DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Carmen Houdayed
v
David Jones
(U2024/1791)

Saud Abu-Samen
v
David Jones Pty Ltd
(U2024/1801)

Antoinette Grixti
v
David Jones Pty Ltd
(U2024/1808)

Helena Nesci
v
David Jones Pty Ltd
(U2024/1812)

COMMISSIONER CRAWFORD SYDNEY, 7 JUNE 2024

Applications for an unfair dismissal remedy – jurisdictional objections – genuine redundancy – three dismissals were genuine redundancies – one dismissal not a genuine redundancy – redeployment reasonable – three applications dismissed – one jurisdictional objection dismissed

Background

[1] On 27 January 2024, David Jones Pty Ltd (**David Jones)** terminated the employment of the following employees on the ground of redundancy:

- Carmen Houdayed (**Ms Houdayed**)
- Saud Abu-Samen (**Mr Abu-Samen**)
- Antoinette Grixti (**Ms Grixti)**
- Helena Nesci (**Ms Nesci**)

collectively, the **Applicants**.

[2] The Applicants were all engaged at David Jones' Burwood store prior to their dismissals. The Applicants held the following part-time positions prior to their dismissals:

- Ms Houdayed: Customer Service Centre – part of Homewares department.
- Mr Abu-Samen: Sales Expert – Homewares department.
- Ms Grixti: Customer Service Assistant – Homewares department.
- Ms Nesci: Sales Professional – Accessories and Handbags.

[3] The terminations arose following a decision to refurbish the Burwood store, which is in a Westfield complex. Prior to the refurbishment, David Jones operated its store on three levels of the complex. The effect of the refurbishment is that the store will only operate on one level while the other two levels are being refurbished, and ultimately only on the two refurbished levels once the work is completed.

[4] The Applicants filed unfair dismissal applications on 19 February 2024. David Jones filed Form F3 employer responses for all the applications on 29 February 2024. All employer responses identified a jurisdictional objection on the ground that each dismissal was a case of "genuine redundancy."

[5] During a Mention/Directions proceeding on 15 March 2024, the parties agreed to the following matters:

- David Jones' jurisdictional objections would be heard and determined as a first step in relation to all applications.

- All four applications would be dealt with together as a matter of efficiency. I note there were initially five applications, but one matter was discontinued prior to the determinative conferences.

- The jurisdictional objections would be listed for determinative conference via video, largely because four of the five applicants were self-represented. This later became four of the four applicants being self-represented after the other application was discontinued.

[6] I issued directions for the filing of material regarding David Jones' jurisdictional objections and listed a determinative conference for 8 May 2024.

[7] On 5 April 2024, David Jones filed a submission in support of a request to be legally represented at the determinative conference on 8 May 2024. On 29 April 2024, the Applicants filed a joint submission which opposed permission being granted to David Jones to be legally represented.

[8] At the beginning of the determinative conference on 8 May 2024, I heard further submissions from the parties regarding whether I should grant permission for David Jones to be legally represented. In accordance with its written submissions, David Jones argued granting permission would enable the matter to be dealt with more efficiently, given its complexity.

David Jones also pointed to a lack of suitable internal employees to advocate on its behalf. The Applicants referred to the size of David Jones and its substantial internal resources. The Applicants also raised concern they would be prejudiced if permission is granted to David Jones, given they are representing themselves. Having heard the parties, I decided to grant permission for David Jones to be legally represented. I was satisfied granting permission would enable the matter to be dealt with more efficiently, taking into account its complexity. I was conscious that there are procedural difficulties associated with hearing various applications together and that having assistance from a lawyer would be likely to expedite the process. In addition, there are some complexities associated with the meaning of "genuine redundancy" in s.389 of the FW Act, as highlighted by the recent Full Federal Court judgment in *Helensburgh Coal Pty Ltd v Bartley* [2024] FCAFC 45 (***Helensburgh Coal***) concerning the reasonable redeployment exclusion in s.389(2).

[9] Although the Applicants represented themselves at the determinative conference, Mr Abu-Samen helpfully took a lead role. David Jones was represented by Mr Mollison from Lander & Rogers.

