FEDERAL CIRCUIT COURT OF AUSTRALIA

WALL v KINGBUILT HOMES PTY LTD & ANOR *[2019] FCCA 2355*

Catchwords:
INDUSTRIAL LAW– Claim for underpayment of notice and for redundancy payment – whether employer entitled to set-off ex-gratia payment – whether employee redundant – employer reorganising so that employee's former role ceased to exist – whether employee offered alternative role – whether alternative role redundant – continuing employee entitled to full notice payment and redundancy payment.

Legislation:
Fair Work Act 2009 (Cth)

Cases cited:
Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate [2015] FCAFC 99
Fair Work Ombudsman v Transpetrol TM AS [2019] FCA 400
Fosters Group Limited v *Wing* [2005] VSCA 322
R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-Op Ltd (1977) 16 SASR 6
Dibb v Commissioner of Taxation [2004] FCAFC 126
Quality Bakers of Australia Ltd v Goulding 1995 60 IR 327

Applicant:	LOCHLIN WALL
First Respondent:	KINGBUILT HOMES PTY LTD
Second Respondent:	PHILLIP KING
File Number:	MLG 3576 of 2018
Judgment of:	Judge Burchardt
Hearing date:	14 August 2019
Date of Last Submission:	14 August 2019
Delivered at:	Dandenong
Delivered on:	4 September 2019

REPRESENTATION

Counsel for the Applicant:	Mr Hooper
Solicitors for the Applicant:	Simon Parsons & Co
Counsel for the Respondents:	Mr Burt
Solicitors for the Respondents:	Bona Fide Lawyers

ORDERS

(1) The matter be adjourned to the Melbourne Registry for mention before Judge Burchardt on **4 October 2019** at **9.30 am**.

(2) The Respondent file and serve written submissions on or before 18 September 2019.

(3) The Applicant file and serve written submissions in reply on or before 27 September 2019.

(4) The Respondents are to pay the Applicant:

(a) $3,734 in lieu of notice; and

(b) $35,820 in redundancy payments

Less any applicable tax

THE COURT NOTES THAT

A. The Applicant is of the view that there is no tax payable on the sums referred to in Order 4.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE

MLG 3576 of 2018

LOCHLIN WALL
Applicant

And

KINGBUILT HOMES PTY LTD
First Respondent

PHILLIP KING
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant's case raises two questions. First, was he paid the correct amount of money in lieu of notice when his employment was terminated, and, second, whether he should have been paid a redundancy payment at the same time. For the reasons that follow, it is my view that the applicant should succeed on both issues.

The Facts

2. Because of the way the parties have conducted the matter, it is not possible to approach the parties' competing positions without determining the relevant facts, which it should be noted are largely the subject of agreement.

3. The applicant commenced to work for the respondent in 2008. From no later than 2011, he was appointed as general manager and sales manager for the commercial division of the first respondent. At the time the applicant commenced work, the company employed no more

than three to four employees, whereas now it employs thirty. It has obviously grown substantially. In about mid-2015, the applicant was appointed in the dual role of general manager and sales manager for both commercial and residential divisions of the respondent.

4. In this role as general manager, the applicant was the second in charge, and reported directly to Mr King, whom is should be noted is, to all effects and purposes, the mind and will of the company, being the founder and sole shareholder thereof. The applicant had a number of managers who reported to him.

5. In June 2018, a review was commenced as to the company's structure. The applicant says this was his suggestion, and the respondent says it was his idea, but in my view nothing turns on this. It is quite clear that one way or the other, the parties contracted Peter McKeon, Business Coach.

6. I accept the applicant's evidence that he was the subject of a telephone call from Brisbane, being a conference call involving Mr King and Mr McKeon in early July 2018. It seems clear on either side's version of the events that there was discussion of changes in management at the company. The applicant was told that he would be moved from being manager to a new role called director of special projects.

7. The applicant has deposed that he was sold the role of director of special projects because he would not be going backwards in relation to seniority, status or remuneration. Mr King has deposed that it was put that there would be a greater emphasis on sales, and having heard and seen each of them give their evidence it is clear to me that any discussion as to exactly what the role of the director of special projects was relatively nebulous, not least because it was a new role and not the subject at that time (or otherwise during Mr Wall's appointment) to any defined position description.

