DECISION

Fair Work Act 2009 (Cth)
s.394 - Application to deal with unfair dismissal

Cassandra Louise Smith (nee Kay)
v
UQ Sport Ltd
(U2021/8591)

DEPUTY PRESIDENT LAKE BRISBANE, 16 FEBRUARY 2022

Application for unfair dismissal remedy – whether genuine redundancy – found to be a genuine redundancy – jurisdictional objection upheld – application dismissed

[1] Cassandra Louise Smith (the Applicant) lodged an application under s.394 of the *Fair Work Act 2009* (the Act) for an unfair dismissal remedy in respect of her dismissal by UQ Sport Ltd (the Respondent).

[2] She commenced her employment with the Respondent on 15 July 2019 on a fixed term, full time contract as a Project Coordinator for six months. On 15 November 2019, the Applicant's employment contract was varied to a permanent, full-time contract. On 21 November 2020, she went on parental leave. Whilst on parental leave, the Applicant was requested to attend a meeting on 23 August 2021 during which she was informed that the Respondent was considering making her position redundant. On 15 September 2021, she was told that a final decision had been made to make her position redundant.

[3] On 24 September 2021, the Applicant lodged an unfair dismissal application claiming that the redundancy was not genuine. The Respondent objected on the basis that the Applicant's dismissal was a genuine redundancy. As the matter could not be resolved by conciliation, the jurisdictional objection was allocated to me for determination.

Preliminary matters

[4] Directions were issued with respect to the filing of material by each party ahead of the hearing scheduled to take place in Brisbane before me on 22 December 2021. At that hearing, the Applicant and her husband, Dwayne Smith, appeared on the Applicant's behalf. The Respondent sought to be legally represented. The Applicant did not object to the Respondent being represented. Even so, I was still required to consider whether permission ought to be granted under s.596 of the Act. Given the volume of evidence and submissions provided by the parties and the strict legal questions involved in considering whether the Applicant's dismissal was a genuine redundancy and whether the requisite processes had been complied with, I was

satisfied that it would be of use to the Commission – and would not unduly prejudice the Applicant – to have the assistance of the Respondent's legal representatives. Further, I was satisfied that the presence of the Respondent's representative would also enable the matter to be dealt with more efficiently. Accordingly, I allowed Margaret Forrest of counsel, instructed by Ben Foley of Clifford Gouldson Lawyers to appear for the Respondent.

[5] As to the other matters I am required to consider under s.396 of the Act, I am satisfied that the application was made within the period required by s.394(2), the Applicant was a person protected from unfair dismissal having met the minimum employment period and earning less than the high-income threshold and the Respondent was not a small business employer to which the Small Business Dismissal Code applied.

[6] By the time the matter came before me for hearing, the Respondent had accepted that the University of Queensland (the University) and UQ Holdings, and various other subsidiaries, are all associated entities within the meaning of the *Corporations Act 2001* (Cth) which is adopted by the Act. Consequently, the only matter for determination was whether the Applicant's dismissal was a genuine redundancy within the meaning of the Act.

Legislation

[7] Under s.385 of the Act, a dismissal cannot have been unfair if it was a "genuine redundancy", which is defined in s.389 as follows:

> "(1) A person's dismissal was a case of ***genuine redundancy*** if:
> (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
> (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
> (2) A person's dismissal was not a case of ***genuine redundancy*** if it would have been reasonable in all the circumstances for the person to be redeployed within:
> (a) the employer's enterprise; or
> (b) the enterprise of an associated entity of the employer."

Respondent's evidence

Jakub Toporek

[8] Mr Toporek is the Respondent's Human Resources Manager. He is responsible for the Respondent's human resources, workplace, health and safety, administrative services and payroll. He reports to Bryan Pryde, the Respondent's Chief Executive Officer.

[9] The Applicant reported to Ashley Lance, the Respondent's Facilities Manager. She was the first Project Coordinator appointed by the Respondent in the Facilities Team. Her role had been created to assist with the growing number of projects that required the Respondent's involvement and otherwise provide Mr Lance with assistance.

[10] Relevantly to these proceedings, Mr Toporek met with the Applicant and Mr Lance on 23 August 2021. During that meeting, the Applicant was advised that the Respondent was considering making her position redundant. They explained the reasons why.

[11] On 26 August 2021, Mr Toporek received correspondence from the Applicant expressing her views about the potential redundancy but indicating a willingness to participate in the consultation process.

[12] Clause 1.4.2(a) of the *UQ Sport Enterprise Agreement 2018* (the Agreement) sets out the classes of employees not covered, which includes those employees whose roles have functions that are traditionally award free and those engaged on common law agreements. Schedule 2 of the Agreement describes the position classifications and pay scales of the positions covered by the Agreement. It does not include the position of Project Coordinator.

[13] Mr Toporek's evidence was that at no time did he expressly or impliedly indicate to the Applicant before or during her employment that her employment was regulated by the Agreement, nor has her employment contract ever referred to it. Mr Toporek stated that Mr Lance informed him, and he verily believes, that on 15 November 2019, Mr Lance wrote to the Applicant confirming a variation of her appointment to Project Coordinator on the same terms and conditions contained in the employment contract, simply converting her appointment from a six-month, fixed term, full-time contract position to a permanent full-time position.

