[2023] FWC 881 [Note: An appeal pursuant to s.604 (C2023/2515) was lodged against this decision - refer to Full Bench decision dated 25 October 2023 [[2023] FWCFB 194] for result of appeal.]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Nicholas Williams

v

KTC Refrigeration & Conditioning Pty Ltd
(U2022/12365)

DEPUTY PRESIDENT BOYCE SYDNEY, 14 APRIL 2023

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

Introduction

[1] Mr Nicholas Williams (**Applicant**) has filed a Form F2 with the Fair Work Commission (**Commission**), being an application for an unfair dismissal remedy (**Application**). By way of that Application, the Applicant asserts that his dismissal by KTC Refrigeration & Air Conditioning Pty Ltd (**Respondent**) was "unfair" within the meaning of Part 3-2 of the *Fair Work Act 2009* (**Act**).

[2] The Respondent says that the Applicant's dismissal was a case of "genuine redundancy" within the meaning of s.389 of the Act, and otherwise denies that the dismissal was unfair.

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

[4] At the hearing, the Applicant represented himself, and Mr Ash *Mola*, Legal Practitioner Director, Brooklyn Lawyers, appeared with permission for the Respondent.[1]

Relevant law

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

> "**385 What is an unfair dismissal**
>
> A person has been unfairly dismissed if the FWC is satisfied that:

(a) the person has been dismissed; and

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

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

(d) the dismissal was not a case of genuine redundancy.

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

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

"**396 Initial matters to be considered before merits**

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;

(d) whether the dismissal was a case of genuine redundancy."

[7] Section 389 provides the statutory definition as to what qualifies as a genuine redundancy:

"**389 Meaning of genuine redundancy**

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

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

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

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

(a) the employer's enterprise; or

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

[8] In view of s.389 of the Act, there are three questions that need to be answered:

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

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

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

Was the Applicant's job no longer required to be performed by anyone because of changes in the operational requirements of the Respondent's enterprise? (s.389(1)(a))

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

[10] The *Explanatory Memorandum to the Fair Work Bill 2008* provides examples as to when a dismissal will be a case of genuine redundancy:

"1547. Paragraph 389(1)(a) provides that a person's dismissal will be a case of genuine redundancy if his or her job was no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise. Enterprise is defined in clause 12 to mean a business, activity, project or undertaking.

1548. The following are possible examples of a change in the operational requirements of an enterprise:

- a machine is now available to do the job performed by the employee;
- the employer's business is experiencing a downturn and therefore the employer only needs three people to do a particular task or duty instead of five; or
- the employer is restructuring their business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists".

[11] The basis upon which "operational requirements" can be said to give rise to change is extremely broad. A change in operational requirements does not only arise where a business has excess labour, is running over budget, unprofitable, losing customers, or down on revenue/s.

As Lee J stated in *Nettlefold v Kym Smoker Pty Ltd*[3] (**Nettlefold**), the phrase "operational requirements" encompasses change arising from both internal and external factors, including via the consideration of matters (over the short, medium and/or longer terms) such as "the past and present performance of the [business], the state of the market in which [the business] operates, steps that may be taken to improve the efficiency of the [business] by installing new processes, equipment or skills, or by arranging for labour to be used more productively, and the application of good management to the undertaking".[4] Indeed, changes to operational requirements might arise because an efficient and/or profitable business proposes or desires to become even more efficient and/or profitable.

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

> "It is not the function of the Commission, in determining whether a dismissal is a case of genuine redundancy, to form a view about the merits of the decision to make a position redundant. Whether it was objectively fair or justifiable to decide to abolish a position is beside the point, as long as the employer acted as it did because of changes in its operational requirements."[6]

[13] It has been held that a job involves "a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employer's organisation, to a particular employee". Relevantly, the test is not whether the person's *duties* or *responsibilities* (or some of them) survive or remain. Rather, the test is whether the whole of the *job* previously performed by an employee (unmodified) still exists.[7] Focus is to be placed upon the *job*, not the duties involved in that *job*, or the individual performing that *job* (or a new/modified job). Importantly, as broadly stated in *Dibb v Commissioner of Taxation*[8], an employee may still be genuinely made redundant when there are aspects of the employee's duties still being performed by another employee, or other employees.[9]

[14] The Applicant was employed by the Respondent between 1 December 2020 and 9 December 2022. At the time of his dismissal, the Applicant was a third year apprentice electrician.

