Redundancy

eBook

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Raising the standard

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Overview

This eBook contains an in-depth overview of redundancy provisions under the Fair Work Act (2009).

Should you have any questions in relation to the information below, please reach out to one of our Employment Relations experts on:

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Redundancy

Genuine redundancy is where an employee's job is no longer required to be performed by anyone because of changes in the operational requirements of the business.

Possible examples of changes in the operational requirements of an enterprise include:

- staff reductions due to technological change
- the employer's business is experiencing a downturn, for example, the employer only needs three people to do a particular task or duty instead of five
- the employer is restructuring their business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists (internal company reorganisation or restructure)
- relocation of the business

Source of Redundancy Provisions

From 1 January 2010, redundancy provisions formed part of the National Employment Standards (NES) under the Fair Work Act 2009 (the Act).

Redundancy Pay

Most From 1 January 2010 the NES provided a scale of redundancy pay based on an employee's years of continuous service with the employer.

Employee period of continuous service	Redundancy
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks

Employee period of continuous service	Redundancy
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 years	16 weeks
At least 10 years	12 weeks

An employee is entitled to be paid at their base rate of pay. An employee's base rate of pay is defined as the rate payable to an employee for his or her ordinary hours of work excluding:

- incentive based payments and bonuses
- loading
- monetary allowances
- overtime or penalty rates
- any other separately identifiable amounts

Exclusions from obligation to pay Redundancy Pay

An employee is not entitled to redundancy pay in the following circumstances:

- the employee's period of continuous service with the employer is less than 12 months
- the employer is a small business employer: a small business employer for the purpose of determining redundancy pay, is an employer who, at a particular time, employs fewer than 15 employees (this is based on a headcount of employees).

When calculating the number of employees employed at a particular time, the following factors are to be taken into account:

- all employees employed by the employer at that time are to be counted
- a casual employee is not to be counted unless, at that time, he or she has
- been employed by the employer on a regular and systematic basis;
- associated entities are taken to be one entity
- the employee being terminated, and any other employees being terminated at that time are counted

Redundancy provisions under the Act do not apply to any of the following employees:

a) an employee employed for a specific period of time, for a specific task, or for the duration of a specified season

b) an employee whose employment is terminated due to serious misconduct

c) a casual employee

d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement

Notice of Termination

On top of redundancy pay the employer is required to give an employee the relevant notice period of termination provided in the NES. The amount of notice required is also based on years of service. Payment in lieu of notice may be made if you do not want an employee to work during this period.

Employee leave during notice period

An employee given notice of termination in circumstances of redundancy may terminate their employment during the period of notice. The employee will be entitled to receive the benefits and payments they would have received under the NES had they remained in employment until the expiry of the notice, but will not be entitled to payment instead of notice.

Job search entitlement

An employee who has been given notice of termination due to redundancy will be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.

If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employer may request the employee to produce proof of attendance at an interview. If proof of attendance is not provided the employee will not receive payment for the time absent. A statutory declaration completed by the employee is deemed sufficient evidence.

Redundancy and Unfair Dismissal

The Fair Work Act 2009 states that a person has been unfairly dismissed if the dismissal was not a case of genuine redundancy.

A person's dismissal was a case of genuine redundancy if:

- 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
- the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy
- 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 the employer's enterprise or the enterprise of an associated entity of the employer

This places an additional obligation on the employer to genuinely search for alternative positions for the employee, prior to making them redundant, this obligation extends beyond the employer's enterprise to an associated entity of the employer.

Determining if alternative employment is suitable

In determining if the alternative employment is suitable (and therefore if the employee forfeits redundancy payments), the Fair Work Commission must consider each employee's circumstances, including:

- Pay levels – is there a reduction in salary?
- Nature of employment – e.g. a change from full time to part time status
- Employment status/seniority – is the employee being demoted?
- Loss of benefits and job security
- Hours of work – if the employee's hours or days differ, the tribunal may take into account factors such as the employee's family responsibilities.
- Location of the work

Variation of redundancy pay

If an employer cannot pay the amount of redundancy pay to the employee, for example due to reasons such as bankruptcy or the employer obtains other acceptable employment for the employee than the employer may apply to FWC. FWC may determine that the amount of redundancy pay should be reduced to a specified amount (which may be nil).

Process

Engaging in a redundancy process for an employee would be involve the following:

- Confirm that the role of position is no longer required within your business and will not be required for the foreseeable future by anyone
- Confirm that the individual fulfilling this impacted role cannot be deployed anywhere within the business or within an associated entity of the business. Associated entities are businesses or other bodies that are connected to each other in some way. Section 50AAA of the Corporations Act provides a full definition
- If the knowledge, skills, and/or experience of the employee allow the potential for redeployment to another role in another area of the business discuss this with the employee as part of the consultation process
- If you can confirm that the role is no longer required to be fulfilled by anyone and that the individual cannot be redeployed in another area of the business or an associated entity, you are able to look at redundancy options and entitlements
- Review the contract of employment to determine the employees start date and if there are any additional contractual terms related to redundancy. Calculate the possible redundancy payment and associated entitlements if the redundancy is to proceed after consultation. Include:
    - Redundancy pay of number weeks (based on the length of service)
    - Incentive based payments and bonuses that might be payable
    - Monetary allowances payable
    - Any applicable overtime entitlements payable
    - Any applicable annual leave and annual leave loading entitlements payable
    - Any long service leave payable upon termination
    - Notice of termination
- Commence the consultation process: invite the employee to a meeting to discuss an organisational change which may have an impact upon their role. It is important to allow the employee 24 hours' notice of your intention to meet and allow the opportunity for the employee to bring a support person to the meeting
- At the initial meeting, conduct the meeting ensuring you:
    - Discuss the applicable changes to the business
    - Discuss the impact these changes have upon the role the employee performs
    - Discuss measures and/or considerations taken into account when determining how to mitigate the impact of these changes on the employee
    - Provide the employee with an opportunity to discuss their thoughts and provide suggestions for alternatives that may not have been considered

