kelly's work in the same way. That is not to suggest that Mr Wright was ungrateful or dismissive of Mr Kelly's work, or that Mr Wright turned a blind eye to the considerable time and energy Mr Kelly expended on the project.

[138] Mr Wright considered and evaluated Mr Kelly's work, quite properly, from a branch wide perspective. The evidence shows that Mr Wright regularly and consistently asked about the benefits or returns of the project for the Branch, predominantly measured by membership recruitment, and also consistently asked about the resources required by the project.

[139] By the time Mr Kelly was dismissed, Mr Wright had come to the view that paying Mr Kelly to co-ordinate the campaign was not a good spend of Branch resources – in other words Mr Wright decided that the value to the Branch of Mr Kelly's work was not as much as the cost of continuing his employment.

[140] In this context it is no surprise that Mr Kelly and Mr Wright disagreed in their evidence about whether Mr Kelly's job was redundant when, in Mr Kelly's view, there was still so much work to do on the HVAC project.

[141] There is no suggestion that somebody else took on Mr Kelly's coordinator functions when Mr Kelly was dismissed. Mr Wright's evidence was that he and Mr Murphy took the lead for the next phase of the project, being negotiations for a potential multi-employer agreement. Other aspects of the HVAC project were also taken on by Mr Wright.

[142] I am satisfied on the evidence that the AMWU made a decision that it no longer required Mr Kelly's job to be done by anyone.

Was Mr Kelly's job redundant "because of changes in the operational requirements of the employer's enterprise"?

[143] The AMWU led evidence of its operational requirements and the reasons for which it decided to make Mr Kelly's position redundant, primarily through the evidence of Mr Wright.

[144] Mr Kelly's challenge to that evidence was twofold. He submitted that:

- (a) the AMWU's evidence was weak and deficient and did not meet the AMWU's evidentiary onus; and/or
- (b) the AMWU's operational requirements were not the real reason for its decision, and that the real reason was Mr Wright's instability, capriciousness or other bad intent.

[145] Firstly, I do not accept that the AMWU's evidence is weak or deficient.

[146] The AMWU said that its declining membership "creates sufficient financial pressures for the union and Mr Wright's approach is to continually reassess the branch's structures and expenditure."

[147] It was commonly accepted that union membership has been in decline for some time. Whilst declining membership and declining revenue does not give the AMWU license to make unfair or capricious decisions cloaked in the guise of financial responsibility, I accept that organisations including the AMWU must necessarily be diligent in managing their financial resources.

[148] Mr Wright’s evidence was that the AMWU was “living beyond its means.” The AMWU led evidence from its financial accounts that showed that operational expenditure exceeded operational revenue by a significant sum. The evidence showed that the AMWU relies on off-budget/special purpose funds to cover operating expenses.

[149] Mr Kelly submitted that “Mr Wright’s admission [in cross-examination] that the Union’s accounts were “messy” was an understatement.” This submission does not fairly reflect Mr Wright’s evidence. Mr Wright indicated that some tied funds were available to pay salaries of union officers or employees and were recorded in the AMWU’s accounting system separately. Mr Wright was asked about financial reports and various tied funds. Under cross examination Mr Wright showed that he was across the AMWU’s financial arrangements and that he had a comprehensive understanding of the AMWU’s financial position.

[150] In answer to an Order for Production the AMWU produced reports that contained line items relating to certain tied funds. The allocation and recording of these monies were not straightforward but it did not appear to me to be “messy” in the sense that the word “messy” might imply disorganisation or delinquency. Mr Kelly’s legal representative may not have understood the intricacies of the AMWU’s accounting systems, but there is no basis for me to doubt Mr Wright’s understanding and familiarity with the AMWU’s finances or the probity of the financial information provided.

[151] There is also no basis for me to doubt the veracity of the AMWU’s assertion that it was ‘living beyond its means’ and was necessarily conscious of its financial circumstances.

[152] Mr Kelly submitted that the AMWU must “produce compelling evidence that supports the change to its operational requirements,” and relied on the Full Bench decision in *Roy Morgan Research Ltd v K Baker* [\[2013\] FWCFB 8936](#) at [27] (“**Roy Morgan**”), viz:

“As was noted by Deputy President Gooley, the Appellant is entitled to restructure its HR team. However, if it wishes to contest an application for relief in respect of the termination of an employee made redundant as a consequence on the basis that the redundancy was due to the changed operational requirements of its enterprise (ss.385(d) and 389(1) of the Act), it must produce evidence to the Commission to support such a proposition, including evidence of the changed operational requirements.”