8. The applicant has deposed that it was put to him that he was going to be a member of a new advisory board that would report to Mr King. Mr King has denied that. Nonetheless, there has been admitted into evidence an affidavit of James McDougall, affirmed 15 July 2019, who relevantly deposed:

At a meeting of all staff on 30 July 2018 a restructure of the first respondent's employment structure was announced.

a) Included in the announcements was the fact that the First Respondent as part of the restructure would create an Advisory Board that would be composed of Phillip King, Peter McKeon, Lochlin Wall and Ian Sowerby.

9. Mr McDougall was not required for cross-examination, and as I indicated during the running of the trial I am therefore going to accept that evidence. Given the announcement was, in fact, made by Mr King, it seems more probable to me than otherwise that the possibility of Mr Wall being appointed to the new, to-be-created, advisory board was indeed put to him at the telephone meeting to which I have referred.

10. In mid-July, a series of slides were emailed by Emily Dunn, the human resources manager of the company, to Mr Wall and Mr King. They are annexure LW3 to Mr Wall's first affidavit. The general tenor of the proposed overheads was that the business was growing rapidly. The general manager's position was becoming untenable because of this, and as a result there was a need for change.

11. On 30 July 2018, Mr King gave a final slideshow presentation to the staff more generally, and the slides are PK1 to his first affidavit. The most telling of these slides, in my opinion, is the one entitled FUTURE STRUCTURE, which showed Mr King as the managing director with Mr Wall as the director of special services immediately under him, and also under Mr King a "Board of Directors" to be announced. I repeat that it was also announced to the staff on this occasion that Mr Wall would be, in fact, included on the board. Underneath the board of directors was to be a general manager to whom a number of other reports were responsible.

12. Another slide which is plainly relevant is the one headed Director of Special Projects. This, again, repeated the subpart of the organisational chart to which I have already referred. The dot points included:

- Lochlin will be relinquishing the position of General Manager and moving into a strategic business development role titled 'Director Special Projects.'

- In this role, Lochlin will report directly to Phil and be responsible for:
    - Managing the growth of Kingbuilt by planning and implementing business development strategies to carry the business forward;
    - Managing the planning, creation and implementation of Kingbuilt display homes;
    - Maintaining and continuing the growth of Kingbuilt by strengthening the existing stakeholder relationships and tapping into new markets such as outer regions of Gippsland.

13. On 2 August 2018, Ms Dunn sent an email to Mr Wall asking him to review an attached position description for the new general manager role, but it seems reasonably clear that no such document was prepared for the director of special projects role that Mr Wall was supposed to be undertaking.

14. I note that the pleadings originally filed on behalf of the respondents, and the first affidavit filed on behalf of the respondents, sought to put in issue alleged misconduct on Mr Wall's part. Following the filing of the applicant's affidavits, which included a number of persons who had worked under Mr Wall who strenuously denied any assertion of misconduct, those allegations have effectively been abandoned.

15. On 20 August 2018, Mr Wall wrote an email to Mr King and Ms Dunn which led to an email exchange which is exhibit PK2 to Mr King's first affidavit. Mr Wall commenced by apologising for his behaviour in the previous week, but I note that he was complaining of having lost much of his areas of former responsibility. The response from Mr King is not critical of Mr Wall, and congratulates him on how well he had been coping. However he posits the possibility that Mr Wall might wish to take some annual leave. Mr Wall's reply once again complains of his not being involved in decisions regarding where the company was going, but does insert *inter alia*:

> *I'm really excited about the opportunity in my new role, and I will deliver even more growth to the business.*

16. On 22 August, it is clear from exhibit PK3 that Mr Wall handed over at least the question of variation requests to another employee. The employee was Amy Hall.

17. Although there may be some slight dispute as to how it exactly came to pass, it is clear that on 7 September 2018 Mr Wall attended a meeting with Mr King and Ms Dunn. In his first affidavit, Mr King sought to put in issue alleged complaints dealt with on that occasion, but those have all now been abandoned. I accept Mr Wall's evidence that he had approached Ms Dunn to seek a job description for his role as director of special projects, and the meeting followed from that discussion.

