FAIR WORK COMMISSION

Technical and Further Education Commission (t/as TAFE NSW) v Pykett

[2014] FWCFB 714

Ross J, President, Booth DP and Bissett C

21 November 2013, 29 January 2014

Appeal — Unfair dismissal application — Genuine redundancy — Reinstatement order — Whether reasonable in all circumstances to redeploy dismissed employee — Whether a reinstatement order must specify position to which person is to be appointed — Fair Work Act 2009 (Cth), ss 385, 389(2), 391(1)(b) — Industrial Relations Act 1988 (Cth), s 170EE.

Words and Phrases — "Genuine redundancy" — Fair Work Act 2009 (Cth), s 389.

Words and Phrases — "Redeployed" — Fair Work Act 2009 (Cth), s 389(2).

The respondent, Lynda Pykett, was terminated from her employment with TAFE NSW on 26 October 2012 and subsequently lodged an application for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009* (Cth) (the FW Act). At first instance Commissioner McKenna rejected TAFE NSW's contention that Ms Pykett's dismissal was a case of "genuine redundancy" (within the meaning of ss 385(d) and 389 of the FW Act) and found that Ms Pykett had been unfairly dismissed. The Commissioner subsequently made orders for reinstatement, continuity of service and lost remuneration.

TAFE NSW appealed the Commissioner's decision that Ms Pykett had been unfairly dismissed and her orders on remedy.

The central issue in contention, both at first instance and on appeal, was whether there must be an identified "job" or "position" to which the applicant could have been redeployed in order to enliven s 389(2) of the FW Act.

The primary submission advanced by the appellant was that s 389(2) required the Fair Work Commission (the Commission) to determine a job to which the employee could be redeployed, identify the circumstances in which the employee could have been redeployed and determine whether redeployment to a "particular job" was reasonable in those circumstances. Underlying the submission was the contention that there must be an identified job or position. The appellant submitted that the Commissioner acted upon a wrong principle in finding it was not necessary to identify a specific position into which Ms Pykett could have been redeployed.

The respondent disagreed and submitted that s 389(2) permitted an employee to bring an application if the employer acting reasonably, could have retained the employee rather than terminating the employee on grounds of redundancy.

Held (granting permission to appeal and upholding the appeal) (by the Commission): (1) It is in the public interest to grant permission to appeal. The appeal raises novel questions about the proper construction of s 389(2) of the FW Act and whether a reinstatement order must specify the position to which the person is to be appointed.

(2) For the purposes of s 389(2) of the FW Act the Commission must find, on the balance of probabilities, that there was a job or a position or other work within the employer's enterprise (or that of an associated entity) to which it would have been reasonable in all the circumstances to redeploy the dismissed employee. There must also be an appropriate evidentiary basis for such a finding.

(3) If an employer wishes to rely on the "genuine redundancy" exclusion then it would ordinarily be expected to adduce evidence as to the following matters:

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

(b) whether there was any obligation in an applicable modern award or enterprise agreement to consult about the redundancy and whether the employer complied with that obligation; and

(c) whether there was a job or a position or other work within the employer's enterprise (or that of an associated entity) to which it would have been reasonable in all the circumstances to redeploy the dismissed employer.

The evidence in relation to (c) would usually include canvassing the steps taken by the employer to identify other work which could be performed by the dismissed employee.

Australian Education Union v Department of Education and Children's Services (2012) 248 CLR 1; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, applied.

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

(4) The Commissioner erred in failing to make a finding that there was a job, a position or other work to which Ms Pykett could have been redeployed. Such a finding is a necessary step in reaching the conclusion that it would have been reasonable in all the circumstances for Ms Pykett to be redeployed within the appellant's enterprise.

(5) Section 391(1) of the FW Act is a limitation upon the Commission's power to order reinstatement under s 390(1), rather than an independent source of power. The Commissioner's reference to s 391(1)(a), rather than s 390(1), in the preamble to the reinstatement order does not constitute an error warranting correction on appeal.

(6) Under ss 390 and 391 of the FW Act an order for a remedy is discretionary and only two types of reinstatement orders can be made: reappointment to the former position or appointment to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal. It was open to the Commissioner not to specify a particular position in the reinstatement order and to leave it to the employer to choose the position and to comply with the order to provide terms and conditions that are no less favourable than those on which the applicant was employed immediately before her dismissal.

Anthony Smith & Associates Pty Ltd v Sinclair (1996) 67 IR 240, applied.

Blackadder v Ramsey Butchering Services Pty Ltd (2005) 221 CLR 539; 139 IR 338, distinguished.

Cases Cited

Anthony Smith & Associates Pty Ltd v Sinclair (1996) 67 IR 240.

