



DECISION

Fair Work Act 2009
s.604—Appeal of decisions

Leesa Zaicos

v

Tamworth Dementia Respite Service Inc
(C2025/8264)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT WRIGHT

SYDNEY, 17 OCTOBER 2025

Appeal against decision in transcript and order [PR790335](#) of Deputy President Boyce at Sydney made on 4 August 2025 in matter number U2025/5143 – application for unfair dismissal remedy – objection on grounds that the dismissal was a case of genuine redundancy – compliance with obligation to consult about redundancy – whether Social, Community, Home Care and Disability Services Industry Award 2010 applied to the dismissed employee – award applied to dismissed employee – employer did not comply with consultation requirements – not relevant to consider whether consultation would have resulted in a different outcome – dismissal was not a case of genuine redundancy – permission to appeal granted – appeal allowed.

Introduction

[1] The Tamworth Dementia Respite Service Inc (the **TDRS**) is a social service providing support for carers of people aged 65 years and over with dementia. Leesa Zaicos commenced employment with the TDRS in March 2021 in the position of Managing Coordinator of Operations. At the time Ms Zaicos commenced employment, the TDRS had a manager and four staff members and serviced 20 clients and carers. By 2025, there were either eight or nine staff members and around 12 volunteers providing services to approximately 90 high-needs dementia clients and their carers.

[2] During 2024, Ms Zaicos became aware of financial issues affecting the operations of the service. The TDRS was considerably behind in making superannuation contributions and taxation payments. Ms Zaicos says that a new accountant was obtained who was working on arranging a payment plan with the Australian Taxation Office and that she had engaged in discussions with the Commonwealth funding manager for the service. Notwithstanding these steps being taken, Andrew Barnden was appointed as the voluntary administrator of the TDRS on 8 April 2025 by its executive committee members under s 436A of the *Corporations Act 2001* (Cth). Mr Barnden is a director of Rodgers Reidy, a registered liquidator and trustee in bankruptcy.

[3] Mr Barnden says that, following his appointment as administrator, he undertook a review of the operations of the TDRS and took immediate steps to ascertain the state of the business which included taking control of the Association's business and assets, conducting a strategic review of the service, including its financial position and cashflow, and continuing to trade. Mr Barnden says that, based on his review of the financial position of the service and in order to maximise the chance of the business continuing in existence, he made the decision that the TDRS was not in the position to maintain Ms Zaicos' employment.

[4] After making this decision, Mr Barnden issued a letter to Ms Zaicos dated 23 April 2025 advising her of his decision. The letter states:

As you are aware, I was appointed Voluntary Administrator of the Association by a resolution of the Association's Executive Committee Members on 8 April 2025 pursuant to Section 436A of the Corporations Act 2001....

Following an urgent strategic review of the Association's financial position, I am implementing a restructure of its financial affairs. As part of this restructure, the Association is unfortunately not in a position to maintain your employment effectively from 23 April 2025. Accordingly, your last date of employment in the Association is 23 April 2025.

[5] The letter of termination further stated that Ms Zaicos would be paid a payment in lieu of notice of termination in accordance with the *Social, Community, Home Care and Disability Services Industry Award 2010*¹ (the **SCHADS Award**). The letter stated:

Based upon the Social, Community, Home Care and Disability Services Industry Award, your notice period is three (3) weeks. As this notice is given to you on 23 April 2025, you are entitled for three (3) weeks of Payment in Lieu of Notice of termination.

[6] During April 2025, Ms Zaicos was on a period of what she described as 'work cover leave' as a result of a workplace injury. In her witness statement filed in the proceedings at first instance, Ms Zaicos said:

I was never consulted about any structural changes, redundancy, or potential adjustments to my role. I was not offered reduced hours, redeployment, or the opportunity to return to my core operational duties later. I would have happily accepted such an arrangement if it had been proposed. The dismissal occurred without warning, during my Workcover leave, and without any attempt at procedural fairness.

