FAIR WORK COMMISSION

Mackay Taxi Holdings Ltd (t/as Mackay Whitsunday Taxis) v Wilson

[2014] FWCFB 1043

Richards SDP, Spencer and Simpson CC

12 February 2014

Termination of Employment — Application for relief from unfair dismissal — Whether genuine redundancy for operational reasons — Onus of proof on employer — Change in operational requirements of employer's enterprise — Requirement for person with qualification lacking in applicant — Where substantial part of tasks applicant performed continued to be performed — Relevance — Reasonableness of redeploying applicant in employer's enterprise — Relevant factors — Fair Work Act 2009 (Cth), ss 385, 389.

An employee of a company having been dismissed, brought proceedings in the Fair Work Commission (the Commission) for an unfair dismissal remedy. The company relied on the defence, under s 385(1)(d) of the *Fair Work Act 2009* (Cth) (the Act), that the dismissal was a case of genuine redundancy on the basis that a person was now required with qualifications which the employee lacked and, this new position having been filled, there was no longer a need for the employee's job to be performed by anyone, albeit some 70% of the tasks performed under that job were continued as part of the new position.

Section 389(1) of the Act provided, relevantly, that a person's dismissal was a case of genuine redundancy 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. Section 389(2) however provided, relevantly, 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 within the employer's enterprise.

At first instance the Commission did not accept that the dismissal was a result of genuine redundancy. The company sought permission to appeal, and to appeal, that decision.

Held (granting permission to appeal and allowing the appeal) (by the Commission): (1) It is in the public interest to grant permission to appeal as it concerns the scope of meaning of s 389 of the Act (and the consequent scope of meaning of what might constitute a redundancy under the Act in certain operational circumstances).

(2) An employer who sought to rely on genuine redundancy as a defence to a former employee's claim of unfair dismissal bore the onus to make out that defence. It was the employer, after all, that was the repository of the facts relevant to a finding that the dismissal was a genuine redundancy.

(3) Operational changes are changes which give effect to a change in the operational focus of a position to the benefit or advantage of the employer (be it to meet governance requirements or to improve efficiency). A job which required a person to hold a specific qualification involved an operational change to, or restructure of, the job it replaced which did not require the person doing it to be so qualified, despite the fact that a large body of the tasks that comprised the original job continued to be performed in the new job. The two jobs were not the same. The requirement for a formal qualification had not been added as a mere administrative initiative.

Ulan Coal Mines Ltd v Howarth (2010) 196 IR 32; *Jones v Department of Energy and Minerals* (1995) 60 IR 304; *Kekeris v A Hartrodt Australia Pty Ltd* (2010) 62 AILR 101-171; [2010] FWA 674, considered.

(4) The Commissioner erred in finding that the position or job itself had not changed or been restructured to a sufficient degree to achieve another operational purpose because a certain volume of duties and tasks remained to be carried out. In this regard, the Commissioner too narrowly construed the scope of s 389(1)(a) of the Act.

(5) The Commissioner made no reference in her decision to the requirements of s 389(2) of the Act, which provides an exclusion from the jurisdictional bar when it would have been reasonable in all the circumstances for the respondent to have been redeployed to an alternative position.

Observation that redeployment may be possible where the training requirement is reasonable.

Ulan Coal Mines Ltd v Honeysett (2010) 199 IR 363, considered.

Cases Cited

Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; 99 IR 309.

Dibb v Federal Commissioner of Taxation (2004) 136 FCR 388.

House v The King (1936) 55 CLR 499.

Jones v Department of Energy and Minerals (1995) 60 IR 304.

Kekeris v A Hartrodt Australia Pty Ltd (2010) 62 AILR 101-171.

R v Industrial Commission (SA); Ex parte Adelaide Milk Supply Co-operative Ltd (1977) 16 SASR 6.

Short v FW Hercus Pty Ltd (1993) 40 FCR 511; 46 IR 128.

Technical and Further Education Commission v Pykett (2014) 240 IR 130.

Termination, Change and Redundancy Case (1984) 8 IR 34.

Termination, Change and Redundancy Case (1984) 9 IR 115.