[15] On 5 December 2022, the Respondent issued the Applicant the following termination letter:

"Dear Nicholas Williams,

Re: Termination of Employment

This notice is to inform you that your employment with KTC Refrigeration & Air Conditioning Pty Ltd will be terminated effective on the 9th of December, 2022.

Your employment has been terminated as we will no longer need your services on account of the downsizing procedure.

We would kindly request that you return all company property that was obtained during the course of your employment with our company, including, but not limited to, your company car, all tools, and the office keys, before the 9th of December 2022.

You are reminded that all trade secrets, business plans, procedures, client contact lists and other confidential information of KTC Refrigeration & Air Conditioning Pty Ltd are proprietary and may not be used by you in any way.

If you have any questions or concerns regarding the above, feel free to contact me.

Sincerely,

Kenan Hussein
Director"

[16] The Respondent made the following submissions in respect of the Applicant's dismissal (for reasons of genuine redundancy):

"24. KTC makes the following submissions:

a. It is a small, family owned business;

b. Its business has 2 arms:

i. warranty repair work; and

ii. mechanical and refrigeration installations;

c. Nicholas performed warranty repair work only;

d. Nicholas represented to KTC's director that he did not want to perform installation work and only wanted to perform warranty repair work;

e. KTC has moved away from performing warranty repair work;

f. KTC has 3 clients it performs warranty repair work for within a 30 kilometre radius of Chipping Norton;

g. The profit margin for warranty repair work is about 3% (approximately $100 net profit per day);

h. KTC forecasted that profits for warranty repair work would continue to deteriorate because of the increased cost in materials, other overheads and inflation;

i. As for installation work, this is a new arm of the business (about 12 months old). KTC does not have many clients. One client was Lanskey Constructions Pty Ltd (Lanskey);

j. KTC was not paid for installation work performed at a project in Neath under a subcontract with Lanskey. Lanskey was indebted to KTC in the sum of $84,095. Lanskey went into administration on 12 December 2022. Lanskey owes 864 subcontractors approximately $18.7 million;

k. KTC is a (sic) unsecured creditor and its prospects of recovery are poor;

l. KTC has serious cash flow problems, and, to that end, it is currently selling company assets (motor vehicles) to make ends meet;

m. KTC has a high level of debt, including debts to:

i. ATO – approximately $57,000

ii. Prospa – approximately $127,000

iii. CW Finance – loan payments of $2,500 per month

n. KTC has been unable to secure any new project work;

o. Nicholas was aware of the difficulties facing the business because KTC's director appraised him of developments, the business' affairs and the distinct possibility that his employment may end if conditions did not improve.

25. Having regard to the approach outlined by the Full Bench in *Christina Adams v Blamey Community Group*, the Commission should be satisfied:

a. KTC made the decision that Nicholas' job of 3rd year apprentice was no longer required to be performed by any worker; and

b. that the decision was made because of changes in the operational requirements of KTC.[10]

8. When considering s 389(1)(a) of the Act in *Christina Adams v Blamey Community Group*, the Full Bench of the Commission stated:

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

9. KTC was registered in 22 March 2021. It is a small business employer as defined under s 23 of the Act. The business has 2 divisions: warranty repair work and mechanical and refrigeration. KTC has moved away from performing warranty repair work. It currently performs limited warranty repair work for 3 clients and within a radius of 30 kilometres from Chipping Norton (KTC's principal place of business). Previously, KTC performed warranty repair work as far as Avalon.

10. Warranty repair work is not a profitable arm of the business. As it stands, the profit margin for warranty repair work is approximately 3% (or $100 net profit per day). KTC forecasted that its small profits would deteriorate in 2023 because of the increased cost in materials, other overheads and inflation.

11. As for the mechanical and refrigeration installation work, this is a new arm of the business (about 12 months old). KTC does not have many clients. One of KTC's clients was Lanskey Constructions Pty Ltd (**Lanskey**). Lanskey failed to pay KTC for mechanical and refrigeration installation works performed at a project in Neath pursuant to a subcontract agreement. Lanskey was, and remains, indebted to KTC in the sum of $84,095. Lanskey went into administration on 12 December 2022. It subsequently went into liquidation on 23 January 2023. Lanskey owes 864 subcontractors approximately $18.7 million. KTC is an unsecured creditor and its prospects of recovering any money are poor.

