



# DECISION

*Fair Work Act 2009*  
s.394—Unfair dismissal

**Julie-Ann Ellis**

v

**Beach Hotel Stradbroke Island No.2 Pty Ltd**  
(U2025/4144)

COMMISSIONER HUNT

BRISBANE, 3 NOVEMBER 2025

*Application for an unfair dismissal remedy – jurisdictional objection – genuine redundancy – position no longer required to be performed by anyone – failure to consult regarding redundancy and failure to consider redeployment – dismissal harsh, unjust and unreasonable – medical evidence required to determine if reinstatement is inappropriate.*

[1] On 4 April 2025, Ms Julie-Ann Ellis made an application to the Fair Work Commission (the Commission) under s.394 of the *Fair Work Act 2009* (the Act) alleging that she had been dismissed from her employment with Beach Hotel Stradbroke Island No.2 Pty Ltd (the Respondent) and that the dismissal was harsh, unjust or unreasonable.

[2] On 17 April 2025, the Respondent filed a *Form F3 Employer Response* to the application. It raised a jurisdictional objection on the basis that the dismissal was a case of genuine redundancy.

[3] Directions were issued for the filing of evidence and submissions in relation to the jurisdictional objection and the merits of the application, and the matter was listed for hearing by Microsoft Teams on 30 July 2025. Ms Ellis represented herself. The Respondent was represented by Ms Lizzy Shobolov, Director of Human Resources and Mr Damien Noyes, Chief Financial Officer.

[4] I decided to conduct the matter as a determinative conference. Ms Ellis gave evidence and was cross-examined. Shay Doyle, bottle shop customer and Ms Eliza Ning, a former colleague, filed witness statements in support of Ms Ellis but were not required for cross-examination.

[5] For the Respondent, Mr Todd Clayton, General Manager of the Beach Hotel Stradbroke Island and Ms Marisa Clayton, Assistant Manager gave evidence and were cross-examined. At the determinative conference, it became clear that Mr Noyes had relevant evidence to give, and I granted leave for Mr Noyes to give oral evidence without having previously filed a witness statement.

## Relevant legislation

[6] Section 394 of the Act provides:

### “394 Application for unfair dismissal remedy

(1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.

Note 2: For application fees, see section 395.

Note 3: Part 6 1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.

(2) The application must be made:

- (a) within 21 days after the dismissal took effect; or
- (b) within such further period as the FWC allows under subsection (3).

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

- (a) the reason for the delay; and
- (b) whether the person first became aware of the dismissal after it had taken effect; and
- (c) any action taken by the person to dispute the dismissal; and
- (d) prejudice to the employer (including prejudice caused by the delay); and
- (e) the merits of the application; and
- (f) fairness as between the person and other persons in a similar position.”

[7] Further, ss.385 and 387 provide as follows:

### “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.”

**“387 Criteria for considering harshness etc.**

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (a) whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.”

**[8]** Section 389 of the Act provides a definition of genuine redundancy. It states as follows:

**“389 Meaning of genuine redundancy**

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

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

[9] Pursuant to s.396(d) of the Act, the Commission must determine whether the dismissal was a case of genuine redundancy before considering the merits of the application. This is the only jurisdictional issue before the Commission. The application was made in time. Ms Ellis has been dismissed and has met the minimum employment requirements, and the Respondent is not a small business.

[10] It is not disputed that Ms Ellis was employed pursuant to the *Hospitality Industry (General) Award 2020* (the Award). The Award contains the following consultation clause:

**"38. Consultation about major workplace change**

**38.1** 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.

**38.2** For the purposes of the discussion under clause 38.1(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.

**38.3** Clause 38.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

**38.4** 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 38.1(b).

**38.5** In clause 38 **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.

**38.6** Where this award makes provision for alteration of any of the matters defined at clause 38.5, such alteration is taken not to have significant effect."

### **Evidence of Ms Ellis**

[11] Ms Ellis lives on North Stradbroke Island. She commenced casual employment on 4 April 2022 as a Bottle Shop Attendant, initially working at the Stradbroke Island Beach Hotel operated by the Respondent. In August 2022, she began working at the Respondent's Dunwich bottle shop in addition to the Hotel. In September 2023, the Respondent opened a Point Lookout bottle shop and Ms Ellis also did shifts there.

[12] From March 2024, Ms Ellis worked only at the Dunwich bottle shop. She became a permanent full-time employee on 30 July 2024, working only at the Dunwich bottle shop.

[13] On 2 February 2025, Ms Ellis injured her back while at work. She reported this to the Respondent via email before opening hours on 3 February 2025 and completed an incident report via telephone before attending work. Following her shift, Ms Ellis attempted to present to a medical clinic, but the clinic was closed upon her arrival. She then presented to the clinic the following morning.

[14] Ms Ellis received a work capacity certificate from the Stradbroke Medical Centre on 5 February 2025 and presented to a physiotherapist that day. Ms Ellis provided her work capacity certificate to the Respondent and discussed a return-to-work plan with her manager. She had further medical appointments and received additional work capacity certificates on 12 February, 19 February and 5 March 2025. Ms Ellis had a telephone call with WorkCover on 10 March 2025, during which she was told that Mr Noyes had said that he did not want her back at work until she was fully recovered. Ms Ellis had not had anything to do with Mr Noyes before learning this was said about her to WorkCover.