Ulan Coal Mines Ltd v Honeysett (2010) 199 IR 363.

Ulan Coal Mines Ltd v Howarth (2010) 196 IR 32.

Wilson v Mackay Taxi Holdings Ltd (t/as Mackay Whitsunday Taxis) [2013] FWC 8634.

Application for permission to appeal and appeal

Cur adv vult

Fair Work Commission

1 This decision concerns an appeal by Mackay Taxi Holdings Ltd (t/as Mackay Whitsunday Taxis) (the Appellant) against a decision of Commissioner Booth in

Wilson v Mackay Taxi Holdings Ltd (t/as Mackay Whitsunday Taxis) [2013] FWC 8634 handed down on 4 November 2013 in U2013/9954. The Respondent is Ms Kaye Wilson.

2 The Commissioner's decision concerns two matters. The first of these was a decision under s 394(2) of the *Fair Work Act 2009* (Cth) (the Act) in relation to whether or not the application should be accepted in a different time to that stipulated under s 394(2)(a) of the Act. The second matter concerned an application by the Appellant under s 389 of the Act. In that matter the Commissioner was required to determine whether or not the application before her should be dismissed for reasons that it concerned a genuine redundancy.

3 It is only the second matter which is the subject of this appeal.

4 At the outset we note that the Commissioner's decision was made off the documents, with the consent of the parties.

Approach to the Appeal

5 The approach to an appeal in the context of s 389 of the Act was considered by a Full Bench in *Ulan Coal Mines Ltd v Honeysett*[1] (the prior Full Bench) as follows:

> [20] The appeals are brought pursuant to s 604 of the *Fair Work Act*. Section 604(2) provides that Fair Work Australia must grant permission to appeal if it is satisfied that it is in the public interest to do so. As indicated already, the applications were made under s 394 which is in Part 3-2 of the *Fair Work Act*. There are special provisions relating to appeals from decisions under Part 3-2. These provisions are in s 400 of the *Fair Work Act*. That section is:
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> > 400 Appeal rights
> >
> > (1) Despite subsection 604(2), FWA must not grant permission to appeal from a decision made by FWA under this Part unless FWA considers that it is in the public interest to do so.
> >
> > (2) Despite subsection 604(1), an appeal from a decision made by FWA in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.
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> [21] Section 400(1) provides that despite subsection 604(2) the tribunal must not grant permission to appeal from a decision under Part 3-2 of the Act unless it considers that it is in the public interest to do so. Therefore we must not grant permission to appeal unless we consider that it is in the public interest. Section 400(2) provides that an appeal from a decision under Part 3-2 of the *Fair Work Act* can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact. Therefore, to the extent that this appeal is on a question of fact, unless there is a significant error of fact no appeal lies.
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> [22] The approach to be taken to an appeal pursuant to s 45 of the *Workplace Relations Act 1996* (the WR Act) was outlined in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (*Coal & Allied*) [(2000) 203 CLR 194]. The following passage indicates that the

1 *Ulan Coal Mines Ltd v Honeysett* (2010) 199 IR 363.

powers of a Full Bench of the Australian Industrial Relations Commission (the Commission) were only exercisable under that section in the case of error in the decision at first instance:

> 17 Because a Full Bench of the Commission has power under s 45(6) of the Act to receive further evidence on appeal, an appeal under that section is properly described as an appeal by way of rehearing. And because there is nothing to suggest otherwise, its powers under sub-s (7) are exercisable only if there is error on the part of the primary decision-maker. And that is so regardless of the different decisions that may be the subject of an appeal under s 45.

[(2000) 203 CLR 194 per Gleeson CJ, Gaudron and Hayne JJ].

[23] Because there is no relevant difference in the terms of s 604 of the *Fair Work Act*, this analysis applies equally to an appeal to a Full Bench of Fair Work Australia under that section. Section 400(2) reinforces this construction and adds an additional requirement, namely, that where an error of fact is involved the error must be substantial. The majority in *Coal & Allied* explained in the following passage how error may be identified where a discretionary decision is involved:

> 21 Because a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process. And unless the relevant statute directs otherwise, it is only if there is error in that process that a discretionary decision can be set aside by an appellate tribunal. The errors that might be made in the decision-making process were identified, in relation to judicial discretions, in *House v The King* in these terms:
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> > If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so [reference omitted].

