



DECISION

Fair Work Act 2009

s.394 - Application for unfair dismissal remedy

Ms Vicky Kekeris

v

A. Hartrodt Australia Pty Ltd T/A a.hartrodt

(U2009/12724)

SENIOR DEPUTY PRESIDENT HAMBERGER

SYDNEY, 19 FEBRUARY 2010

Alleged unfair dismissal – case of genuine redundancy.

[1] On 8 October 2009 Ms Vicky Kekeris (the applicant) lodged an application pursuant to s.394 of the Fair Work Act (2009) (the Act) for an order granting a remedy against her former employer A. Hartrodt Australia Pty Ltd (the respondent) on the basis that her dismissal by the respondent had been unfair.

[2] A telephone conference was held on 27 October 2009 but no settlement was reached. On 3 November 2009 the respondent filed an objection to the application on the ground, *inter alia*, that the termination of Ms Kekeris's employment was a case of genuine redundancy. Directions were issued and the parties filed outlines of submissions and witness statements. The file was referred to me for determination and a hearing was conducted on 4 February 2010. I heard both the application for a remedy and the respondent's objection together.

[3] During the hearing the applicant was represented by Mr M Gibian of counsel. The respondent was represented by Mr R Moore of counsel. Evidence was given by the applicant and Mr Adrian Ford, the Director of the respondent's Sydney Branch.

Background

[4] The respondent forms the Australian arm of the global firm 'a.hartrodt', which has offices in Europe, Asia, Africa, North and South America, New Zealand and the Pacific. It is an international freight forwarder and customs agent and moves cargo around the world, attending to customs clearances and deliveries for its clients. The respondent's head office is in Mascot, Sydney and has branch offices in Sydney, Melbourne, Brisbane, Perth and Adelaide.

[5] The applicant commenced employment with the respondent on 19 March 1990 initially as a filing clerk and remained continuously employed until the termination of her

employment on 30 September 2009. From around 2005, the applicant held the position of Export/Import Seafreight Supervisor.

[6] During 2008 the respondent decided to introduce a 'New Forwarding System' (NFS) using software known as Cargowise. The installation of Cargowise at the Sydney branch of the respondent commenced in about April 2009.

[7] In his oral evidence Mr Ford described some of the benefits of the NFS:

"...we can take a shipment from order control, through web tracker, right through the system to our overseas office and then bring the shipment back, showing full visibility to the client. The new system has an ability that once that information is entered into the system it cascades through all the modules, through to the customs module, the order control module, the web tracking module. It means that we don't have to re-input information because of this cascading effect. The system on the import and the export side is very similar in its screens so it gives us flexibility with operators if we have a shortage in one area or an overload in another area. When we get to the customs side, the cascading of the information allows us to better process our customs work because there's not the re-entry of information, there's this cascading. When we get to the quoting side of the system we do our quotes within the NFS. The quotes have a cascading effect right down to job level so that we again get the benefit that (1) we're going to charge correctly what we've quoted; (2) the – it will not be reliant on the individual operator to go and try and find the quote and come back. The reporting functionality in the new system, there is a great deal of reports that we're able to access for clients depending on what sort of information they want. There's a lot of reports that we can access to allow us to manage our business. We're able to give the clients a window into the system so that they can come in and extract automatically their invoices. They can extract automatically the statements. They can extract documentation that they give us. So we retain their records for them in that sense. That's a brief overview."¹

[8] As 2009 progressed, Mr Ford had meetings with his managers to discuss how the business should be restructured "*so that the structure would fit together with the NFS and its capabilities*".² By early July Mr Ford had, in consultation with his managers, determined that three teams should be established: 'import', 'export' and 'customs' teams, each under the supervision of a designated team leader.³

[9] Mr Ford, during his oral evidence, explained that the greater functionality of the NFS meant that the Branch could "*do more with less*". Whereas previously there had been six separate departments: customs, air and sea; import, air and sea; export, air and sea – with four supervisors in charge "*the functionality and the cascading nature of the information within the system allows me to reduce my teams and get more out of them in essence*."⁴

¹ Transcript PN844

² Exhibit H1, paragraph 24

³ Exhibit H2, paragraph 7

⁴ Transcript PN870-872

[10] According to Mr Ford's evidence, he discussed the proposed team structure with the Managing Director of the respondent, Mr Haarhaus. The latter gave his 'in principle' agreement to the introduction of the proposed team structure within the Sydney Branch.