[10] Given it was David Jones' jurisdictional objection, the David Jones witnesses gave evidence first and were cross-examined by the Applicants. That process was quite lengthy and took most of the day on 8 May 2024. As a result, the parties agreed it would be necessary to convene a further determinative conference to hear evidence from the Applicants and closing submissions.

[11] In addition, Mr Abu-Salem made a request for David Jones to produce business records regarding the use of casual employees at the Burwood store around the time of the dismissals and afterwards. The request was made as part of an argument that David Jones was engaging casual employees to perform the work previously performed by the Applicants. I raised the prospect of an order to produce documents being issued to gather this evidence, which I considered was clearly relevant to the matters I needed to determine. Ultimately, that was not required because David Jones agreed to file workforce data attached to an explanatory additional witness statement ahead of the further determinative conference. David Jones filed this material in accordance with its commitment.

[12] The further determinative conference was held via video on 16 May 2024. The Applicants continued representing themselves and Mr Mollison continued representing David Jones.

Material filed

David Jones

[13] David Jones relied on the following evidence in support of its jurisdictional objections:

- A witness statement from Nadia Kemister (Regional Manager – NSW & ACT) dated 5 April 2024. Ms Kemister's statement contained evidence about the process followed by David Jones in relation to the refurbishment and dismissals. Ms Kemister's statement had the following annexures attached:

- NK-1: A document headed "Burwood Network Strategy Update" dated October 2023. This document provides guidance to leaders for conversations with team members about the refurbishment process. The document refers to a first stage from January 2024 to November 2024 where David Jones will only operate on level two of the building, while the ground level and first level are refurbished. Once the refurbishment is completed in around November 2024, David Jones will open on the ground floor and level one, and it will then hand back the level two space. The document refers to employees being redeployed from January 2024.

- NK-2: This document contains a bar code for employees to scan to complete a "Burwood Team Member Preference Survey" (**Preference Survey**). The document states the survey will be open from 17 to 26 November 2023.

- NK-3: A copy of a document that contains the information sought from employees in the Preference Survey.

- NK-4: An example of the letter that was given to affected employees, including the Applicants, on 4 January 2024. The letter communicated that the relevant position at the Burwood store is no longer required. The letter attached a list of vacant positions that employees could apply for and states their employment will end on 27 January 2024 if they cannot be redeployed. Indicative termination payment calculations, including redundancy payments, were provided. Details of EAP and outplacement services were also provided.

- NK-5: An example of the letter that was given to affected employees, including the Applicants, on 23 January 2024. The letter confirmed that the employee's employment would end on 27 January 2024 by reason of redundancy.

I marked Ms Kemister's statement **Exhibit R1**.

- A second witness statement from Ms Kemister dated 3 May 2024. The second statement responds to evidence raised in statements filed by the Applicants and had the following annexures attached:

  - NK-6: A copy of a letter from Ms Kemister to Ms Nesci dated 4 January 2024. The letter notifies Ms Nesci that her position as Sales Professional is no longer required and referred to a list of vacant roles that Ms Nesci could apply for.

  - NK-7: A copy of a letter from Ms Kemister to Ms Nesci dated 23 January 2024. The letter confirms Ms Nesci was unsuccessful in her application for redeployment and that her employment will terminate by reason of redundancy on 27 January 2024.

  I marked Ms Kemister's second statement **Exhibit R2**.

- A witness statement from Hannah Neill (Human Resources Business Partner – NSW South) dated 5 April 2024. Ms Neill's statement contained evidence about the

redundancy process and about each of the Applicants. Ms Neill's statement had the following annexures attached:

- HN-1: An email from Kate Bergin (Director Omnichannel) to all staff sent on 16 November 2023 regarding refurbishments at five David Jones stores, including Burwood.

- HN-2: A copy of a letter from Marita Grech (Senior ER) to a Shop, Distributive and Allied Employees Association (**SDA**) official dated 25 October 2023. The letter provides the SDA with notice of the refurbishment at the Burwood store and identifies the number of employees likely to be affected.

- HN-3: An extract of consultation provisions from the *David Jones Enterprise Agreement 2018*.