18. Mr Wall says that Mr King told him at this meeting that he had changed his mind about the director of special projects role, that he did not know what role they might have for him, that any role might be part time or perhaps in a new East Gippsland office that they might open.

19. Having heard and seen both Mr King and Mr Hall give their evidence, I have no doubt that Mr Wall's recollection is correct. The fact is that while matters were proceeding apace in other areas (a new general manager had been appointed and a position description prepared) nothing had happened in relation to the director of special projects position description.

20. It seems clear beyond doubt that Mr King suggested that Mr Wall take a period of leave and that Mr Wall agreed. Mr Wall sent an email to Kingbuilt staff on 10 September 2018, which is exhibit PK4, which is consistent with his version of the conversation with Mr King on 7 September 2018. It states, relevantly:

> *As you know, the recent changes at Kingbuilt have caused a little bit of confusion about my new role and there's some confusion around what my duties and responsibilities are.*
>
> *I have decided to take a month off work commencing immediately, this will give the new managers a chance to familiarise themselves with their roles and it will provide all of you with clarity about the reporting lines in the new structure, it will also give me a much needed break and a chance to refocus my attention to working on the business as opposed to in it.*

> *I want to thank you all for your cooperation and support over the past few months and look forward to working with you all in a new capacity as of Monday 8 October.*

21. In his first affidavit, Mr King says at paragraph 35:

> *I made the decision that I would speak with Lochlin again to see if there was any way that we could alter his duties to be more focused on sales, if he was not agreeable to this then there was no way he could continue to work at Kingbuilt.*

22. Once you strip away the pejorative content of Mr King's affidavit as it was first filed (as has now been done – see MFI1) it is clear that paragraph 35 reflects Mr King's true state of mind. It is implicit but inescapable from what he says in paragraph 35 that Mr Wall's new role as director of special projects, inchoate as it clearly was at the time, was going to be altered by Mr King to that of salesman or Mr Wall was going to be dismissed. In fact, it is clear that that is what occurred.

23. On 21 September 2018, while he was actually on annual leave, Mr Wall was summoned to meet Mr King at Mr King's farm. There is disagreement between the two players as to exactly what was said. It is clear that by this stage Mr Wall had formed the view that his position, i.e. that of director of special projects, was not panning out the way he had understood it to have been represented to him. He had prepared a spreadsheet of potential redundancy payments accordingly.

24. Mr King says he spoke to Mr Wall about Mr Wall's possible difficulties working within the new structure. This included, totally contrary to the spreadsheet slides previously issued, Mr Wall working in sales and reporting to Amy Hall, who had previously, in fact, reported to Mr Wall. It is clear that Mr King said to Mr Wall that he doubted that he would ever accept reporting to Ms Hall, and I accept that Mr Wall agreed that this would be so.

25. It is quite clear that at this meeting Mr King told Mr Wall that selling houses would be part of his job. Indeed, in the evidence he gave, Mr King said that the person ultimately hired to ostensibly replace Mr Wall, a Mr Alexander (whom I did not permit to be called as I felt his evidence would not advance the matter significantly) was mainly

selling new homes, even though he had the title of director of special projects.

26. Noteworthily, under cross-examination Mr King said that the title for director of special projects was a name for a higher-level sales person. Both parties have, in my view, unconsciously reconstructed the events of this conversation. Contrary to the position put in his affidavit, I find that Mr King did not tell Mr Wall that if he was not prepared to accept the new management team arrangements, his employment would be terminated.

27. Equally, Mr Wall's conclusion that they had agreed he would be amicably dismissed by reason of redundancy is likewise a reconstruction following the event. As I find, no definitive agreement was reached between them, although it is quite clear that Mr Wall did not conclusively say he would not accept the proposed new arrangements and Mr King definitely did not tell him that if he did not do so, his employment would be terminated. Nor did Mr King say that termination of employment was to take place.