[7] Ms Zaicos was not cross-examined in relation to this evidence. In his witness statement, Mr Barnden does not suggest that any form of consultation occurred prior to him sending the letter dated 23 April 2025 informing Ms Zaicos that her employment was terminated with immediate effect. Mr Barnden's submissions in reply to Ms Zaicos' witness statement assert that:

Due to the Voluntary Administration process and the bona-fide restructuring, there was no requirement for any consultation, warnings nor a reduction in her hours.

[8] Mr Barnden indicates that he provided a detailed report to creditors on 16 May 2025, and a meeting of creditors took place on 26 May 2026 at which the creditors voted in favour of a motion to execute a deed of company arrangement. The deed of company arrangement was

executed on 11 June 2025, at which time Mr Barnden became the deed administrator and control of the TDRS reverted to its existing committee members. It appears that the TDRS continues to operate.

Decision of the Deputy President

[9] On 25 April 2025, Ms Zaicos applied to the Commission for an unfair dismissal remedy under s 394 of the *Fair Work Act 2009* (Cth) (**Act**). On 6 May 2025, the TDRS filed a 'Form F3 Employer response to unfair dismissal application'. In answer to the question 'Did an award or an enterprise agreement apply to the Applicant?', the TDRS indicated that the SCHADS Award applied to Ms Zaicos. The response indicated that the TDRS objected to the application on the ground that the dismissal was a case of genuine redundancy. The response stated that 'after a review of the Association's financial position, it is not in the position to maintain Ms Zaicos['] employment based upon a bona fide restructure of the Association as part of the Voluntary Administration process'.

[10] The Deputy President issued directions in relation to the matter on 18 June 2025. The directions required the parties to file and serve submissions and evidence in support of or in opposition to 'the genuine redundancy jurisdictional objection'. The directions provided that the matter was listed for hearing on 4 August 2025 'in regard to the Respondent's genuine redundancy objection (only)'. The hearing took place as foreshadowed on 4 August 2025. At the commencement of the hearing, the Deputy President said:²

We are down to hear the respondent's jurisdictional objection of whether the applicant was dismissed for reasons of genuine redundancy within the meaning of section 389 of the Fair Work Act.

[11] Neither Ms Zaicos nor Mr Barnden was formally cross-examined at the hearing, but both made some supplementary oral submissions. The Deputy President then gave his decision *ex tempore* at the conclusion of the hearing. The reasons of the Deputy President are recorded in the transcript of the hearing.

[12] The Deputy President commenced by summarising the submissions made by the parties. Relevantly to the grounds of appeal, the Deputy President recorded that Ms Zaicos made the following submission:³

The applicant says that there was no procedural fairness in her dismissal in the sense that she wasn't consulted about the relevant changes that were happening and that she would have been happy to accept any type of arrangement other than dismissal, [about] which she hadn't been consulted. She says her dismissal occurred without warning during WorkCover leave and without any attempt at procedural fairness.

[13] The Deputy President noted that s 389 of the Act provides the statutory definition of what constitutes a genuine redundancy. He observed that, having regard to s 389, there are three questions the Commission needs to resolve:⁴

Firstly, 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? Secondly, did the respondent comply with any obligation under a modern award or enterprise agreement that applied to the

applicant's employment to consult the applicant about a redundancy? Thirdly, 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?

[14] The Deputy President found that TDRS, or Mr Barnden as the administrator, no longer required Ms Zaicos' job to be performed by anyone because of changes in the operational requirements of the enterprise having regard to its financial position and the decisions that had to be made at the relevant time.⁵ The Deputy President then turned to the second question, namely, whether the TDRS had complied with any obligation under a modern award or enterprise agreement to consult about the redundancy. The Deputy President's reasons in relation to that question were as follows:⁶

The second issue I must consider is whether the respondent complied with an obligation of a modern award or enterprise agreement that applied to the applicant to consult about the redundancy. No submissions were made on this point. It is not apparent to me that the applicant was covered by a modern award or enterprise agreement.