[15] On 17 March 2025, Ms Ellis emailed various managers of the Respondent detailing some of her medical appointments and stated that she is eager to return to work.

[16] On 19 March 2025, the Respondent's North Stradbroke Island staff, including Ms Ellis were issued the following letter:

“Dear Team

### **The Beach Hotel Stradbroke Island Renovations Staff & Support Plan**

We are excited to share important news regarding the future of The Beach Hotel, Stradbroke Island. A major renovation is set to begin on **1st April 2025**, with the project expected to be completed by **late 2025 (with the final day of trade being the 29th March 2025)**. This transformation will ensure the venue remains a vibrant community hub while introducing modern amenities and enhanced facilities for our guests.

#### **Key Renovation Highlights**

- **Bar, Bistro, and Deck Upgrades:** Modernized interiors while retaining the venue's signature relaxed charm. An operable roofing system will provide year-round weather protection.
- **Function Space Expansion:** An extended outdoor deck offering spectacular views of Cylinder Beach, available for events and communal use.
- **New Entertainment Features:** Installation of large LED screens for live sports and movie nights, a revitalized VIP Gaming Lounge, and a dedicated outdoor stage for live performances.
- **Operational Improvements:** the new design has been focused on delivering enhanced operational efficiencies across food, beverage and function spaces.
- **Sustainability & Economic Benefits:** The project will boost local employment, support tourism, and enhance community engagement.

#### **Staff Closing Party Sunday, 30th March 2025**

To show our appreciation for all who have contributed to The Beach Hotel, we invite you to a **Staff Closing Party on Sunday, 30th March 2025**. The morning will include a small working bee to help prepare the venue for renovations, followed by a grand celebration in the afternoon. This event is a chance to reflect on the incredible memories we've made, acknowledge the hard work of our team, and look forward to an exciting

new chapter ahead. We encourage all staff to attend as we celebrate the end of an era and the bright future to come. More details are to come.

### **Staff Support During Renovations**

We recognize that these renovations will impact our team, and we are committed to providing support and guidance throughout the process. Below are the key employment considerations during this period:

### **Employment Opportunities & Reassignments**

- **Redeployment:** Where possible, staff will be reassigned to roles within Moreton Hospitality's other venues, including The Beach Hotel Broadbeach, Cora Restaurant and Bar, and our island bottle shops.
- **Employment Impact:** Due to the temporary closure, roles will be affected. Impacted team members will be encouraged to apply for available positions within the company when available and will be given priority for re-employment once the venue reopens.
- **Severance Entitlements:** Staff whose roles are affected will receive formal communication regarding their employment status, entitlements, and assistance in securing alternative positions within Moreton Hospitality where applicable.

### **Support Assistance**

A dedicated HR meeting will be scheduled to address any questions and provide further clarity. If you have immediate concerns, please contact either Todd Clayton, General Manager or Marisa Clayton, Assistant Manager. We deeply appreciate your dedication and contributions to The Beach Hotel, and we look forward to reopening as an even stronger and more vibrant venue. Thank you for being a valued part of Moreton Hospitality.

Best regards,

**Tony J Hazell**

CEO”

[17] A group text message was sent to relevant employees on 19 March 2025 with the following relevant passages:

“There is no immediate change to the operations of the bottleshop. We may adjust some trading hours, based on demand.

We still have Easter trade approaching where we are expecting to still be very busy (pending tourist activity).

I will get next week’s roster published today and start making a plan for the following one.”

**[18]** On 20 March 2025, Ms Ellis received a work capacity certificate stating that she could carry a load of up to 2kg. She then provided this certificate to her manager the same day in the hope of returning to work as soon as possible. Ms Ellis sent a follow up email to her manager on 25 March 2025.

**[19]** On 31 March 2025, Ms Ellis received a redundancy letter from Mr Noyes. The letter stated as follows:

**“Termination of your employment by reason of redundancy**

The purpose of this letter is to confirm the outcome of a recent review by **Beach Hotel Stradbroke Island No.2 Pty Ltd (ABN: 164 994 763)** (*“the employer”*) of its operational requirements, and what this means for you.

As a result of the venue renovations, as detailed and defined in the staff letter issued on 19 March 2025, the full-time position of Bottle Shop Attendant is no longer required. The employer has considered all avenues to find you an alternative position within the enterprise and any associated entities, however there are no suitable positions available at this time.

Regrettably this means your employment will terminate. This decision is not a reflection of your performance. If you wish to seek an in-person meeting to clarify this position, this can be scheduled with venue management upon your request.

For further personal assistance, please refer to the guidance provided by Fair Work on the second page of this letter.

**Redundancy Payment:**

Your employment will end immediately. Based on your length of service, you are entitled to a notice period of 1 week. In lieu of receiving this notice, this period will be paid out, to the sum of \$1,192.30. In addition, you will also be paid your accrued entitlements and any outstanding pay up to and including your last day of employment.

Upon acknowledgment of receipt of this letter the employer intends to action your Redundancy Payment promptly. With payment being processed on the subsequent Wednesday, in line with the usual payroll cycle.