28. Perhaps unsurprisingly, both parties moved to better secure their position. My conclusion that Mr King did not terminate Mr Wall's employment is only fortified by the email he sent to Mr Wall the same day (exhibit LW-08) in these terms:

> *Thanks for meeting me this afternoon. I just wanted to follow up with an email to confirm our agreement for the immediate amicable cessation of your employment with Kingbuilt as per our discussion.*
>
> *Your understanding during this time is much appreciated along with your service during your time at Kingbuilt.*
>
> *As discussed, we'll meet again on Wednesday 26 September 2018, where I should be able to present your entitlement figure.* (underlining added)

29. Mr Wall's reply on the same date relevantly asserts:

> *Just to clarify this afternoon's discussion, I have agreed that my position at Kingbuilt has become redundant and that we are now working through what the redundancy package for my ten years*

> *of service. Hopefully we can reach an amicable settlement as soon as possible.*

30. Mr King responded relevantly:

> *As you're aware, Kingbuilt recognised gaps in your skillset and therefore moved you out of the general manager role. Another role was created to continue to include you in the business but to make it a full time role you would have been required to report to others that you had previously managed. As we both agreed, you would be unable and unwilling to do this, leaving us with no option but to terminate your employment.*
>
> *Just to make it totally clear, your employment has been terminated, not made redundant as you're suggesting. However, as a goodwill gesture, I will include an amount on top of your entitlement as part of a final settlement.*
>
> *On the 2nd October when we meet can you please bring all the items in your possession belonging to Kingbuilt such as your car, fuel card, laptop, phone, any keys and anything else that you may have and I will have your settlement details and a cheque to hand to you.*

31. Thereafter, the applicant was paid (exhibit PK6) his outstanding annual leave, his outstanding salary, his outstanding long-service leave and a further payment described as commission in the sum of $13,289.27. It would seem that this figure was designed to produce a final total payout of almost exactly $70,000.

Is the applicant entitled to the notice claim payment that he seeks?

32. There is no dispute, as I understand it, that Mr Wall's final payment in lieu of notice was calculated on the basis of his base salary alone without the additional matters which he has claimed. It is common cause from the amended defence that as at the date of termination, Mr Wall was entitled not only to a base salary of $156,000 but motor vehicles worth a total of $32,056.76 per annum, a fuel card allowance to the value of $4356 per annum and mobile phone usage to the value of $1419 per annum. Mr King has deposed at paragraph 47 of his first affidavit:

> *These calculations did not include Lochlin's allowances for motor vehicles, fuel, or mobile phone usage as it had already been*

> *agreed between Lochlin and myself that he would not be performing any more duties on behalf of Kingbuilt again, and therefore would not require his vehicles or mobile phone for work purposes.*

33. I do not accept that Mr Wall had made any such agreement or indicated that he would accept such an outcome. To the contrary, his own schedule of proposed payments was at his all-in level of salary.

34. Section 117 of the *Fair Work Act 2009* (Cth) ("the Act), which the respondent concedes applies to the applicant, relevantly asserts at paragraph 117(2)(b):

> *The employer must not terminate the employee's employment unless:*
>
> *(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.*

35. "Full rate of pay" is defined in s 18 of the Act as follows:

> *The full rate of pay of a national system employee is the rate of pay payable to the employee, including all of the following:*
>
> *(a) incentive-based payments and bonuses;*
>
> *(b) loadings;*
>
> *(c) monetary allowances;*
>
> *(d) overtime or penalty rates;*
>
> *(e) any separately identifiable amounts.*

36. It should be noted that the introductory words of subsection (1) *"The full rate of pay of a national system employee is the rate of pay payable to the employee"* is not an all-inclusive definition but, rather, a phrase of general import. The Court is therefore concerned to find what the "rate of pay" of Mr Wall was. The employer filed in the Fair Work Commission, in an unfair dismissal case subsequently abandoned by Mr Wall, a form F3 response (LW-01). At paragraph 1.5, the response

indicated that at the time of the dismissal, Mr Wall's salary was "$156,220 plus superannuation", but the next entry is important.