[14] On or about 17 August 2021, Mr Pryde and Mr Toporek agreed that Mr Toporek would contact the Applicant to discuss her employment. Accordingly, on 20 August 2021, Mr Toporek called the Applicant and requested that she attend a meeting with him on 23 August 2021 for the purpose of discussing her employment and giving her an organisational update. Mr Toporek's memory was that he told the Applicant she could bring a support person along. He recalls her asking if she could bring Lucy, to which he responded, "You can bring anyone."

[15] That meeting occurred on 23 August 2021, with the Applicant and Mr Lance present. At that meeting, Mr Toporek recalls explaining to the Applicant that the Respondent was considering making her position redundant because of the Respondent's reduced financial position, the involvement of the University in major projects, the uncertainty of those projects moving forward and the fact that the Respondent was trying to reduce its overall staff numbers. Mr Toporek told the Applicant that a final decision had not been made about her position. Nevertheless, he offered the Applicant two roles within the Respondent into which she could be redeployed. Those were a full-time customer service officer or a part-time shift supervisor. He acknowledged that both roles were different to her current position. The Applicant asked whether it would be possible to extend her parental leave. Mr Toporek indicated that was something the Respondent could consider. The meeting concluded with Mr Toporek asking that the Applicant respond about the additional positions by 26 August 2021.

[16] On 26 August 2021, Mr Toporek received correspondence from the Applicant summarising what occurred at the meeting on 23 August 2021. She understood that her position was at risk of redundancy but that no decision yet been made. She also raised the possibility that she could request an additional 12 months of parental leave, to which she had been told the Respondent would need to investigate that option. She recalled being told that there were no vacant positions suitable for redeployment, but the Respondent had outlined a couple of available positions. She agreed they were not suitable. The Applicant went on to ask for more information about how the Respondent had tried to avoid or minimise the effect of, or need for, the proposed redundancy. The Applicant wrote that she was inadvertently denied a representative of her choosing, contrary to the Respondent's obligations under the Agreement. The Applicant wrote that based on what she understood was the return-to-work guarantee in

the Act, the Respondent had a responsibility to provide her with employment in her pre-parental leave position within the Respondent or an associated entity. She said that by not backfilling her position during her parental leave, the Respondent had negatively impacted her ability to return to that position. She was displeased that she had not been invited to discuss that decision before she had commenced parental leave. She concluded the letter by reminding the Respondent of her varied skills and experience, which were not limited to project coordination and stated that she could be utilised across the Respondent's business or its associative entities.

[17] On 2 September 2021, Mr Toporek called the Applicant to arrange a meeting. During that call, he confirmed that she was welcome to bring her husband to the meeting. Later that day, the Applicant indicated that 6 September 2021 at 9:30am would be an appropriate time to have that meeting.

[18] On 6 September 2021, Mr Toporek and Mr Lance met with the Applicant and her husband. During that meeting, Mr Toporek informed the Applicant that the Respondent had decided to make her position redundant, effective immediately, on the basis that there were a lack of projects that required coordination, the University was involving itself in more projects thus reducing the resources the Respondent was required to commit, the uncertainty surrounding a number of significant projects, and consequently, the Respondent no longer required her position to be performed by anyone. During the meeting, Mr Toporek described the particulars of each of the two positions open to the Applicant and what additional training may be available to her if she took them up. Later that day, Mr Toporek wrote to the Applicant outlining those positions and documenting (albeit with the wrong dates) the process thus far.

[19] On 13 September 2021, Mr Toporek received an email from the Applicant stating that she did not wish to accept either of the two redeployment positions. Mr Toporek said that a decision was made regarding the redundancy after the September meeting where the redeployment opportunities were rejected and it was clear that there was no rationale put forward for the continuance of the decision. So, on 15 September 2021, Mr Toporek emailed the Applicant confirming that because she had declined the redeployment positions her employment would be terminated because her position was to be made redundant, effective 15 September 2021. To that end, on 21 September 2021, Mr Toporek emailed the Applicant a copy of her employment separation certificate.

[20] As to the Applicant's inquiry regarding the possibility of extending her parental leave for a further 12 months, Mr Toporek's evidence was that he had told her in the 6 September 2021 letter that the Respondent would consider extending her parental leave upon receipt of a formal written application but no such application was ever received. Mr Toporek confirmed that the Respondent's decision with respect to making the Project Coordinator position redundant was in no way influenced by the Applicant's verbal request for an extension of parental leave.

[21] Mr Toporek was also asked how an employee would be told that their employment was governed by the Agreement, to which he stated that it would be set out in their letter of offer. He said that the Applicant had been employed under a common law agreement because the responsibilities and accountabilities of the role were that of a professional employee and higher in nature in comparison to other roles within the Respondent. The Applicant's role had come about when Mr Lance needed assistance to manage the growing number of projects that the Respondent was involved in. It was initially described as a project administrator, but it was quickly realised that Mr Lance required a higher level of assistance (a coordinator role) that

would not just do administrative tasks but would get involved in management and coordination of the projects. The Applicant was responsible for coordination and management of the projects. Consequently, the role that the Applicant ultimately held was deemed to be a common law role.

[22] Mr Toporek was taken to the definitions within the *Clerks – Private Sector Award 2020* (the Clerks Award) and asked whether the descriptions would apply to the Applicant's role. He said:

> "No doubt in some degree and I think [indistinct] UQ Sport operations are all levels of roles and managers have some clerical administrative duties involved. From my perspective it would have changed as the involvement in projects happened. So, you know, there could be one week where you're just working really heavily on documenting things. Another week you're starting to research analysis, et cetera – managing and coordinating everything. So there would be a degree of administrative work – 100 per cent – but it wouldn't be the main purpose or scope of the position which is why it's judged not to apply to clerical award."

