OFFICE FOR employment relations
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> Redundancy – A Step by Step Guide

The following notes are intended as a general guide for the termination of employment on the ground of "***Redundancy***". It is not possible to detail precise guidelines as circumstances may vary from one workplace to another. If the organisation has any doubts concerning the correct procedural requirements, industrial relations or legal advice should be obtained.

An employee's job becomes redundant when the employer *no longer wishes anyone to do the job that the employee has been doing*. The employer's decision must result not from any personal conduct or performance of the employee, nor on account of any consideration specific to the employee, but from reasons of an economic, technological, structural or similar nature.

Federal and State laws require employers to have objective reasons for terminating employment on account of redundancy and to follow a fair process in selecting and notifying employees who may be affected. Awards and agreements may also contain detailed provisions concerning termination of employment, introduction of change to the workplace and redundancy: such provisions must also be observed. The National Employment Standards also include provisions for redundancy.

The 'operational requirement' exemption has been removed from the Federal legislation and replaced with a 'genuine redundancy' exemption. A genuine redundancy is when an employer no longer needs to have that job to be done by anyone. It is not a genuine redundancy if it is reasonable for the person who was doing that job to be redeployed in either the same business or the business of an entity associated with the employer.

If an employee is made genuinely redundant and the employer has complied with all requirements of any applicable award or agreement in relation to consultation, the employee cannot pursue an unfair dismissal remedy.

Where redundancy is the basis for termination of employment, there are two primary standards that the employer has to meet: 1. that the redundancy is for a valid reason; and 2. that the termination is not "harsh, unjust or unreasonable" under industrial law.

Create Date	May 10
Review Date	May 2011
Author	SO'C
No. of pages	9
File path D:\Information Sheets\2010 Redundancy.doc	

The consequences of a Court finding a termination to be not for a “valid reason” or "harsh, unjust or unreasonable" may include re-instatement and/or payment of substantial compensation to the employee(s).

1. NOTIFY ALL EMPLOYEES AND REPRESENTATIVES OF THE POTENTIAL REDUNDANCY SITUATION

As soon as the employer identifies a potential redundancy situation, all employees who may be affected should be advised in person that redundancies may be required. This should be confirmed in writing, with a summary of the reasons why redundancies may be necessary. This is not the *formal* notification of confirmed redundancies, it is written notification of *proposed* redundancies. The relevant union or employee representatives should be notified at the same time as employees.

2. PREPARE REDUNDANCY PROPOSAL

Immediately after the initial discussion with the workforce and notification to the union or employee representatives, the employer should prepare a redundancy *proposal* that:

- considers available alternatives to redundancy;
- identifies the number and type of jobs to be potentially declared redundant;
- establishes fair and reasonable criteria for selecting the employees to be declared redundant; and
- outlines the redundancy package to be offered to employees whose employment is to be terminated.

An employer should regard redundancy as the last resort. The employer should investigate all available alternatives, including:

- redeployment, i.e. arranging suitable alternative employment within the organisation (or related entity – Fair Work Act 2009) or training the employees to take on new positions;
- redeployment to a lesser position in the organisation (or related entity)
- job sharing;
- a reduction in overall working hours or overtime (but only after full consultation with all the employees who might be affected);
- natural attrition, i.e. not replacing employees who resign or retire;
- calling for expressions of interest for voluntary redundancies;
- introducing an early retirement scheme;
- a reduction in the number of hours worked by casual employees who do not have a reasonable expectation of ongoing work; and
- investigation of employment opportunities with external organisations.

Both Federal and State laws prohibit discrimination on a number of grounds and require the employer to adopt fair and objective criteria in deciding:

- which roles are to be retained;

- which roles are to be made redundant;
- a clear process to determine which employees will remain in roles (where there are one or more affected and qualified employees for a single position)
- how each employee affected by the employer's decision is to be treated.