37. At paragraph 1.6, the following is recorded:

> *In addition to their salary or wages, was the applicant entitled to any other monetary amounts or any non-monetary benefits at the time of the alleged dismissal?*

38. This has a box "yes" which has been crossed. The paragraph goes on to say, "If you answered "yes" to question 1.6, please, provide details", to which the following is appended:

> *Two company vehicles jointly valued at $32,056.76, vehicle fuel $4356, mobile phone $1419.*

39. In these circumstances, in my view, the full rate of pay for Mr Wall was, indeed, as he himself put it, his package in a total of $194,051. The additional amounts might be thought to be "any other separately identifiable amounts" or might be thought to be simply part of his full rate of pay. In my opinion, they are probably other identifiable amounts to the purposes of s18(1)(e), but if I am wrong in that conclusion, in any event, these figures form part of what is fairly described on the materials as Mr Wall's full rate of play.

Can the Employer Set Off the Top-Up Payment

40. The nature of this payment is clearly described by Mr King in his email on 24 September 2018, when he relevantly asserted:

> *Just to make it totally clear, your employment has been terminated, not made redundant as you're suggesting. However, as a goodwill gesture I will include an amount on top of your entitlements as part of a final settlement.*

41. The payment itself is described in PK4 as "commission", but it is clear that there was no commission due to Mr Wall under his contract. It was clearly a goodwill gesture.

42. I have been referred to authority in this regard. Counsel for the respondents referred to the decision of *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* [2015] FCAFC 99. At [44] the Full Court observed:

> *It is significant for the purpose of the present appeal that the Commission resolved the issue whether the wages paid were to be brought into account in assessing the balance due under the award by reference to the intention of the parties, a matter dependent on an examination of the facts relating to the making of the agreement.*

At [48] the Court continued:

> *In Pacific Publications Limited v Cantlon (1983) 4 IR 415 (Pacific Publications) the Industrial Commission of NSW expressed a preference for the view expressed by Sheldon J in Ray v Radano. The question in Pacific Publications was whether an amount of $4000 paid to a journalist on retrenchment as a special gratuity could be taken into account to satisfy an award entitlement to 16 weeks paid annual notice. The Commission said at 421:*
>
> > *Despite the subsequent allegation and the suggestions in argument to the contrary, we do not think that the payment designated a "special gratuity" was intended to be a payment in lieu of reward notice on termination. The company clearly appropriated the payment, at the time of making it, as a "special gratuity" in the special circumstances of the retrenchments then occurring and not as a payment in respect of any obligation which had arisen or might arise under cl 12. A gratuity labelled as a "Christmas bonus" (to take the illustration of Sheldon J) would clearly be incapable of subsequent deduction by the payer as part of the payment of wages or some other unsatisfied award entitlement.*

43. The Court has also been referred to the decision of Rares J in *Fair Work Ombudsman v Transpetrol TM AS* [2019] FCA 400. Having traversed extensive authority, Rares J stated at [113]:

> *It follows that there is no inflexible principle that precludes a creditor, who has appeared to designate or appropriate a payment to discharge a specific liability, from relying on all of the circumstances to demonstrate that the true character of the payment is, in fact, different or, alternatively, to justly the use of that payment as a set off to a different liability.*

44. It should be noted that his Honour's conclusion in that case, at [117], Transpetrol was entitled to set off fully the total wages it paid to each crew member to reduce the sum of its liabilities in respect of each of

their relevant contraventions was very much a decision turning on the specific facts of that case.

45. In this instance, adopting the observations of the Full Court in *Linkhill* and the approach denoted by Rares J in *Transpetrol*, an examination of the facts of the case shows that the respondent clearly intended to pay the applicant his "entitlements" and that the additional payment was as "a goodwill gesture".

46. It was seen from exhibit RK6 that no tax was deducted from the top-up figure, which was designed to produce the nice round sum of $70,000.

47. Looking at the circumstances of the case as a whole, it seems to me entirely clear that the proper characterisation of the additional sum was that it was an ex gratia payment. It was not intended to, nor was it expressed to, meet any kind of contractual or award entitlement. Indeed, it expressly operated on a completely different footing, namely the goodwill of the employer.

48. In these circumstances, in my view, it is not open to the respondents now to re-characterise the nature of the payment made and then to further appropriate the payment to meet the obligation to pay the outstanding notice. The applicant's claim therefore accordingly succeeds.