[153] In *Roy Morgan* the Full Bench upheld DP Gooley’s reasoning that an employer must provide evidence beyond “mere assertions [of a] desire to do things differently” (at [8], [26]-[27]).

[154] The Full Bench in *Teterin v Resource Pacific Pty Ltd* [\[2014\] FWCFB 4125](#) at [23]-[29], (2014) 244 IR 252 at 261-263 explored the question of onus in some detail. The Full Bench accepted that the notion of an *onus of proof* imports legal doctrines that should have no part in the Commission’s procedural or decisional process (at [23]). The Full Bench noted that the *evidentiary onus*, being “the burden of adducing or pointing to sufficient evidence to raise an issue for determination by the court”, is borne by the party bearing the risk of non-persuasion as to the fact in issue (at [25]-[29]).

[155] In this matter the AMWU carried the risk of non-persuasion regarding the elements of s.389.

[156] In my view the AMWU has met its evidentiary onus. The AMWU led evidence directly from the decision-maker, Mr Wright, as to his reasoning. The AMWU provided evidence beyond mere assertions, including evidence:

- (a) that between 2017 and 2023 membership dropped from 62,225 to around 48,476;
- (b) that between 2018 and 2023 membership revenue dropped from \$9.5M to \$8M;
- (c) of financial statements that show that the AMWU's operational expenses exceed its operational receipts;
- (d) of financial statements that show that off-budget revenue subsidises operational wage expenses; and
- (e) that the work of three employees (Mr Kelly, Mr Coffey and Ms Isberg) on a full-time basis over three months from October 2022 to February 2023 increased membership in the HVAC sector by only 60-100 members.

[157] In assessing the weight of this evidence it is important to note that the Commission's task is not to conduct a merits review of the employer's decision or to consider whether there was a better decision the employer could have made (per *Adams* at [14]).

[158] There is potential for ambiguity about the reference to "changes" in the operational requirements of the employer's enterprise in s.389(1)(a).

[159] Mr Kelly's submissions imply that a genuine redundancy can only occur when an employer provides evidence of some kind of financial hardship. This implication is contained in Mr Kelly's criticism of the AMWU's case and his complaint that the employer did not produce evidence that sufficiently justified its decision to make Mr Kelly's position redundant.

[160] By contrast, in *Staniland v Stegbar Pty Ltd* [2017] FWC 4703 at [13] Deputy President Saunders found that the dismissal of an office assistant/administrator in a showroom was a genuine redundancy in circumstances where the employer decided that it was better to instead have a second sales assistant in the showroom in order to meet the employer's strategic goals. There was no suggestion in that matter that the employer changed its arrangements because of any economic hardship - it simply made a decision to change its operational requirements in a way that resulted in the genuine redundancy of an employee.

[161] One of the examples provided in the Explanatory Memorandum (see [119] above) is "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", which does not assume financial hardship.

[162] In my view the term "changes in the operational requirements of the employer's enterprise" include changes in labour requirements that arise because an employer decides to make operational changes. Such changes in operational requirements do not need to be in response to some kind of financial adversity: changes could arise because the employer devises a better way (or at least what it genuinely thinks to be a better way) to operate its enterprise. For the purposes of s.389(1)(a) the crucial link that must be established, beyond mere assertion, is that the relevant job became redundant *because of* the change in operational requirements.

[163] When Mr Kelly commenced employment the AMWU curated a new role for him presumably on the assumption that to do so was a good spend of union funds. Mr Kelly was dismissed, on the AMWU's case, because it decided that it was no longer a good spend of union funds to pay Mr Kelly.

[164] The evidence was that after devoting considerable resources to the project between June 2022 and March 2023, including having Mr Kelly, Mr Isberg and Mr Coffey working full-time on the project between November 2022 and March 2023, the AMWU had gained 60-100 new members. Measured against a general ratio of 1 organiser for 800 members, this gain was not significant.

[165] As the AMWU stated in its closing submissions: "the potential dividend of the additional investment demanded by Kelly [in March 2023] was something in the order of 260 additional members, in the extremely improbable scenario that every worker in the sector was organized."