Australian Education Union v Department of Education and Children's Services (2012) 248 CLR 1.

Blackadder v Ramsey Butchering Services Pty Ltd (2005) 221 CLR 539; 139 IR 338.

Coal & Allied Mining Services Pty Ltd v Lawler (2011) 192 FCR 78; 207 IR 177.

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

Customs, Collector of v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280.

Fox v Australian Industrial Relations Commission (2007) 161 FCR 263; 166 IR 85.

GlaxoSmithKline Australia Pty Ltd v Makin (2010) 197 IR 266.

Hogan v Hinch (2011) 243 CLR 506.

Immigration and Ethnic Affairs, Minister for v Wu Shan Liang (1996) 185 CLR 259.

Maritime Union of Australia v Patrick Stevedores Holdings Pty Ltd (2013) 237 IR 1.

O'Sullivan v Farrer (1989) 168 CLR 210.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

Pykett v Technical and Further Education Commission (t/as TAFE NSW) [2013] FWC 8679.

Pykett v Technical and Further Education Commission (t/as TAFE NSW) [2013] FWC 8196.

Pykett v Technical and Further Education Commission (t/as TAFE NSW) [2013] FWC 4982.

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

Permission to appeal and appeal

M Eaton, of counsel, for the appellant.

Mr Gibson, of counsel, for the respondent.

Cur adv vult

Fair Work Commission

1 Lynda Pykett was terminated from her employment with TAFE NSW on 26 October 2012 and subsequently lodged an application for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009* (Cth) (the FW Act). On 12 August 2013 Commissioner McKenna rejected the respondent's contention that Ms Pykett's dismissal was a case of "genuine redundancy" (within the meaning of ss 385(d) and 389 of the FW Act) and found that Ms Pykett had been unfairly dismissed.[1] The parties were given an opportunity to make submissions on remedy and on 18 October 2013 the Commissioner decided to

1 *Pykett v Technical and Further Education Commission (t/as TAFE NSW)* [2013] FWC 4982.

make an order for reinstatement, pursuant to s 391(1)(b).[2] On 7 November 2013 the Commissioner issued a further decision, and order, dealing with continuity of service and lost remuneration.[3]

2 TAFE NSW has appealed the Commissioner's decision that Ms Pykett had been unfairly dismissed and the Commissioner's orders on remedy.

3 Before turning to the particular issues raised in the appeal we wish to make some general observations about the nature of an appeal from an unfair dismissal decision.

4 An appeal under s 604 of the FW Act is an appeal by way of rehearing and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision maker.[4] There is no right to appeal, rather an appeal may only be made with the permission of the Commission.

5 The decision subject to appeal was made under Pt 3.2 – Unfair Dismissal – of the FW Act. Section 400(1) provides that permission to appeal must not be granted from a decision made under that part unless the Commission considers that it is in the public interest to do so. Further, in such matters appeals on a question of fact may only be made on the ground that the decision involved a "significant error of fact" (s 400(2)). In *Coal & Allied Mining Services Pty Ltd v Lawler*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s 400 as "a stringent one".[5] The Commission *must not* grant permission to appeal *unless* it considers that it is "in the public interest to do so".

6 The task of assessing whether the public interest test is met is a discretionary one involving a broad value judgment.[6] In *GlaxoSmithKline Australia Pty Ltd v Makin* a Full Bench of the Commission identified some of the considerations that may attract the public interest:

> … the public interest might be attracted where a matter raises issue of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[7]

7 The appeal focuses on two aspects of the Commissioner's decisions and orders:

(i) the finding that Ms Pykett's dismissal was not a "genuine redundancy"; and

(ii) the reinstatement order.

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2 *Pykett v Technical and Further Education Commission (t/as TAFE NSW)* [2013] FWC 8196 and PR543507.

3 *Pykett v Technical and Further Education Commission (t/as TAFE NSW)* [2013] FWC 8679 and PR544139.

4 This is so because on appeal FWC has power to receive further evidence, pursuant to s 607(2); see *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; 99 IR 309 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

5 *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; 207 IR 177 at [43].

6 *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 243 CLR 506 at [69] per Gummow, Hayne, Heydon, Crennon, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; 207 IR 177 at [44]-[46].

7 *GlaxoSmithKline Australia Pty Ltd v Makin* (2010) 197 IR 266 at [27].

8 We are satisfied that it is in the public interest to grant permission to appeal. The appeal raises novel questions about the proper construction of s 389(2) and whether a reinstatement order must specify the position to which the person is to be appointed.