[11] Prior to the introduction of the new team structure, there were four supervisors in the Sydney Branch: the applicant in the current matter, Ms Kekeris (supervisor of sea freight import and export); Ms Tzirkas (supervisor of customs sea freight deliveries and invoicing); Mr Kelly (supervisor of customs clearance) and Mr Ali (supervisor of air freight import and export).

[12] At the end of August 2009, Mr Ford and his operational managers had a meeting with Mr Haarhaus where the introduction of the new team structure was discussed⁵. Following this meeting Mr Haarhaus developed a Power Point presentation⁶. The presentation was headed 'Cargo Wise EDI – Restructuring (Brisbane, Melbourne, Sydney) and was relevant to the structures in each of those offices. Amongst the objectives listed in the presentation were:

- To implement the NFS in the best possible and most efficient way;
- To be in a position to offer a 'state of the art' software to our own staff but also to our own customers;
- To automate more processes like invoicing, rating and statistics;
- To create more flexible positions by providing cross training to our staff;
- To achieve cost reductions;
- To 'streamline' decision and responsibility processes;
- To achieve identical/near identical structures in all three branches.

[13] The presentation proposed, amongst other things, reducing the number of departments and reducing the number of managerial/supervisory roles. Under the Branch Manager and Operations Manager this meant replacing the existing supervisor positions with three positions: Teamleader Export, Teamleader Inward, and Teamleader Customs Clearance, each with their own teams reporting to them. The implementation phase included defining the final structure for each branch – "*keeping in mind to have a clear and (near) identical structure in all three branches*".

[14] Mr Ford's evidence is that in or about mid-September 2009 it was decided to introduce the new structure in the Sydney office on 1 October 2009⁷. According to Mr Ford this meant that:

"Only three team leaders were required, where there were previously four supervisors. One position was therefore redundant."⁸

⁵ Exhibit H2, paragraph 13

⁶ Exhibit H1, attachment D

⁷ Exhibit H2, paragraph 14

⁸ Exhibit H1 paragraph 31

[15] According to his evidence, Mr Ford then had to decide who of the existing supervisors would be retained in the new team leader positions. He decided that Mr Kelly was to be retained in the new ‘customs’ team leader position given his possession of a customs licence “*and the satisfactory manner in which he had discharged his prior duties in the customs area.*”⁹ The issue, according to Mr Ford, then became which of Ms Tzirkas, Ms Kekeris and Mr Ali would fill the import and export team leader positions. He developed a list of factors and assessed the abilities of each of the three supervisors against each factor. Mr Ali came out the highest of the three, then Ms Tzirkas and then Ms Kekeris.¹⁰

[16] Mr Ford spoke to Ms Kekeris on 30 September 2009 and told her that she had been made redundant. According to Mr Ford’s evidence:

“Prior to the decision to terminate Ms Kekeris, I considered whether she could be redeployed but decided that she could not. The only possible redeployment after my appointment of employees to the ‘team leader’ roles was to a lower paying position. I would have had to displace a lower-level employee in order to do this. I held the view that Ms Kekeris would not have accepted a position on lower pay within the Sydney Branch Office.”¹¹

Consideration

[17] S.385 of the Act states that:

“A person has been *unfairly dismissed* if FWA 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.”

[18] In this matter it is not in contention that the applicant was dismissed, nor is there any suggestion that the employer is subject to the Small Business Fair Dismissal Code. However, as noted above, the respondent claims that the dismissal was ‘a case of genuine redundancy’. This is not a jurisdictional issue as such – rather the issue of whether the dismissal was harsh, unjust or unreasonable’ only arises if it was not a case of genuine redundancy. S.396 (d) requires that FWA decide whether a dismissal was a case of genuine redundancy before considering the merits of an application. Accordingly I now turn to deal with this issue.

⁹ Exhibit H2, paragraph 15

¹⁰ Exhibit H2 paragraphs 15-20

¹¹ Exhibit H2 paragraph 25

[19] S.389 of the Act states that:

“(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.”