- HN-4: These documents concern the employee whose application was discontinued before the determinative conference.

- HN-5: A copy of an email, redundancy letter, and statement of service provided to Ms Nesci on 23 January 2024.

I marked Ms Neill's statement **Exhibit R3**.

- A second witness statement from Ms Neill dated 3 May 2024. The second statement responds to evidence raised in statements filed by the Applicants and had three documents attached. However, the documents all related to the former employee whose application was discontinued before the determinative conference. I marked Ms Neill's second statement **Exhibit R4**.

- A witness statement from Sabina Keranovic (Burwood Store Manager) dated 3 May 2024. Ms Keranovic's statement included evidence about a Skills and Capabilities Assessment (**Skills and Caps Assessment**) that was used to determine the suitability of Burwood team members for alternative roles. Ms Keranovic's statement had the following annexure attached:

  - SK-1: A copy of the final Skills and Caps Assessment spreadsheet.

  I marked Ms Keranovic's statement **Exhibit R5**.

- A witness statement from Andrew Williams (Assistant Store Manager – formerly at Burwood and currently at Parramatta). Mr Williams' statement provided evidence about his involvement in meetings at the Burwood store on 3 January 2024 and his previous experience working with the Applicants. I marked Mr Williams' statement **Exhibit R6**.

- A third statement from Ms Kemister dated 14 May 2024. The statement was filed after the first determinative conference to provide additional evidence about the use

of casual employees at the Burwood store. The third statement had the following annexure attached:

- NK-8: A document providing details about the hours worked by full-time, part-time, and casual employees at the Burwood store, and David Jones stores across Australia, from October 2023 to April 2024.

I marked Ms Kemister's third statement **Exhibit R7**.

[14] All the David Jones witnesses were cross-examined on their evidence by the Applicants during the determinative conference on 8 May 2024. Ms Kemister was cross-examined on her third statement during the determinative conference on 16 May 2024.

[15] David Jones relied on an outline of submissions dated 5 April 2024 and submissions in reply dated 3 May 2024. Mr Mollison supplemented the written submissions with oral submissions at the end of the determinative conference on 16 May 2024.

Applicants

[16] The Applicants each provided a witness statement in opposition to David Jones' jurisdictional objections. The statements provided were:

- Witness statement of Mr Abu-Samen dated 29 April 2024. I marked Mr Abu-Samen's statement **Exhibit A1**.
- Witness statement from Ms Houdayed dated 29 April 2024. I marked Ms Houdayed's statement **Exhibit A2**.
- Witness statement from Ms Nesci dated 29 April 2024. I marked Ms Nesci's statement **Exhibit A3**.
- Witness statement from Ms Grixti dated 29 April 2024. I marked Ms Grixti's statement **Exhibit A4**.

[17] The Applicants were cross-examined on their evidence by Mr Mollison.

[18] The Applicants relied on an outline of submissions dated 29 April 2024. The Applicants each made oral submissions at the end of the determinative conference on 16 May 2024.

Statutory provisions – unfair dismissal and genuine redundancy

[19] Section 385 of the FW Act defines when a person has been "unfairly dismissed". The definition states:

"A person has been *unfairly dismissed* if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy."

[20] The matters listed in s.385 are not dealt with in the order they appear in that section. That is because of s.396 of the FW Act, which states:

"The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

(a) whether the application was made within the period required in subsection 394(2);

(b) whether the person was protected from unfair dismissal;

(c) whether the dismissal was consistent with the Small Business Fair Dismissal Code (**SBFDC**);

(d) whether the dismissal was a case of genuine redundancy.

[21] There is no dispute that the four applications were made within the 21-day filing period and that the Applicants were protected from unfair dismissal. It is also clear that David Jones is not a small business employer and the SBFDC is not relevant.

[22] The initial matter that needs to be resolved in relation to each of the four applications before the merits are considered is "whether the dismissal was a case of genuine redundancy."

[23] The definition of "genuine redundancy" is contained in s.389 of the FW Act, which states:

"(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."