9 We now turn to deal with each of these issues.

Genuine Redundancy

10 Section 385(d) of the FW Act provides that a person has been "unfairly dismissed" if, among other things, the Commission is satisfied that the dismissal was not a case of "genuine redundancy". The expression "genuine redundancy" is defined in s 389:

> 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
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> (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.
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> (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.

11 In her decision of 12 August 2013 the Commissioner found that, for the purpose of s 389(1)(a), TAFE NSW no longer required Ms Pykett's job to be performed by anyone because of changes to the operational requirements of it's enterprise.[8] The Commissioner also found that for the purpose of s 389(1)(b) there was no obligation to consult about Ms Pykett's redundancy pursuant to the term of a modern award or enterprise agreement. On that basis the issue identified in s 389(1)(b) did not arise.[9]

12 There is no challenge to the Commissioner's findings in relation to s 389(1)(a) and (b).

13 The appeal is directed at the Commissioners decision in relation to s 389(2). The appellant contends that the Commissioner acted upon a wrong principle in her consideration of that subsection.

14 The Commissioner found that the examination of redeployment options within the employers enterprise was "artificially and unreasonably constrained by an abstract, policy-specified meaning of redeployment"[10] and concluded that Ms Pykett's dismissal was not a case of genuine redundancy because it would have been reasonable in the circumstances for her to be redeployed within TAFE NSW. There is no challenge to the Commissioner's finding, at [31] of the

8 *Pykett v Technical and Further Education Commission (t/as TAFE NSW)* [2013] FWC 4982 at [15]-[17].

9 *Pykett v Technical and Further Education Commission (t/as TAFE NSW)* [2013] FWC 4982 at [6].

10 *Pykett v Technical and Further Education Commission (t/as TAFE NSW)* [2013] FWC 4982 at [30].

decision of 12 August 2013, that if the employer's redeployment search had not been so constrained it is more likely than not that other redeployment options would have arisen for consideration.

15 The central issue in contention, both at first instance and on appeal, is whether there must be an identified "job" or "position" to which the applicant could have been redeployed in order to enliven s 389(2). The primary submission advanced by the appellant is that s 389(2) requires the Commission to determine a job to which the employee could be redeployed, identify the circumstances in which the employee could have been redeployed and determine whether redeployment to a "particular job" was reasonable in those circumstances. Underlying the submission is the contention that there must be an identified job or position. It is submitted that the Commissioner acted upon a wrong principle in finding it was not necessary to identify a specific position into which Ms Pykett could have been redeployed.

16 The respondent submits that the Commissioner made no error of principle in not identifying which position, specifically, Ms Pykett could have been redeployed into and contends that the appellant's submissions proceed on a false premise in that s 389(2) does not require that there be an identified "job" or "position" to which the relevant employee could have been redeployed.

17 The respondent contends that it is not necessary to identify a particular job or position to which Ms Pykett could have been redeployed in order to enliven s 389(2). The respondent submits that it is significant that s 389(2) does not refer to redeployment to a specific "position" or "job". It refers to redeployment "within the employer's enterprise" or "the enterprise of an associated entity of the employer". It is submitted that there is no basis in the words used or in the context to read s 389(2) as limiting the concept of redeployment by requiring the Commission to identify a specific position to which the employee should have redeployed. It is sufficient the Commission be satisfied that the employee could reasonably have been deployed to perform other work within the employer's enterprise.

18 The respondent submits that the context of s 389 does not support a narrower interpretation. The purpose of s 389(2) is beneficial, it is to permit an employee to bring an application if the employer acting reasonably, could have retained the employee rather than terminating the employee on grounds of redundancy. That objective would have been achieved if there was work the employee could reasonably have been engaged to perform whether or not it constituted an existing identified position or job. Nor do other provisions in Pt 3-2 of the FW Act suggest a different interpretation.

19 This aspect of the appeal turns on the proper construction of s 389(2) of the FW Act. We propose to deal with that matter first, including a consideration of relevant Full Bench authority, before turning to the decision subject to appeal.

20 Ascertaining the meaning of s 389(2) necessarily begins with the ordinary and grammatical meaning of the words used.[11] These words must be read in context by reference to the language of the Act as a whole and to the legislative purpose.[12]

21 Section 389(2)(a) states, relevantly for present purposes:

11 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at [26].

12 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

> (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 …

22 Section 389(2)(a) provides an exception to the circumstances in which a person's dismissal was a case of "genuine redundancy" (within the meaning of s 389(1)). So much is clear from the introductory words of s 389(2): "A person's dismissal was *not* a case of genuine redundancy *if* …" (emphasis added).

23 If s 389(2)(a) is enlivened a person's dismissal will not be a case of *genuine redundancy* even if the person's employer no longer requires the person's job to be performed by anyone because of changes in the operation requirements of the employers enterprise and any relevant consultation obligations have been met. The subsection then goes on to set out the circumstances which enliven the exception, namely:

> … if it *would have* been reasonable in all the circumstances for the person to be redeployed within … the employer's enterprise.