12. KTC has serious cash flow problems and to that end, it is currently selling company assets (motor vehicles) to make ends meet. It is a company with a high level of debt. Its creditors include: the Australian Taxation Office (approximately $57,000), Prospa Finance (approximately $127,000) and CW Finance (KTC makes loan repayments of about $2,500 per month to CW Finance).

13. KTC has been unable to secure any new project work.

14. Nicholas performed warranty repair work only.

15. Further, Nicholas represented to KTC's director and fellow workers that he did not want to perform mechanical and refrigeration installation work and only wanted to perform warranty repair work.

16. KTC's warranty repair work is currently being performed by KTC's director.

17. In Low v Menzies Property Services Pty Ltd, Mr Low submitted that his dismissal was not a case for genuine redundancy because:

> ***"(1) The work he previously performed was still being done by the other remaining Workplace Injury and Return to Work Coordinator, Mathieson. This demonstrated, he submitted, that the employer had not decided that his job was no longer required to be performed by anyone.***
>
> *(2) In deciding to make his position redundant, Menzies wrongly compared his job, and workload, to that of a Case Manager, when the role of a Case Manager was significantly different in nature and not fairly comparable."*
>
> (**emphasis added**)

18. Vice President Hatcher responded to Mr Low's first submission as follows:

> *"I reject the first submission. It is well established that the fact that the duties of a particular job or position which has been abolished have been re-allocated to another position or positions as part of an employer's restructure does not alter the fact that the employer no longer requires that position or job to be performed by anyone. Here, Menzies had two positions of Workplace Injury and Return to Work Coordinator. It has decided to abolish one of those positions, and have the holder of the remaining position perform all of the work previously done by both the position holders. That is a situation which falls squarely into s.389(1)(a)"*

19. In other words, it is not open for Nicholas [the Applicant] to submit to the Commission that section 389(1)(a) is not satisfied by reason of KTC's director solely performing the warranty and repair work of the business.

20. At all material times, Nicholas has been aware of the difficulties facing the business because KTC's director appraised him of developments, the business' affairs and the distinct possibility that his employment may end if conditions did not improve.

21. Having regard to these submissions, the Commission should determine that KTC made the decision that:

a. Nicholas' job was no longer required to be performed by anyone;

b. That decision was made because of changes in the operational requirements of the business."[11]

[17] The Applicant challenges the Respondent's assertions that it no longer required his job to be performed by anyone because of operational reasons. In this regard, the Applicant submits (in summary) that:

a) the work he performed for the Respondent's business was not limited to warranty repair work;

b) the Respondent continues to perform warranty repair work, and the performance of such work is not limited to work performed by Mr Kenan Hussein;

c) there has been no significant loss of work (or workload) to the Respondent's business as at the time the Applicant was dismissed, rather, such work has been on the rise;

d) the Respondent's assertions as to financial difficulties and serious cash flow problems are to be contrasted with it purchasing two new vehicles in 2022. This brings into question the Respondent's financial records;

e) the evidence shows that shortly after the Respondent dismissed the Applicant, two other workers were moved into the Applicant's role (i.e. the Applicant's role was still required to be performed); and

f) the Respondent has failed to bring evidence of its financial troubles, and has failed to identify any changes to its operations.[12]

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

a) The Respondent has two divisions, a warranty repair work division, and mechanical and refrigeration installation work division. The Respondent also undertakes general maintenance and service work, but does not have a separate or specific division for such general maintenance and service work.

b) Employees of the Respondent are allocated to one of its two divisions, albeit, from time to time, the work they perform may cross-over between divisions. The work performed by the Applicant was no exception in this regard, noting that he mainly performed warranty repair (including general maintenance or service) work.