Please feel free to contact payroll@moretonhospitality.com.au with any questions you may have with regards to your redundancy payment.

We sincerely thank you for your hard work and valuable contributions during your time with us. Once renovations are completed and the venue returns to full operations, we would like to invite you to apply to re-join the team.

Yours sincerely

Damien Noyes

**Chief Financial Officer”**

[20] On 1 April 2025, Ms Ellis sent an email enquiry about her redundancy letter, and received the following response from Ms Madeleine Irwin, Human Resources Coordinator:

“Hi Julie-Ann

Thank you for your query.

The position of genuine redundancy was reached due to the significant circumstance of the full venue renovation.

As noted in the staff letter issued on 19 March 2025, unfortunately the venue closure will significantly impact our staff, due to a large reduction in total available hours across the venue.

As this position is completely unrelated to your current position with Workcover, the business is comfortable that there is no conflict.

However, please feel free to contact Workcover or engage your own solicitor if you wish.

Kind regards,

**Madeleine Irwin**

**Human Resources Coordinator”**

[21] On 3 April 2025, Ms Ellis received a work capacity certificate clearing her to carry loads of up to 5kg.

[22] Ms Ellis stated that she was not aware that the Respondent had considered redeployment of its staff to its Broadbeach venue, and she had never indicated that she was not interested in redeployment to a non-Stradbroke Island venue. She stated that she was not asked by the Respondent if she would retrain in another role nor whether she was interested in redeployment.

[23] In her witness statement, Ms Ellis stated that she considers herself a hard worker and is respected by the local community. She knows how to best stock the store, including by ensuring cold beer cartons are on top. She stated that at least twice per week, male managers would permit deliveries of warm beer to be placed on top of cold beer, and she and another female employee would then have to move the cartons to ensure customers could access cold cartons.

[24] In evidence given during the determinative conference, Ms Ellis agreed that to be fully fit to return to work, without restriction, she would need to be certified to be able to lift a minimum of 15kg. At the time of the determinative conference, Ms Ellis had capacity to lift 10kg.

[25] Ms Ellis explained that she has L4 and L5 issues in her spine. Prior to February 2025, her back would be sore, and she would manage it with Panadol and rest.

[26] Ms Ellis has been in receipt of workers’ compensation payments since her injury. The gross weekly payments are \$1,192.06. The weekly payment is not insignificant and would be

far more than what Ms Ellis could expect to receive in wages if she had been redeployed into casual work during the Hotel renovations and shared shifts with other employees.

[27] Following the determinative conference, Ms Ellis provided evidence to the Commission that on 19 September 2025, WorkCover wrote to her, including the following:

“Recent medical evidence confirms your work-related injury will not improve with further treatment, and no longer prevents you from working, which means payments must stop.”

[28] The payments ceased on 19 September 2025.

[29] Ms Ellis seeks reinstatement with the Respondent. During the determinative conference she stated that had the Respondent held discussions with her in late-March 2025, she would have accepted casual employment, returning when she was cleared fit for work. She submitted that she should be reinstated as a casual employee with a minimum of two to three days’ work per week.

### **Evidence of Mr Doyle**

[30] Mr Doyle resides on the island and is a daily customer of the Dunwich bottle shop. He considers that Ms Ellis is a very hard worker and made everybody feel welcome. He has observed “back packers” working at the bottle shop and considers they do not have appropriate customer service.

[31] Mr Doyle has observed the following:

- workers placing hot cartons of beer on top of cold cartons;
- workers on Wednesdays, during deliveries, working slowly and not prioritising the beer in the fridge;
- too much stock at the Dunwich bottle shop in summer, resulting in the beer taking longer to cool down; and
- when Ms Ellis was working, others sitting down while Ms Ellis did the lifting.

### **Evidence of Ms Ning**

[32] Ms Ning began working for the Respondent as a casual bottle shop attendant in September 2023. She worked out of all three bottle shops on the island, but in the last 12 months of her employment worked out of the Hotel and Dunwich bottle shops. She was made a permanent, full-time employee in August 2024.

[33] Ms Ning hurt her back on 28 January 2025 and made a WorkCover claim. She too was made redundant on 31 March 2025. She considers that the venue closure was an excuse to dismiss her and Ms Ellis.

## **Evidence of Mr Clayton**

[34] Mr Clayton is the General Manager at the Hotel operated by the Respondent. He commenced the role in May 2024. The venue's last full trading day was 29 March 2025.

[35] The business undertook a restructure in preparation for the closure. A number of roles, including the full-time Bottle Shop Attendant role held by Ms Ellis, were made redundant. Casual employees and selected multi-skilled staff were retained based on operational need and their ability to work flexibly across the bottle shop and hotel operations. Those who were medically fit were required.

[36] A staff-wide meeting was held on 18 March 2025 to communicate the venue closure and impact on staffing. Ms Ellis was not present due to being on WorkCover. Communications were shared via WhatsApp (14 January and 19 March 2025) and a closure letter at [16] sent to staff. Ms Ellis received the redundancy letter at [19] on 31 March 2025. No direct one-on-one consultation occurred with Ms Ellis due to her being on leave.

[37] Mr Clayton stated that management considered redeployment of all affected staff. An option was for employees to be redeployed to the group's Broadbeach venues, however Ms Ellis had previously indicated she was not interested in relocating off the island.