Consideration - findings on the evidence

[24] I consider the evidence led by David Jones establishes the following facts:

i. Team members at the Burwood store, and the SDA, were initially notified about the refurbishment process in late October or early November 2023.[1] All employees would have been aware of the refurbishment by 16 November 2023.[2]

ii. The refurbishment process at the Burwood store is part of a broader David Jones strategy to update its operations, initially across five stores in New South Wales and Victoria.[3]

iii. The refurbishment process would commence in January 2024 and would initially involve a reduction from David Jones operating on three levels of the Burwood Westfield store to only operating on level two for around 10 months. The ground floor and level one would be refurbished during this period and would reopen in around November 2024. David Jones would then cease using level two and hand this space back to the owners.[4]

iv. Staff members at the Burwood store were asked to complete the Preference Survey during the period of 17 to 26 November 2023.[5] The survey invited employees to express a preference about taking leave while the refurbishment process was occurring in 2024 and asked employees to nominate preferences for other locations and positions.[6]

v. Ms Keranovic took responsibility for developing the Skills and Caps Assessment for the team members at Burwood which was used to determine which redeployment opportunities may be suitable for the team members in an initial phase.[7]

vi. In early 2024, David Jones determined that it would retain 39 team members at the Burwood store while the refurbishment was occurring. Nineteen team members were redeployed to other stores based on the Skills and Caps Assessment scores. The roles of sixteen employees, including the Applicants, were determined to be redundant.[8]

vii. The Applicants were given notice in writing that their role had become redundant on 4 January 2024.[9] When this notice was provided, David Jones attached a list of vacant positions that the Applicants could apply to be redeployed into.[10]

viii. The Applicants were each spoken to individually about the redundancy decision on the following dates:

- Ms Houdayed: Ms Neill met with Ms Houdayed face-to-face at the Burwood store on 8 January 2024.[11]

- Mr Abu-Samen: Mr Williams was involved in a phone call with Mr Abu-Samen on 4 January 2024.[12] Ms Keranovic also spoke with Mr Abu-Samen on 22 January 2024.[13]

- Ms Grixti: Ms Neill met with Ms Grixti on 8 January 2024.[14]

- Ms Nesci: Ms Neill spoke with Ms Nesci on 8 and 22 January 2024.[15]

ix. Ms Nesci applied to be redeployed into a vacant part-time Beauty Consultant – Clinique role at David Jones' Elizabeth Street store. Ms Houdayed, Mr Abu-Samen and Ms Grixti did not apply to be redeployed to any of the vacant positions.[16]

x. The total hours being worked by employees at the Burwood store has reduced by more than 50% when the month of October 2023 is compared with March and April 2024. The number of casual hours has also reduced by at least 50% for that same comparison period.[17] I consider this to be the most appropriate comparison as it excludes the busier Christmas and New Year period.

Consideration – initial point – selection of employees

[25] Understandably, the Applicants in these matters focused heavily on what they perceived to be unfairness with David Jones' selection process for determining which employees would continue working in the Burwood store while the refurbishment occurs. The term "favouritism" was frequently used by the Applicants during the determinative conferences.

[26] As I stated to the Applicants on several occasions during the determinative conference, I do not have the power to overrule David Jones' decision concerning which employees it selected to continue working at the Burwood store while it was being refurbished. The Explanatory Memorandum to the Fair Work Bill 2008 states at paragraph 1553:

> "Whether a dismissal is a genuine redundancy does not go to the process for selecting individual employees for redundancy. However, if the reason a person is selected for redundancy is one of the prohibited reasons covered by the general protections in Part 3-1 then the person will be able to bring an action under that Part in relation to the dismissal."[18]

[27] There are numerous Commission decisions over the years that have confirmed the Commission does not have the power to review which employees were selected to be retained or made redundant if it is satisfied operational changes have led to the relevant job no longer being required.[19]

[28] By way of practical example, a business operating a factory may have 40 machine operators engaged to operate its 10 machines. The machine operators are trained to be able to work on all the machines as required. If the business decides to sell three of its machines, the business may determine it only requires 28 machine operators to operate the remaining seven machines. That may lead to 12 machine operators being made redundant on the basis that their

job is no longer required to be performed by anyone because of operational changes. Assuming the 12 redundant employees regularly worked on various machines, many of the duties that the redundant employees were performing each day may continue being performed by the remaining 28 employees. That, in itself, does not mean that the 12 machine operator jobs were not genuinely redundant.

