DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Alesia Khliustova
v
Isoton Pty Ltd
(U2023/535)

COMMISSIONER PLATT ADELAIDE, 28 APRIL 2023

Application for an unfair dismissal remedy – jurisdictional objection - whether termination was a genuine redundancy – redundancy not genuine – jurisdictional objection dismissed.

[1] On 20 January 2023, Ms Alesia Khliustova (the Applicant) lodged an application pursuant to s.394 of the *Fair Work Act 2009* (the Act) seeking a remedy for an alleged unfair dismissal by her former employer Isoton Pty Ltd (the Respondent or Isoton). At the time of her dismissal, the Applicant was engaged as a permanent full time Software Engineer working 40 hours a week at a salary of $78,500.00. The requirements of the role included providing development, enhancement, troubleshooting and maintenance of software.[1]

[2] Isoton asserts that Ms Khliustova cannot have been unfairly dismissed as the dismissal was a case of genuine redundancy.

[3] Ms Khliustova disputes Isoton's characterisation of her dismissal as a genuine redundancy within the meaning of s.389 of the Act.

[4] Section 389 of the Act states:

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

(a) the employer's enterprise; or

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

[5] Directions were issued for the determination of the jurisdictional objection and filing of materials on 17 February 2023. Consent directions concerning the discovery of certain material were issued on 10 March 2023.

[6] A digital court book was compiled from the material that was filed by both parties and was distributed to the parties prior to the hearing. The entirety of the digital court book was received into evidence, with appropriate weight being given to all evidence after an assessment of its relevance and its character (e.g. hearsay, opinion/submission).

[7] The hearing was conducted on 21 March 2023. Ms Khliustova was represented by Mr Griffin (of counsel), Isoton was represented by Mr Duggan (of counsel). Permission was granted pursuant to s.596 on the grounds of complexity and efficiency.

[8] Ms Khliustova submitted a witness statement (with supporting documents) and gave evidence. Isoton submitted a statement from Mr Caleb Steer (General Manager) who also gave evidence. No credit issues arose from the evidence. I have determined to discuss the evidence as it relates to each of the requirements of s.389.

Changes in the operational requirements of the employer's enterprise [s.389(1)(a)]

[9] Mr Steer gave evidence that in mid-2022, Isoton had determined to implement an increased technical support presence in India. This was due to longer term cost considerations. Isoton had previously tried to establish a presence in India but had failed. Mr Steer considered that the successful establishment of a technical support function in India would assist in increasing its competitiveness against other Australian competitors. Isoton expected to engage 12 persons in India.

[10] In late 2022, as a result of a number of significant financial challenges (which included the unexpected long-term deferment of a contract with anticipated revenue in the order of $800K, the loss of invoiced and future revenue of approximately $335K from a client who had determined to exit Australia, and an unforeseen ATO Tax impost of $310K), Isoton determined to reduce its costs base. This included removing a number of positions in Australia and reducing the number of positions previously intended to be recruited in India. Mr Steer gave evidence of the positions removed from the pre-restructure Organisational Chart.[2] I note that the number of positions in Isoton reduced, as did the proposed number of positions in the related entity in India. Mr Steer's evidence was not significantly challenged.

[11] Ms Khliustova contends that there has not been any change in Isoton's operational requirements and that Isoton has not provided sufficient documentary evidence to support the same. In addition, Ms Khliustova contends that Mr Steers' conduct in interviewing a variety of persons for various roles between 29 November 2022 and 9 January 2023 indicates the work that she performed is still required to be undertaken. This last reference appears to be related to

Isoton's intention to recruit 12 persons for its Indian entity. As noted above, the financial predicament resulted in a decision to reduce the originally intended headcount.

[12] I accept that Isoton's financial predicament resulted in a change in its operational requirements (by way of headcount in Australia) in order to reduce costs.

[13] On 8 December 2022, Isoton made the decision that 4 positions in its Australian operations were to be made redundant. This included Ms Khliustova's position as Software Engineer.[3]

[14] I am satisfied that the requirements of s.389(1)(a) was met in respect of Ms Khliustova's position.