[(2000) 203 CLR 194 per Gleeson CJ, Gaudron and Hayne JJ].

[24] For these reasons an appeal under s 604 of the *Fair Work Act* should be characterised as an appeal by way of rehearing and the authorities in relation to the corresponding [Workplace Relations] Act provisions are applicable to appeals under s 604, subject only to the qualification in s 400(2). An appeal cannot succeed in the absence of error on the part of the primary decision-maker and any error of fact must be substantial.

6 We apply the approach of the prior Full Bench.

Legislative provisions

7 Section 385 of the Act provides that a person has been unfairly dismissed if the Fair Work Commission (the Commission) 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.

8 Section 389(1) of the Act provides that 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.

9 Section 389(2) of the Act, however, provides 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 within:

(a) the employer's enterprise; or

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

Summary of evidence before the Commissioner

10 The evidence before the Commissioner was of limited nature, and because the matter was determined off the documents, the statements before her were not subject to any examination. We will firstly summarise the Respondent's claims as they were before the Commissioner, and then turn to those of the Appellant.

11 In summary, the Respondent:

- claimed that she was informed by her employer on 28 March 2013 that he was "making my position redundant and that because I didn't have a Cert IV in Bookkeeping then I wasn't qualified for the new position and that he didn't have a spot for me";
- was also informed that she would need to meet the costs of any training herself;
- was informed that she could apply to the new position and that recognition of prior learning/experience may assist her in advancing towards the new qualification;
- was informed on 24 April 2013 following the completion of the recruitment process that she had been unsuccessful and the new position has been filled by a new recruit.

12 The Respondent was of the belief that she could have performed the new position at the required level and was of the belief the new recruit would need to be trained in the business.

13 The Respondent also held that:

> I believe I could have performed the new position to a high standard, undertaken the required study and could have been guided in the new tasks by the support of

> the Company's accountant, who had been performing many of the tasks to be done by this *new position*.

(Emphasis added)

14 The Respondent also stated that she was of the belief that her position "was not redundant in that all duties in my role would have to be done by someone and [her employer] never indicated my job was being cut up and given to other staff, it is my belief the new person would do *my job with the additional new tasks*" (emphasis added).

15 The Respondent's claims went on to the effect that:

> none of the tasks I was doing could just disappear. All my tasks were very relevant to the fluent functioning of the administration needs of taxi owners and operators, also had the Mackay Taxi Holdings' […] obligations of statistics and payments with the Transport and Main Roads which is the overarching government regulator of the taxi industry in Queensland. None of these tasks could be cancelled and at no time did [the employer] say that my tasks were being split up and given to other staff [or] that my dismissal [was] due to a downturn in industry.

16 The Respondent also claimed that since her dismissal a further person had been employed in the office to assist with taxi driver documentation, and that she could have done that job. There was no evidence as to whether this person had been employed at the time of the termination or subsequently.

17 The evidence before the Commissioner in respect of the Appellant's claims (through a statement by Mr Gary Button, the Manager of the Appellant's business, was concise, and is set out largely in full below:

> I make this statement in relation to the jurisdictional objection of the Respondent, that the termination was a genuine redundancy and therefore beyond jurisdiction.
>
> 1. The board of the organisation determined that the administration of the business required restructuring, with a view to increasing the capacity of the administration to function at a higher level than was currently the case.
> 2. I was required by the board to explore the requirements of implementing the necessary changes, and in consultation with the board it was determined that the new role would require a person with formal book-keeping training, skills and experience.
> 3. It was also identified that there was not sufficient work to keep a book-keeper occupied full-time, so the decision was made to incorporate some existing tasks within the book-keeper role.
> 4. Ultimately that meant that an existing administration position would no longer be required, and consultation in relation to that was held with the Applicant in this matter.
> 5. We determined that for the Applicant to acquire the necessary training to be able to move into the new role, would require at a minimum, twelve months of study.
> 6. We had previously sought to engage the Applicant in upskilling and she was resistant to any training, even short courses, so we did not have confidence that she would undertake or complete the necessary training.
> 7. The training also represented a considerable outlay in funds which we could not at that point afford, and the simple fact was that we needed to make the change at that time and could not afford to wait twelve months in the hope that the Applicant may ultimately become qualified.
> 8. We therefore advertised the position and allowed the Applicant to apply for the position.