[29] In an unfair dismissal context, the redundant employees may be able to argue their dismissal was not a case of "genuine redundancy" because the three machines were not actually sold, or because the overall workload did not reduce despite the machines being sold. The employees can also argue they could have reasonably been redeployed to other positions, or that consultation obligations were not complied with. However, they are not able to argue their dismissal was not a "genuine redundancy" because they should not have been one of the 12 machine operators selected for redundancy from the pool of 40 machine operators. The Commission does not have the power to interfere with the employer's selection decisions in that context. Further, as Mr Mollison submitted, the Commission would generally not have enough evidence about the full cohort of employees to conduct a meaningful comparison and assessment, even if the power was there.

[30] For completeness, there may be legal options available to contest an employer's selection decision in relation to a redundancy. For example, the Applicants referred to potential age discrimination during the determinative conference. As the Explanatory Memorandum excerpt above identifies, if an employer takes an employee's age into account when selecting which employees are to be made redundant, a general protections application can potentially be brought by the affected employee. However, that is not the type of application I am dealing with here because that is not the case the Applicants chose to bring.

Consideration - jobs no longer to be performed because of operational change

[31] I accept the evidence led by David Jones establishes that the job of each Applicant is no longer required to be performed by anyone because of changes in David Jones' operational requirements at the Burwood store.

[32] I accept the reduction from operating on three levels of the Westfield complex to one level for around 10 months and then two levels from around November 2024 is an operational change that has resulted in reduced labour requirements for customer-facing roles.

[33] Aside from the selection issues, the main point the Applicants relied upon in arguing that their job is still required to be performed was that David Jones has replaced them with casual labour. The Applicants led some anecdotal evidence in support of this argument.

[34] I have no reason to doubt the accuracy of the labour data for the Burwood store filed by David Jones.[20] That evidence indicates labour requirements at the Burwood store have reduced by more than 50% when October 2023 is compared with March and April 2024. That evidence is inconsistent with the proposition that the labour requirements at the Burwood store have not been reduced and David Jones has merely allocated permanent hours to casual employees.

[35] The Applicants did also refer to the possibility of unpaid leave being taken while the refurbishment work occurred not being properly explored by David Jones. I accept David Jones

could have done more in relation to this issue. However, the possibility was clearly brought to the attention of employees in the Preference Survey and there is no evidence any of the Applicants requested to take unpaid leave instead of being made redundant. I do not consider the hypothetical possibility of agreement being reached for unpaid leave to be taken for a period of 10 months establishes that the relevant jobs were no longer required to be performed. I also accept David Jones' evidence that the precise operating arrangements to apply when the refurbishment has been completed have yet to be determined.

[36] I find that David Jones no longer required the job of each Applicant to be performed because of changes in its operational requirements. I find s.389(1)(a) is satisfied in relation to each application.

Consideration – compliance with consultation obligations

[37] Based on my findings on the evidence outlined above, the steps taken by David Jones to purportedly satisfy the consultation obligations in Schedule B.2 and B.3 of the *David Jones Enterprise Agreement 2018* were:

i. Team members were notified of the "major change", being the refurbishment and reduced store space, in late October and early November 2023. The SDA was notified in writing and a staff meeting was arranged for 1 November 2023. An email was sent to staff on 16 November 2023 from Ms Grech.

ii. On 4 January 2024, David Jones provided notice in writing to each Applicant that a definite decision had been made that the job of each Applicant was no longer required.

iii. Between 4 and 22 January 2024, David Jones met with each Applicant individually to discuss the redundancy and what options were available.

[38] The Applicants did not refer to any specific consultation obligation in the *David Jones Enterprise Agreement 2018* that David Jones failed to comply with.

[39] I am satisfied that the steps taken by David Jones outlined above are sufficient to establish David Jones complied with its consultation obligations under the *David Jones Enterprise Agreement 2018*. I find s.389(1)(b) is satisfied in relation to each application.

