DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Nicholas Georgiou
v
Wingman Solutions Pty Ltd
(U2022/10146)

DEPUTY PRESIDENT LAKE BRISBANE, 30 MARCH 2023

Application for unfair dismissal remedy – whether an employee and whether a genuine redundancy – found to be an employee and a genuine redundancy – application dismissed.

[1] Mr Nicholas Georgiou (**the Applicant**) has made an application under s.394 of the *Fair Work Act 2009* (**the Act**) for an unfair dismissal remedy in respect of his dismissal by Wingman Solutions Pty Ltd (**the Respondent**). The application was made on 18 October 2022.

[2] In the Applicant's Form F2, he states he held the role of the Chief Financial Officer (**CFO**) with the Respondent on a full-time basis from 30 August 2021 until his dismissal on 27 September 2022. The Applicant states he was made redundant from his role.

[3] The Respondent raised a jurisdictional objection that the Applicant was not a person protected from unfair dismissal as he was a sub-contractor, not an employee. The matter was listed for conciliation but did not proceed as the Respondent determined that he was not prepared to participate in a conciliation. The matter was then allocated to me for determination. I issued Directions for filing of material and listed the matter for a Hearing.

[4] The Hearing was held on 14 February 2023 via Microsoft Teams. The Applicant gave evidence on his own behalf. Mr Tyler Abdyukov (Call Manager) and Ms Dana Aiolupotea (Training Manager) appeared and gave evidence on behalf of the Respondent. Mr Tony Hodder lodged the Form F3 as the initial contact for the Respondent. He did not attend or provide evidence.

[5] I have considered all the evidence and submissions for determination on whether the Applicant was an employee and whether the dismissal can be classified as a genuine redundancy within the meaning of the Act. I am satisfied that the Applicant was an employee of the Respondent, and that his dismissal had arisen from genuine redundancy. I provide the reasons below.

LEGISLATION

[6] Section 390(1) of the Act sets out the circumstances in which the Commission may grant a remedy by way of reinstatement or compensation for unfair dismissal. It provides:

> ***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).'*

[7] However, s.396 of the Act sets out a number of matters which the Commission must consider before turning to the merits of an unfair dismissal application. It provides:

> ***396 Initial matters to be considered before merits***
>
> *The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:*
>
> *1. whether the application was made within the period required in subsection 394(2);*
>
> ***2. whether the person was protected from unfair dismissal;***
>
> *3. whether the dismissal was consistent with the Small Business Fair Dismissal Code;*
>
> **4. *whether the dismissal was a case of genuine redundancy.***

[8] As is made clear from the above provisions of the Act, I must first determine whether the Applicant is an employee and then determine whether the termination of the Applicant was a genuine redundancy before considering the merits of the application.

[9] Section 386 of the Act defined the meaning of dismissed as follows:

> *(1) A person has been **dismissed** if:*
>
> (a) *the person's employment with his or her employer has been terminated on the employer's initiative; or*
> (b) *the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.*

*(2) However, a person **has not been dismissed** if:*

*(a) the person was employed under a **contract of employment for a specified period of time, for a specified task, or for the duration of a specified season**, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season;*

(b) the person was an employee:

(i) to whom a training arrangement applied; and

(ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

and the employment has terminated at the end of the training arrangement; or

(c) the person was demoted in employment but:

(i) the demotion does not involve a significant reduction in his or her remuneration or duties; and

(ii) he or she remains employed with the employer that effected the demotion.

[10] Section 389 of the Act defines genuine redundancy for the purposes of s.396 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.

EVIDENCE

Applicant's submissions and evidence

[11] The Applicant submits that he was employed as CFO for the Respondent from 30 August 2021 and the particulars of the employment contract was executed by Mr Hodder and witnessed by Ms Shelly Hodder. The employment contract stated that the Applicant was employed on permanent full-time basis.

[12] The Applicant states that he was made redundant on 27 September 2022. He states that he was first advised that his position was being made redundant through email from Mr Hodder on the same date. Mr Hodder raised issues with the Applicant's performance and stated that a consultant recommended that the Applicant's position be outsourced. The Applicant states he was provided with a Deed of Release on 13 September 2022 which ceased his employment with the Respondent.

[13] The Applicant does not contest that he was made redundant. He seeks a redundancy payment of four weeks, annual leave, loading, and unpaid wages. The Applicant submits that he is owed the four weeks by reference to an email from Mr Hodder dated 30 September 2022 which was agreed to with Employsure. The Applicant did not provide evidence of the unpaid wages.

[14] The Applicant also sought unpaid entitlements including tax withheld for the 2022 and 2023 Financial Year. The amount sought was $16,203.00 which was tax withheld in 2022 and $4,644.00 for the tax withheld in 2023. The Applicant also sought unpaid accrued superannuation of $6,112.42 for the 2022 Financial Year and $1,837.00 for the 2023 Financial Year. The Applicant provided income statements and final pay slip in support of this claim.

[15] In summary, the Applicant asserts he was an employee of the Respondent and that the Respondent has not paid the correct entitlements. The Applicant is seeking compensation as he was unfairly terminated without payment.