(Emphasis added)

24 The use of the past tense in this expression directs attention to the circumstances which pertained at the time the person was dismissed.

25 The word "redeployed" should be given its ordinary and natural meaning. The ordinary meaning of the word "redeploy" includes:

> Move (troops, workers, material etc) from one area of activity to another, reorganise for greater effectiveness; *transfer to another job, task or function*.[13]

(Emphasis added)

26 The Explanatory Memorandum to what is now s 389(2) is in the following terms:

> 1551. Subclause 389(2) provides that a dismissal is 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, or within the enterprise of an associated entity of the employer (as defined in clause 12).
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> 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 or experience*.

27 The meaning of s 389(2) was the subject of some consideration by a Full Bench in *Ulan Coal Mines Ltd v Honeysett*[14] (*Honeysett*). *Honeysett* was an appeal from a decision which concluded that the dismissal of certain of the appellant's employees did not involve genuine redundancy. To put the appeal decision in context it is necessary to say something about what was decided at first instance.

28 The dismissals of the applicants arose as a result of the restructuring of Ulan's coal mining operations. The Ulan mine was about 50 kilometres north of Mudgee. The 10 applicants were among 14 mine workers retrenched. Ulan was part of Xstrata Coal Pty Ltd (Xstrata). A number of other companies in the

13 *The New Shorter Oxford English Dictionary*, p 2514.

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

Xstrata group operated coal mines in NSW and at the time of the dismissals there were vacancies for positions as mine workers in all of these mines. The decision at first instance concerned the application of the redeployment exclusion in s 389(2) and in particular the concept of redeployment in an associated entity, within the meaning of s 389(2)(b).

29 The Commissioner found that it would not have been reasonable in all the circumstances for the employees to be redeployed within Ulan. However, he found that at the time of the dismissals, Xstrata was in a position to require the other mines in the Xstrata group, all being associated entities, to engage the employees. In the course of his decision the Commissioner said:

> [36] A stark point of difference between the parties concerns what is meant by "redeployment". I do not accept the definition put forward by Ulan. It says one must give the word a broad, practical and purposeful meaning. Its argument results, in effect, to mean employment in an associated entity. In my view, to suggest that redeployment equates to employment elsewhere is not to take an expansive view of the word redeployment. It is to alter its meaning …
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> [40] Redeployment as envisaged by s 389(2) requires a transfer of the employee. This is so even if it also might mean the entering into a new contract of employment.
>
> [41] Any action of Ulan to make some job vacancies known to employees, taking steps to have associated entities delay closing employment opportunities and then with those associated entities offering employment following an open selection process is not redeployment. It is merely assisting in the gaining of employment.

30 The Commissioner concluded that it would have been reasonable in all the circumstances for most of the employees to have been redeployed in the vacant positions at the other Xstrata mines.

31 On appeal Ulan submitted that the Commissioner had failed to properly construe the meaning and effect of s 389(2)(b). Ulan submitted that the Commissioner's decision was wrong because he did not identify the particular positions in a particular enterprise to which each of the six applicants could have been redeployed. In dismissing the appeal the Full Bench made a number of observations about the interpretation of s 389(2) and the meaning of the term "redeployed":

> First, s 389(2) must be seen in its full context. It only applies when there has been a dismissal. An employee seeking a remedy for unfair dismissal cannot succeed if the dismissal was a genuine redundancy. In other words, if the dismissal is a case of genuine redundancy the employer has a complete defence to the application. Section 389(2) places a limitation on the employer's capacity to mount such a defence. The defence is not available if it would have been reasonable to redeploy the employee. The exclusion poses a hypothetical question which must be answered by reference to all of the relevant circumstances.
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> Secondly, it is implicit in the terms of s 389(2)(b) that it might be reasonable for an employee dismissed by one employer to be redeployed within the establishment of another employer which is an entity associated with the first employer. It follows that an employer cannot succeed in a submission that redeployment would not have been reasonable merely because it would have involved redeployment to an associated entity. Whether such redeployment would have been reasonable will depend on the circumstances. The degree of managerial integration between the different entities is likely to be a relevant consideration.