[23] As to the pay increase received by the Applicant, which she says she was entitled to because she was an Agreement-covered employee, Mr Toporek said that the intent of the policy decision was to make sure that common law employees received the same increase on 1 January as those covered by the Agreement. The intent was that they would mirror one another.

[24] As to the emails sent from the generic Human Resources email regarding the reduced operations due to COVID-19, Mr Toporek's evidence was that:

> "My initial thoughts about this is that this was made to an error, and that error again comes in play where such a close mirroring of policies exist between enterprise agreement and all policies, because you can almost make a call - we're trying to make sure that our common law employees and our enterprise agreement employee are treated as similar as possible. So we don't have, 'Well, I'm on a common law contract, and if I don't get an increase,' or this and that. So I would assume that this was made in error. Enterprise agreement gives us that direction, but so does leave policy, as it again mirrors it."

[25] It was however noted that he was not the author of that document.

[26] Mr Toporek was asked why, if the Applicant was not covered by the Agreement, her personal section of FlareHR would include a copy of it. His evidence was that the Respondent does not have a separate onboarding journey for the Agreement and common law employees. All employees have access to the Agreement whether they are covered by it or not. The fact that the document was in the Applicant's folder is not indicative of her employment being governed by it. What is indicative of whether a role is a common law or Agreement covered position is the employee's contract. The Applicant's contract, having no reference to the Agreement in it, was a common law position not subject to the Agreement.

Bryan Pryde

[27] Mr Pryde has been the Respondent's Chief Executive Officer since 2013. In that role he is responsible for the Respondent's overall operational, financial and administrative functions and processes. In his evidence, Mr Pryde set out the structure of the Respondent and its associated entities, though given the question of associated entities is no longer live, I will not reproduce that evidence here.

[28] To the extent that it was relevant, Mr Pryde stated that UQ Sport has its own independent business structure and operates as an autonomous business unit. It is financially independent of the University and does not receive any direct funding or financial support from it. It can make its own restructuring decisions and undertake those processes independently of the University and UQ Holdings. There is no managerial integration between the Respondent and either of these entities. Nor is the Respondent subject to day-to-day nor strategic managerial control by either of those entities. The Respondent has its own strategic and operational plans and budgets. It also has its own dedicated human resources department and makes recruitment decisions completely independently of the University and UQ Holdings. The University has no power or influence over its recruitment decisions, nor does the Respondent have any power or influence over the University's recruitment decisions. It is the same in respect of UQ Holdings.

[29] Throughout the course of Mr Pryde's employment with the Respondent, it has made approximately four to five restructures, none of which involved any managerial input or guidance from the University or UQ Holdings. Similarly, the Respondent has never canvassed redeployment opportunities within the University, UQ Holdings or any other entity for employees of the Respondent whose positions become redundant. Mr Pryde was not aware of the reverse happening either.

[30] With respect to the issues raised by the Applicant of the payment and employment of the facilities manager, Mr Pryde denied that the University sponsored a portion of his salary to enable him to then participate in the project. Rather, he stated, the University paid a fee for service which enabled the Respondent to be compensated for work he was doing for their projects. His evidence was that, "We were simply being compensated, in the first instance, for the time the facilities manager was putting in. We don't hire out staff for invoices."

[31] The pandemic has had significant impacts on the Respondent. Given the absence of students and staff, there has been a decline in the use of facilities (and therefore the associated entry fees), a drop in membership, fewer and cancelled events, a significant decline in retail revenue and a significant increase in cleaning costs.

[32] COVID-19 particularly impacted the Applicant's job because all capital projects were put into abeyance and there was no certainty regarding when they may recommence. These projects made up the majority of the Applicant's workload. Mr Pryde accepted that the Applicant may have assisted in some other projects but stated that primarily her duties prior to the pandemic involved the fitness centre and water sports facility projects. He stated that prior to the pandemic probably 90 to 95% of the Applicant's time and duties would have been taken up by those projects, but from after the pandemic started, virtually none of it was spent on them because there was nothing to be done. Consequently, the Respondent had to find alternative duties for the Applicant to undertake until she commenced parental leave. These involved updating COVID-19 related documents and undertaking COVID-19 risk assessments.

[33] When the Applicant went on parental leave, a decision was made not to back fill her position because there was simply no work to be done by a person in that position. No discussion occurred about redundancy then because the Applicant was not working and it was hoped that by the time she was due to return, the projects would have restarted and thus the Applicant's role, would be required. That however did not transpire because the projects still have not restarted.

[34] Mr Pryde was regularly reviewing the Respondent's financial position in March 2020 given the impacts of the pandemic. There were several roles – including the Applicant's – which became vacant between June 2020 and July 2021 that were not replaced because of the financial impacts of COVID-19.

[35] In light of these matters, on 21 May 2021, Mr Pryde met with Mr Lance to discuss the future structure of the Facilities Team. The Applicant's position was reviewed given the financial position of the Respondent, the lack of current projects on foot and the uncertainty regarding future projects. In reviewing the Respondent's position, it became clear that the Applicant's position was no longer required to be performed by anyone.