It follows that under section 389(1)(b) of the Act, there was no requirement for the respondent to engage in consultations about redundancy.

I point out that if a modern award applied to the applicant, consultation provisions in the award would have applied. That said, the question in relation to consultation is whether there would have been any different position arrived at had the consultation occurred. On the evidence, there is no evidence that such different position would have been arrived at in terms of Mr Barnden. Mr Barnden was not subject to cross-examination about any alternative position. As far as Mr Barnden was concerned in making his decision, the applicant's wages were a significant cost that he needed to remove from the business, and he did so accordingly.

It follows that section 389(1)(b) of the Act is either not relevant to my considerations today or I consider it otherwise satisfied having regard to the evidence before me.

[15] The Deputy President also concluded that there was no basis upon which he could find that it would have been reasonable in all the circumstances to redeploy Ms Zaicos.⁷

[16] At the conclusion of his reasons, the Deputy President summarised his findings. In relation to s 389(1)(b), the Deputy President said:⁸

There either were no consultation obligations under a modern award or enterprise agreement that applied to the applicant's employment, or, if they did, any such consultation could not have produced a different result. It follows that section 389(1)(b) of the Act is either not a relevant consideration or does not otherwise weigh against any finding as to the applicant's position being made redundant.

[17] As such, the reasoning of the Deputy President in relation to the question of consultation contains two components. First, the Deputy President asserted that it was not apparent that Ms Zaicos was covered by a modern award or enterprise agreement and, as such, there was no requirement for the TDRS to consult. Second, the Deputy President concluded that, even if a modern award did apply to Ms Zaicos' employment, consultation would not have produced a different result. In light of those two findings, the Deputy President concluded that s 389(1)(b) was either irrelevant or did not 'weigh against any finding as to [Ms Zaicos'] position being made redundant'.

[18] At the conclusion of the hearing, the Deputy President stated that the dismissal met the definition of genuine redundancy under s 389 of the Act and ‘this is not a case in which the Commission has power to proceed any further with the applicant’s unfair dismissal application’.⁹ The Deputy President made an order¹⁰ on the same day dismissing Ms Zaicos’ unfair dismissal application.

Grounds of appeal and permission to appeal

[19] Ms Zaicos’ notice of appeal contains four grounds, each of which concerns the question of whether the Deputy President erred in finding that s 389(1)(b) of the Act was either not relevant or satisfied. The first ground is that the Deputy President erred in finding that no modern award applied to her employment. The second and third grounds are that the Deputy failed to correctly apply s 389(1)(b) in circumstances in which the consultation obligations in the SCHADS Award were not met and in stating that, even if consultation had occurred, it may not have changed the outcome. The fourth ground is that the Deputy President denied Ms Zaicos procedural fairness by failing to acknowledge that she was covered by the SCHADS Award and that TDRS had consultation obligations under that award.

[20] Under s 604(1) of the Act, a person aggrieved by a decision of the Commission may appeal the decision only with permission. In the case of an appeal from a decision made in unfair dismissal proceedings under Part 3-2 of the Act, s 400(1) provides that the Commission may only grant permission to appeal if it considers it is in the public interest to do so. We are satisfied it is in the public interest to grant permission to appeal in this matter. As we explain below, the Deputy President erred in his application of s 389(1)(b) and was wrong to find that Ms Zaicos’ dismissal was a case of genuine redundancy. The decision demonstrates a misunderstanding of the operation of s 389(1)(b) that should be corrected. The decision also involved an unjust outcome in that Ms Zaicos’ unfair dismissal application was dismissed at a preliminary stage even though her dismissal was not a case of genuine redundancy.

What is a case of genuine redundancy?

