

MAKING EMPLOYEES REDUNDANT DOING IT THE RIGHT WAY

Kenefick v Australian Submarine Corporation
Industrial Relations Court Of Australia

Ryan, von Doussa & Madgewick JJ

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A decision to make employees redundant is reviewable by the Courts if the termination is improper or carried out in an unfair manner. In these circumstances the employer may be ordered to compensate the employees. At the same time, employers can expect a decrease in productivity and a loss of time and resources.

It is therefore important to ensure that the right approach is adopted when making employees redundant.

WHEN DOES A REDUNDANCY ARISE?

To establish that a genuine redundancy has arisen, an employer must show that it no longer wants a particular job to be done. If that is the case, then the employee's position has become redundant.

The events which give rise to a genuine redundancy:

- the employer decides that it no longer wishes a job that has been performed to be performed by anyone any longer;
- the employer's decision is based on the ordinary and customary turn over of labour;
- as a result, the employee's employment is terminated; and
- the termination is not due to any performance failure by the employee.

HOW TO EFFECT REDUNDANCIES

Once an employer decides to make a position redundant it should inform the affected employee(s) as soon as possible. There are two reasons for this:

1. to give employees early notice so that they may seek alternative employment; and
2. to give employees the opportunity to have their say about the proposed redundancy.

An employer should give employees time to deal with the emotional, family and domestic turmoil caused by a potential redundancy.

The Industrial Courts and Tribunals have stated that a failure to adopt a fair procedure and give employees a say will lead to compensation being awarded.

In *Kenefick v Australian Submarine Corporation* (1996) the Full Bench of the Australian Industrial Relations Commission held that a failure by an employer to act in a consultative manner was a reviewable matter which could lead to compensation being awarded to employees.

A useful procedure for employers to adopt is as follows:

1. issue a memoranda to all employees effected by potential redundancy advising them of proposed restructuring. The memoranda should outline the nature and the purpose of the restructure;
2. conduct face to face meetings with employees to explain the restructuring, how it will effect employees and how the employer proposes to select employees for redundancy;
3. publish a timetable providing employees with dates for each stage of the proposed restructure;
4. invite employees to submit their comments on the restructuring and any suggestions which may lessen the impact of the redundancy; and
5. appoint an employee representative to respond to any enquiries or comments by employees in relation to the proposed redundancy.

Employees whose positions have been made redundant may have the termination reviewed in the industrial courts. The Courts and the Tribunals can order re-instatement, re-employment and/or compensation.

How To Make the Final Decision Easier

One way to make the decision easier is to initially offer voluntary redundancy packages. An employer can then decide to accept or reject applications from existing employees. Employers should ensure that voluntary redundancy packages:

- comply with applicable contracts of employment, awards and industry standards;
- clearly explain the implications of accepting a redundancy;
- are in writing and provide a calculation sheet showing how much an employee can expect to receive on termination before and after tax.

Employers should allow employees sufficient time to consider the redundancy and discuss the redundancy with their families. Employers should not pressure any employee to accept a redundancy package.

Redundancy terminations should never be on the basis of cost cutting. Such redundancies have been overturned by the industrial courts for failure to consider alternative cost cutting measures.

Points for Employers to Consider

After deciding to restructure the workforce an employer should:

1. ensure that the new restructured workforce deals with the operational requirements of the business only. The restructure should not be calculated as a means to terminate a troublesome employee;
2. ensure that the goals of cost-cutting are in fact achieved by making the redundancies;
3. show that other cost-cutting measures have been considered and discounted;

4. ensure that employees have been able to consult with them to see if alternatives are possible;
5. ensure that the benefits of restructuring justify the harshness of the termination of employment;
6. ensure that redundancy can not be avoided by means such as job sharing or converting full-time positions to part-time positions.

How to Establish Fair Selection Criteria for the Positions which Remain After the Restructure

When selecting employees for the remaining positions an employer should:

- prepare and issue job descriptions and any relevant selection criteria to all employees;
- provide every employee with an opportunity to prepare a resume and address their suitability for any position they wish to apply for;
- conduct an interview with each employee on a confidential basis;
- consider offering any long-term employees career counselling and assistance to prepare resumes for the upcoming interviews;
- explain to any unsuccessful candidate why she/he was not suitable for a remaining position.

Employers should not discriminate in their selection of employees on any of the following grounds:

1. age;
2. sex;
3. pregnancy;
4. race;
5. marital status;
6. disability;
7. union membership.

How to Deal With Long-Term Employees

Long-term employees should be given an opportunity to work in alternative positions if possible. All available options should be discussed with such employees. Further, employers should not advertise for external candidates unless they have carefully considered the suitability of all existing employees first.

In order to assist employees to find future employment, employers should allow them to work out their notice period if they so wish.

FINAL COMMENTS

Employees whose positions have been made redundant may have the termination reviewed in the industrial courts. The Courts and the Tribunals can order re-instatement, re-employment and/or compensation.

In order to defend these types of claims, employers must be able to show that they effected the redundancy in a fair manner. The best way to do this is to provide written evidence that employees were given notice of the changes, employees were allowed to consult with the employer, employees were made redundant on the basis that the employee's job no longer existed and fair selection criteria were used when selecting candidates for the remaining positions.

Sam Ingui and Victoria Hiley's article first appeared in Colin Biggers & Paisley's *Workplace Services Update* bulletin (April 2001). It is reprinted here with permission.