c) The fact that the Director of the Respondent, Mr Kenan Hussein, still performs warranty repair work does not support the Applicant's contention that his redundant role is still required to be performed.[13] It is not uncommon for a Director of a small business to absorb tasks or categories of work in order to reduce staff numbers (and overall salary liabilities).[14] However, this does not mean that a particular role continues to exist. This is equally so notwithstanding that the Director may, from

time to time, seek the assistance of other employees of the Respondent to perform such warranty repair work.[15]

d) At or about the time that the Applicant was made redundant, the Respondent made a business (or operational) decision that it would limit the warranty repair work it undertakes.[16] The Respondent was also, at this time, continuing to experience a "poor cash flow situation".[17]

e) The Respondent, through its witness statements tendered in the proceedings, has explained the basis upon which it has reduced its warranty repair workload. In his submissions, the Applicant contends that the Respondent ought to have proven the workload reduction via the tender of work records.[18] I do not agree. If the Applicant seeks to challenge the Respondent's contention as to a workload reduction by reference to its work records, he had the ability to obtain an order for production in respect of such records (which he did not). I therefore accept the Respondent's evidence that it reduced its warranty repair workload at or about the time that the Applicant was made redundant. Further, simply because the Applicant was made redundant because the Respondent wanted to eliminate or otherwise reduce the warranty repair work it performed does not mean that the Respondent was required (in an absolute sense) to never again undertake warranty repair work.[19]

f) The Respondent has only employed one additional qualified tradesman in the six months prior to February 2023[20] (noting that the Applicant was an apprentice at the time of his dismissal).

g) In his submissions, the Applicant contends that because money owed to the Respondent, arising from a business that the Respondent subcontracted to going into administration, relates to the Respondent's mechanical and refrigeration installation work division, it is irrelevant to the Respondent's contentions as to its poor financial position. As a matter of logic, I am unable to understand, let alone accept, this contention.[21]

h) The Applicant also asserts that the Respondent's evidence as to its cash-flow problems ought not be accepted because the Respondent obtained two brand new work vehicles in 2022.[22] Again, as a matter of logic, I am unable to understand, let alone accept, this contention. The evidence is that the new work vehicles obtained by the Respondent in 2022 are subject to an on-going finance arrangement that continues to deleteriously impact upon the Respondent's cash-flow.[23]

[19] In his submissions, and during cross-examination, the Applicant has raised concerns with the selection of himself for redundancy. In this regard, the Applicant says that during his employment with the Respondent he did perform work other than warranty repair work, he was capable of performing work other than warranty repair work, and other employees who were not selected or chosen to be made redundant have skills or experience equal to or less than him.[24] The difficulty with these contentions of the Applicant is that the selection of, or the process of selection, of an individual for redundancy is not a relevant consideration in determining whether a dismissal is a case of genuine redundancy under s.389 of the Act (see *UES Int'l v Leevan Harvey* [2012] FWAFB 5241, at [27]).

[20] All in all, I find that the evidence discloses that the Respondent had genuine operational reasons to make changes to its business (by reference to its on-going poor cash flow, and in respect of its decision to limit its warranty repair work), and that such changes (as determined on a *bona fide* basis by the Respondent) resulted in the Applicant's job no longer being required to be performed by anyone. I thus find that the Respondent satisfies s.389(1)(a) of the Act.

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

[21] The Applicant made extensive submissions asserting a failure by the Respondent to consult with him (or consult with him appropriately) in respect of its decision to make his role redundant.

[22] The statutory requirement under s.389(1)(b) requires a finding of fact, whereby the section "is not made out unless the various requirements of the relevant consultation clause are demonstrably discharged by the employer".[25]

[23] The parties accept that the *Electrical, Electronic and Communications Contracting Award 2020* (**Award**) covered and applied to the Applicant at the time of his dismissal.

[24] Clause 27 of the Award relevantly requires consultation after an employer "makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees". The phrase "significant effects" is relevantly defined to include "termination of employment".

[25] The consultation requirements under clause 27 of the Award are conditional upon the relevant change being a "major" one that is likely to have "significant effects on employees". Determination of whether a change falls within this definition appears to be one of fact and degree. As White J said in *Port Kembla Coal Terminal Ltd v CFMMEU*[26]:

> "I do not regard a simple comparison between the number of employees to be terminated, and the number of the employees in its workforce overall … as being necessarily conclusive of the question of whether a change is "major". Much may depend on the circumstances of a given case including, for example, the seniority and importance of the employees … , the extent to which … employees work in an integrated or disconnected manner; the consequences for the continuing employees of the redundancies and consequent terminations, as well as other matters".[27]

[26] It has been said that reference to the plural "employees" rather than "employee" in similarly worded clauses does not capture individual redundancies on the basis that individual redundancies do not constitute a "major change" to the Respondent's operations that impact upon a collective of employees.[28]