[166] An Order to Produce was issued for "a complete copy of all records (including financial records) relied upon in the consideration of and or the decision to declare the position occupied by Mr Kelly redundant". Mr Kelly said that no document was produced or relied upon by the AMWU that indicated that Mr Kelly's redundancy was considered. He said, "no minute, report or decision of the Union's various NSW and National Steering Committees, Branches, or Executives have been provided by the AMWU."

[167] Mr Kelly relied upon the absence of such material to submit that Mr Wright decided to dismiss Mr Kelly for improper reasons. I do not accept this submission. The absence of a document recording the AMWU's deliberations is not proof that deliberations did not occur.

Alleged 'real' reason – spiteful and capricious

[168] Mr Kelly submitted that the real reason he was dismissed was Mr Wright's personal/emotional instability and/or his spiteful capriciousness. The allegation was variously put:

- (a) the evidence shows that Mr Kelly's termination is a direct result of the continuation of unpredictable and menacing behaviour by Mr Wright;
- (b) the AMWU "reverse engineered" Mr Kelly's redundancy in order to secure what would otherwise clearly and evidently be an unfair dismissal;
- (c) Mr Wright's feelings towards Mr Kelly "inexplicably turned sour" in or around August 2022, and Mr Wright was intent on wiping out employees of the AMWU who he did not favour;
- (d) the reasons for the animosity felt by Mr Wright towards him "are unknown and unknowable at this stage" but that "the core truth is that Mr Kelly's termination was a summary dismissal dressed up (and dressed up poorly) as a genuine redundancy";
- (e) Mr Wright's spite remains the only logical explanation for Mr Kelly's termination; and
- (f) the reason for the termination of his employment was Mr Wright's capriciousness and instability alone.

[169] I accept the inherent difficulty for Mr Kelly in making good his allegation about Mr Wright's subjective intentions, particularly when Mr Kelly was firmly convinced that he was dismissed at a time when there was still much work to do on the HVAC project.

[170] It is helpful to compare the genuine redundancy provisions in s.389 with the general protections provisions. Section 340 prohibits the taking of adverse action *because of* certain prohibited reasons. Section 340 turns on the term "because" (*Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 at [100]-[101], (2012) 248 CLR 500; (2012) 220 IR 445). Section 360 says that "a person takes action for a particular reason if the reasons for the action include that reason", which means that s.340 can be contravened even when the prohibited reason is not the only reason for taking adverse action. Section 361 imposes a rebuttable presumption that "the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise."

[171] There is no genuine redundancy exclusion in the general protection provisions. This means that an employer's decision that it no longer requires a person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise could contravene the general protection provisions if the reasons for making that person's job redundant also included prohibited reason(s). In such circumstances a contravention could occur when there were at least two operative and substantive reasons for dismissal.

[172] The recent High Court decision in *Qantas Airways v Transport Workers Union of Australia* [2023] HCA 27 is a case in point. The majority in the Court acknowledged that there were "sound commercial reasons" for Qantas' decision to outsource a portion of its workforce and to make affected employees redundant (at [3]). However the Court ultimately concluded that Qantas contravened s.340 because its reasons for making its outsourcing decision included additional reasons that were prohibited reasons.

[173] Mr Kelly made an application for relief alleging that he was unfairly dismissed. Though he uses more colourful and sinister terms, he alleges that Mr Wright's reasons for dismissing him were unfair reasons.

[174] In the genuine redundancy provisions within the unfair dismissal statutory regime, the employer bears the evidentiary onus to establish that it made a job redundant *because of* changes in the operational requirements of the employer's enterprise. If the Commission is satisfied that a job was redundant because of changes in the operational requirements of the employer's enterprise, and the other requirements in s.389 are satisfied, then the employer's complete defence is made out and the Commission cannot inquire further into whether there were also unfair reasons for making the job redundant.

[175] The observation of the Full Bench in *Adams' case* (see [124] above for the full context) is apposite:

"... If there was an ulterior motive for the decision - that is, if **the real reason for the decision did not genuinely relate to any change in operational requirements**, whatever the ostensible reason may have been - then it will not be possible to make the second finding of fact. However once these findings of fact are made, the element of the

genuine redundancy definition contained in s.389(1)(a) is satisfied and **no further inquiry is necessary.**”

[Emphasis added]

[176] Understood in this context, the AMWU has led evidence that supports its case that Mr Kelly’s job was made redundant because of changes in the operational requirements of its enterprise. Mr Kelly has challenged that evidence. Mr Kelly’s challenge will succeed if I cannot be satisfied that Mr Kelly’s job was made redundant because of changes in the operational requirements of the employer’s enterprise. Mr Kelly’s challenge fails if I am satisfied that his job was made redundant because of changes in the operational requirements of the employer’s enterprise, even if I am also satisfied that Mr Kelly’s job was made redundant for additional spiteful, capricious, or unfair reasons.