The following criteria are unlawful and may entitle an employee to take legal action against the employer on the ground of unlawful discrimination:

- Temporary absence from work because of illness or injury;
- union membership or participation in union activities outside work hours;
- non-membership of a union;
- seeking office, or having acted or acting, as a representative of employees;
- filing a complaint or participating in proceedings against an employer;
- race, colour, sex, sexual preference, physical or mental disability, marital status, family responsibilities, age, pregnancy, religion, political opinion, national extraction or social origin; and
- absences from work during maternity or other parental leave.
- temporary absence from work because of the carrying out of a voluntary emergency services activity.

The employer can only terminate employment for the above reasons if, and only if, the reason for termination is made on the inability to perform the inherent requirements of the particular position.

There is a further exception with respect to members of the staff of an institution conducted in accordance with the teachings of a particular religion or creed.

The OER nevertheless advises Catholic employers to be extremely cautious in relying on any of the above reasons for the basis of their decision to terminate employment.

Criteria for selecting employees to be declared redundant may appear fair and reasonable, but may indirectly disadvantage a particular employee or group of employees when applied to a particular workplace. This is called "indirect discrimination" and is unlawful unless the employer can demonstrate that the criteria are reasonable in the circumstances.

Examples of potentially discriminatory policies are:

- following a "last-on, first-off" policy in an industry that has historically excluded women, because it is likely that women will be disadvantaged in comparison with men;
- retrenching only part-time employees, because statistics generally show that women are more likely to work part-time than men; and
- retrenching only employees restricted to *light duties*, because people with physical impairments or injuries are likely to be disadvantaged.

In general, the employer should ignore personal beliefs about which individuals have the greatest right or need to work. For example, the employer does not have the legal right to decide that married employees with children and/or mortgages should be retained, but single employees with no children and/or mortgages should be made redundant. Further, employers should not consider that male employees have a greater right or need to work.

It is impossible to give a definitive answer as to what criteria are fair and reasonable in selecting employees for redundancy, but the following principles serve as a general guide.

First, the employer's decision should relate directly to the employment circumstances, not to incidental concerns.

Secondly, the employer should determine what future skills are required from the workforce and then evaluate objectively each employee on the basis of existing skills.

Thirdly, the employer should carefully consider whether the criteria for selecting employees to be declared redundant discriminate, directly or indirectly, against a particular employee or group of employees. If so, the employer then needs to decide whether the use of such criteria is reasonable under the circumstances.

It is strongly recommended that the employer seeks industrial advice at this stage to ensure that the proposed process and selection criteria are not discriminatory or flawed in some other manner.

3. CONSULT WITH EMPLOYEES AND UNIONS/REPRESENTATIVES

As soon as a definite decision has been made about the future structure or operation of the workplace that might lead to one or more jobs becoming redundant, the employer should inform all employees of its intentions and the process that is to be proposed in dealing with the situation. The employer should consult with the relevant union or employee representatives and discuss measures to avert any terminations, or to minimise their number, and measures to lessen the adverse effects of possible terminations.

The employer should detail the reasons for the restructure or changes to the operations of the workplace, any available alternative to redundancy and what can be done to minimise the adverse impact on the employees.

The employer should treat the employees with compassion and sensitivity. It is important that each employee is allowed an opportunity to voice natural fears and frustration and alternatives to redundancy. It is important that the union or employee representatives are given proper opportunity to discuss all matters with the employer before any final decision is made.

The information given to employees and their union or representatives should be accurate and consistent. In other words, the employer should ensure that all employees and their union or employee representatives receive the same information.

If a union or employee representative indicates to the employer that it intends to challenge the genuineness of the redundancies, or the procedures that the employer has proposed, the employer should immediately seek industrial relations advice.

4. MAKING THE FINAL DECISION

The employer should make a final decision about the proposed restructure and any redundancies only after it has examined any alternatives and taken all measures to avert the need for redundancies.

The employer should formally meet with the employees and their union/ representatives to advise of the final decision. This should then be confirmed in writing to all affected employees and their union/representatives. This advice should summarise the reason for the redundancy, all alternatives and other measures considered to avert the redundancies, the positions and number of employees to be made redundant, assistance to be offered to affected employees and the effective date of termination. It should invite each employee to discuss the final decision with the employer.

5. NOTICE OF TERMINATION

The employer should give at least the minimum notice of termination prescribed by the applicable award (if any) or Federal legislation.