[38] By March 2025, Ms Ellis had not been cleared fit to return to unrestricted duties. Mr Clayton's view was that given Ms Ellis' limited availability, geographic preference and medical restrictions, there were no reasonable or safe options for redeployment. Mr Clayton considered that retaining Ms Ellis in the casual pool would have undermined the finality of the restructure and created operational risk while she remained medically unfit and administratively inactive.

[39] Mr Clayton denied that the decision to make Ms Ellis' position redundant was based on her WorkCover status or medical condition.

[40] In evidence given during the determinative conference, Mr Clayton stated that he had minimal contact with Ms Ellis during her employment.

[41] Mr Clayton consulted with Mr Noyes in relation to Ms Ellis' redundancy. Mr Clayton wanted to ensure that skilled employees who had lost hours of work from the Hotel could gain hours in the bottle shops, and those employees had broader capabilities than Ms Ellis. Those capabilities included stock ordering and rostering across the whole business.

[42] Four female employees from the Hotel were retained and redeployed into the bottle shops. One of those employees is on a salary while three are casual employees. Mr Clayton agreed that some of those four employees needed to be trained in the bottle shop.

[43] Prior to the Hotel closing there had been around 16 casual employees working in the Dunwich bottle shop. Following the closure, there were only four per week. Ms Ellis and Ms Ning had been the only permanent employees working in the various bottle shops and both were made redundant when the Hotel closed for renovations. Some casual employees were let go.

[44] Mr Clayton stated that all staff received the same communication. He considered that due to Ms Ellis' incapacity there was no way of talking to her at the time. During the determinative conference, Ms Ellis stated that she had capacity to attend the Hotel for a one-on-one meeting. Mr Clayton stated that he left it in the hands of head office.

[45] I inquired of Mr Clayton if he knew of the Respondent's obligations when considering making an employee redundant. He stated that he knew that there were responsibilities but could not name them. He stated that he knew that there were responsibilities pursuant to the Award, but he did not review the Award and simply left it to head office.

[46] With regard to the letter of 19 March 2025, Mr Clayton agreed that the Respondent had not met its consultation obligations in the Award. He agreed that he did not contact Ms Ellis to discuss consultation or redeployment and the first she learned of her role being made redundant was when she received the letter dated 31 March 2025.

[47] With regard to redeployment, he stated that the Respondent considered that Ms Ellis could only lift 2kg – 5kg in weight and that could not be accommodated. Mr Clayton stated that an employee needs to be able to safely lift a minimum of 15kg as a box of beer is approximately 12kg.

[48] Mr Clayton stated:

“Look, the casuals that were kept were already medically cleared, available and able to work across different venues.”

[49] During the determinative conference, Mr Clayton agreed that he had made an assumption that Ms Ellis would not accept work at Broadbeach. The following was stated:

Mr Clayton: So the indication Julie had come over the time of it was an assumption that was made with you being on the island. Your commitment to the island. I think it's well spoken about in your statements. And it was an assumption that you may not move to Broadbeach, although there are and whatever opportunities may have been there, at Broadbeach. So there was an assumption that you may not want to move to Broadbeach based on the conversations that I've had with you over the last 12 months or so and how you feel about the island.

Ms Ellis: Yeah. I don't understand why you can assume what I am thinking without asking me in person. Yeah.

Mr Clayton: I understand.

### **Evidence of Mr Noyes**

[50] Mr Noyes gave oral evidence as to the duties of the four managerial employees who secured work in the bottle shops during the Hotel's renovations.

[51] Mr Noyes agreed that while Ms Ellis might not have been able to assist with stock deliveries while incapacitated, if she had been fit, she could have done closing shifts. He agreed that the bottle shops do not receive stock every day.

[52] I inquired if the Respondent and associated entities considered Ms Ellis for any roles in the Broadbeach operations, including gaming room attendant. Mr Noyes replied that they are very late finishes, and you need to have a Responsible Service of Gambling certificate (RSG). Ms Ellis responded that she has her RSG.

[53] Ms Ellis stated that the Respondent had knowledge that she had her RSG, provided on the commencement of her employment. She stated if they had asked her in March 2025, she would have reminded them. Mr Noyes conceded that he was not aware Ms Ellis had her RSG. Mr Noyes said it was unlikely there were any gaming roles available at Broadbeach in March 2025.

[54] Mr Noyes stated that he did look at the Award obligations but considered that the correspondence of 19 March 2025 and 31 March 2025 was sufficient. Mr Noyes said he would liked to have invited Ms Ellis in for an interview, but she was on WorkCover, and he was told by WorkCover that he could not invite her to an interview to discuss her potential redeployment opportunities.

[55] Mr Noyes stated that if Ms Ellis had been redeployed as a casual employee after 31 March 2025 and came back to work when she was fit, it would not be fair on other casual employees.

[56] Mr Noyes suggested that Ms Ellis had not been able to move pallets of beer when deliveries came in prior to becoming incapacitated. Ms Ellis gave sworn evidence that she could and she did.

### **Evidence of Ms Clayton**

[57] Ms Clayton is the Assistant Manager at the Hotel operated by the Respondent. She commenced the role in May 2024. Ms Clayton's written statement largely replicated that of Mr Clayton's.