[27] In this case, there was only one redundancy (i.e. the Applicant's role) in a small business of less than 10 employees. I do not accept, on the evidence before me, in the circumstances of this case, that s.389(1)(b) of the Act is enlivened for consideration in these proceedings. In this

regard, I find that, on the terms of clause 27 of the Award, by reference to the case law set out in this decision:

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

- was not a "major change" (i.e. the Respondent's Director picked up work allocated to the warranty repair work division (albeit with assistance from other employees from time to time)); and

- did not have "significant effects" upon the Respondent's remaining employees on an individual or collective basis (i.e. there is no evidence of any effects let alone significant effects flowing to any of the Respondent's employees arising from the redundancy of the Applicant's role with the Respondent).

b) The Respondent has satisfied its Award obligations as to consultation concerning the Applicant's redundancy in that no Award consultations obligations arise for determination in these proceedings.

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

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

[29] The highest binding interpretation of s.389(2) remains that stated in *Ulan Coal Mines Limited v A. Honeysett & Ors*[29] (***Honeysett***):

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

> available position, the qualifications required to perform the job, the employee's skills, qualifications and experience, the location of the job in relation to the employee's residence and the remuneration which is offered".
>
> (emphasis added)

[30] It can been seen from the foregoing extract from *Honeysett*, that the reasonableness of redeployment for the purposes of s 389(2) of the Act is to be assessed as at the time of the relevant dismissal.[30] Further, in assessing the reasonableness of redeployment, it is necessary to identify the position or other work to which the employee could have been redeployed,[31] and determine whether that position or other work is, for want of a better term 'the right fit' (or reasonable) for both the employer and the employee. Relevantly, s.389(2) of the Act does not:

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

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

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

[31] The conclusion of the Full Bench in *Teterin v Resource Pacific Pty Ltd t/a Ravensworth Underground Mine*[32], as to the interaction between s.389(2) and s.385(d) of the Act, are also worth drawing attention to, as follows:

> "The manner in which the Deputy President expressed his conclusions may be justified by reference to s.385(d), which requires that for a person to have been unfairly dismissed, the Commission must be satisfied that the dismissal was *not* a case of genuine redundancy. It must follow that the applicant in an unfair dismissal case bears the risk of failure if the state of satisfaction required by s.385(d) cannot be reached. If the Deputy President considered the evidence insufficient to allow him to determine whether redeployment was reasonable under s.389(2), then (there being no issue with respect to the s.389(1) matters) he could not be satisfied that the dismissals were not genuine redundancies, meaning that the applications before him had to be dismissed."[33]

[32] Similarly, in *Jain v Infosys Ltd*[34], the Full Bench said:

> "… in the context of the question whether a dismissal was an unfair dismissal in which there is also agitated whether the dismissal was a case of genuine redundancy, to the extent that there is a legal onus of proof or something analogous thereto, it rests with the

> applicant in the sense that the applicant bears the risk of failure if the satisfaction required by s.385 including paragraph (d) is not reached."[35]

[33] The Applicant submits that he should have been redeployed because he held relevant experience in installation work, and had previously offered to perform installation work. Further, the Respondent's contentions that the Applicant refused, or did not want, to perform installation work are denied by the Applicant and not supported on the evidence.

[34] However, the Applicant has failed to identify any specific role or roles that, at the time of his dismissal, were available (vacant) for his redeployment (i.e. beyond the assertion that his role ought not have been made redundant in the first place, or that he should have been simply redeployed (in his existing role) to perform installation or other available work across the Respondent's business).[36] In my view, this is fatal to the Applicant's contention that the Respondent has failed to comply with s.389(2) of the Act. In other words:

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

and

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

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

[36] In view of my findings set out in paragraphs [34] and [35] of this decision, I find that the Respondent has satisfied s.389(2) of the Act.

Other matters

[37] The Applicant makes various claims as to what he submits are the 'real' reasons for his dismissal (disguised by the Respondent as a redundancy). I do not accept that the evidence supports these so-called 'real' reasons for the Applicant's dismissal. Further, given my findings that the Respondent has satisfied the requirements of s.389 of the Act, it follows that the Applicant has failed to satisfy me that his dismissal was 'not' a case of genuine redundancy (s.385(d)). In other words, it is unnecessary, perhaps even beyond jurisdiction, for me to make findings as to the Applicant's claims as to the 'real' reason/s for his dismissal.