If the employer transfers an employee to lower paid duties due to the original position becoming redundant, the employee is entitled to the same period of notice of the transfer as would have applied to termination of employment.

For example, if the employee is entitled to four (4) weeks' notice of termination, but instead of termination agrees to be transferred to lower paid duties, the employee is entitled to four (4) weeks' notice of the transfer, calculated on the higher rate of pay.

During the period of notice, employees should be allowed to take one day off in each week to look for alternative employment.

The employer should invite employees whose positions have become redundant to work out their period of notice. If an employee wants to leave immediately, a written confirmation of agreement to accept payment in lieu of notice should be obtained.

6. OFFER ASSISTANCE

If possible, the employer should offer each employee, whose position has been made redundant, whatever assistance is needed to find suitable alternative employment and to cope with anxiety and stress.

For example, it may be possible to offer employees accurate information about future employment prospects, independent financial management services and government assistance. A Catholic employer should also offer pastoral support to all employees affected directly or indirectly by the redundancy process.

The employer should also:

- use whatever networks are available with other employers to absorb redundant employees or to find them alternative employment;
- provide factual references and allow the employees whose positions have been made redundant to use in-house facilities in preparing job application letters and résumés; and
- if possible, offer training in additional skills during the period of notice so that the employees are better equipped to find employment.

7. MAKE APPROPRIATE PAYMENT

When the employees actually finish work, the employer should make payment of any moneys to which the employees are entitled and confirm in writing the amount of money and how it has been calculated. The employer should pay an amount of severance pay not less than the amount prescribed by the applicable award (if any).

Federal legislation prescribes minimum standards in relation to notice of termination that an employer must give to an employee. Minimum standards in relation to severance pay are not prescribed. However, decisions of the Federal Court of Australia suggest that the employer should generally offer severance pay in accordance with the provisions typically found in awards.

In some States, the employer may have a legal obligation to pay greater amounts of severance pay.

8. NOTIFY THE COMMONWEALTH EMPLOYMENT SERVICE

Where there is to be greater than fifteen redundancies, the employer is required to write to the Commonwealth Employment Service (or applicable government organisation) and provide the following details:

- the reasons for the terminations;
- the number and categories of employees likely to be affected; and
- time when, or the period over which, the employer intends to carry out the terminations.

Beyond these requirements, obligations on the employer are limited. There is no effective requirement to notify and consult with trade unions [see s 668]. Furthermore, the AIRC does not have power to intervene.

9. CHECK THE FEDERAL AWARD OR STATE AWARD STANDARD FOR SEVERANCE PAYMENT

Employers are advised to check the current definition of 'small employer' in the appropriate jurisdiction relating to your organisation (eg. Either federal or state). Under the National Employment Standards, small employers are not required to provide redundancy payments on termination of employment. It is important to know if the small employer provisions apply to your organisation.

FEDERAL AWARD STANDARDS

WITH RESPECT TO SEVERANCE PAY

Severance pay - for employers employing 15 or more employees

Period of Continuous Service	Severance Pay
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay*
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

*A "week's pay" means the ordinary time rate of pay for the employee concerned. Provided that the rate shall exclude:

- overtime
- penalty rates
- disability allowances
- shift allowances
- special rates
- fares and travelling time allowances
- bonuses
- any other ancillary payment of a like nature.

The severance payment shall not exceed the amount which the employee would have earned if employment with the employer had proceeded to the employee's normal retirement date.

MINIMUM PERIODS OF NOTICE

Period of Continuous Service	Period of Notice
Not more than 1 year	At least 1 week
Between 1 - 3 years	At least 2 weeks
Between 3-5 years	At least 3 weeks
5 years or more	At least 4 weeks

The period of notice is increased by 1 week if the employee is over 45 years and has had at least two years continuous service. This accords with most termination change and redundancy clauses.

The above-mentioned periods of notice are applicable to non-award employees or in cases where an award does not have a termination provision. In all other cases the award provisions apply.

Further References:

Fair Work Act 2009 (effective 1 July 2009)

National Employment Standards