[58] Ms Clayton recalled that Ms Ellis had a very low restriction on what she could lift at work when she was injured. She recalls discussing the issue with Ms Ellis' manager, Jake Morely.

[59] Ms Clayton stated that she did not speak with Ms Ellis during the redundancy process as she did not want to be a third wheel.

[60] In answering questions from me, Ms Clayton stated that she is familiar with the Award obligations regarding redundancy. She stated that an employer needs to consult with an employee before making them redundant and look at other opportunities the business may have. Ms Clayton agreed that the Respondent did not meet its obligations to Ms Ellis by writing to her in relation to consultation. Ms Clayton stated that she did not know why the Respondent did not meet its obligations.

[61] Ms Clayton agreed that it was appropriate to have discussions with Ms Ellis, and if Ms Ellis had said she would like to be redeployed as a casual employee and return to work when she was fit, it should have been contemplated. Ms Clayton agreed that it would not have cost the business anything for the duration of Ms Ellis' incapacitation.

[62] Ms Clayton stated that if Ms Ellis had been made a casual employee and upon becoming fit for work, accepted a minimum number of casual hours, that might have been appropriate.

### **Submissions**

[63] In oral closing submissions, the Respondent submitted that it had sent out memos and WhatsApp messages with the changes to the Hotel. It was conceded that there was no one-on-one meeting held with Ms Ellis. It was submitted that it was not considered practical to do so. Ms Ellis did not attend the group meeting when it was held.

[64] The Respondent accepts that Ms Ellis was not informed that her job was at risk. Any redeployment discussions were held internally and not with Ms Ellis.

[65] It was submitted that if Ms Ellis had been made a casual employee, it would undermine the employment relationship and might provide Ms Ellis with greater rights than other casual employees.

[66] With respect to the Commission's considerations pursuant to s.387 of the Act, the Respondent submitted:

- (a) There was a valid reason for the dismissal as the permanent role did not exist;
- (b) Ms Ellis was informed of her dismissal;
- (c) Ms Ellis was not given an opportunity to respond regarding her capacity;
- (d) Not relevant;
- (e) Not relevant;
- (f) There are 170 employees across the group; it is not a small business;
- (g) Ms Shobolov was not employed by the Respondent at the time of the dismissal and the Respondent did not have any internal human resources expertise;
- (h) Not relevant.

[67] With respect to remedy, in the event the Commission finds that Ms Ellis was unfairly dismissed, the Respondent holds concerns about Ms Ellis' capacity. The Respondent would want to be assured that she can safely perform the work and not be at risk of being further injured.

[68] It was submitted that if Ms Ellis was reinstated as a casual employee for 2-3 days per week, a true casual employee would not have minimum hours.

[69] The target for the completion of the Hotel renovations is October 2025.

[70] Ms Ellis agreed that the Respondent could satisfy the test that the role of permanent, full-time Bottle Shop Attendant was not required to be performed by anybody.

[71] Ms Ellis submitted that the Respondent cannot satisfy the consultation and redeployment obligations and therefore the jurisdictional objection ought to be dismissed.

[72] With respect to the Commission's considerations pursuant to s.387 of the Act, Ms Ellis submitted:

- (a) There was not a valid reason for the dismissal. She submitted that there was no reason for her to be dismissed on 31 March 2025;
- (b) She agreed that she was informed of her dismissal;
- (c) She submitted that she was not given an opportunity to respond regarding her capacity;
- (d) Not relevant;
- (e) Not relevant;
- (f) The Respondent is not a small business;
- (g) She submitted that the Respondent was definitely impacted by not having internal human resources expertise;
- (h) Not relevant.

[73] With respect to remedy, at the time of the determinative conference, Ms Ellis sought reinstatement as a casual employee with a minimum of 2-3 days of work. She seeks continuity of service.

[74] Ms Ellis accepts that the WorkCover payments to her would far exceed any remuneration she would have earned if still employed with the Respondent.

[75] At the determinative conference, the fact that Ms Ellis only received one week's payment in lieu of notice was discussed despite her employment contract providing for the payment of four weeks. The additional payment was promptly made by the Respondent to Ms Ellis.

## Consideration

### *Genuine Redundancy*

[76] I turn now to a consideration of the criteria set out in s.389 of the Act. For Ms Ellis' dismissal to be a case of genuine redundancy, the Respondent must meet each of the criteria set out in s.389 of the Act, where relevant.