Consideration – redeployment

[40] I consider this is clearly the most contentious issue in relation to whether the dismissals were cases of "genuine redundancy". David Jones is a very large business[21] with numerous stores that operate in similar ways. David Jones would inevitably have more options in terms of redeployment than many other businesses.

[41] In *Helensburgh Coal*, the plurality judgment stated the following concerning the reasonable redeployment exclusion, which appears in s.389(2) of the FW Act and has the potential to negate what would otherwise be a "genuine redundancy":

> "There can be little doubt that s 389 of the FW Act—and, more broadly, the significance of "genuine redundancy" to s 385(d)—was intended to narrow the circumstances in which an employee might be said to have been "unfairly dismissed"; and, thereby, to afford employers a defence in circumstances involving dismissals for operational reasons (as opposed to reasons of conduct or capacity). A dismissal that is a "case of genuine redundancy" is immune from relief under Pt 3-2. That is so even if it might unambiguously qualify as "harsh, unjust or unreasonable".
>
> There is, then, some force to the applicant's contention. The proper construction of s 389(2) of the FW Act will be one that takes account of the facilitative character of the immunity that is inherent in s 385(d) of the FW Act.
>
> That immunity, however, is not absolute. Indeed, s 389(2) serves unambiguously to qualify it and it is the scope of that qualification, rather than the immunity itself, that falls to be construed. That task begins and ends with an analysis of the words in which the qualification is expressed: *Alcan* at [47]; *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362, 374 at [37] (Gageler J). On any view, they contemplate a qualification of some width: specifically, redeployment that "in all [of] the circumstances" would have been "reasonable".
>
> Those words do not appear in s 389(1) of the FW Act. A case of genuine redundancy may arise if a dismissal is the consequence of changes in the operational requirements of an employer's enterprise. The FW Act does not contemplate any inquiry into the reasonableness of such changes, neither "in all [of] the circumstances" or at all. Subject to s 389(1)(b) and 389(2), *any* change in operational requirements will suffice.
>
> Section 389(2), by contrast, requires that the possibility of redeployment should be assessed according to what "would have been" reasonable. That necessarily envisages some analysis of the measures that an employer *could* have taken in order to redeploy an otherwise redundant employee. In its proper context, "redeployed" can only refer to the prospect that an otherwise redundant employee might be taken from a position no longer required and deployed to the discharge of other tasks. If, in a given case, there were measures that could have been taken and which, in all of the circumstances, could reasonably have led to redeployment, that will suffice to engage the exemption to the immunity.
>
> Given the undeniable width of the text in which the exemption is couched, there is no reason to excise from "all [of] the circumstances" the possibility that an employer might free up work for its employees by reducing its reliance upon external providers. The existence of that possibility in any given case is a circumstance that is capable of informing whether redeployment "would have been reasonable"."[22]

[42] David Jones argued it considered redeployment in two phases.

[43] In the first phase, the Skills and Caps Assessment was used by managerial staff to redeploy staff to suitable alternative roles. This was a relatively informal process, and it is not clear if the Applicants even knew it was occurring. What is clear is that the Applicants did not become aware of the Skills and Caps Assessment at all until after they were dismissed. The

Applicants were not redeployed as part of this first process, largely because they had scored at the lower end of the scale.[23]

[44] David Jones also submitted the Applicants did not help themselves when completing the Preference Survey because they identified the existing Burwood store as a preference for redeployment. However, the Applicants provided credible explanations for why they did this. I do not consider it is appropriate to place any weight on this conduct in determining whether redeployment was reasonable.

[45] In the second phase, the Applicants were provided with a list of vacant positions that they could apply for on 4 January 2024 when they were notified that their existing job was redundant.[24]

[46] There is no dispute that Ms Nesci applied for a vacant part-time Beauty Consultant, Clinique position at the Elizabeth Street store and that Ms Houdayed, Mr Abu-Samen and Ms Grixti did not apply for any vacant positions.