> Thirdly, the question posed by s 389(2), whether redeployment would have been reasonable, is to be applied at the time of the dismissal. If an employee dismissed for redundancy obtains employment within an associated entity of the employer some time after the termination, that fact may be relevant in deciding whether redeployment would have been reasonable. But it is not determinative. The question remains whether redeployment within the employer's enterprise or the enterprise of an associated entity would have been reasonable at the time of dismissal. In answering that question a number of matters are capable of being relevant. They include the nature of any available position, the qualifications required to perform the job, the employee's skills, qualifications and experience, the location of the job in relation to the employee's residence and the remuneration which is offered.[15]

32 The Full Bench dismissed the appeal, in the following terms:

> The Commissioner found that entities associated with Ulan had vacancies for jobs which were potentially suitable for the dismissed employees and there was no evidence that redeployment from Ulan to the mines operated by these associated enterprises would have any impact on operational efficiency. While the Commissioner decided that some of the employees dismissed by Ulan were encouraged to apply for vacancies at mines operated by associated entities, he also found that neither Xstrata nor its associated entities had a policy of employing persons who might be redundant in other enterprises in the group. In Xstrata's case, this is despite the fact that it had overall managerial control in relation to the mining operations of the associated entities. These findings were open to him. The Commissioner also found no evidence that any of the relevant employees would have been unwilling to be redeployed to one of the other mines. It must be said that all of the evidence was not one way on this issue and, as Ulan's submissions indicate, some of the employees in particular did not display a great deal of energy in following up on vacancies which Ulan brought to their attention. Nevertheless we think it was open to the Commissioner to find that if offered redeployment they would have accepted it. We have concluded that the Commissioner's decision was open on the evidence and other material before him and did not involve any error in interpretation of the section.[16]

33 The Full Bench went on to make some *obiter* remarks about the operation of s 389(2):

> 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. Other considerations may be relevant such as the location of the job and the remuneration attaching to it. Where an employer decides that, rather than fill a vacancy by redeploying an employee into a suitable job in its own enterprise, it will advertise the vacancy and require the employee to compete with other applicants, it might subsequently be found that the resulting dismissal is not a case of genuine redundancy. This is because it would have been reasonable to redeploy the employee into the vacancy. In such a case the exception in s 385(d) would not apply and the dismissed employee would have the opportunity to have their application for a remedy heard. The outcome of that application would depend upon a number of other considerations.

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15 *Ulan Coal Mines Ltd v Honeysett* (2010) 199 IR 363 at [26]-[28].

16 *Ulan Coal Mines Ltd v Honeysett* (2010) 199 IR 363 at [31]-[32].

> Where an employer is part of a group of associated entities which are all subject to overall managerial control by one member of the group, similar considerations are relevant. This seems to us to be a necessary implication arising from the terms of s 389(2)(b). While each case will depend on what would have been reasonable in the circumstances, subjecting a redundant employee to a competitive process for an advertised vacancy in an associated entity may lead to the conclusion that the employee was not genuinely redundant.[17]

34 *Honeysett* is authority for the proposition that for the purpose of s 389(2)(b) it is sufficient if the Commission identifies a suitable job or position to which the dismissed employee could be redeployed. The Commission must then determine whether such a redeployment was reasonable in all the circumstances. We note that given the factual context the Full Bench in *Honeysett* did not need to consider whether s 389(2) may be satisfied if the dismissed employee could be redeployed to perform *other work* within the employer's enterprise (or that of an associated entity). Given its particular factual circumstances *Honeysett* is *not* authority for the proposition that it is always necessary to identify a particular job or position to which the dismissed employee could have been redeployed.

35 As we have mentioned, the use of the past tense in the expression "would have been reasonable in all the circumstances for the person to be redeployed …" in s 389(2)(a) directs attention to the circumstances which pertained when the person was dismissed. As noted in *Honeysett*, "[T]he exclusion poses a hypothetical question which must be answered by reference to all of the relevant circumstances".[18] The question is whether redeployment within the employer's enterprise or an associated entity would have been reasonable at the time of dismissal. In answering that question the Full Bench in *Honeysett* observed that a number of matters are capable of being relevant:

> They include the nature of any available position, the qualifications required to perform the job, the employee's skills, qualifications and experience, the location of the job in relation to the employee's residence and the remuneration which is offered.[19]

36 We have earlier set out the submissions of the appellant and the respondent as to the proper construction of s 389(2) (see [15]-[18] above). We accept the respondent's submissions. For the purposes of s 389(2) the Commission must find, on the balance of probabilities, that there was a job or a position or other work within the employer's enterprise (or that of an associated entity) to which it would have been reasonable in all the circumstances to redeploy the dismissed employee. There must also be an appropriate evidentiary basis for such a finding. Such an interpretation is consistent with the ordinary and natural meaning of the words in the subsection; the Explanatory Memorandum and Full Bench authority. We acknowledge that the facts relevant to such a finding will usually be peculiarly within the knowledge of the employer respondent, not the dismissed employee. If an employer wishes to rely on the "genuine redundancy" exclusion then it would ordinarily be expected to adduce evidence as to the following matters:

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17 *Ulan Coal Mines Ltd v Honeysett* (2010) 199 IR 363 at [34]-[35].