9. We received an application for the position from a person who had the training, skills and experience we required, so the decision was made to appoint that person.
10. This left the applicant without a position, and as no other vacancies existed at that time into which we could place her, we then proceed to terminate her employment.

Commissioner's decision

18 On the basis of the above evidence, the Commissioner reasoned as follows:

> [22] There appears no dispute about the consultation requirements of s 389(1)(b). However the parties are at odds about whether the decision to change the role amounts to a genuine redundancy.
>
> [23] From the material of both parties, it is apparent the Respondent decided to employ a qualified bookkeeper, for example a person possessed of a Certificate IV, which the Applicant does not possess but says she was willing to acquire if assisted by the Respondent. It is also apparent that the duties undertaken by the Applicant remained to be discharged. She submits that indeed a further person has been engaged to undertake such duties.
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> [24] The Applicant asserts that the new role includes some 70% of her previous role, and the Respondent does not appear to dispute this. The statement of Mr Button confirms that "some existing tasks" would be transferred to the bookkeeper, the major change being, however, the decision of the Respondent to engage a person with "formal book-keeping training, skills and experience". That is, the Applicant's job, or a significant part of it was still required, but qualifications added to the role.
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> [25] Mr Button also submits that the Respondent advertised the position, allowing the Applicant to apply for it, but that she was not successful, another applicant being more suitable. This, the Respondent submits, is a genuine redundancy because "the Applicant was not successful in obtaining the new position and consequently was displaced from her old role, and that her employment was terminated as a result".
>
> [26] On the Respondent's own evidence, a decision was made to engage a qualified bookkeeper in lieu of the Applicant's job, incorporating a sufficient proportion of the Applicant's duties into the new role to justify full-time employment. The Respondent adduced no evidence as to the fate of the balance of the Applicant's role, all of which appears to be ongoing.
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> Conclusion
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> [27] …
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> [28] I am not convinced that the changes instituted by the Respondent resulted in a genuine redundancy, but were changes to an existing and continuing role. This cannot satisfy the statutory definition of genuine redundancy, which requires that the job is no longer required to be performed by anybody.
>
> [29] I therefore dismiss the Respondent's jurisdictional objections.

Grounds for Appeal

19 The grounds of the appeal were not carefully elucidated, in that there are no discretely formulated grounds. The Appellant provided more so a series of generally argued, overlapping grounds.

20 The Appellant contends generally that the Commissioner's decision contains significant errors of fact and law.

21 It was claimed that the Commissioner erred in her conclusion that the changes were to "an existing and continuing role" and did not meet the statutory definition of a genuine redundancy.

22 The Appellant also claimed that the Commissioner's description of the change as comprising no more than added on qualifications to the existing job was an error in fact. That is to say, the Appellant argued that the qualifications were required to give effect to new higher level duties, not as mere add-ons, and they were the foundation to the new job or position.

23 The Appellant also contends that the Commissioner had erred in that she confused the tasks and duties associated with the Respondent's job with the job itself. That is, the tasks and duties which comprise the Respondent's job may well have continued to be required to be performed, but not within the structure of the job as it had been.

24 The Appellant also contends that it was not open to the Commissioner to accept the Respondent's claim that some unspecified body of her former duties were being performed by a new employee. This is because there was no specificity to the claim by the Respondent in this regard, and that it was not made out that this person was employed at the time or contemporaneously with the Respondent's termination.

Appeal in the public interest

25 At the outset we make clear our view as to whether the appeal is in the public interest.

26 This appeal concerns the scope of meaning of s 389 of the Act (and the consequent scope of meaning of what might constitute a redundancy under the Act in certain operational circumstances). We consider that it is in the public interest to grant permission to appeal, as a consequence.