[47] The Applicants, and particularly Mr Abu-Samen, referred to David Jones being able to be redeploy them to casual work at the Burwood store. This point was understandably made interchangeably in terms of whether the relevant job was still required to be performed by anyone, and in relation to redeployment. In any event, I accept the evidence led by David Jones establishes that the hours worked by casual employees has reduced along with full-time and part-time hours at the Burwood store.[25]

[48] I also do not consider it would have been reasonable for any of the Applicants to be redeployed to a casual role. I consider that would constitute employment under a new casual employment contract and not redeployment as contemplated by s.389(2) of the FW Act. In addition, as I identified during the determinative conference, there is no legal impediment to David Jones engaging any of the Applicants as a casual employee now, or in the future.

[49] Given the process and facts identified above, I am satisfied it was not reasonable in all the circumstances for Ms Houdayed, Mr Abu-Samen and Ms Grixti to be redeployed by David Jones. I am satisfied on balance that David Jones explored all reasonable options for redeployment during the first phase which relied on job matching based on the Skills and Caps Assessment. In relation to the second phase involving vacant positions, I do not consider it was reasonable for David Jones to redeploy Ms Houdayed, Mr Abu-Samen or Ms Grixti to a vacant position that they did not apply for. As a result, I do not consider the redeployment exclusion in s.389(2) of the FW Act is enlivened in relation to Ms Houdayed, Mr Abu-Samen or Ms Grixti.

[50] I consider the situation is different for Ms Nesci, in relation to the second phase of David Jones' redeployment consideration. I found the evidence from David Jones' witnesses about why Ms Nesci could not be redeployed to the Beauty Consultant, Clinique role at the Elizabeth Street store to be unpersuasive.[26] Ms Nesci gave evidence that she began working for David Jones in 2014 in the beauty section, specifically L'Occitane skincare, before moving to general beauty. After six years, Ms Nesci moved to handbags and accessories.[27] Ms Nesci had nearly 10 years of service as a part-time employee for David Jones and had specific experience in beauty work. I do not accept Ms Nesci would not have been suitable for what David Jones

described as a "faster paced, elevated clientele"[28] at the Elizabeth Street store. I also do not accept Ms Nesci's lack of experience with the Clinique brand made it unreasonable for Ms Nesci to be redeployed to this role. Based on her evidence and submissions during the determinative conference, I consider Ms Nesci would have adjusted quickly to the new role, particularly with some minimal training. I do not accept Ms Nesci's concerns about travelling at night were sufficient to justify a conclusion that it was not reasonable for Ms Nesci to be redeployed to this role. I also accept Ms Nesci's evidence that she was not aware the informal discussion she had with Ms Neill on 22 January 2024 was effectively an "interview" for the vacant position.

[51] While it appears the approval of Clinique may have been required for the redeployment to be implemented,[29] I do not consider any of the evidence gives rise to any reason for concern from Clinique about Ms Nesci being able to perform the role. In any event, this issue is purely speculative because Ms Nesci was never even provided with an opportunity to meet with anyone from Clinique.[30] I do not consider David Jones can say it was not reasonable for Ms Nesci to be redeployed to this position because of potential unidentified concerns from Clinique.

[52] I find that it was reasonable for David Jones to redeploy Ms Nesci to the vacant role she applied for as Beauty Consultant, Clinique at the Elizabeth Street store. As a result, I find Ms Nesci has established that the exclusion in s.389(2) is triggered which means her dismissal was not a case of "genuine redundancy".

Additional comments

[53] Although I have determined that the dismissals of Ms Houdayed, Mr Abu-Samen and Ms Grixti fall within the meaning of a "genuine redundancy", that does not in any way mean I consider there were any issues with their performance as David Jones employees. The Applicants understandably expressed some confusion during the determinative conferences regarding the difference between being managed for poor performance and recording low scores in the Skills and Caps Assessment. There is an important difference. There was no suggestion from David Jones that any of the Applicants were not performing their jobs competently and adequately. That must have been the case given all the Applicants had extremely long periods of service with David Jones. All the Skills and Caps Assessment was doing was trying to separate the existing employees so decisions could be made about redundancies and redeployments. The way David Jones implemented the Skills and Caps Assessment was inherently subjective. It is likely that different people would have given different scores for different people. The Applicants should not interpret their low scores as meaning they were not good employees. To the extent that some of the evidence relied upon by David Jones raised specific concerns with the Applicants' performance,[31] I consider that evidence was extremely regrettable and should not have been included. The Applicants all earned the right to be proud of their long careers with David Jones despite the redundancy process, which was not triggered at all by their performance. I recommend that David Jones reflects on how the process was managed so improvements can be made in the future. It is far from ideal that passionate, dedicated, and long-term employees have been left feeling so disgruntled at the end of the process.