[36] On 12 August 2021, Mr Pryde emailed Mr Toporek and asked that he manage the redundancy of the Project Coordinator role. Mr Pryde's evidence was however that no decision had been made about the redundancy, until about sometime in September when Mr Toporek recommended it after the consultation process had occurred. Mr Pryde then made the final decision to make the Applicant redundant.

[37] In Mr Pryde's mind it was not reasonable for the Respondent inquire about redeployment options within the University.

Anthony Zgrajewski

[38] Mr Zgrajewski is the Associate Director, Governance and Compliance in the Governance and Risk Division of the University. He is a former Secretary of the Respondent and a current Secretary of UQ College Ltd, a subsidiary of UQ Holdings.

[39] His evidence was that to the best of his knowledge and belief, the University nor UQ Holdings have any day-to-day or strategic managerial control over the Respondent or any of the other subsidiaries of UQ Holdings. Each entity has its own strategic plans, operational plans and budgets that are independently developed. The Respondent makes recruitment decisions completely independently of the University. Similarly, it does not have the power or influence over recruitment decisions of the University. His evidence was that, to the best of his knowledge and belief, each of the entities that comprise the UQ Holdings subsidiaries – including the Respondent – have no power or influence over recruitment decisions of each other.

Respondent's submissions

[40] The Respondent points to several factors that prove that the Applicant's dismissal was a genuine redundancy.

[41] First, the Respondent no longer required the role of Project Coordinator to be performed by anyone because of changes in the operational requirements of their enterprise. That is demonstrated by the evidence of Mr Pryde and Mr Toporek, outlined above. Simply put, at the time, the Respondent had no new projects on the horizon and therefore no need for a Project Coordinator. That remained the situation at the time of the hearing.

[42] Second, the Respondent says that the Agreement does not apply to the Applicant and neither does the *Clerks Award*, the *Professional Employees Award*, nor the *Miscellaneous Award*. Consequently, there is no requirement for the Respondent to consult with the Applicant prior to the redundancy occurring. However, even if the Agreement did apply, the Respondent says that the consultation requirement was wholly complied with. That, the Respondent asserts, was demonstrated by the evidence of Mr Toporek who was the one managing the redundancy process. The requirements of clause 4.1 of the Organisational Change Policy were substantially complied with except for providing information to the Applicant in writing after there was an initial meeting on 23 August 2021.

[43] The Respondent further asserts that there was not a requirement to comply with clause 3.1 of the Agreement because that relates to major changes and the definition of major changes refers to changes that affect multiple employees. That was not the case here. Further, clause 10.7 of the Agreement specifically applies to redundancy. While the Respondent submits that the clause does not apply here, even if it did, they say it has been wholly complied with. Alternatively, if it was found to apply and not wholly complied with, the Respondent asserts that substantial compliance is sufficient. To that end, the Respondent referred to *Tyzska v Sun Health Food*.[1]

[44] As to the requirement to offer other employment to the Applicant within UQ Sport, the Respondent says it identified two positions. As evidenced by Mr Toporek, those positions were the only two permanent positions available at UQ Sport at the time of the redundancy. The Applicant declined both. In those circumstances, the Respondent asserts that it would not have been reasonable to redeploy the Applicant within UQ Sport.

[45] With respect to the requirement in s.389(2)(b) to consider whether it was reasonable for the Respondent to redeploy the Applicant in an alternative position within an associated entity of the Respondent, the Respondent submits that in all the circumstances it would not have been reasonable for the Applicant to be redeployed within the enterprise of the University or UQ Holdings or any of the subsidiaries of UQ Holdings. The Respondent submits that evidence shows that UQ Holdings does not have any employees of its own and in relation to the University and the subsidiaries, the Respondent asserts that based on the test laid out in the cases of *Kestrel*[2] and *Ulan (No 2),*[3] it would not have been reasonable for the Applicant to be redeployed within the enterprise. In *Ulan (No 2)* it was held that the degree of managerial integration between different entities is a relevant consideration in redeployment to an associated entity.[4] Similarly, managerial integration redeployment should be considered where an employer is part of a group of associated entities which are all subject to overall management.

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[1] *Hanna Tyszka v Sun Health Foods Pty Ltd* [2010] FWA 1781.

[2] *Stickley v Kestrel Coal Pty Ltd* [2015] FWC 2884.

[3] *Ulan Coal Mines Ltd v Honeysett and Ors* [2010] FWAFB 7578.

[4] *Ulan Coal Mines Ltd v Honeysett and Ors* [2010] FWAFB 7578.

[46] The Respondent submits that the evidence of Mr Pryde and Mr Zgrajewski indicates that the Respondent is not subject to overall managerial control from the University or UQ Holdings. Nor is there managerial integration among those entities. On that basis, making a call to those entities regarding alternative work for the Applicant would not have been reasonable because the Respondent has no power to tell the University or any of the UQ Holdings subsidiaries who to employ.

[47] As to the positions mentioned by the Applicant that may have been available within the University, the Respondent submits that they are simply position descriptions and there is no evidence of the Applicant's suitability for each of those roles. Therefore, even if the Applicant is successful in asserting that a call should have been made to those entities, the Commission is not able to properly consider whether it would be reasonable to have redeployed the Applicant into any of them.

[48] For all those reasons, the Respondent said that s.389 of the Act is satisfied, the Applicant's dismissal was a genuine redundancy and the Commission lacks jurisdiction to hear this application so it ought to be dismissed.

