

Workplace Law Legal Update

Redundancy

As of 1 January 2010, Employers should be aware that under the National Employment Standards (NES) the rules relating to redundancy and redundancy pay have now changed. Redundancy under the NES happens when an employer either:

- Decides they no longer want an employee's job to be done by anyone and terminates their employment (except in cases of ordinary and customary turnover of labour), or
- Becomes insolvent or bankrupt.

Please note that what constitutes ordinary and customary turnover of labour may depend on the relevant circumstances.

A redundancy may happen when:

- The job someone has been doing is replaced due to the employer introducing new technology;
- The business slows down due to lower sales or production;
- The business relocates;
- A merger or takeover happens; or
- The business restructures or reorganises.

Genuine Redundancy

The case for 'genuine redundancy' should be clearly made out so that your business may avoid any potential claims by an employee.

Employer's should consider the procedure below in order to minimise any potential legal risks, as well as to ensure that the relevant entitlements owed to employees are complied with:

- Consultation process;
- Identifying the redundant position;
- Reasonable timeframe for redundant position; and
- Payment and finalisation.

Consultation process

In order for the redundancy to be a 'genuine redundancy', employers must first hold discussions with the employees who are likely to

be affected any changes to the workplace.

Consultations with all employees should be formal in nature. A meeting should convey the gravity of the action that the business intends to undertake. It is imperative that the discussions focus on the commercial realities that the business is facing and not on the intention to remove any specific employee.

The objective of the consultation period is to provide employees with an opportunity to make any contributions to the business' plans for major workplace change. Employers should also emphasise anticipated business improvement into the future at these discussions with the employees.

Subsequent to these discussions, employers should objectively identify the position or positions that are to be made redundant. The most appropriate way to perform this task is to create a matrix with required knowledge and duties that identifies and distinguishes the different positions within employers business.

Identifying the redundant position

When identifying the position that is to be made redundant, employers should consider the commercial context for each position. This is to say that each position must be evaluated against a certain set of criteria to determine its intrinsic value to the company. In addition to this, the skill set required to perform the functions of each particular role is of great importance.

Factors that need to be considered when evaluating which position should be made redundant should be set out in a 'Redundancy Matrix'.

Please note that any evidence as a result of the matrix that suggests that the functions of the position no longer need to be performed, or can be performed by another person are critical to the case for 'genuine redundancy'.

The skills that are required to perform a role within the business are directly relevant to making a position redundant. An employee's role may be classified by:

- Primary duties being those duties that are central to the role the employee is to perform for the business; and
- Secondary duties being those duties that include duties to assist with the primary duties, but are not central to the role the employee performs.

An employee's primary duties usually require a specific set of skills or knowledge. Therefore, where an employee that is to be made redundant does not have the required skills or knowledge to perform the primary duties of a role, it is unreasonable to re-assign that employee to that role.

Please be aware that any injury or disability that an employee has cannot be considered a factor in deciding to make the position redundant. To use such factors in deciding to make the position redundant would expose employers to the risk of a claim by an employee. To avoid any doubt, the decision to make the position redundant must be based on commercial and operation factors, and in no way reference the fact that an employee is suffering from an injury or disability.

REDEPLOYMENT

It is considered that a dismissal is not a genuine redundancy if it would have been reasonable in the circumstances for the employee to be redeployed within the employer's enterprise or an associated entity. Therefore, employers must ensure that they consider other positions within the business that the employee may be redeployed to in the event of their position being made redundant in order to satisfy that the dismissal was a genuine redundancy.

COLLECTIVE AGREEMENT

It is important to note that an employee's dismissal is a 'genuine redundancy' under the Act if both of the following elements are satisfied:

- The employer no longer needs the person's job to be done by anyone because of changes in the operational requirements of the business, and
- The employer followed any consultation requirements in the modern award, enterprise agreement or other industrial instrument that applies.

Reasonable timeframe for redundant position

There is no express timeframe that a position must be made redundant for, however the general test is on the basis of reasonable grounds for making the position redundant.

There is a notional timeframe that a position must be redundant for is minimum period of time. Consequently, where a position is redundant for less than this period of time, an employee may pursue the employer claiming the redundancy was not a 'genuine redundancy' and may give rise to a claim of unfair dismissal by an employee.

Payment and finalisation

Employers will be obliged to provide those employees whose position is made redundant with notice of the intention to make a position redundant under the NES provided under the *Fair Work Act 2009 (Cth)*.

In addition to the required notice period, employers will be obliged to remunerate their employees with redundancy pay under any applicable industrial instruments.

Contact:

Jonathon Hadley
Partner

T: +61 7 3002 8722

F: +61 7 3221 3068

E: jonathonh@hemhart.com.au

This update provides general information only and does not constitute legal advice.