[21] The significance of whether a dismissal is a case of genuine redundancy is that s 385(d) of the Act provides that, leaving to one side the other requirements, a person has been ‘unfairly dismissed’ only if the Commission is satisfied that the dismissal was not a case of genuine redundancy.¹¹ If a person’s dismissal was a case of genuine redundancy, the person has not been unfairly dismissed, and no unfair dismissal remedy can be ordered under s 390(1).

[22] Section 389 defines when a person’s dismissal is ‘a case of genuine redundancy’ in the following terms:

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.

[23] The Deputy President described the question of whether Ms Zaicos' dismissal was a case of genuine redundancy as a 'jurisdictional objection'. As Full Bench authority has previously made clear, the contention of a respondent to an unfair dismissal application that a dismissal was a case of genuine redundancy is not a matter which goes to the jurisdiction of the Commission to hear and determine the application. It is simply one of the matters about which the Commission must be satisfied in order for a person to have been unfairly dismissed. In *McKerlie v RateIt Australia Pty Ltd*¹² (**McKerlie**), the Full Bench said:¹³

The Commission certainly has the jurisdiction to entertain and determine an unfair dismissal application if the application has been made in accordance with s 394 and the applicant is a person protected from unfair dismissal as defined in s 382. The substantive determinative functions of the Commission in respect of an application that is within jurisdiction are to decide whether the dismissal the subject of the application was unfair and, if so, what if any remedy should be granted. As s 385 makes clear, the substantive elements of an unfair dismissal (apart from the fact of the dismissal itself) about which the Commission must be satisfied are threefold: (1) the dismissal must be harsh, unjust or unreasonable; (2) the dismissal must not be consistent with the Small Business Fair Dismissal Code; and (3) the dismissal must not be a case of genuine redundancy. The power to grant a remedy cannot be exercised absent the Commission reaching the requisite state of satisfaction about these three matters.

Section 396, which is located within Div 5, Procedural matters, of Pt 3-2 of the FW Act, requires that certain matters, including whether the dismissal was a case of genuine redundancy, be determined before '*considering the merits of the application*'. This meaning of the italicised expression is not pellucidly clear, but it presumably refers to the question of whether the dismissal is harsh, unjust or unreasonable and perhaps also to the question of remedy. However this requirement to decide issues in a certain order of priority does not mean they need to be the subject of a separate, preliminary hearing and, because the facts relevant to whether a dismissal is a case of genuine redundancy will usually be interwoven with those concerning whether the dismissal is harsh, unjust or unreasonable, it will not generally be a convenient and efficient course of action to hold a preliminary hearing concerning the question of genuine redundancy. Not all the 'initial matters' identified in s 396 are jurisdictional matters. Determining whether a dismissal is a genuine redundancy (as defined) precedes and may obviate the need to determine other questions ('merits'). In that sense it is commonly referred to as a 'preliminary matter'. Nonetheless, it is a matter to be decided by exercising arbitral power on an application that is otherwise within jurisdiction.

[24] The fact that s 396(d) of the Act provides that the Commission must decide whether a dismissal was a case of genuine redundancy 'before considering the merits of the application' does not mean the requirement is jurisdictional. It also does not require that a separate hearing be conducted in relation to that matter.

[25] Whether a separate hearing should be conducted in relation to the genuine redundancy question is a matter that will depend on an assessment of what procedural course is most convenient to the parties and the Commission. However, as was observed in *McKerlie*, where a person is dismissed purportedly on grounds of redundancy, there is likely to be a high degree

of overlap between the factual and other issues which arise in relation to the genuine redundancy question and the question of the fairness of the dismissal. We agree that it will rarely be convenient and efficient to hold a separate hearing concerning the question of genuine redundancy. The errors that Ms Zaicos has identified in the decision under appeal are, in part, attributable to the Deputy President considering issues that could only have been relevant to the question of fairness when determining, following a separate hearing, whether the dismissal was a case of genuine redundancy.