Applicant's evidence

[49] The Applicant provided a wealth of material in support of her application. I have considered it all but have only summarised the key elements of it in this decision.

[50] On 11 July 2019, Mr Lance offered the Applicant the position of Project Coordinator by telephone conversation. On 12 July 2019, she received 'Welcome to UQ Sport' onboarding email. She also received a formal offer of employment, which the Applicant says was silent as to the Agreement. Between 12 July 2019 and 14 July 2019, the Applicant completed the onboarding requirements in 'FlareHR' system and associated training in 'Go1' learning platform set by the Respondent. In the Applicant's onboarding folder was a copy of the Agreement.

[51] On 15 July 2019, the Applicant commenced employment with the Respondent as a Project Coordinator on a full time six-month fixed term basis. On 15 October 2019, the Respondent offered the Applicant full time ongoing employment. Accordingly, on 15 November 2019, the Respondent issued the Applicant with 'Variation to Appointment' effective 1 December 2019, which the Applicant signed and returned on the same date.

[52] On 23 March 2020, the Respondent stood the Applicant down due to COVID-19 Workstation Distancing. On 11 May 2020, the Applicant resumed working under a varied agreement of 51-hours per fortnight following a JobKeeper direction. That agreement was documented, signed and returned by the Applicant on 15 May 2020. On 11 May 2020, the Applicant notified Mr Lance verbally that she was pregnant. On 14 May 2020, the Applicant resumed alternate duties and working location.

[53] On 25 June 2020, the Respondent reduced the Applicant's hours in the week commencing 6 July 2020 to 41 hours a fortnight under the JobKeeper value $1500 per fortnight. That agreement was documented, signed and returned by the Applicant on 3 July 2020.

[54] On 28 July 2020, the Respondent returned the Applicant's hours to a temporary full time 70 hour fortnight for the period of 13 July 2020 to 24 July 2020. That agreement was documented, signed and returned by the Applicant on 28 July 2020.

[55] On 24 August 2020, the Respondent returned the Applicant's hours to 35 hour week (70 hour fortnight) effective same date. That agreement was documented, signed and returned by the Applicant on 1 September 2020.

[56] On 4 September 2020, the Applicant provided the Respondent with written Parental Leave Notification. On 9 September 2020, the Respondent provided the Applicant with confirmation receipt by email. This was followed by a formal letter on 27 September 2020 from Mr Toporek. On 21 November 2020, the Applicant commenced 12 month parental leave period. The Applicant remained on parental leave until 20 August 2021.

[57] During her employment, the Applicant's duties varied from day-to-day and though primarily made up of the Fitness Centre Project and Water Sports Facility Project, were not entirely made of same. She included a detailed list of duties, tasks and key responsibilities completed during her employment, including ordering stationery, assisting the facilities manager to define requirements scope and objectives for smaller projects, creating and maintaining project documentation, plans and reports, ensuring that standards were maintained during the project lifecycle, coordinating the development of draft proposals and business cases, coordinating project meetings with stakeholders (and the associated resources required for same) attending project meetings and taking minutes (and then preparing and distributing them), maintaining computer records and checklists, as well as a range of other tasks. She would organise meetings, prepare and take meeting minutes, provide them to the facilities manager for his review and submission to the Respondent, as well as coordinating and collaborating with the Respondent's various clubs, their presidents, secretaries and collecting data relating to these projects.

[58] During the pandemic, the Applicant's responsibilities varied. With many of her ordinary duties not needed at that time, the Applicant became involved in reviewing, revising and otherwise managing COVID-safe plans and checklists and communicating with venues prior to their final certification and implementation. Over the course of this period, she had several communications with the Respondent's Human Resources Department, representatives of which had referred her to the Agreement, which confirmed her belief that it applied to her.

[59] On 20 August 2021, the Respondent requested that the Applicant attend a meeting to discuss her position. She says that she was not told that she could bring a support person to that meeting. She did acknowledge, though, that when she asked whether she could bring Lucy, Mr Toporek said she could bring anyone. Lucy was the Applicant's newborn for whom she did not have alternative care arrangements at the time. It was agreed that meeting would take place on 23 August 2021. At the meeting, the Applicant was told that her position was being considered for redundancy and this was part of the consultation. The meeting went past in a bit of a "blur" so on 26 August 2021, the Applicant wrote a letter in response to that meeting to the Respondent, seeking to clarify several matters. The contents of that letter were summarised above and are not contested.

[60] On 2 September 2021, the Respondent requested that the Applicant attend a meeting to discuss her position. It was agreed that meeting would take place on 6 September 2021. At the meeting, the Applicant attended with her husband, Mr Toporek and Mr Lance. During the meeting the Respondent offered the Applicant redeployment to positions within the Respondent's business (neither of which were suitable) but did not discuss option to redeploy within the Respondent's associated entities. The Applicant says that she was told that because the Respondent was a separate business and had its own ABN, it was therefore not an associated entity of the University. It is uncontested now though that the Respondent has a number of associated entities, one of which is the University.

[61] On 13 September 2021, the Applicant responded to the proposed redeployment offers clearly outlining the reasons why the positions offered were not suitable and requested consideration of redeployment of positions with an associated entity of the Respondent. She specifically set out a number of roles that were currently being publicly advertised by the University that may be more appropriate.