### ***s.389(1)(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***

[77] The test to be considered when determining whether there has been a reorganisation or redistribution of duties is whether the employee has any duties left to discharge.<sup>1</sup> Where there is no longer any function or duty to be performed by an employee, his or her position becomes redundant even where aspects of that employee's duties are still being performed by other employees.<sup>2</sup>

[78] The decision in *Kekeris v A. Hartrodt Australia Pty Ltd T/A a.hartrodt*<sup>3</sup> considered this point and established that the test is whether the previous job has survived the restructure or downsizing, rather than a question as to whether the duties have survived in some form. The Full Bench in *Ulan Coal Mines Limited v Howarth and others* [2010] FWAFB 3488 considered and applied the decision of Ryan J in *Jones v Department of Energy and Minerals* (1995) 60 IR 304 and said:

“[17] It is noted that the reference in the statutory expression is to a person’s “job” no longer being required to be performed. As Ryan J observed in *Jones v Department of Energy and Minerals* (1995) 60 IR 304 a job involves “a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employees’ organisation, to a particular employee” (at p. 308). His Honour in that case considered a set of circumstances where an employer might rearrange the organisational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions. In these circumstances, it was said that:

‘What is critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organisation, any duties left to discharge. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant...’ (at p.308)

This does not mean that if any aspect of the employee’s duties is still to be performed by somebody, he or she cannot be redundant (see *Dibb v Commissioner of Taxation* (2004) FCR 388 at 404-405). The examples given in the *Explanatory Memorandum* illustrate circumstances where tasks and duties of a particular employee continue to be performed by other employees but nevertheless the “job” of that employee no longer exists.”

[79] The decision to extensively renovate the Hotel was made in mid-March 2025. I accept that the Respondent was entitled to utilise its skilled and more qualified staff to work in the Respondent’s bottle shops across the island to retain their skills and provide sufficient work for them. Ms Ellis’ permanent role was no longer required to be performed by anybody; the hours at the bottle shop would be distributed across various employees, all of them casual except for the one salaried worker from the Hotel.

[80] I am satisfied that following the changes in the operational requirements of the Respondent’s enterprise, the Respondent no longer required Ms Ellis’ job to be performed by anyone. The criterion in s 389(1)(a) of the Act is satisfied.

***s.389(1)(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***

[81] The obligation on an employer to consult about redundancy only arises when a modern award or enterprise agreement applies to an employee and that modern award or enterprise agreement contains requirements to consult about redundancy.

**[82]** It is not disputed that Ms Ellis was employed under the Award; the consultation clause is produced at [10].

**[83]** The Respondent made a definite decision to make a major change to the business, terminating two permanent, full-time employees from the bottle shops and ending the employment of many from the Hotel and some casual employees from the bottle shops. The Respondent's decision had a significant effect on employees, including by the elimination of several positions.

**[84]** It follows that the Respondent was required to comply with the consultation obligations in clause 38 of the Award. Having reached this conclusion, I turn to consider whether the Respondent complied with its consultation obligations within the Award.

**[85]** In mid-March 2025, the Respondent made a definite decision to reduce the number of employees across the island's operations. Ms Ellis was sent the letter of 19 March 2025, informing her that the renovations would have an impact on the team, and the Respondent would provide support and guidance throughout the process. The communication suggests that Hotel staff will be redeployed, but there is no mention of Ms Ellis' role being affected.

**[86]** It appears that there were internal discussions between Mr Clayton and Mr Noyes about Ms Ellis' role being made redundant, but nobody reached out to Ms Ellis to communicate with her directly or invite her to a meeting.

**[87]** There is no evidence before the Commission of the Respondent having engaged in consultation with Ms Ellis after the definite decision was made. There was no opportunity afforded to Ms Ellis to consult with the Respondent about the definite decision, and therefore the Respondent was not in a position to consider any matters raised by Ms Ellis in compliance with clause 38.4 of the Award.

**[88]** Further, the Award consultation obligations require communication to the relevant employee in writing, which of course did not occur. The written notification is an express term of clause 38.2.

**[89]** Having regard to these findings, I am not satisfied that the Respondent complied with the consultation obligations prescribed by the Award. Accordingly, I am not satisfied that the cessation of Ms Ellis' employment was a genuine redundancy within the meaning of s.389 of the Act.

**[90]** In light of the conclusion reached, it is unnecessary to consider s.389(2), being whether it would have been reasonable in all the circumstances for Ms Ellis to have been redeployed within the Respondent, or an associated entity. However, for completeness, and in case I am incorrect about the consultation obligations above, I have determined the issue below.

***s.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.***

[91] In *Hallam v Sodexo Remote Sites Australia Pty Ltd*,<sup>4</sup> a Full Bench of the Commission stated the following:

“...Subsection 389(2) states that 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. Subsection 389(2) places no obligation on an employer to redeploy, or to do everything possible to achieve a redeployment outcome. The exception is applied at the time of dismissal. It operates so that a dismissal that would otherwise be a case of genuine redundancy under subsection 389(1) will not be so if it would have been reasonable in all the circumstances for the person to be redeployed within the employer’s enterprise, or with an enterprise of an associated entity of the employer.” [references omitted]

[92] As the Full Bench observed in *TAFE NSW v Pykett*,<sup>5</sup> to show that it would have been reasonable for the Respondent to redeploy Ms Ellis, it is not necessary to identify a particular job or position in which Ms Ellis could have been redeployed. However, the Commission must be satisfied on the balance of probabilities, and based on the evidence, that there was a ‘job or a position or other work’ to which it would have been reasonable to redeploy Ms Ellis.

[93] Whether redeployment of an employee is considered reasonable will depend on the circumstances that exist at the time of the dismissal.<sup>6</sup>

[94] The evidence before the Commission is centred on the Respondent’s contention that Ms Ellis was unfit for work and therefore could not have been redeployed. There was never any consideration as to how long Ms Ellis might have been certified unfit for work. Ms Ellis’ evidence is that if she had been consulted, she would have sought to be employed as a casual employee and accepted shifts when she overcame her injury.