18 *Ulan Coal Mines Ltd v Honeysett* (2010) 199 IR 363 at [26].

19 *Ulan Coal Mines Ltd v Honeysett* (2010) 199 IR 363 at [28].

(i) that the employer no longer required the dismissed employee's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise;

(ii) whether there was any obligation in an applicable modern award or enterprise agreement to consult about the redundancy and whether the employer complied with that obligation; and

(iii) whether there was a job or a position or other work within the employer's enterprise (or that of an associated entity) to which it would have been reasonable in all the circumstances to redeploy the dismissed employer.

37 The evidence in relation to (iii) would usually include canvassing the steps taken by the employer to identify other work which could be performed by the dismissed employee.

38 As we have mentioned, we accept the respondent's submissions as to the proper construction of s 389(2). But that is not the end of the matter. The difficulty for the respondent is that the Commissioner failed to make the requisite finding and for that reason the appeal must be upheld. We now turn to the decision subject to appeal.

39 The relevant parts of the Commissioner's decision are as follows:

> [31] The exploration by the respondent of Managing Excess Employees-defined redeployment for the applicant solely or principally contemplated only redeployment into an advertised, permanent vacancy and in the context of the "matching" processes such as salary range. However, *there may well have been other reasonable redeployment options available within the respondent's enterprise that simply were not considered due to the constraints in the Managing Excess Employees policy* concerning positions into which the applicant could be considered for redeployment, such as to be redeployed to undertake the work performed by agency casuals. *It is more likely than not that if the consideration of redeployment options had been more broadly approached by the respondent beyond only matched advertised, permanent vacancies, other reasonable redeployment options would have emerged within the respondent's enterprise and appropriately been considered*. If the substantive occupant of a position was expected to be absent from that role for due to, for instance, six months of parental leave, it would seem reasonable to expect that a time-limited redeployment into that role might be considered both as appropriate for consideration and reasonable in all the circumstances in the case of an excess employee who wished to remain employed by the respondent so he or she could continue to seek appointment to a more secure, substantive position within the respondent's enterprise. In this regard, I take notice of the fact that superannuation entitlements for employees in NSW public sector-type schemes, for example, can be substantially affected depending on the superannuant's age and the timing of date of the termination of employment.
>
> [32] The examination of the full range of actual redeployment options within the respondent's enterprise that otherwise may have arisen for consideration was not only artificially or unreasonably constrained by the abstract of the Managing Excess Employees-specified meaning of redeployment, there was no real prospect the applicant would have been redeployed to an advertised, permanent vacancy during her retention period because the respondent had a freeze on filling certain permanent positions at that time, and other matters were put on hold as a result of disputation between the applicant's union and the respondent. As such, it

> appears that any possibility of redeployment, even within the confined meaning of redeployment as contemplated in the Managing Excess Employees policy, in the circumstances of that freeze, was no more than a theoretical construct as it concerned the applicant and certain positions. When the applicant was declared to be an excess employee, she was given the option of accepting a voluntary redundancy package, being a package that contains significantly better financial arrangements than the scale of payments that applies in the case of a forcible redundancy. Instead of accepting the voluntary redundancy package, the applicant opted to try to be redeployed. However, there was, it appears, no real possibility that the applicant could have been redeployed, within the meaning of the Managing Excess Employees policy, because of the freeze on certain permanent appointments. The existence of the freeze was not known to the applicant when she opted to seek redeployment after she was declared an excess employee. The applicant's redundancy payments in the forcible redundancy were inferior to those that would have applied if the applicant had accepted voluntary redundancy, for example, on the basis of informed decision-making about the freeze. On one view of it, the respondent may have misled the applicant through a lack of disclosure about the freeze on certain permanent appointments relevant to her potential redeployment at the time when the applicant determined not to accept the voluntary redundancy package.
>
> [33] The respondent has objected to the application on the basis the termination of the applicant's employment was a "genuine redundancy". *It would*, however, in my view, *have been reasonable in all the circumstances for the respondent to redeploy or to consider redeploying the applicant within its enterprise other than to an advertised, permanent vacancy. I do not consider it necessary in the circumstances of this case to determine which position, specifically, would have been appropriate for redeployment of the applicant. That the respondent did not allow for any consideration of the redeployment of the applicant within its enterprise other than under the artificial confines of the Managing Excess Employees-conditioned understanding of "redeployment", in and of itself, leads me to the conclusion the dismissal was not a genuine redundancy within the meaning of the Act.*[20]

(Emphasis added)

40 The Commissioner erroneously focussed on the inadequacy of the appellant's redeployment policy and failed to make a finding that there was a job, a position or other work to which Ms Pykett could have been redeployed. Such a finding is a necessary step in reaching the conclusion that it would have been reasonable in all the circumstances for Ms Pykett to be redeployed within the appellant's enterprise. The failure to make such a finding is an error which warrants correction on appeal. We now turn to the second issue raised in the appeal, whether a reinstatement order must specify the position to which the person is to be appointed.