Summary of findings

[38] Having regard to the evidence and submissions of the parties, I have made the following findings:

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

(b) The Respondent has satisfied its obligations as to consultation under the Award in that no Award consultations obligations arise for determination in these proceedings (s.389(1)(b) of the Act).

(c) The Respondent has complied with the requirements of s.389(2) of the Act in that it denies that it would have been reasonable in all of the circumstances to have redeployed the Applicant in its enterprise, and the Applicant has failed to identify (on the evidence) that a role existed that it would have been reasonable to redeploy him into as at the time of his dismissal.

Conclusion

[39] The Respondent has made good its case as to genuine redundancy. Accordingly, the Applicant's dismissal is not one which the Commission has the power to interfere with under the Act. His Application is therefore *dismissed*. An order to this effect will follow the publication of this decision.

DEPUTY PRESIDENT

Appearances:

The Applicant (Mr Nicholas *Williams*) appeared for himself.

Mr Ash *Mola*, Legal Practitioner Director, Brooklyn Lawyers, appeared with permission for the Respondent.

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[1] Transcript, PN21-PN22.
[2] *Ulan Coal Mines Limited v Henry Jon Howarth & Ors* [2010] FWAFB 3488, at [15] (Boulton J, Drake SDP, and McKenna C), citing *R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Cooperative Limited* (1977) 16 SASR 6; *Termination, Change and Redundancy Cases* (1984) 8 IR 34 and (1984) 9 IR 115; *Short v F.W. Hercus Pty Limited* (1993) 40 FCR 511.
[3] (1996) 69 IR 370.
[4] Ibid, at 373.
[5] [2014] FWC 7829.
[6] Ibid, at [16]. Cited with approval in *Adams v Blamey Community Group* [2016] FWCFB 7202, at [14].
[7] *Kekeris v A. Hartrodt Australia Pty Ltd* [2010] FWA 674, at [27].
[8] [2004] FCAFC; (2004) 136 FCR 388.
[9] Ibid, at [43]-[44].
[10] Respondent's Submissions, annexed to Form F3, at [24]-[25].
[11] Respondent's Submissions, 7 February 2023, at [8]-[21] (citations omitted).
[12] Form F2, Item 3.2; Applicant's Submissions, 14 February 2023 and 23 March 2023.
[13] Transcript, PN281-PN283, PN297, PN307-PN313, and PN426.
[14] Kenan Hussein Statement, 21 February 2023, at [10].
[15] Applicant's Closing Submissions, 23 March 2023, at [30], [35] and [51]-[52].
[16] Transcript, PN308-PN316.
[17] Kenan Hussein Statement, 21 February 2023, at [12].
[18] Applicant's Closing Submissions, 23 March 2023, at [26] and [53].
[19] Applicant's Closing Submissions, 23 March 2023, at [40]; Compare Kenan Hussein Statement, 21 February 2023, at [10], and [19]-20].
[20] Kenan Hussein Statement, 21 February 2023, at [13]-[14].
[21] Applicant's Closing Submissions, 23 March 2023, at [41]-[42].
[22] Applicant's Closing Submissions, 23 March 2023, at [43]-[46].
[23] Kenan Hussein Statement, 21 February 2023, at [11]-[12]. Although I accept that many of the assertions of the Respondent's financial status contained in the Respondent's submissions are unsupported in the evidence relied upon by the Respondent in these proceedings.
[24] Transcript, PN144.
[25] *Maxwell v Bardrill Corporation Ltd* [2015] FWC 4019, at [40]-[41].
[26] (2016) 248 FCR 18; [2016] FCAFC 99.
[27] Ibid at [499].
[28] *Tsiftelidis v Crown Melbourne Limited* [2016] FWCFB 4675, at [33].
[29] [2010] FWAFB 3488; (2010) 199 IR 363.
[30] See also *Technical and Further Education Commission v Pykett* [2014] FWCFB 714 (2014) 240 IR 130, at [35].
[31] Ibid, at [34], [36], [38]–[40].
[32] [2014] FWCFB 4125; (2014) 244 IR 252.
[33] Ibid, at [31(2)]. See also at [26].
[34] [2014] FWCFB 5595.
[35] Ibid, at [35].
[36] Transcript, PN77-PN81, and PN122.