Respondent's submissions and evidence

[16] The Respondent submits that their core business is to provide support services, including automated business systems, RTO training, NDIS approved support and personal development and performance coaching, to care industries.

[17] Mr Hodder asserts that the application is baseless as the Applicant failed to fulfil his duties to set up business operations and secure funding for growth. The Applicant was tasked with bookkeeping and producing reports. The Respondent states that the failure to fulfil these duties had led to significant issues for the company once their technology was rolled out. Furthermore, the Applicant engaged in misconduct by hiring his girlfriend and paid her for two months despite cash flow issues without advising or consulting Mr Hodder of her employment. Mr Hodder provided email correspondence between himself and the Applicant in support of the claim.

[18] Mr Hodder did not attend the hearing and did not provide any further evidence that could assist the Commission. Mr Abdyukov and Ms Aiolupotea attended as representatives for the Respondent. Both were present to answer questions regarding the emails provided by Mr Hodder, but neither were involved in the Applicant's dismissal.

[19] The Respondent stated that there was no genuine redundancy as start-up companies of their size do not offer redundancy and is uncertain how redundancy can be owed to the Applicant. The Respondent does not contest it is a small business stating that they had

approximately twenty employees and did not clarify which of these employees were permanent or causal employees.

CONSIDERATION

Is the Applicant a sub-contractor or employee?

[20] I will first consider whether the Applicant was an employee of the Respondent in considering whether he is a person protected from unfair dismissal per s396(b) of the Act.

[21] In *ZG Operations Australia Pty Ltd v Jamsek*[1] and *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*,[2] the High Court emphasised the central importance of the contract between the parties in ascertaining the existence and nature of any relationship between them. When characterising a relationship regulated by a wholly written, comprehensive contract which is not a sham or otherwise ineffective, the question is to be determined solely by reference to the rights and obligations under that contract. It is not permissible to examine or review the performance of the contract or the course of dealings between the parties.[3] However where there is no written contract, in the determination of whether the relationship was one of employment or otherwise, it is necessary to identify by way of inference from the dealings between the parties what the terms of that contract were.[4]

[22] The Respondent submits that the Applicant was hired as a sub-contractor and that the employment contract was not valid. The Respondent states that he did not sign it rather his wife signed it and added his name later. It is a well-established principle from *L' Estrange v F Graucob Ltd [1934] 2 KB 394* to *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165* that a party who signs the contract is bound in the absence of fraud.

> *"It is not the subjective belief or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe."*[5]
>
> *"[w]hen a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."*[6]

[23] In this matter, the Applicant provided an employment contract that had been signed by the Respondent and witnessed which stated that the Applicant was a full-time employee.

[24] The Agreement between the Respondent and the Applicant appear to be one of an employment relationship. The first page of the Agreement states '*Employment Agreement'.* Furthermore, in the Recitals, the Respondent states themselves to be an employer and states Mr Georgiou to be an employee. Furthermore, in clause 5 of the Employment Agreement, it states that *'the employee is to carry out all reasonable instructions and to undertake any work reasonably required by the employer.'* The wording of the duties provided by this contract appears to be one of an employee-employer arrangement rather than one of a sub-contractor.

[25] I am satisfied that the wording of the agreement indicates Applicant was engaged as an employee of the Respondent on a full-time basis.

Genuine redundancy

[26] Although the Respondent conceded the jurisdictional objection regarding genuine redundancy, I am required to consider whether there is a genuine redundancy per s.396(d) if the Act as an initial matter before considering the merits. In so doing, I must consider the criteria under s.389 of the Act.

1. Did the Applicant's employer no longer require the Applicant's job to be performed by anyone because of operational requirements of the employer's enterprise?

[27] In considering a whether there has been a reorganisation or redistribution of duties, it is pertinent to consider whether the employee has any duties left to discharge.[7] Where there is no longer any function or duty to be performed by an employee, his or her position becomes redundant even where aspects of that employee's duties are still being performed by other employees.[8]

[28] Hamberger SDP considered this issue in *Kekeris v A. Hartrodt Australia Pty Ltd T/A a.hartrodt*[9] and established that the test is whether the previous job has survived the restructure or downsizing, rather than a question as to whether the duties have survived in some form. In *Ulan Coal Mines Limited v Howarth and others* [2010] FWAFB 3488, the Full Bench considered and applied the decision of Ryan J in *Jones v Department of Energy and Minerals* (1995) 60 IR 304 and said:

> *[17] It is noted that the reference in the statutory expression is to a person's "job" no longer being required to be performed. As Ryan J observed in Jones v Department of Energy and Minerals (1995) 60 IR 304 a job involves "a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employees' organisation, to a particular employee" (at p. 308). His Honour in that case considered a set of circumstances where an employer might rearrange the organisational structure by breaking up the collection of functions, duties and responsibilities attached to a single position and distributing them among the holders of other positions, including newly-created positions. In these circumstances, it was said that:*
>
> > *"What is critical for the purpose of identifying a redundancy is whether the holder of the former position has, after the re-organisation, any duties left to discharge. If there is no longer any function or duty to be performed by that person, his or her position becomes redundant…" (at p.308)"*
>
> *This does not mean that if any aspect of the employee's duties is still to be performed by somebody, he or she cannot be redundant (see Dibb v Commissioner of Taxation (2004) FCR 388 at 404-405). The examples given in the Explanatory Memorandum illustrate circumstances where tasks and duties of a particular employee continue to be performed by other employees but nevertheless the "job" of that employee no longer exists.*

[29] 'Operational requirements' is a broad term which encompasses present performance of the business, the state of the market in which the business operates, steps that may be taken to improve efficiency by installing new processes, equipment or skills, or by arranging labour to be used more productively and the application of good management to the business.

[30] The email dated 13 September 2022 states that a decision had been made to make the Applicant's position redundant. The email states:

> '*Hi, Nick,*
>
> ***I have to move all duties over to Traks asap please and retire your position because we have no gauge on where we are within our financial services****. Cashflow position Is not just based upon what we can and can't afford, it's also about understanding what clarity and communication we have between our services and others, and how we support each department within the construction of the business opportunities and development of those opportunities as well as build our team. I asked Eric to support you to help you as he had the experience if needed to support you but also allow us to see our position, but you haven't taken that support and expertise and we have discovered that lost some of these opportunities.*
>
> .....
>
> *We are out of time, a few months back an experience CFO came in support of you due to your lack of experience at the same time he provided us feedback on your understanding and position, and his recommendation to us, was that he views your position was part-time at best if that and your position should be outsourced to save costs, he understood what we were trying to do within the business model, but view the biggest cost savings would be your position at this time, we took his advice on board and decided to continue to support you, and allow you to grow by giving you more time at our costs, but we have no reflection of your work and you absent just continue to get worse that has had a major impact on the business,* ***so we have no confidence or choice to support this role anymore, and need you to support this transition to Traks by Monday 19th September please to retire this position.***
> *You're sincere.*
>
> (emphasis added)

[31] The Respondent used the words 'retire the position' and their intention to outsource the role to Traks indicates the Applicant was intended to be made redundant by the Respondent. The Applicant was notified about his role no longer being existent within the organisation on 13 September 2022 and that the decision was effective from 19 September 2022. I find that there is a sufficient basis that the Applicant was made redundant as his role was outsourced.

2. <u>Did the Respondent comply with any obligations in a modern award or enterprise agreement that applied to the employment to consult about redundancy?</u>

[32] The obligation on an employer to consult about redundancy only arises when a modern award or enterprise agreement applies to an employee and that modern award or enterprise

agreement contains requirements to consult about redundancy. There is no legislative requirement to consult about the redundancy before a decision is made to make an employee redundant.

[33] There is no applicable enterprise agreement. The Applicant was consulted regarding his position in becoming redundant and there were no redeployment opportunities available under an applicable Award which would require the Respondent to offer him a different position within the Company as his role was specialised and no longer required.

3. Was it 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?

[34] The Respondent's business was a small start-up with approximately 20 people employed. The role of the Applicant was specialised and there was no opportunity for him to be redeployed.

[35] I am satisfied that redeployment was not available in this instance and the employer had fulfilled their obligations under s.389(2).

CONCLUSION

[36] I am satisfied that the Applicant was an employee of the Respondent, and the dismissal was a genuine redundancy under s.389 of the Act. The Applicant was aware that the Commission would be unable to grant the relief he was seeking. The jurisdictional objection of genuine redundancy is upheld and I order this Application to be dismissed.

DEPUTY PRESIDENT

Appearances:
N. Georgiou for the Applicant
T. Abdyukov and D. Aiolupotea for the Respondent

Hearing details:

14 February 2023 via Microsoft Teams
Brisbane

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[1] [2022] HCA 2.

[2] [2022] HCA 1, 398 ALR 404, 312 IR 1 (Personnel Contracting).

[3] *Personnel Contracting* at [40]-[62] per Kiefel CJ, Keane and Edelman JJ; [172]-[178] per Gordon J; [203] per Steward J.

[4] *Chambers and O'Brien v Broadway Homes Pty Ltd t/a Broadway Homes* [2022] FWCFB 129 at [91]; *Personnel Contracting* at [42] and [54] per Kiefel CJ, Keane and Edelman JJ; [177]-[178], [188]-[190] per Gordon J.

[5] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 40 (Gummow CJ, Gummow, Hayne, Callinan and Heydon JJ).

[6] Ibid at 46.

[7] *Jones v Department of Energy and Minerals* [1995] IRCA 292 (16 June 1995), [(1995) 60 IR 304 at p. 308 (Ryan J)]; cited with approval in *Ulan Coal Mines Limited v Howarth and others* [2010] FWAFB 3488 (Boulton J, Drake SDP, McKenna C, 10 May 2010) at para. 17, [(2010) 196 IR 32].

[8] Ibid.

[9] [2010] FWA 674.