[177] Apart from the dismissal, Mr Kelly does not allege that Mr Wright acted capriciously or spitefully towards him in any other way. Mr Kelly said in cross-examination that he did not know whether Mr Wright had any animosity towards him. He said “Cory Wright sometimes has animosity but other times he thought I was the best thing on earth. That’s the nature of our job, we dispute things, we shake hands and we move on, that’s the union movement, that’s how it is.”

[178] Ms Carovska said Mr Wright told her in September 2022 that he wanted to sack Mr Kelly because “he said he believed that Mr Kelly was a bad influence and that he had poisoned Royce [Coffey].” Mr Wright agreed that he spoke to Ms Carovska about Mr Kelly at this time and said that he spoke to her about allegations that Mr Kelly was being critical of the union. Mr Wright denies telling Ms Carovska that he wanted to sack Mr Kelly. Mr Wright said that he spoke to Ms Carovska because he believed Ms Carovska could “handle the concerns as a senior organiser of the Branch.” This evidence does not provide a sound basis for me to find that six months later in March 2023 Mr Wright acted capriciously in dismissing Mr Kelly, let alone establish that the single ‘real’ reason for the dismissal was Mr Wright’s unspecified dislike for Mr Kelly.

[179] Mr Wright accepted in cross-examination that the decision to dismiss Mr Kelly was his and his alone. However he did indicate that he sought advice from others before deciding to dismiss Mr Kelly. Mr Wright’s account is corroborated by the evidence of Mr Murphy, Ms Fortesque and Ms Carovska – who each attest to Mr Wright seeking their counsel before dismissing Mr Kelly.

[180] Mr Wright was tested under cross-examination about his reasons for dismissing Mr Kelly and when cross-examined Mr Wright was composed, considered, respectful and thoroughly across the subject matter. Mr Wright adhered consistently to his evidence in chief.

[181] Mr Kelly could not identify any cause or reason for Mr Wright’ allegedly capricious conduct towards him in March 2023. Perhaps this is why one of the assertions put against Mr Wright is that he is “unstable.” In other words Mr Kelly could not proffer any rational reason for Mr Kelly’s alleged capriciousness towards him and so he ran with the additional allegation that Mr Wright was unstable.

[182] The AMWU presented sound commercial reasons for deciding not to continue Mr Kelly's involvement as the coordinator of the HVAC project, described above.

[183] By March 2023 Mr Kelly was asking for more resources to be deployed to the project and Mr Wright was considering whether the AMWU should continue the project coordinators job. Clearly Mr Wright and Mr Kelly did not view the success or the viability of the HVAC project in the same way.

[184] In the circumstances, Mr Wright's assessment of the project and of the viability of continuing Mr Kelly's role as the coordinator of the project was not spiteful, capricious, or even unfair.

[185] I note parenthetically that even if I had not excluded evidence of Mr Wright's alleged poor behaviour towards others (see [104]-[114] above), and even if I had considered that evidence at its highest, I still could not be satisfied that Mr Wright acted capriciously, spitefully or even unfairly towards Mr Kelly.

[186] After considering Mr Kelly's assertions that Mr Wright acted capriciously, spitefully or in an unstable manner towards him in deciding to make this job redundant, I am nonetheless satisfied that the AMWU made a decision that it no longer required Mr Kelly's job to be performed by anyone because of changes in the operational requirements.

Consideration – Did the Respondent comply with any applicable consultation requirements?

Did a modern award or enterprise agreement apply to Mr Kelly's employment?

[187] Mr Kelly submitted that his employment was covered by the *Clerks—Private Sector Award 2020 (the Clerks Award)* and therefore the consultation obligations in that award applied.

[188] Mr Kelly advanced two arguments, one based on the terms of the *AMWU Staff Agreement 2020-2022 (the AMWU Agreement)* which Mr Kelly accepts did not apply to him, and one based on the terms of the classification description for a Level 5 Clerk in the Clerks Award.