[62] On 15 September 2021, the Respondent wrote to the Applicant confirming that her role was being made redundant and that payment of her redundancy would be processed that day. The attached letter stated that the Respondent was an autonomous business unit and was not subject to the overall managerial control of the University and had very limited managerial integration with the University. Further the Respondent made recruitment decisions (as did the University) completely independently of one another. That is, the University had no power to influence the Respondent's decision, in the same way that the Respondent could not influence the University. Accordingly, the Respondent was of the view it was precluded from canvassing the redeployment options with the University. It had not considered (nor was it required to) the roles within the University identified by the Applicant for redeployment. That said, the Applicant was welcome to apply for those positions and indeed, was encouraged to do so. The email indicated that she would be paid four weeks' severance, four weeks' notice and her accrued annual leave. The letter concluded by thanking her for contributions to the Respondent and wishing her all the best.

Applicant's submissions

[63] During the initial meeting with the Respondent on 23 August 2021, the Applicant asked if a decision had been made about the continuation of employment and was advised by Mr Toporek that no decision had been made. The Applicant says that the instruction from Mr Pryde to Mr Toporek that he "begin the process of managing the redundancy of the Project Coordinator role" suggests that a decision had already been made.

[64] The Applicant says that the reason for the redundancy were the lack of projects, the University retaining control of project resources and uncertainty about the future. The Applicant submits that the duties she performed as Project Coordinator included additional projects and that aspects of her role would still be required and exist under the normal operations of facilities management in day-to-day activities (eg. maintenance upgrade works), which occur on a repetitive basis. The Applicant also submits that the Respondent is in a stronger financial position compared to previous years because of the reopening of sporting facilities.

[65] The Applicant claims that her dismissal was a case of non-genuine redundancy. She states that is demonstrated by the following factors. First, the decision to make the position redundant had been made prior to undertaking any consultation with the Applicant. Second, the financial position of the Respondent which led to the decision made was known by them a number of months prior to the decision, yet no attempt was made to commence consultation at the earliest possible opportunity. Third, the alternate positions available within the Respondent would have required a career change by the Applicant and were thus not appropriate options for redeployment. Fourth, the Respondent did not attempt to determine whether there were any appropriate positions within the University even though to do so would have been simple – perhaps a single email or phone call – and the Applicant had already identified potentially appropriate roles within the University that were being publicly advertised. Finally, the Applicant asserts that the duties she performed were not limited to the fitness centre and water sports facility projects, with aspects of the role continuing to be required, and the duties associated with that project transferring to the University.

[66] The Applicant submits that the Agreement applied to her employment, though she accepts her letter of agreement dated 12 July 2019 was silent as to its application. As such, the Applicant asserts that her employment offer did not exclude the operation of the Agreement. Further, she says that signing the letter of agreement did not mean that she was not covered by an award or the Agreement.

[67] The Applicant further submits that the Agreement can be applied to the position of Project Coordinator, because the coverage clause does not exclude the position and schedule 2 includes the position of Office Administrator under the Clerks Award Level 2-3, which she says is like her own, as well as other coordinator roles. The Applicant says that had the Agreement not applied to her, she would be considered within the ambit of the Clerks Award because her duties as project coordinator were largely administrative in nature. Additionally, the Applicant argues that the classification structure defined by the Australian Bureau of Statistics identifies Project Coordinator as 'Clerical and Administrative Workers' which supports her contention that she could be covered by the Clerks Award. The Applicant conceded in her submissions that the Miscellaneous Award and the Professional Employees Award does not apply or did not apply to her employment.

[68] The Applicant submits she was treated by the Respondent at all times during her employment as though the Agreement was applicable to her employment, including but not limited to, direct email communication from the Respondent, which referred the Applicant to the Agreement. The correspondence pointed out the reduced operation section within the Agreement. On that basis, the Applicant asserts that the Respondent itself treated her as if she was covered by the Agreement.

[69] The Applicant says another example of this was her salary increase. The Applicant says that the Agreement refers to a salary increase effective from 1 January 2020. If she had simply been a common law contract employee, she says the salary increase would not have applied to her, as it was a benefit that only applied to the Agreement covered employees.

[70] Further the Applicant asserts that the Respondent did not comply with the terms of the agreement as it relates to redundancy and consultation requirements. She says that consultation regarding the redundancy was not "as soon as practicable after making its decision". A review of the Project Coordinator role was commenced on 21 May 2021; however, the Applicant was not informed of the fact that Respondent was considering a redundancy until much later.

[71] Similarly, while the Applicant was on parental leave her position was not backfilled due to the reduced need and funding issues faced by the Respondent at the time. She was not consulted about this. The Applicant says the Respondent had 18 months to communicate with her about the financial impacts of the pandemic on her position, but they did not do so until August.

[72] The Applicant states that the Respondent had denied her of right to a representative in the initial meeting on 23 August 2021 and would only allow the Applicant's husband to appear as a support (rather than advocate her behalf) at the meeting on 6 September 2021. She says that accordingly the Respondent has not provided proper opportunity for the Applicant to participate in the redundancy consultation process and has denied her right to a proper process as ought be afforded in a genuine redundancy.

Redeployment

[73] The Applicant contends that it was reasonable to expect that the Respondent would canvass the availability of alternate employment from an associated entity, namely the University.