[95] Further, there was no consideration as to whether Ms Ellis could have accepted roles within the Respondent’s operations at Broadbeach. No discussion was held with Ms Ellis as to whether she held a RSG certificate, and it is incredibly regrettable that Mr Clayton made assumptions about her ability to leave the island and work at Broadbeach. Ms Ellis was denied the opportunity to be considered for roles at Broadbeach, if they existed, because of the Respondent’s failure to hold a conversation with her.

[96] I consider that rather than being dismissed on 31 March 2025, Ms Ellis ought to have been redeployed into a casual role within the island’s bottle shops to perform work when she was cleared fit to do so.

### **Was the dismissal harsh, unjust or unreasonable?**

[97] A dismissal may be unfair, when examining if it is ‘harsh, unjust or unreasonable’ by having regard to the following reasoning of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*:<sup>7</sup>

“It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.”

[98] I am duty-bound to consider each of the criteria set out in s.387 of the Act in determining this matter.<sup>8</sup>

*s.387(a) – whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees)*

[99] When considering whether there is a valid reason for termination, the decision of North J in *Selvachandran v Peterson Plastics Pty Ltd* (1995) 62 IR 371 at 373 provides guidance as to what the Commission must consider:

“In its context in s.170DE(1), the adjective “valid” should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of s.170DE(1). At the same time the reasons must be valid in the context of the employee’s capacity or conduct or based upon the operational requirements of the employer’s business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must “be applied in a practical, common-sense way to ensure that the employer and employee are treated fairly.”

[100] However, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in the position of the employer.<sup>9</sup>

[101] I am satisfied that the Respondent no longer required Ms Ellis’ job to be performed by anyone because of changes in the operational requirements of the enterprise.

[102] I am of the view, however, that the Respondent made the decision to dismiss Ms Ellis from the Respondent’s employment because of her incapacity. On the evidence before the Commission, there was no consideration to allow Ms Ellis some time to recover from her injury. The decision made to dismiss her was simply about the circumstances as they existed in late March 2025.

[103] There is no reason why the Respondent had to dismiss Ms Ellis entirely from her employment. She has stated, and I accept her evidence, that if a discussion had been held with her, she would have agreed to be converted to casual employment and to resume work when she was cleared fit to do so.

**[104]** On the evidence before the Commission, the casual employees in the bottle shops performing work in March 2025 that were retained were not medically incapacitated. Mr Clayton stated that Ms Ellis' lifting restrictions could not be accommodated. It goes without saying that Ms Ellis could not have been rostered for shifts until such time as she was certified fit for work. Being able to lift only around 2kg – 5kg in a bottle shop is, unsurprisingly, unable to be accommodated. However, there is no satisfactory explanation for the Respondent's decision to dismiss her entirely.

**[105]** The consideration of fairness as to who is and is not dismissed is not a relevant consideration in s.389 of the Act. When considering the criteria in s.389, there is no requirement to look into why a person was chosen for dismissal over another. In evaluating the s.387 considerations, fairness is a factor. The Respondent's determination that it would not be fair to other casual employees if Ms Ellis worked casual shifts when certified fit for work is a disappointing submission to have been made. Ms Ellis had not been considered suitable to retain by the Respondent because she was medically incapacitated at the end of March 2025.

**[106]** I am satisfied that there was a valid reason to end the permanent, full-time employment of Ms Ellis at the end of March 2025, however there was not a valid reason for Ms Ellis to have been dismissed from her employment with the Respondent.

*s.387(b) – Whether the person was notified of that reason*

**[107]** Ms Ellis was notified of the reasons for the dismissal in the termination letter dated 31 March 2025.

*s.387(c) – Whether there was an opportunity to respond to any reason related to the capacity or conduct of the person*

**[108]** It is conceded by the Respondent, and I so find that Ms Ellis was not provided with an opportunity to respond to any reason related to her capacity to have been retained by the Respondent.

*s.387(d) – Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal*

**[109]** Where an employee protected from unfair dismissal has requested a support person be present to assist in discussions relating to the dismissal, an employer should not unreasonably refuse that person being present.

**[110]** There is no positive obligation on an employer to offer an employee the opportunity to have a support person. The Explanatory Memorandum, *Fair Work Bill 2008* (Cth) at [1542] states the following:

“This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer an employee the opportunity to have a support person present when they are considering dismissing them.”

[111] Ms Ellis was not unreasonably refused by the Respondent to have a support person present in discussions relating to the dismissal as there were no discussions. This matter is appropriately considered under s.387(h).

*s.387(e) – Whether there was a warning of unsatisfactory work performance before dismissal*

[112] Ms Ellis' dismissal did not relate to unsatisfactory performance. This is a neutral factor.

*s.387(f) – Whether the respondent's size impacted on the procedures followed and s.387(g) – Whether the absence of a dedicated human resource management specialist impacted on the procedures followed*

[113] The Respondent is not a small business. At the time of the dismissal the Respondent did not have any internal human resource management expertise. I consider that the lack of internal expertise impacted on the procedures followed.