Consultation [s.389(1)(b)]

[15] Isoton concedes that Ms Khliustova's role was covered by the *Professional Employees Award 2020* (the Award).[4] Clause 24 of the Award provides the relevant consultation requirements concerning major workplace change:

> ***"24. Consultation about major workplace change***
>
> ***24.1*** *If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:*
>
> ***(a)*** *give notice of the changes to all employees who may be affected by them and their representatives (if any); and*
>
> ***(b)*** *discuss with affected employees and their representatives (if any):*
>
> ***(i)*** *the introduction of the changes; and*
>
> ***(ii)*** *their likely effect on employees; and*
>
> ***(iii)*** *measures to avoid or reduce the adverse effects of the changes on employees; and*
>
> ***(c)*** *commence discussions as soon as practicable after a definite decision has been made.*
>
> ***24.2*** *For the purposes of the discussion under clause 24.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:*
>
> ***(a)*** *their nature; and*
>
> ***(b)*** *their expected effect on employees; and*

> *(c) any other matters likely to affect employees.*
>
> ***24.3*** *Clause 24.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.*
>
> ***24.4*** *The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 24.1(b).*
>
> ***24.5*** *In clause 24* ***significant effects****, on employees, includes any of the following:*
>
> *(a) termination of employment; or*
>
> *(b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or*
>
> *(c) loss of, or reduction in, job or promotion opportunities; or*
>
> *(d) loss of, or reduction in, job tenure; or*
>
> *(e) alteration of hours of work; or*
>
> *(f) the need for employees to be retrained or transferred to other work or locations; or*
>
> *(g) job restructuring.*
>
> ***24.6*** *Where this award makes provision for alteration of any of the matters defined at clause 24.5,such alteration is taken not to have significant effect."*

[16] Mr Steer gave evidence that on 9 December 2022, Ms Khliustova attended an online meeting with Mr Greg Steer, Mr Caleb Steer and two other employees. In this meeting, Ms Khliustova and the other two employees were notified that their positions were being made redundant. On 10 December 2022, the Applicant was blind copied into an email from Mr Caleb Steer. The recipients were not disclosed. The email stated:

> "*As discussed yesterday, the business has made the difficult decision to make multiple positions redundant for the following reasons:*
>
> - *Extra large project MyRepublic cancelled and failed to pay*
> - *Several large TPG projects were pushed out or cancelled*
> - *Significant company tax bill not predicted in financial forecasting*
> - *Issus with staff efficiency and overall profit*
> - *A downturn in overall project income*
>
> *Your last working day at Isoton will be Monday, the 9th of January 2023. Your manager/team lead will discuss any required handover activities with you, and we will send you details of your redundancy payout within the next few business days*."

[17] The meaning of the term 'consultation' was considered in detail by a Full Bench of the Commission in *CFMMEU v Mt Arthur Coal*[5]. Whilst that decision was primarily related to consultation regarding the development of a COVID-19 policy, the observation at paragraph [108] applies equally in this matter:

> *"**[108]** The following propositions may be drawn from these cases about what constitutes consultation:*
>
> - *the content of any specific requirement to consult is necessarily dictated by the precise terms in which such a requirement is expressed; the nature of the factual or legal issues the subject of the requirement; and the factual context in which the requirement is exercised, including the particular circumstances of the persons with whom there must be consultation*
>
> - *a responsibility to consult carries a responsibility to give those consulted an opportunity to be heard and to express their views so that they may be taken into account*
>
> - *the consultation needs to be real; it must not be a merely formal or perfunctory exercise*
>
> - *even though management retained the right to make the final decision, it is not to be assumed that the required consultation was to be a formality. Management has no monopoly of knowledge and understanding of how a business operates, or of the wisdom to make the right decisions about it. The process of consultation is designed to assist management, by giving it access to ideas from employees, as well as to assist employees to point out aspects of a proposal that will produce negative consequences and suggest ways to eliminate or alleviate those consequences*
>
> - *the party to be consulted [must] be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon*
>
> - *while the word 'consultation' always carries with it a consequential requirement for the affording of a meaningful opportunity to the party being consulted to present those views, what will constitute such an opportunity will vary according [to] the nature and circumstances of the case. In other words, what will amount to 'consultation' has about it an inherent flexibility*
>
> - *a right to be consulted, though a valuable right, is not a right of veto*
>
> - *the consultation obligation is not concerned with a likelihood of success of the process, only to ensure that it occurs before a decision is made to implement a proposal*
>
> - *an ordinary understanding of the word "consult" would suggest that the obligation to consult does not carry with it any obligation either to seek or to reach agreement on*

the subject for consultation. Consultation is not an exercise in collaborative decision-making. All that is necessary is that a genuine opportunity to be heard about the nominated subjects be extended to those required to be consulted before any final decision is made