Modern award coverage

[26] The first appeal ground contends that the Deputy President erred in finding that no modern award or enterprise agreement applied to Ms Zaicos' employment. There is no suggestion that any enterprise agreement applied to Ms Zaicos. However, Ms Zaicos points out that a range of documents that were before the Deputy President expressly record that the parties conducted their relationship on the basis that the SCHADS Award applied to her employment. Those documents include:

- (a) The letter of termination dated 23 April 2025 which specifies the period of notice of termination to which Ms Zaicos was entitled as being based on the SCHADS Award.
- (b) A pay slip dated 9 April 2025 which recorded Ms Zaicos' classification as being 'SCHADS L8.1'.
- (c) The 'Form F3 Employer response to unfair dismissal application' which stated that the SCHADS Award applied to Ms Zaicos in answer to the question 'Did an award or an enterprise agreement apply to the Applicant?'.
- (d) The witness statement of Mr Barnden which set out various entitlements to which Ms Zaicos was entitled under the SCHADS Award, including with respect to annual leave loading and superannuation on the payment she received in lieu of notice.
- (e) The minutes of the meeting of creditors held on 26 May 2025 which recorded that Ms Zaicos had a claim with respect to various entitlements under the SCHADS Award which the chairperson advised should be admitted.

[27] Mr Barnden confirmed at the hearing of the appeal that there is no dispute between the parties that the SCHADS Award applied to Ms Zaicos.

[28] The parties were correct to have conducted themselves on the basis that the SCHADS Award applied to Ms Zaicos' employment. A modern award applies to an employer and employee if it covers the employer and employee, it is in operation and no provision of the Act provides, or has the effect, that it does not apply.¹⁴ A modern award covers an employer and employee if it is 'expressed to cover' the employer and employee.¹⁵

[29] Clause 4.1 of the SCHADS Award provides that it is an industry award which covers employers throughout Australia in, relevantly, the 'social and community services sector' and

their employees in the classifications listed in Schedule B to Schedule F. The ‘social and community services sector’ is defined in clause 3.1 as follows:

social and community services sector means the provision of social and community services including social work, recreation work, welfare work, youth work or community development work, including organisations which primarily engage in policy, advocacy or representation on behalf of organisations carrying out such work and the provision of disability services including the provision of social, community or disability services including the provision of personal care including therapeutic care and domestic and lifestyle support to a person with a disability in a community and/or residential setting including respite centre and day services.

[30] There is, and could be, no dispute that the services provided by the TDRS mean that it is an employer in the ‘social and community services sector’.

[31] Ms Zaicos’ pay slip identified her classification as being ‘SCHADS L8.1’. Clause B.8.1 of Schedule B to the SCHADS Award identifies the characteristics of a ‘social and community services employee level 8’. In general terms, a level 8 employee is ‘subject to broad direction from management/the employer and will exercise managerial responsibility for an organisation’. Other characteristics which may be present in a position at this level include the ‘initiation and formulation of extensive projects or programs which impact on the organisation’s goals and objectives’, providing ‘financial, specialised, technical, professional and/or administrative advice on policy matters within the organisation and/or about external organisations such as government policy’ and the development and implementation of techniques, work practices and procedures in all facets of the work area.

[32] Ms Zaicos described her responsibilities as including overseeing operations at Tamworth for staff, clients and carers, ensuring the organisation’s compliance with outputs and reports to the Commonwealth, following all aged care policies, procedures, guidelines and standards, liaising with referring agents, My Aged Care and other allied health professionals and reporting on operational activities to the governing committee. We are comfortably satisfied that Ms Zaicos’ role as Managing Coordinator of Operations falls within the social and community services employee level 8 classification in the SCHADS Award. That is the classification specified on Ms Zaicos’ pay slips and in accordance with which she was paid. The TDRS was correct to have classified Ms Zaicos as falling within that classification.