*s.387(h) – Other matters*

[114] I am concerned that Mr Noyes gave evidence that Ms Ellis could not move pallets of beer on delivery days prior to incurring her injury. There was no basis for Mr Noyes to have made such an unfair and incorrect assumption. Ms Ellis' evidence is accepted that she did, in fact, perform physically strenuous tasks of moving beer cartons.

[115] It is disappointing that Mr Clayton assumed Ms Ellis would not be interested in performing work at Broadbeach. A discussion with her would have covered off many topics and likely have led to Ms Ellis convincing the Respondent not to dismiss her entirely from the Respondent's employment. I consider the fact that nobody bothered to speak with Ms Ellis at all to be particularly harsh. Mr Noyes' evidence that WorkCover told him he was not allowed to speak with Ms Ellis sounds implausible.

[116] None of the Respondent's management personnel took the time to read the Award obligations. Ms Ellis did not even have time to learn that her job was at risk; she was dismissed on 31 March 2025 without any prior notice.

[117] I have had regard to the fact that the dismissal was conducted in breach of the consultation provisions of the Award and that issue weighs heavily for a finding that the dismissal was harsh, unjust or unreasonable.

## **Conclusion**

[118] The jurisdictional objection that the dismissal was a case of genuine redundancy requires two affirmative elements and one negative element which must be satisfied to establish whether a dismissal was or was not a case of genuine redundancy.

[119] I have determined that the second affirmative element was not satisfied in this case. Specifically, the Respondent has not complied with an obligation in the Award that applied to

Ms Ellis' employment to consult about her redundancy. Therefore, the dismissal did not satisfy the meaning of genuine redundancy as contained within s.389(1)(b) of the Act.

[120] Further, I have determined that it would have been reasonable in all the circumstances for Ms Ellis to have been redeployed within the Respondent's enterprise or an associated entity of the Respondent, and the Respondent had no regard to its obligations to consider and discuss redeployment opportunities with Ms Ellis. Accordingly, and further to [119], the dismissal did not satisfy the meaning of genuine redundancy as contained within s.389(2) of the Act.

[121] Consequently, the jurisdictional objection has been determined and dismissed, and consideration has turned to the substantive merits of the application. Having appropriate regard for the various factors contained within s.387 of the Act, I determine that Ms Ellis' dismissal was harsh, unjust and unreasonable.

## Remedy

[122] Section 390 of the Act reads as follows:

**“390 When the FWC may order remedy for unfair dismissal**

- (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
  - (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
  - (b) the person has been unfairly dismissed (see Division 3).
- (2) The FWC may make the order only if the person has made an application under section 394.
- (3) The FWC must not order the payment of compensation to the person unless:
  - (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
  - (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies.”

[123] Ms Ellis is a person protected from unfair dismissal for the Act's purposes and is a person who has been unfairly dismissed. Accordingly, I am empowered to exercise discretion as to whether she can be reinstated.

[124] I have formed the preliminary view that I am inclined to reinstate Ms Ellis to perform work for the Respondent if I can be satisfied that she has the requisite capacity to safely perform work.

[125] It is not clear whether Ms Ellis has any medical restrictions that would now prevent her from returning safely to perform the role of Bottle Shop Attendant. The communication from WorkCover dated 19 September 2025 states that Ms Ellis maintains a work-related injury which will not improve with further treatment but does not prevent her from working.

[126] Ms Ellis is directed to furnish to the Commission and to the Respondent current medical evidence as to her capacity to work as a Bottle Shop Attendant. She is welcome to provide any further written statement to support her being reinstated. This evidence is to be filed and served by no later than 10 November 2025. Following receipt of the evidence, the Respondent will be afforded a brief period of time to provide any evidence or submissions in respect of the material filed by Ms Ellis.

[127] If a further hearing is required as to whether it is appropriate for Ms Ellis to be reinstated, this will be listed promptly.



COMMISSIONER

*Appearances:*

*J Ellis*, the Applicant.  
*L Shobolov* and *D Noyes*, for the Respondent.

*Hearing details:*

2025.  
Video using Microsoft Teams.  
30 July.

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<sup>1</sup> *Jones v Department of Energy and Minerals* [1995] IRCA 292 (16 June 1995), [(1995) 60 IR 304 at p. 308 (Ryan J)]; cited with approval in *Ulan Coal Mines Limited v Howarth and others* [2010] FWAFB 3488 (Boulton J, Drake SDP, McKenna C, 10 May 2010) at para. 17, [(2010) 196 IR 32]

<sup>2</sup> *Ibid*

<sup>3</sup> [2010] FWA 674.

<sup>4</sup> *Hallam v Sodexo Remote Sites Australia Pty Ltd* [2017] FWCFCB 6847 at [20].

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<sup>5</sup> [\[2014\] FWCFB 714](#), (2014) 240 IR 130 at [36].

<sup>6</sup> *Ulan Coal Mines Limited v Honeysett* (2010) 199 IR 363 at [28].

<sup>7</sup> (1995) 185 CLR 410, [465].

<sup>8</sup> *Sayer v Melsteel* [\[2011\] FWAFB 7498](#) at [20].

<sup>9</sup> *Walton v Mermaid Dry Cleaners Pty Ltd* (1996) 142 ALR 681, 685.