The Reinstatement Order

41 On 18 October 2013 Commissioner McKenna made a reinstatement order pursuant to s 391(1)(b), in the following terms:

> 1. The Technical and Further Education Commission T/A TAFE NSW

20 *Pykett v Technical and Further Education Commission (t/as TAFE NSW)* [2013] FWC 4982 at [31]-[33].

appoint Lynda Pykett to a position of Technical Officer ½ Scientific, on terms and conditions no less favourable than those on which she was employed immediately before the dismissal; and

2. the appointment is to occur within 21 days of the date of this order.[21]

42 This order has been stayed pending the determination of the appeal.

43 The relevant provisions of the FW Act are ss 390 and 391(1):

> 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.
>
> 391 Remedy — reinstatement etc.
>
> Reinstatement
>
> (1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:
>
> (a) reappointing the person to the position in which the person was employed immediately before the dismissal; or
>
> (b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

44 The essence of the error alleged on appeal is the proposition that a reinstatement order pursuant to s 391(1)(b) must specify the position to which the person is to be appointed. In summary terms the propositions in support of that contention are as follows:

(a) The power to order reinstatement is found in s 390(1). Section 391(1) is a limitation on the power in s 390(1), not an independent source of power. Any reinstatement order made under s 390 must be an order that is of the kind described in s 391(1)(a) or (b).

(b) The order made necessarily divested the Commission of it's responsibility to ensure the that order was properly within the powers available under the Act. The Commissioner could not have been positively satisfied that the relevant terms and conditions of the position to which TAFE appointed Ms Pykett were no less favourable unless:

(i) the Commissioner identified the position to which Ms Pykett was to be appointed;

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21 PR543507.

(ii) The Commissioner compares the terms and conditions attached to that position with the terms and conditions of the persons previous position; and

(iii) the Commissioner was necessarily satisfied that the terms and conditions were not less favourable.

(c) The line of authority commencing with *Anthony Smith & Associates Pty Ltd v Sinclair*[22] (*Sinclair*) is no longer applicable as the legislative provisions then in operation are materially different from the current provisions.

(d) Reliance is placed on *Blackadder v Ramsey Butchering Services Pty Ltd*[23] (*Blackadder*) in relation to the phrase "terms and conditions" in s 391(1)(b).

45 We accept the first proposition. The Commission's power to order reinstatement is to be found in s 390(1) and s 391(1) is a limitation upon that power, rather than an independent source of power. But we reject the suggestion that the Commissioner's reference to s 391(1)(a) in the preamble to her order (rather than to s 390(1)) constitutes an error warranting correction on appeal. The reasons under challenge must be read as whole and considered fairly. An error is not to be found merely in looseness of language or infelicity of expression.[24]

46 We reject each of the other propositions advanced in support of the appellant's contention. The order made did not divest the Commission of its responsibility to ensure that the position to which Ms Pykett was to be appointed was "on terms and conditions no less favourable" than those on which she was employed immediately before the dismissal. To the contrary, the order clearly stated that this was to be so and the employer is obliged to comply with that order.

47 The nature and scope of a reinstatement order was considered by the Full Court of the Industrial Relations Court in *Anthony Smith & Associates Pty Ltd v Sinclair*.[25] In *Sinclair* the Court held:

> … s 170EE(1)(a)(ii) of the Act … empowers the Court to require the employer to reinstate the employee by appointing him or her "to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination". This might be a specific position, the availability and suitability of which is revealed by the evidence. On other occasions, the Court will not specify a particular position. Provided that the Court is satisfied that reinstatement is practicable and appropriate, it is open to the Court to make an order in terms of par (a)(ii), leaving it to the employer to choose the position and to comply with the Court's order to provide terms and conditions that are no less favourable than those on which the employee was employed immediately before the termination. If this course is taken, the employer may select an existing position, or he or she may create a new position for the purpose. If the latter, contrary to the submission of counsel for the employer, it will not be

22 *Anthony Smith & Associates Pty Ltd v Sinclair* (1996) 67 IR 240.

23 *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539; 139 IR 338.