Was Mr Wall Entitled to a Redundancy Payment

49. As I discussed with counsel during the running of the case, there is simply no possible question that Mr Wall's original position as general manager became redundant in July 2018. The flowcharts and the evidence are entirely clear.

50. The following extracts taken from the judgment of Habersberger AJA in *Fosters Group Limited v Wing* [2005] VSCA 322 guide my approach to whether or not Mr Wall's circumstances upon the reorganisation of the business amounted to a redundancy.

51. At [33] Habersberger AJA relevantly quoted Bright J in *R v Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-Op Ltd (1977) 16 SASR 6*:

> *If I am right in this, then in its widest form the concept of redundancy connotes that an employee becomes redundant whenever (and for whatever reason) his employer no longer desires to have performed the job which that employee was doing.*

52. At [34] Habersberger AJA quoted from the Full Court of the Federal Court in *Dibb v Commissioner of Taxation* [2004] FCAFC 126 where Spender, Dowsett and Alsop JJ referred to the observations of Ryan J in *Jones v Department of Energy and Minerals* (1995) 60 IR 304 at[308] as follows:

> *However, it is within the employer's prerogative to 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. It is inappropriate now to attempt an exhaustive description of the methods by which a reorganisation of that kind may be achieved. One illustration of it occurs where the duties of a single, full time, employee are redistributed to several part time employees. What is critical for the purpose of identifying a redundancy is whether the whole former position has, after the reorganisation, any duties left to discharge. If there is no longer any function or duty to be performed by the person, his or her position becomes redundant in the sense in which that word was used in the Adelaide Milk Cooperative case.*

53. Habersberger AJA also quoted at [34] *Quality Bakers of Australia Ltd v Goulding* 1995 60 IR 327 at [332] – [333] where Justice Beazley said:

> *There was no dispute that the operational requirements of business may include redundancy. A redundancy will arise where an employor has labour in excess of the requirements of the business; where the employer no longer requires to have a particular job performed; or where the employer wishes to amalgamate jobs.*

54. At [35] Habersberger AJA again quoted the Full Court in *Dibb* at [41]:

> *in Jones, Ryan J observed that a job involves 'a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employer's organisation, to a particular employee'. We accept that view. Ryan J then observed that where such duties are reassigned, the question whether any function or duty remains to be performed by the employee. We do not understand His Honour to have meant that if any aspect of the employee's duties*

> *is still to be performed by somebody, he or she cannot be redundant.*

55. At [43] of the extract of the *Dibb* judgment relevantly continued:

> *We consider that is it more accurate to say that an employee becomes redundant when his or her job (described by reference to the duties attached to it) is no longer to be performed by any employee of the employer, though this may not be the only circumstance in which it could be said the employee becomes redundant. Reallocation of duties within an organisation will often lead the employer to consider whether an employee, previously employed to perform specific functions assigned to a particular job, will be able to perform any available job existing after reallocation. Even if the employee's job, defined by reference to its duties, has disappeared, he or she may still be able to perform some other available job to the satisfaction of the employer. In that case, no question of redundancy arises. It is only if the employer considers that there is no available job for which the employee is suited, and that he or she must therefore be dismissed, that the question of redundancy arises.*

56. Habersberger AJA went on to say at [36]:

> *It seems to me that the approach followed in Adelaide Milk has been reflected in the wording of Fosters' policy. The critical question is whether through no fault of the employee his or her role no longer exists or the duties have so changed that for practical purposes the original role no longer exists.*

57. Taking these passages in mind, it is clear that prior to the reorganisation the First Respondent had a Managing Director to whom the General Manager (Mr Wall) reported. Every other sub-part of the business reported directly to Mr Wall. Following the reorganisation (see Future Structure document) Mr Wall was moved sideways to be nominally the Director of Special Projects. The new General Manager was to report to the Board of Directors and that position has a number of reports directly to them. It seems clear beyond doubt that the new General Manager did not have all of the responsibilities that Mr Wall had previously had. This was after all the whole point of the reorganisation. So much is clear from the material put out by the employer before the reorganisation took place. Mr Wall's original position as General Manager was reallocated to a number of different employees, one of whom happened to have the same title. There is no

suggestion now that Mr Wall was reallocated because of incompetence or misconduct and it follows inexorably that Mr Wall's original job as General Manager simply ceased to exist.