[33] The consequence is that Ms Zaicos was covered by the SCHADS Award and the SCHADS Award applied to her employment. Clause 8.1 of the SCHADS Award requires an employer to give notice to and engage in discussions with affected employees if it has made a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees. Clause 8.2 requires that the employer must give all relevant information about the changes in writing to affected employees. ‘Significant effects’ are defined in clause 8.5 to include termination of employment. Those obligations applied to the TDRS. The Deputy President was wrong to find that there was no requirement for the TDRS to engage in consultation about redundancy.

Whether consultation would have produced a different outcome

[34] The second and third appeal grounds in the notice of appeal contend that the Deputy President failed to correctly apply s 389(1)(b) of the Act in circumstances in which the

consultation obligations in the SCHADS Award were not met and in stating that, even if consultation had occurred, it may not have changed the outcome.

[35] The evidence made plain that the TDRS did not give notice to Ms Zaicos of the decision to restructure its operations, engage in any discussions in relation to the effect of the changes on Ms Zaicos or provide relevant information to Ms Zaicos or any representative. It did not comply with clause 8 of the SCHADS Award. Indeed, it did not consult at all. However, the Deputy President's conclusion that Ms Zaicos' dismissal was a case of genuine redundancy had a second basis. The Deputy President reasoned that consultation would not have resulted in a different outcome and, therefore, s 389(1)(b) was either satisfied or did not weigh against his conclusion that Ms Zaicos was redundant.

[36] This reasoning misunderstands s 389(1)(b). Section 389(1) is definitional. It defines what constitutes a 'genuine redundancy'.¹⁶ Unless the requirements of the subsection are met, the dismissal is not a case of genuine redundancy. The requirements in s 389(1) are cumulative. A person's dismissal is a case of genuine redundancy only if 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* the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy. If the employer has not complied with an obligation in a modern award or enterprise agreement to consult about the redundancy for the purposes of s 389(1)(b), then the dismissal is not a case of genuine redundancy even if s 389(1)(a) is satisfied.

[37] The Deputy President's suggestion that Ms Zaicos' position was redundant despite a failure to consult, or that the failure to comply with consultation obligations in a modern award does not weigh against a finding that her position was redundant, is misconceived. The question was not whether Ms Zaicos' position was redundant in a general sense, but whether her dismissal was a case of genuine redundancy as defined. In *Livingstones Australia v ICF (Aust) Pty Ltd*,¹⁷ the Full Bench explained:¹⁸

... s 389(1)(b) evinces a legislative intent to ensure that statutory consultation rights are upheld in cases where an employer decides that there are genuine operational reasons to make an employee or employees redundant. The existence of genuine operational reasons justifying the redundancy is not enough. The employer must also comply with consultation obligations imposed by an award or enterprise agreement before a termination based on those operational requirements can be 'a case of genuine redundancy' for the purposes of the FW Act, and s 385(d) in particular.

[38] In short, an employer must comply with consultation obligations imposed by a modern award or enterprise agreement. If it does not, the dismissal is not a case of genuine redundancy.

[39] No further inquiry is warranted to answer the question posed by s 389(1)(b). In particular, whether the Commission believes that compliance with a consultation obligation would have produced a different outcome is irrelevant to the genuine redundancy question. The question is only whether the employer complied with an obligation to consult imposed by a modern award or enterprise agreement or it has not. Whether consultation is likely to have produced a different result might be relevant to the subsequent assessment as to whether the dismissal was harsh, unjust or unreasonable for the purposes of s 385(b).¹⁹ In assessing if a dismissal was harsh, unjust or unreasonable, that matter would need to be considered together

with the other factors in s 387. The failure of the employer to comply with its consultation obligations is itself a matter which the Commission may consider relevant for the purposes of s 387(h) and would have to be considered as part of the overall assessment of fairness.²⁰

[40] In this matter, the Deputy President's decision concerned only the preliminary question of whether Ms Zaicos' dismissal was a case of genuine redundancy and not whether her dismissal was harsh, unjust or unreasonable. The Deputy President was wrong to regard speculation as to whether consultation could have produced a different result to be relevant to whether the dismissal was a case of genuine redundancy. The TDRS failed to comply with the obligation to consult imposed by clause 8 of the SCHADS Award. The consequence is that Ms Zaicos' dismissal was not a case of genuine redundancy.