Consideration

27 We observe generally that the Commissioner dealt with this matter off the documents and was not in a position to resolve any factual conflicts, and was otherwise left to make inferential findings from the materials before her. Further, the Commissioner was not in a position to reach findings on the basis of credit as the witness statements had been left unexamined.

28 The onus falls on the employer, which seeks the relief, in these matters to make out its case. It is the employer, after all, that is the repository of the facts relevant to a finding that the dismissal was a genuine redundancy as set out at s 389 of the Act.

29 Was it made out that there was a redundancy within the meaning of the Act?

30 The Appellant had set about seeking to increase the skill level of its bookkeeping/accounting responsibilities. This goal was to be achieved by ensuring the incumbent possessed a suitable qualification.

31 The Respondent did not hold any qualifications, having left school at Year 11, it appears. The Commissioner found as much:

> [23] From the material of both parties, it is apparent the Respondent decided to employ a qualified bookkeeper, for example a person possessed of a Certificate IV, which the Applicant does not possess but says she was willing to acquire if assisted by the Respondent. […]

32 The higher level duties and responsibilities did not in their own right constitute a full time permanent position or job.

33 Thus, a large body of the tasks that comprised the Respondent's job continued to be performed. We note here that the Commissioner referred to the new role being "70%" of the Respondent's previous role. We do not know where this claim is found in the material before the Commissioner, though it is broadly reflective (regardless) of the state of the evidence.

34 The job, however, was not the same job. The requirement for a formal qualification was not added to a job as if a mere administrative initiative. The qualifications required were reflective of new and higher level duties which were to be carried out by an appropriately qualified bookkeeper. Given the manner in which the matter proceeded, the Commissioner was not in a position to set aside the Appellant's evidence in this regard.

35 The job was therefore a new job, despite the fact that it incorporated many of the former tasks performed by the Respondent.

36 Contrary to the Commissioner's findings, we think the changes to the position referred to above are operational changes. That is, they are changes that give effect to a change in the operational focus of a position to the benefit or advantage of the employer (be it to meet governance requirements or to improve efficiency).

37 Whether the original duties or tasks continue to be required to be performed is not necessarily relevant: it is the operationally-driven changes to the position that need to be made out.

38 We think this point was made sufficiently clear by the Full Bench in *Ulan Coal Mines Ltd v Howarth*.[2]

39 In that decision, the Full Bench endorsed the proposition that it does not matter if discrete duties or tasks survive the operational change or restructure and continue to be performed. The question to be determined, in actuality, is whether the former position itself survives:

> [15] These were the circumstances in which it was necessary to consider the meaning and application of the relevant statutory provisions and, in particular, the expression "the person's employer no longer required the person's job to be performed by anyone" in s 389(1)(a) of the Act. These words have long been used and applied in industrial tribunals and courts as a practical definition of redundancy (see e.g. *R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Cooperative Limited* (1977) 16 SASR 6; *Termination, Change and Redundancy Cases* (1984) 8 IR 34 and (1984) 9 IR 115; *Short v FW Hercus Pty Limited* (1993) 40 FCR 511). They have also been adopted in the National Employment Standards provided under the Act in dealing with entitlements to redundancy payments (see s 119).
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> [16] The *Explanatory Memorandum to the Fair Work Bill 2008* provides examples as to when a dismissal will be a case of genuine redundancy:
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> > 1547 Paragraph 389(1)(a) provides that a person's dismissal will be a case of genuine redundancy if his or her job was no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise. Enterprise is defined in clause 12 to mean a business, activity, project or undertaking.
> >
> > 1548 The following are possible examples of a change in the operational requirements of an enterprise:

2 *Ulan Coal Mines Ltd v Howarth* (2010) 196 IR 32.

- 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.

[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.

[18] In *Kekeris v A Hartrodt Australia Pty Ltd* [2010] FWA 674 Hamberger SDP considered whether a dismissal resulting from the restructure of a supervisory team was a case of genuine redundancy. As a result of the restructure, four supervisory team leader positions were replaced by three team leader positions. The Senior Deputy President said:

> 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 new 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.