[54] I also note David Jones is very likely to hire new employees in late 2024 when the refurbishment is completed, and the store commences operating on two levels. David Jones has made it clear that there is no impediment to any of the Applicants being rehired in the future despite the redundancies. If Ms Houdayed, Mr Abu-Samen or Ms Grixti are still interested in returning to work for David Jones when the refurbishment is completed, they can apply for the new roles and these proceedings should have no bearing on any decisions about whether they will be rehired.[32]

Conclusions

[55] David Jones' jurisdictional objections are upheld in relation to the applications made by Ms Houdayed, Mr Abu-Samen and Ms Grixti. The dismissals were cases of "genuine redundancy."

[56] The applications made by Ms Houdayed, Mr Abu-Samen and Ms Grixti are dismissed.

[57] David Jones' jurisdictional objection in relation to Ms Nesci's application is dismissed. It would have been reasonable for Ms Nesci to be redeployed and the dismissal was not a case of "genuine redundancy."

[58] The determination of the merits of Ms Nesci's unfair dismissal application will now be progressed by the Commission in accordance with its usual processes.

COMMISSIONER

Appearances:

Mr Abu-Samen, Ms Houdayed, Ms Grixti and Ms Nesci representing themselves.
Mr Mollison from Lander & Rogers on behalf of David Jones.

Determinative conference details:

8 May.
16 May.
Sydney (by video via Microsoft Teams)
2024.

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[1] Exhibit R3, Annexure HN-2 which is a letter to the SDA dated 25 October 2023. Exhibit R5 at [7] confirms a store meeting was held on 1 November 2023, although this was not attended by Mr Abu-Samen, Ms Nesci or Ms Grixti.

[2] Exhibit R3, Annexure HN-1.

[3] Exhibit R3, Annexure HN-1.

[4] Various evidence including Exhibit R3 at [10] and Exhibit R1, Annexure NK-1.

[5] Exhibit R1, Annexure NK-2.

[6] Exhibit R1, Annexure NK-3.

[7] Exhibit R5 at [11] to [15].

[8] Exhibit R1 at [34] and [45].

[9] Exhibit R1 at [43] and Exhibit R2, Annexure NK-6

[10] Exhibit R1, Annexure NK-4.

[11] Exhibit R3 at [36].

[12] Exhibit R6 at [38].

[13] Exhibit R5 at [18].

[14] Exhibit R3 at [39] to [41].

[15] Exhibit R3 at [54] and [56].

[16] Exhibit R5 at [18] and [19].

[17] Exhibit R7, Annexure NK-8.

[18] Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1553].

[19] For example, see *Ms Josina can der Kuur v G4s Secure Solutions Australia Pty Ltd T/A G4s* [2015] FWC 5095 at [22] and *Zhiming Yang v Telstra Limited* [2023] FWC 3319 at [16].

[20] Exhibit R7.

[21] David Jones Form F3 response forms state it had 6,604 employees when the dismissals occurred.

[22] *Helensburgh Coal Pty Ltd v Bartley* [2024] FCAFC 45, Katzmann and Snaden JJ at [55] to [60].

[23] For example, Exhibit R3 at [21] to [24] and Exhibit R5 at [15]

[24] The list is in Exhibit 1, Annexure NK-4.

[25] Exhibit R7.

[26] Exhibit 1 at [53] and [54]; Exhibit R3 at [56] to [59]; Exhibit R5 at [21] and [22].

[27] Exhibit A3 at [4].

[28] Exhibit R1 at [53](b).

[29] Exhibit 1 at [53](c).

[30] Exhibit 1 at [53](c).

[31] For example, Mr Williams' comments about Ms Grixti and Ms Houdayed in Exhibit R6 at [36] and [37].

[32] Sections 340 to 342 of the FW Act