58. What is less clear is what happened thereafter. As I have found, and once again the flowcharts themselves make it clear, Mr Wall was offered an alternative position of director of special projects. This position was to report directly to Mr King and, furthermore, in an interrelated development, Mr Wall was to be appointed to the new advisory board, which also reported directly to Mr King and stood between Mr King and the other various reports.

59. All of this crystallised by 30 July 2018, when the final presentation was made to employees generally.

60. Thereafter, there was plenty of change going on in the company. New employees were being engaged and position descriptions written for them. The reorganisation continued apace, but although it seems common cause, as Mr King puts it at paragraph 29:

> *Lochlin moving solely to his new directive a director of special projects –*

nothing of any note appears to be occurring to Mr Wall. It is plain that Mr Wall did ask for a position description and did not get one. His role had not been crystallised in any meaningful way. As earlier indicated, despite being concerned by the organisational changes, which Mr Wall correctly assumed had significantly changed his prior role, he remained enthusiastic. He was then sent off on leave for a month. During that time, Mr King formed the view that he wanted Mr Wall in sales. He formed the view, and this was subsequently implemented, that director of special projects was simply a designation of a senior salesperson. The crux of the matter, to repeat, is that set out at paragraph 35 of Mr King's affidavit:

> *I made the decision that I would speak with Lochlin again to see if there was a way that we could alter his duties to be more focused on sales, if he was not agreeable to this, then there was no way he could continue to work at Kingbuilt.*

61. Albeit that there is some disputation as to exactly what was said, and I have dealt with this conflict already, there is no doubt that at the

meeting on 21 September 2018, Mr King indicated to Mr Wall that it was probable that in the event that Mr Wall continued in employment under the new regime, he would be reporting to Amy Hall, who had previously reported to him and that he did not think that Mr Wall would like this. Mr Wall, unsurprisingly, agreed but did not refuse the position. He had, however, already opined that his position was redundant and came prepared to discuss this.

62. They did not, as Mr Wall said in evidence (but not in his affidavits), shake hands on the deal. Rather, the matter, as I find, was left unclear. As earlier indicated, both sides moved to shore up their positions with self-serving correspondence thereafter. I have no doubt that Mr King did say he had changed his mind about the director of special projects role. In truth, this is apparent from his own affidavit material. Indeed, as I find he even posited the possibility of Mr Wall being part time or employed at a new East Gippsland Office. Whatever it was, and it was never clearly defined, that the director of special projects role was, it was never going to come to pass. The role as it was sold to Mr Wall was, indeed, redundant.

63. In my view, the better analysis of the course of events is not that contended for by the applicant through his counsel in closing submissions but the one I traversed with counsel myself. What really happened was that the company had grown to a point where it was perceived that major reorganisation was necessary and, as a result, Mr Wall's role as general manager became redundant. He was kept on board by the offer of the title of the director of special projects with his salary and conditions remaining unchanged and the prospect of a senior role in the organisation. Nonetheless, that role never came to pass.

64. The fact is that, to the extent that the role was ever under any kind of active participation, it lasted from 30 July to 7 September or thereabouts. I think what happened was that the parties simply never came to terms as to what the ongoing replacement role was going to be and the true determinant of Mr Wall's employment was the redundancy of his prior position and his refusal to accept the vastly more junior position in the organisation as a salesman reporting to other employees over whom he had previously had authority. Were it necessary to make

a finding, I would find Mr Wall's refusal to accept the alternative position entirely reasonable.

65. In the end, it does not matter whether it was the director, special projects role that became redundant, which, for the reasons given, I think it did, or whether, in truth, that role simply never materialised in any meaningful way and the original job was redundant. On either view, and both are tenable, Mr Wall succeeds.

Conclusion

66. For the above reasons, the applicant should be paid the payments he claims in lieu of notice and for redundancy. I will hear from the parties as to what, if any, other orders should be made.

I certify that the preceding sixty-six (66) paragraphs are a true copy of the reasons for judgment of Judge Burchardt.

Associate:

Date: 4 September 2019