(at para [27])

[19] In the present case, the Commissioner appears not to have drawn an appropriate distinction in his reasoning between the "jobs" of the mineworkers who were retrenched and the functions performed by those mineworkers or take proper account of the nature of the restructure at the mine which led to an overall reduction in the size of the non-trades

> mineworker workforce. The Company restructured its operations in various ways including by outsourcing certain specialised, ancillary and other work and increasing the proportion of trade-qualified mineworkers and outbye crews. As a result, it was identified that there were 14 non-trades mineworker positions which were surplus to the Company's requirements. The mineworkers whose employment was to be terminated were determined according to the seniority principle as provided in the Agreement. This did not mean that the functions or duties previously performed by the retrenched mineworkers were no longer required to be performed. It also did not mean that the positions of some of these mineworkers (e.g. in underground crews) did not continue, although those positions might after the restructure be filled by more senior non-trades mineworkers transferred from other parts of the operations or by trade-qualified mineworkers. However fewer non-trades mineworker jobs were required overall at the mine as a result of the operational changes introduced and, for this reason, the jobs of the 14 mineworkers selected for retrenchment could be said to no longer exist.
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> [20] These circumstances readily fit within the ordinary meaning and customary usage of the expression in s 389(1)(a) of the Act where a job is no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise.

40 In the case before the Full Bench cited above, the employer had restructured its operations by increasing the number of trade qualified mineworkers, but this did not mean the duties of the functions and duties performed previously by the retrenched mineworkers were no longer required to be performed. Those positions continued to be performed by more senior mineworkers, in some instances. The case, however, is distinguishable from the current circumstances in so far as there was also a reduction in the number of employees.

41 Further, the examples provided by the Explanatory Memorandum, referred to above, are not exhaustive, but they are demonstrative of the kinds of changes in operational circumstances that can affect enterprises. Such changes may, as here, alter or extend the range of duties that comprise a job and the qualification mix required as a consequence. Equally, the duties that comprise a job may be redistributed and continue to be performed by others (and the job disappear). Or else the job itself and the body of duties associated with it may disappear altogether (with a downturn, an efficiency drive, a contractual change, a change in business focus, or a technological development etc).

42 On the unexamined and uncontested evidence before the Commissioner, the job as it had been had become a more complex job at the higher end, requiring the exercise of duties by a person who was a qualified bookkeeper, which the Respondent was not. The fact that a body of the former duties associated with the Respondent's position continued to be required to be performed in whole or in part is beside the point.

43 The operational objective on the part of the Appellant to rely on the qualified services of a bookkeeper to improve the "capacity of the administration to function at a higher level" brought about a real and genuine change to the position as it had been performed by the Respondent. This is the kind of change that ordinarily would give rise to a redundancy (where the incumbent does not possess the qualifications to give effect to the operational objective).

44 In any event, the Commissioner did not reject the evidence as put to her, but rather formed a contrary view: that the introduction of a requirement for formal

competencies to give effect to higher end bookkeeping outcomes whilst requiring the continuation (to a considerable volume) of the former duties and tasks did not signal a new position had been created.

45 We disagree. The genuineness of the rationale for the new qualifications was not attacked. It is reasonable in such circumstances that an employer, as the bearer of risks, might re-organise the manner in which work is conducted and with what degree of specialism. If this were not the case, significant rigidities would be introduced into business improvement systems.

46 There was more put to us by the Appellant in relation to the reallocation of lower order activities amongst junior staff and trainees, and the diminution of a deal of process requirements related to the Respondent's position, as it was.

47 Generally, we think the Commissioner, because she took the view that because a certain volume of duties and tasks remained to be carried out and that as a result the position or job itself had not changed or been restructured to a sufficient degree to achieve another operational purpose, fell into error. In this regard, the Commissioner too narrowly construed the scope of s 389(1)(a) of the Act.

Further matter relevant to the jurisdictional question

48 That said, there is one matter relevant to the jurisdictional question that needs to be determined.

49 We note that the Commissioner made no reference in her decision to the requirements of s 389(2) of the Act, which provides an exclusion from the jurisdictional bar when it would have been reasonable in all the circumstances for the Respondent to have been redeployed to an alternative position. Section 389(2) of the Act is set out above.