[74] The Applicant points to the decision of *Aldred v Hutchinson Pty Ltd* in which it was held to be reasonable to expect Hutchinson Pty Ltd to canvass the availability of roles within the entity nationwide.[5] There it was stated that:

> "To artificially limit enquiries concerning redeployment opportunities within the Respondent's enterprise to the Victorian division was inherently unjust, having regard to the nature of the employer's enterprise as a large national construction business."[6]

[75] The Applicant said that in this case it would have been entirely reasonable to expect that the Respondent would canvas or facilitate an investigation into roles that may be available employment options within the University. The Applicant says could have been as simple as making a phone call or sending an email. She says that given that she was able to identify reasonable employment opportunities within the University using publicly available information, it would be entirely reasonable to expect that the Respondent would undertake that single call or email. That is particularly so, the Applicant says, in circumstances where she understands that the Respondent contacted the University regarding its submissions and evidence in these proceedings.

[76] The Respondent raised *Kestrel* in support of its position. There, the Commission found it was not reasonable for the Applicant to be redeployed within the Rio Tinto Coal Australia Group as it was demonstrated that there were no positions that the Applicant could have reasonably been redeployed into. The Applicant says that case may be distinguished because here the Respondent did not acknowledge the positions presented to it by the Applicant during the consultation process and the Commission should keep that in mind when considering the reasonableness of the Respondent's actions.

[77] At the meeting on 23 August 2021, the Respondent provided reasons as to why they were making the position redundant but did not explain the actions the Respondent was taking

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[5] *Aldred v Hutchinson Pty Ltd* [2012] FWA 8289.

[6] *Aldred v Hutchinson Pty Ltd* [2012] FWA 8289.

to mitigate the effect on the possibility of redundancy as per the Agreement. The Applicant submits that the decision had already been made to make her redundant, given that Mr Toporek had been asked to "begin the process of managing the redundancy of the Project Coordinator role".

Consideration

[78] There are a number of issues that I must consider under s.389 of the Act.

[79] First, whether the Respondent no longer required the Applicant's job to be performed by anyone because of changes in the Respondent's operational requirements.[7] Based on the evidence presented, it is clear that the pandemic had severe consequences for the Respondent's operations. With fewer students and staff attending the campus, there was a significant reduction in income but increased expenditure with respect to cleaning. The University put a number of its capital projects into abeyance, which meant that there was no work to be done in respect of same by the Respondent. While I accept that some aspects of the Applicant's role may still have needed to be done, I accept the Respondent's overwhelming evidence which indicated that there was no longer a need for anyone to perform the role of Project Coordinator because there were no major projects to coordinate. Indeed, the Respondent had not required anyone in the Applicant's role during the entirety of her parental leave. Based on the evidence before me, I am satisfied that the Applicant's position was no longer required to be performed by anyone because of changes in the operational requirements of its business.

[80] The Applicant complained about the Respondent's failure to backfill her position as if their failure to do so contributed to her redundancy. I do not think that is the case. It seems, based on the evidence, that at the time the Applicant went on parental leave there was no need for anyone to step into her position. However, the Respondent did not then act to make her position redundant because it was hopeful that by the time the Applicant returned from parental leave, the capital projects would have restarted, and her position would therefore be needed. Unfortunately, that did not occur. The Respondent was simply doing the best it could in an unprecedented and unpredictable situation.

[81] Second, whether the Applicant's employment was regulated by the Agreement or a Modern Award.[8] The Applicant's role was not listed in Schedule 2 of the Agreement, nor was the Agreement listed as being applicable in her employment contract. While I accept that the Agreement being in her onboarding file may have led to some confusion, particularly when coupled with the Respondent's Human Resources personnel referring the Applicant to it, neither of those occurrences could incorporate the Agreement into the Applicant's employment where her contract did not do so. I am satisfied that her employment was not subject to the Agreement.

[82] Turning now to the application of the Clerks Award, I must determine whether the Applicant was "wholly or principally engaged in clerical work". While I accept that her role did have clerical components to it – she organised meetings, typed meeting minutes and made corrections to same, ordered stationery, created and maintained project documentation, coordinated draft proposals and business cases– the evidence before me suggests that result the vast majority of the tasks that were being undertaken by the Applicant, even when she was

[7] *Fair Work Act 2009* (Cth) s.389(1)(a).

[8] *Fair Work Act 2009* (Cth) s.389(1)(b).

performing the alternate duties after the COVID pandemic started, could not be considered clerical work. The other roles she performed ordinarily included maintaining computer based records management systems, assisting Mr Lance to manage internal and external stakeholders, identifying and extracting information from internal and external sources, compiling design review checklists, collating, dissecting, analysing project information to be presented to Mr Lance for review and included within the project documentation before submission to the University, preparing business case submission documentation and assisting in a number of projects. Then once COVID-19 struck, the Applicant became responsible for reviewing and considering changes with Queensland COVID Safe industry plans to be implemented in plan revisions, preparing visions of the Respondents COVID Safe management plans and applying the COVID Safe checklist, as well as editing document editing, resetting new templates and communicating to venues for review prior to Operations Manager sign-off for release and implementation in accordance with WHS.

[83] I am satisfied that a true and wholistic assessment of the nature of the Applicant's work reveals that the principal purpose of the Applicant's employment was not clerical work.[9] Accordingly, I am satisfied that she was not covered by the Clerks Award.

[84] The Applicant did not press her initial submission that the Miscellaneous Award and the Professional Employees Award applied to her employment, and the Respondent agreed that they did not. I need not consider their application in my reasons.