[189] Firstly Mr Kelly submits that because the terms of the AMWU Agreement incorporate the terms of the Clerks Award, and because Mr Kelly was an officer of the AMWU and excluded from the terms of the AMWU Agreement, the exclusion from the AMWU Agreement meant that he was therefore covered by the Clerks Award. I reject this argument.

[190] Secondly, Mr Kelly has compared aspects of his role to the generic references in the classification descriptors for Level 5 in the Clerks Award. He referred to his specialist knowledge, initiative, discretion and judgement, responsibility for one's own work, his responsibility to train and supervise other employees in lower levels and so on. He relied on the similarities between the skill descriptors and his duties and responsibilities to submit that his job was covered by the Clerks Award.

[191] The gaping hole in Mr Kelly's logic is that on any view of the evidence he was not an employee "wholly or principally engaged in clerical work" (per clause 4.1 of the Clerks Award).

[192] Clerical work is defined to include “recording, typing, calculating, invoicing, billing, charging, checking, receiving and answering calls, cash handling, operating a telephone switchboard, attending a reception desk and administrative duties of a clerical nature.”

[193] Mr Kelly was not wholly or principally engaged to do clerical work. In fact the evidence was that the limited amount of ‘clerical’ work that Mr Kelly did was done badly. In cross-examination Mr Kelly said that one of his “fatal flaws” in life is dealing with computers. There was peripheral evidence that office staff had raised complaints about Mr Kelly asking them to perform basic clerical tasks for him. One of the complaints about Mr Kelly’s conduct when he assisted organisers at job sites was that he mistakenly sent a disparaging email to the person he was disparaging.

[194] For whatever reason Mr Wright did not properly consult with Mr Kelly about his potential redundancy. In truth Mr Wright did not consult with Mr Kelly at all about his dismissal even though, on Mr Wright’s own admission, he had been contemplating it for several weeks. I suspect that much of Mr Kelly’s aggrievement and suspicion of foul play stem from the swift and relatively brutal manner in which he was dismissed.

[195] I am nonetheless satisfied that no modern award or enterprise agreement applied to Mr Kelly’s employment and therefore the AMWU did not have any obligation to consult with Mr Kelly about the redundancy for the purposes of s.390(1)(b).

Consideration - Would it have been reasonable in all the circumstances to redeploy Mr Kelly?

Were there any vacant positions into which Mr Kelly could have been redeployed?

[196] Finally I must consider whether it would have been reasonable in all the circumstances for Mr Kelly to be redeployed within the AMWU’s enterprise at the time that his job was made redundant.

[197] Unsurprisingly Mr Kelly relies on the fact that one week after his position was made redundant the AMWU advertised for three organiser positions. Mr Kelly said in his evidence that when he worked on site with other organisers he basically did the job of an organiser.

[198] Mr Kelly said that in the circumstances the evidence was that he was more than suitable to fulfil a role as an organiser. Mr Kelly had assumed the role of a mentor to some organisers employed by the AMWU and had trained and assisted organisers on WHS matters over the course of his employment.

[199] Mr Coffey was employed as an organiser and work closely with Mr Kelly. In February 2023 Mr Coffey resigned his employment. On the same day that Mr Kelly was dismissed, Mr Wright sent Mr Coffey an SMS saying, “got a job offer for you”. Mr Wright said that the position he offered Mr Coffey that day was one of the two positions kept open from November 2022 (see [64] above).

[200] The AMWU relied on a quirk of timing to submit that there were only two vacant organiser positions for which Mr Kelly could have been considered for redeployment at the time that he was dismissed, and that I need not consider whether it would have been reasonable

to redeploy Mr Kelly to the three positions advertised after Mr Kelly was dismissed. Shortly after Mr Kelly was dismissed two organisers, Mr Moore and Mr Isberg, commenced sick leave/workers compensation of seemingly uncertain duration. Mr Wright said that Mr Moore's and Mr Isberg's absences caused him to decide to advertise for three organiser positions on delegation, and the AMWU submitted that Mr Wright was not to know of these vacancies on the day he dismissed Mr Kelly.

[201] I do not need to resolve this point because I am satisfied that it would not have been reasonable to redeploy Mr Kelly to any of the organiser positions.

[202] I am satisfied that there were vacant positions at the time of Mr Kelly's dismissal that he could have been redeployed to.

Would it have been reasonable to redeploy Mr Kelly to any such vacant position?