50 It is true that the Commissioner turned her mind to whether the Respondent could have been trained to perform the additional duties which made up the new position, but she made no express finding in that respect, let alone a finding that went to s 389(2) of the Act.

51 The only evidence, as it was, before the Commissioner in this respect was a disputed claim between the Appellant and the Respondent.

52 This is not a point of criticism, however. The Commissioner had found that the dismissal had not met the requirements of s 389(1)(a) of the Act, and there was no obligation upon her to make further findings that would have been of superfluous effect. But the situation facing the Full Bench, of course, is different, given our findings.

53 The Respondent had contended that she should have been re-deployed to "the new position".

54 The Appellant contended that the competency level required to deliver the bookkeeping and other functions (such as Accounts Payable) required too lengthy a period of training and was too expensive to underwrite. Thus while the Respondent was free to apply for the position, she was not redeployed to that position as it would not be reasonable in the circumstances to so.

55 The Respondent further contended, to the contrary, that she was capable of performing the duties with assistance, financial support and without extensive delay. In essence the Respondent contends it was reasonable in the circumstances to redeploy her to the new position.

56 We observe, in this particular regard, that the Full Bench in *Ulan Coal Mines Ltd v Honeysett* (2010) 199 IR 363 commented generally that redeployment may be possible where the training requirement is reasonable:

> [34] It may be appropriate to make some concluding remarks about the operation of s 389(2). It is an essential part of the concept of redeployment under s 389(2)(a) that a redundant employee be placed in another job in the employer's enterprise as an alternative to termination of employment. *Of course the job must be suitable, in the sense that the employee should have the skills and competence required to perform it to the required standard either immediately or with a reasonable period of retraining. […] .*

(Emphasis added)

57 The Full Bench appears here in some part to have recast (in the converse) item 1552 of the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), which states:

> 1552. *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*.

58 That said, the materials before the Commissioner also gave rise to a claim that another person had been appointed at or following her termination to a position to carry out the Respondent's former duties. This matter was left unexplored in the decision, though (if only potentially) it may have had relevance to the prospects or otherwise of the Respondent's redeployment for the purposes of s 389(2) of the Act.

59 To reach a conclusion as to the reasonableness of redeployment for the purposes of s 389(2) of the Act, the Commission must make a finding on the requisite, civil burden of proof. The Commissioner made no such findings. The various claims in relation to redeployment were left unresolved, and the materials that did bear on the issues above were not subject to examination.

60 Because there was no finding in relation to s 389(2) of the Act, the threshold jurisdictional status of the application was therefore left undetermined in its entirety.

61 We would be satisfied that the jurisdictional objection under s 389 of the Act would be made out, but only pending the determination of this final matter (under s 389(2) of the Act). Such an approach to an outstanding determination of a factual issue under s 389 of the Act was adopted in *Ulan Coal Mines Ltd v Honeysett* (2010) 199 IR 363. The same approach has been reflected in the more recent decision of a further Full Bench in *Technical and Further Education Commission v Pykett* (2014) 240 IR 130 at [40] and [54].

62 We add finally that there was no contest between the parties on appeal as to the Commissioner's finding that the requirements of s 389(1)(b) of the Act was made out, and the parties did not contest this matter at first instance either, it appears.

Conclusion

63 We have granted leave to appeal in the public interest, for the reasons given earlier.

64 We grant permission to appeal and uphold the appeal, and quash the

Commissioner's decision for reason it construed too narrowly the legislative scope (under s 389(1) of the Act) for operational changes to give rise to a redundancy.

65 Having quashed the Commissioner's decision, we have determined that in the circumstances it is desirable to remit the determination of the final, unaddressed threshold jurisdictional matter (under s 389(2) of the Act) to Commissioner Simpson to determine in the ordinary course.

Permission to appeal granted; appeal upheld; first instance decision quashed; determination of the final, unaddressed threshold jurisdictional matter (under s 389(2) of the Act) remitted to Simpson C to determine

DR RJ DESIATNIK