Other grounds and contentions

[41] In circumstances in which we are satisfied that the appeal should be allowed on the bases set out in grounds 1 to 3, it is unnecessary to address ground 4 which complains of a denial of procedural fairness. Ms Zaicos' written submissions raise various other issues, including whether the Deputy President should have accepted Mr Barnden's claim that her redundancy was required for financial reasons, whether it would have been reasonable for her to be redeployed and that her dismissal was unfair because she was dismissed whilst on leave as a result of a workplace injury. Those submissions are not directed at any ground contained in the notice of appeal. It is, in any event, not necessary or appropriate for the Full Bench to consider those submissions in circumstances in which the issues raised may be relevant to whether Ms Zaicos' dismissal was harsh, unjust or unreasonable. That question will need to be considered by a member of the Commission.

Conclusion

[42] For these reasons, the TDRS did not comply with its obligations under the SCHADS Award to consult about Ms Zaicos' redundancy for the purposes of s 389(1)(b). Permission to appeal should be granted, the appeal allowed and the decision of the Deputy President quashed. The objection made by the TDRS on grounds that the dismissal was a case of genuine redundancy must be dismissed. It will be necessary for a member of the Commission to determine whether the dismissal was harsh, unjust or unreasonable. In circumstances in which the Deputy President has expressed a view as to whether consultation was likely to produce a different outcome, the better course is that Ms Zaicos' application should be remitted to another member of the Commission.

[43] The Full Bench makes the following orders:

- (a) Permission to appeal is granted;
- (b) The appeal is allowed;
- (c) The decision and order of Deputy President Boyce issued on 4 August 2025 in matter number U2025/5143 are quashed;
- (d) The objection made to Ms Zaicos' unfair dismissal application on the basis that her dismissal was a case of genuine redundancy is rejected; and
- (e) The application in matter number U2025/5143 is remitted to be determined by another member of the Commission.



PRESIDENT

Appearances:

L Zaicos, the applicant, in person.

A Barnden, of Rodgers Reidy, appeared for the respondent in his role as Deed Administrator.

Hearing details:

2025.

Sydney (in person):

13 October.

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¹ MA000100.

² Transcript, 4 August 2025 PN5.

³ Ibid PN106.

⁴ Ibid PN125.

⁵ Ibid PN136.

⁶ Ibid PNs 137–140.

⁷ Ibid PN146.

⁸ Ibid PN148.

⁹ Ibid PN151.

¹⁰ [PR790335](#).

¹¹ *Helensburgh Coal Pty Ltd v Bartley* [2025] HCA 29; (2025) 99 ALJR 1185 [59] (Edelman J) (*'Bartley'*).

¹² [\[2020\] FWCFB 5131](#); (2020) 301 IR 271.

¹³ Ibid [57]–[58].

¹⁴ *Fair Work Act 2009* (Cth) s 47(1).

¹⁵ Ibid s 48(1).

¹⁶ As explained in *Bartley* [2025] HCA 29; (2025) 99 ALJR 1185 [30] (Gageler CJ, Gordon and Beech-Jones JJ).

¹⁷ [\[2014\] FWCFB 1276](#); (2014) 240 IR 448.

¹⁸ Ibid [36].

¹⁹ See, eg, *Maswan v Escada Textilvertrieb (t/as ESCADA)* [2011] FWA 4239 [39]; *Arnold v Real Estate Mt Hawthorn Pty Ltd (t/as Oxford Property Group)* [2019] FWC 5446, 289 IR 164 [89]–[90].

²⁰ *UES (Int'l) Pty Ltd v Harvey* [2012] FWAFB 5241, 215 IR 263 [47]–[49].