    - Allow the employee the opportunity to take at least 1 day to think through information discussed, their options and propose any additional alternatives not previously considered (further time should be given if requested)
    - Schedule a follow up meeting to discuss these considerations
- Where a follow up meeting has been scheduled, conduct a follow up meeting to discuss the employees considerations/suggestions and invite the employee to discuss any additional items or factors they would like considered before proceeding with the redundancy
- If the employee provides items for consideration you need to show consideration for each item. This may involve concluding the meeting to research, investigate and consider each item.
- If the employee does not provide any items for consideration, you can proceed with the redundancy.
- When proceeding with the redundancy, you can determine if you would like the employee to serve their notice period or if you would like to offer the employee payment in lieu of the notice period.
- If you are opting for the employee to serve their notice period, it is important to be aware that some awards contain job search entitlements that require the employer to allow the employee up to the equivalent of one day's time off each week during the notice period without loss of pay for the purpose of seeking other employment.
- Once formally accepted and completed, I recommend communicating an update of the organisational change to the rest of the business to assist in addressing any concerns regarding the change. This is best done in a face-to-face capacity where possible. A clear plan communicating the message regarding the organisation change is also important to ensure that you are delivering a clear and consistent message.

Meeting preparation and tips

When inviting the employee to the meeting, advise them that they may bring someone for support but that they do not have to.

If the employee asks if it is a performance discussion, say no, but that it is an important discussion.

The meeting should be held in a suitable office or meeting room that people cannot walk past and look in, or hear, the contents of the discussion.

The room should have a telephone, or you should have a phone with you, in case the individual would like to call someone or have someone join the meeting.

Ensure that you have your notes with you. Have water and tissues available.

Possible reactions & responses

Faced with the news that their position no longer exists; people respond with different concerns and individual emotions. Whilst you cannot be sure exactly what reactions you are going to get; you can be prepared with how you will respond to these in the meeting.

Shock and denial

They may say “I don’t believe it” “You must be joking” or “But I’ve worked here for years”. Or they may sit in silence after the opening statement. Try not to overload them with subsequent information until they have had time to express some reaction. Ask questions to determine if they have heard and understood the message. Gently repeat and reinforce the news to them.

Distress

An employee may become tearful, or express a sense of helplessness or hopelessness, they may make statements such as “What am I going to do now” “what will I tell my family” or “this is the worst thing that’s ever happened to me”. It is important that the employee has time to process the news, so don’t worry about sitting and saying very little if they are crying or trying to compose themselves. Once you are sure they are listening, try to redirect their attention towards the supports that are going to be available to them.

Make statements to acknowledge their distress, such as “I appreciate this has come as a shock”.

Note: If the employee’s level of distress is of concern to you, for example they are having difficulty composing themselves, struggling to breathe or you are just generally concerned about their health, you may need to seek immediate support from your first aid officer.

Anger and Hostility

In this case the employee may show physical signs of anger such as a raised voice, abusive statements or threats, or you may observe changes in their demeanour or posture. They may make statements such as “Do you think I’m going to accept this without a fight” “you’ve always had it in for me” or “you can stick your job - I’ve never really liked working here anyway”.

When subjected to anger and hostility, it is essential not to get drawn into justifying the situation, taking sides, commiserating with the employee against “the powers that be” or launching into a slanging match over past issues. Instead, let the employee express their anger and acknowledge it but concentrate on retaining your own composure. Look for openings to lead them towards learning what support will be made available to them.

Note: If at any time the employee threatens you, becomes physically aggressive (e.g. standing up, banging the table, throwing items) or you just feel generally unsafe, trust your instincts about whether you need to cease the meeting and leave the room. You made decide you only feel comfortable resuming the meeting with another manager present.

Bargaining

You may hear “Can the decision be delayed a bit’ or “could I just take a pay cut or reduce my hours”.

Engaging in any type of negotiation would likely give false hope, raise any number of inconsistencies and leave you wide open to difficulties with other employees later on. At the time it is important to stress that all possible avenues for alternatives were investigated by the business, the decision was not made lightly but that the decision is final.

Relief and Acceptance

Normally seen in those who have been expecting a decision or where the process has been going on for a long time and where a lot of uncertainty has been present in the organisation.

They may make statements such as “Well, I was expecting this” or “I’m glad the decision has been made - what now”. To confirm that this isn’t just a different form of shock or denial, probe gently and ensure that the message was heard and understood, lay out the necessary and subsequent actions and the availability of support structures open to them.

Important Do’s and Don’ts

- Keep the meeting to the point
- Don’t deviate from the script, be consistent and confirm the decision is final
- Emphasize that the ROLE, not the PERSON, is being made redundant
- Be empathetic but in control. Be prepared to listen, and allow the employee to vent emotion
- Don’t apologise, offer false hope, blame anyone else, or suggest that you know how they feel
- Do not get drawn into an argument, or debate the finality of the decision
- DO NOT discuss any other factors as having contributed to the decision, such as the employee’s performance, attitude, behaviour, tenure or age

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