[20] Ms Kekeris’s employment was not subject to an enterprise agreement, nor of course was it covered by a modern award as the dismissal occurred before 1 January 2010. Accordingly there were no obligations of the type referred to in s.389 (1) (b). The only issues to be determined therefore are:

1. whether the respondent no longer required the applicant’s job to be performed by anyone because of changes in the operational requirements of the respondent’s enterprise; and
2. whether it would have been reasonable in all the circumstances for the applicant to be redeployed either within the respondent’s enterprise or the enterprise of an associated entity of the respondent.

[21] The evidentiary onus is on the respondent to establish, on the balance of responsibilities, its contention that the dismissal was a case of genuine redundancy. In other words the respondent must demonstrate **both** that it no longer required Ms Kekeris’s job to be performed by anyone because of changes in its operational requirements and that it was not reasonable in all the circumstances to redeploy Ms Kekeris.

[22] The Explanatory Memorandum provides some additional guidance on how these provisions are to be interpreted.

[23] It states at paragraph 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.”

[24] At paragraph 1552 it states

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

[25] Paragraph 1553 states:

“Whether a dismissal is a genuine redundancy does not go to the process for selecting individual employees for redundancy. However, if the reason a person is selected for redundancy is one of the prohibited reasons covered by the general protections in Part 3-1 then the person will be able to bring an action under that Part in relation to the dismissal.”

[26] In relation to the current matter I am satisfied on the basis of the evidence of Mr Ford that the restructure of the supervisory team took place because of ‘genuine operational requirements’ associated with the introduction of the NFS. The applicant’s representative, Mr Gibian, did not contest that four supervisory team leader positions had been replaced by three team leader positions. However, on the basis of an analysis of the relevant position descriptions both before and after the restructure Mr Gibian contended:

“when one looks at it there were two positions dealing with air freight and sea freight, import and export, just divvyed up in a slightly different way, and one position dealing with customs”.¹²

[27] When one looks at the specific duties performed by the applicant prior to her termination they have much in common with those of two of the positions in the new structure. The test is not however whether the duties survive. Paragraph 1548 of the explanatory memorandum makes clear that it can still be a ‘genuine redundancy’ where the duties of a previous job persist but are redistributed to other positions. The test is whether the job previously performed by the applicant still exists. The evidence clearly discloses that none of the supervisory positions that existed prior to the restructure survived. In particular, the applicant’s job of supervisor of sea freight import and export no longer exists.

[28] Having found that the respondent no longer required the applicant’s job to be performed by anyone because of changes in the respondent’s operational requirements I must consider whether it would have been reasonable in all the circumstances for the applicant to be redeployed either within the respondent’s enterprise or the enterprise of an associated entity of the respondent.

¹² Transcript PN1483

[29] It is clear from the applicant's cross examination that the only positions she would have considered being redeployed to were the import or export team leader positions¹³. There is no evidence that there were any other positions that the applicant could have been redeployed into. However as a result of the restructure these positions had been filled by Ms Tzirkas and Mr Ali. To argue that the applicant should have been redeployed into either of these two positions amounts to contending that it should have been one or other of those two who should have been made redundant rather than the applicant. However, as is clear from the explanatory memorandum, the process for selecting which employee is to be made redundant is not relevant to determining whether a dismissal is a case of 'genuine redundancy'.

[30] The termination of the applicant's employment was a case of genuine redundancy. Her application is therefore dismissed.

SENIOR DEPUTY PRESIDENT

Appearances:

Mr M Gibian of counsel, for the applicant

Mr R Moore of counsel, for the respondent

Hearing details:

SYDNEY

2010

4 February

5 February

Decision Summary

TERMINATION OF EMPLOYMENT – genuine redundancy – restructure – s394 Fair Work Act 2009 – terminated following restructure – could not be redeployed – position no longer exists – genuine redundancy – application dismissed.

¹³ For example, at transcript PN573

Kekeris v A. Hartrodt Australia P/L t/as a.hartrodt

U2009/12724

[2010] FWA 674

Hamberger SDP

Sydney

19 February 2010

Citation: *Kekeris v A. Hartrodt Australia P/L t/as a.hartrodt* [2010] FWA 674 (19 February 2010)

Printed by authority of the Commonwealth Government Printer

<Price code C, PR993177>