24 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 286-287; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 and 291; *Fox v Australian Industrial Relations Commission* (2007) 161 FCR 263; 166 IR 85 at [116]-[119] and *Maritime Union of Australia v Patrick Stevedores Holdings Pty Ltd* (2013) 237 IR 1 at [33]-[37].

25 *Anthony Smith & Associates Pty Ltd v Sinclair* (1996) 67 IR 240.

> to the point that, in the absence of the order, the employer might not have created the position … an order for reinstatement can be made requiring the employer to appoint the applicant to another position. The Court can them impose the condition that the terms and conditions of employment will be no less favourable than those engaged by the respondent immediately prior to his termination.

48 If *Sinclair* is still good law then it is a complete answer to this aspect of the appeal. In *Sinclair* the Court was considering the application of ss 170EE(1) and (2) of the former *Industrial Relations Act 1988* (Cth) (the IR Act). The appellant contends that these provisions are materially different from ss 390 and 391 of the FW Act.

49 Section 170EE was relevantly in the following terms:

> (1) In respect of a contravention of a provision of this Division (other than section 170DB or 170DD) constituted by the termination of employment of an employee, the Court may, if the Court considers it appropriate in all the circumstances of the case, make the following orders:
>
> (a) an order requiring the employer to reinstate the employee by:
>
> (i) reappointing the employee to the position in which the employee was employed immediately before the termination;
>
> (ii) appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination; and
>
> (b) if the Court makes an order under paragraph (a):
>
> (i) any order that it thinks necessary to maintain the continuity of the employee's employment; and
>
> (ii) an order requiring the employer to pay to the employee the remuneration lost by the employee because of the termination.
>
> (2) If the Court thinks, in respect of a contravention of a provision of this Division (other than section 170DB or 170DD) constituted by the termination of employment of an employee, that the reinstatement of the employee is impracticable, the Court may, if the Court considers it appropriate in all the circumstances of the case, make an order requiring the employer to pay to the employee compensation of such amount as the Court thinks appropriate.

50 The appellant submits that under s 170EE (unlike ss 390 and 391) the power to order reinstatement was dependent on positive findings by the Court that such an order was "appropriate in all the circumstances" and that reinstatement was "practicable". The appellant contends that s 391(1) of the FW Act is quite different. It requires that an order for a person's reinstatement "must be an order that" meets the stated criteria, that is, the FW Act mandates, in a way that the IR Act did not, that the appointment of the person is actually on terms and conditions no less favourable. It is submitted that *Sinclair* is no longer good law because the current provisions require the Commission to ensure that any reinstatement order made actually falls within the limitations of s 391, in contrast with previous provisions that did not impose a comparable express requirement.

51 We are not persuaded that there is any relevant distinction between s 170EE of the IR Act and ss 390 and 391 of the FW Act. Under both provisions an order for a remedy was discretionary and only two types of reinstatement orders could

be made: reappointment to the former position or appointment to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal. The fact that s 391(1) provides that a reinstatement order must be an order of the type specified does nothing more than describe the orders capable of being made by the Commission. The effect of the provision is indistinguishable from the earlier provision.

52 In addition to the differences between s 170EE of the IR Act and the current provisions the appellant relied on the judgments of the High Court in *Blackadder* in relation to the phrase "terms and conditions" in s 391(1)(b). *Blackadder* does not assist the appellant. The order in *Blackadder* required no more than that the applicant "be reinstated to the position in which he was employed prior to the termination of his employment". The question before the Court concerned whether there had been compliance with that order. The substance of the dispute was whether the reinstatement order required the employer to provide actual work to the employee or merely reinstate the employee's contractual position. The judgments do not touch upon the capacity of the Commission to order that an employee be appointed to another position on terms and conditions no less favourable.

53 It follows from the foregoing that *Sinclair* remains apposite. Accordingly, it was open to the Commissioner not to specify a particular position and to leave it to the employer to choose the position and to comply with the order to provide terms and conditions that are no less favourable than those on which the applicant was employed immediately before her dismissal.

54 For the reasons given we are satisfied that it is in the public interest to grant permission to appeal. We grant permission to appeal, uphold the appeal and quash the Commissioner's decision and orders. We remit the matter to Commissioner McKenna to determine Ms Pykett's application in accordance with our decision. In remitting the matter to Commissioner McKenna we have considered the appellant's submission[26] that it is implicit in the Commissioner's decision that there was no position to which Ms Pykett could have been redeployed, but we do not find that submission persuasive. The Commissioner made no such finding and nor is such a finding implicit in her reasons for decision.

Permission to appeal granted; appeal upheld and Commissioner's decision and orders quashed; matter remitted to Commissioner McKenna to determine application in accordance with the Full Bench decision

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26 See Transcript at [1063]-[1076].