- *the requirement to consult affected workers would … not be satisfied by providing the employees with a mere opportunity to be heard; the requirement involves both extending to affected workers an opportunity to be heard and an entitlement to have their views taken into account when a decision is made*

- *genuine consultation would generally take place where a process of decision-making is still at a formative stage*

- *the opportunity to consult must be a real opportunity not simply an after thought*

- *consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even by its withdrawal.*

- *there is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, 'this is what is going to be done' and saying to that person 'I'm thinking of doing this; what have you got to say about that?'. Only in the latter case is there 'consultation'*

- *it is implicit in the obligation to consult that a genuine opportunity be provided for the affected party to attempt to persuade the decision-maker to adopt a different course of action. If a change has already been implemented or if the employer has already made a definite or irrevocable decision to implement a change then subsequent 'consultation' is robbed of this essential characteristic*

- *any offer to consult in relation to the matter was in the context that the respondent had already made an irrevocable decision, then the party had not, to use his Honour's words, consulted about the decision in any meaningful way."*

[18] Ms Khliustova's evidence differed slightly from Mr Steers. The Applicant contended that she was told that there might be redundancies, and that if that were the case, her position would be one of them, a day prior to Mr Steers' meeting.

[19] The conversation detailed by Mr Steer does not constitute 'consultation'. Ms Khliustova was not given an opportunity to be heard and to express her views such that they might be taken into account in Isoton's decision making process. Isoton's consultation was at best a perfunctory exercise. The decision had been made prior to the discussion of 9 December 2022

[20] The information provided in the letter dated 10 December 2022 did not remedy the defect and, in my view, fails to meet the requirements of Clause 24.2 of the Award.

Redeployment [s.389(2)]

[21] Isoton submitted that no vacant positions were available at Isoton for redeployment of the staff whose positions were being made redundant as a consequence of the restructure of its workplace, the only option was to dismiss those staff members.[6] The Applicant submits that the Respondent was still recruiting Senior Software Engineers, Software Engineers, Test Analysts and Java Developers in December 2022.[7]

[22] Isoton conceded that its Indian operations were conducted by a related entity.

[23] During the hearing Mr Steer conceded that during the restructure it continued to recruit for a reduced number of positions at its Indian operations.

[24] On the evidence, it is clear that the work performed by Ms Khliustova would have enabled her to perform at least one of the roles in the Indian operation.

[25] Mr Steer gave evidence that he did not offer the Indian based role to Ms Khliustova as he did not believe she would have accepted it as it was in India and had a lower level of remuneration compared to the Australian role.

[26] Had Isoton consulted with Ms Khliustova it may have been advised that she was keen to work in different cultures, prepared to travel and, despite the lower wages, would have liked to experience the role for 2-3 months. Such evidence was presented at the hearing. I have no reason to disbelieve Ms Khliustova. I note that this information may be relevant to remedy if awarded.

[27] It is dangerous for Employers with redeployment options to fetter offers based on their own prejudices.

[28] In this case it is clear to me that Isoton had a role available in an associated entity that would have been reasonable in all the circumstances for Ms Khliustova to be redeployed in.

[29] I find that Isoton did not meet the requirements of s.389(2) of the Act.

Conclusion

[30] Having considered each of the factors detailed in s.389 of the Act, I have concluded that the dismissal of Ms Khliustova was not a genuine redundancy as defined.

[31] At the hearing the parties indicated that in the event I made such a determination they would seek the assistance of the Commission in conciliating the matter. Accordingly, the matter will be referred to another Member of the Commission for further Conciliation. If the matter is not resolved within 14 days, Directions will be issued for the hearing of the merits and so far as is necessary, determination of remedy.

COMMISSIONER

Appearances (by video conference):

Mr Griffin (of counsel) for the Applicant
Mr Duggan (of counsel) for the Respondent

Hearing details:

2023.
Adelaide.
21 March.

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[1] Respondent's Book of Documents, page 14.

[2] Page 56 of the Court Book

[3] Respondent Submissions, Witness Statement of Caleb Steer at [45] – [47].

[4] [MA000065].

[5] [2021] FWCFB 6059.

[6] Respondent Submissions at [18] and [19].

[7] Applicant's Form F2 Unfair dismissal application.