[203] All of the witnesses agree that Mr Kelly's duties and responsibilities interacted with and, to a limited degree overlapped with, the work of the AMWUs organisers.

[204] That said, it was also universally accepted that Mr Kelly was not employed as an organiser per se. As the AMWU submitted:

“As Mr Wright explained in cross-examination, the role of an organiser is to recruit members, develop delegate structures and HSRs, bargain enterprise agreements and service workplaces in an allocated area. Although Kelly was at times involved in recruitment and did at times support organisers (apparently generally by attending disciplinary meetings), his role was distinct from that of an organiser.”

[205] Mr Wright said that the organiser positions were “on delegation” and for fixed terms, and carried the expectation that whoever took on the positions would eventually return to industry. In Mr Kelly's case I do not see the fixed-term nature of engagement on delegation to be a matter that would make it unreasonable for Mr Kelly to be deployed on such a basis. Mr Kelly did not leave full-time employment to join the AMWU, and his initial terms of employment were on fixed term contracts.

[206] More significantly, Mr Wright said that he did not offer Mr Kelly redeployment as an organiser because he did not think that Mr Kelly's skills, demeanour or overall approach to organising was consistent with ongoing employment as an organiser.

[207] The test in s.392(2) is whether it would have been “reasonable in all the circumstances” to redeploy Mr Kelly to an organiser position – which requires me to exercise a discretion within a potentially broad range of circumstances and possible outcomes.

[208] Mr Wright thought that Mr Kelly was competent in his job as a Special Projects Officer. Mr Wright also thought that one aspect of Mr Kelly's role was problematic – being his work in assisting other organisers at member sites. I accept that Mr Wright's concerns about Mr Kelly's conduct at member sites was reasonably held.

[209] I have not included details of the complaints raised about Mr Kelly’s conduct when assisting other organisers on site (see for example paragraphs [96]-[99] above), suffice to say that the complaints are not at all trivial.

[210] Mr Wright recognised Mr Kelly’s effectiveness to agitate disputes on-site. Mr Wright’s personalised Christmas message to Mr Kelly, delivered by SMS on 23 December 2022, included Mr Wright looking forward to “giving some bosses ulcers with you next year”, to which Mr Kelly’s response included “For sure – plenty of pain ahead”. However I also accept as reasonable Mr Wright’s assessment that Mr Kelly was not well suited to an *ongoing* organiser position based on the feedback he had received from other officials and employers.

[211] It does not seem that Mr Kelly was ever formally disciplined about these matters – which is not surprising or problematic. Mr Wright thought that in the role of Special Projects Officer the concerns about Mr Kelly’s conduct on site were not insurmountable.

[212] Mr Wright said more generally that Mr Kelly would not be a “good fit” as a full-time organiser, and that his approach to organising was not “well aligned with the organising philosophy of the AMWU.” Mr Wright’s evidence was that from the start of the employment he had identified that Mr Kelly would need oversight and monitoring to ensure he met the identifiable differences in expectations of working at the AMWU contrasted against his previous experience.

[213] Ms Fortesque identified key differences between the AMWU’s approach to organising and Mr Kelly’s experience as an organiser in the construction industry. As she said, AMWU members tend not to move around and have to live with the consequences of overly confrontational actions by union organisers.

[214] I accept all of these concerns to be reasonable and find that in these circumstances it would not have been reasonable to redeploy Mr Kelly to an organiser position where almost all of Mr Kelly’s time would be spent performing the very functions that Mr Wright and others had already identified to be problematic.

Conclusion

[215] In summary:

- (a) the AMWU decided that it no longer required Mr Kelly’s job as a Special Projects Officer to be performed by anyone;
- (b) the AMWU made this decision because of changes in its operational requirements;
- (c) Mr Kelly’s employment was not covered by an enterprise agreement or award and therefore the AMWU was not obliged to consult with Mr Kelly for the purposes of s.389(1)(b);
- (d) it was not reasonable to redeploy Mr Kelly to another position;
- (e) the dismissal of Mr Kelly was a case of genuine redundancy for the purposes of s.389; and
- (f) therefore Mr Kelly was not unfairly dismissed for the purposes of s.385 because his dismissal was a case of genuine redundancy.

[216] I will make a separate order dismissing Mr Kelly's application ([PR767192](#)).



DEPUTY PRESIDENT

Appearances:

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O Fagir of Counsel instructed by *J Kennedy* of Hall Payne Lawyers for the Respondent

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