[85] For those reasons, I am not satisfied that the Applicant's employment was covered by a modern Award or the Agreement. If, however, I am wrong in that conclusion, I will for completeness turn to whether the Respondent complied with any consultation obligations.

[86] Clause 10.7 of the Agreement provided for the consultation required where an employee was being made redundant in the following terms:

> "10.7.1 Where the Employer has made a definite decision that the Employer no longer wishes the job an employee has been doing to be done by anyone and this is not due to the ordinary and customary turnover of labour and that decision may lead to termination of employment, the Employer shall consult the Employee directly affected and where relevant, a representative of their choosing.
>
> 10.7.2 The consultation will take place as soon as practicable after the decision has been made and shall cover the reasons for the proposed termination(s) and measures to avoid or minimise the termination(s) and/or their adverse effects on the Employee(s) concerned."

[87] Contrary to the Applicant's submission, I am satisfied that – if one is to consider the Agreement – it is this is clause one must consider with respect to the consultation required when an employee's is being considered for redundancy.

[88] The Respondent's Organisation Change Policy provides that as soon as practicable after a need for a significant change (including redundancy) is identified, the Respondent will provide in writing to the impacted employee all relevant information about the change, information about the expected effects of the change on the employee and support cope with

[9] *McMenemy v Thomas Duryea Consulting Pty Ltd T/A Thomas Duryea Consulting* [2012] FWAFB 7184.

the change effectively. It was accepted by the Respondent that the requirement that the information be given in writing was overlooked on this occasion.

[89] I am satisfied that based on the evidence given by Mr Pryde and Mr Toporek, that the Applicant was informed as soon as the decision was being contemplated about her position being made redundant. I understand that the Respondent had not embarked on those discussions when the Applicant first went on parental leave – despite the difficult financial position that the Respondent found itself in at that time – because there was some hope that by the time she was ready to return they would need someone to resume in her position. Unfortunately, that did not eventuate and so a review was conducted, and conversations had, about making her position redundant. I am satisfied that it was not until early September that Mr Pryde made the final decision to make the Applicant's position redundant based on advice from Mr Toporek. The Applicant never formally made the application for an extension of parental leave. The consultation process began as early as 23 August 2021. While the Respondent did not comply with the requirement to put all the details in writing in accordance with the Operational Change Policy, I do accept that it substantially complied with the consultation requirement.

[90] On that basis, I am satisfied that even if the consultation requirements in the Agreement or the Respondent's Organisational Change Policy applied, they were substantially met by the Respondent. The Applicant was informed of the possibility of her position being made redundant and the reasons why, offered an opportunity to respond and to consider the only other permanent positions presently available within the Respondent's enterprise. It was not until after the Applicant rejected those roles – which all involved appreciated were not particularly appropriate for her – a decision was made to make her redundant.

[91] The fourth and final issue I must consider is whether it would have been reasonable in all the circumstances for the Applicant to be redeployed within the enterprise of the Respondent's associated entities.[10]

[92] The Applicant postulated that the Respondent should have formally identified any available positions with the University and given her the opportunity to transfer directly into them. The University had a number of vacant roles, though without more information I cannot finally determine whether the Applicant would have been suitable for them. Regardless, I am not satisfied that it would have been reasonable to require the Respondent to embark upon that process. The Respondent and the University have separate management and different strategic objectives. They have their own objectives, strategic plans and operations. The Respondent's human resources department and recruitment function run entirely separately from its associated entities, and it has no influence with respect to personnel decisions. Thus, while the Respondent may support the overall purpose of the University, there is a lack of integration with respect to the management, control and operations of the entities.

[93] The Applicant is one employee, but the Respondent has many employees, as does the University. It would be unreasonable to expect each of the associated entities to consult for every employee whose role were being considered for a redundancy.

[94] The Applicant proved that she was able to search for roles within the Respondent's associated entities. Indeed, she identified some that she thought might be appropriate. There was nothing from stopping her for applying for those roles and asking her current employer to

[10] *Fair Work Act 2009* (Cth) s.389(2)(b).

support that application. However, I consider that to require the Respondent to formally offer to transfer her to a role within an entity over which it had no control would be unreasonable.

[95] Therefore, having regard to the authorities,[11] while it may not have been inappropriate for the Respondent to reach out to its associated entities, it would not have been reasonable to expect them to do so. In other words, having considered all the circumstances, I am not satisfied that it would have been reasonable for the Applicant to be redeployed – as part of the redundancy process – within the University or UQ Holdings and the Respondent was not obliged to canvass the University or UQ Holdings (or its other subsidiaries) for redeployment opportunities. She was, however, free to apply for those roles herself.

[96] For the reasons stated above, I am satisfied that the termination of the Applicant's employment was a genuine redundancy in accordance with s.389 of the Act and that appropriate consultation was undertaken in relation to the redundancy. I find that that jurisdictional objection is upheld and that the Applicant was not unfairly dismissed.

[97] Accordingly, I order that the Applicant's application be dismissed.

DEPUTY PRESIDENT

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[11] *Stickley v Kestrel Coal Pty Ltd* [2015] FWC 2884 (*Kestrel*); *Roy v SNC-Lavalin Australia Pty Ltd* [2013] FWC 7309; *Ulan Coal Mines Ltd v Honeysett and Ors* [2010] FWAFB 7578.