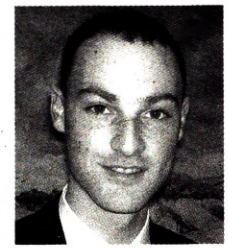
Redundancy payments for award employees



By Anthony Massaro, Solicitor, Russell Kennedy

Introduction

On 26 March 2004, the full bench of the Australian Industrial Relations Commission (**Commission**) handed down its decision in the *Redundancy Test Case* (Print PR032004). The case involved a number of claims by employee and employer groups in relation to the standard redundancy provisions of several key Awards. The Commission decided to increase current standard redundancy payments, and to partially extend the old standard redundancy provisions to cover small businesses.

A supplementary decision clarifying the position of small businesses was handed down on 8 June 2004. This decision reflected the fact that the test case decision created what was effectively a retrospective liability for small businesses of up to eight weeks pay in relation to some employees.

Background

For the past 20 years, the *Termination, Change and Redundancy case* (***TCR case***) has been the standard for employees' entitlements on termination across Australia. The Commission set down a number of basic obligations for employers as to notice and severance payments, which were then incorporated into most federal awards and adopted by most of the states. Pursuant to the *TCR case*, in addition to any relevant notice payments, an award employee whose employment was terminated on the grounds of redundancy would be entitled to a redundancy payment according to the following table:

Period of continuous service	Redundancy payment
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 or more	8 weeks pay

Small businesses – defined as businesses with less than 15 employees – were exempt from the obligation to make redundancy payments, although this exemption could be removed by order of the Commission in individual cases.

Redundancy Test Case

The Commission was asked to consider 25 submissions made by the Australian Council of Trade Unions (**ACTU**), the Australian Chamber of Commerce and Industry (**ACCI**), and the Australian Industry Group (**AiG**), including claims by the ACTU for an increase in redundancy payments, and the extension of the standard redundancy requirements to cover casual employees and employees of small businesses. The employer groups opposed these application, and sought to have further exemptions granted to insolvent employers, or employers without the capacity to pay.

The Commission declined all but two of the submissions, deciding to increase redundancy payments, and to remove the small business exemption.

Increased redundancy payments

The Commission pointed to the fact that because the maximum amount of severance pay is reached after four years of service, the current scale did not adequately take into account the effect of termination on employees with longer periods of service. The Commission accepted the ACTU's argument that the hardship suffered by an employee made redundant after five years would be greater than that suffered by an employee made redundant after four years, and increased the standard redundancy payment for employees terminated between their fourth and tenth years of service.

The purpose of increasing these redundancy payments was to take into account the loss of accrued employment benefits which could not be transferred, such as long service leave. While employees are generally only entitled to take long service leave after 15 years of continuous service, most awards provide for payment of accrued long service on a pro-rata basis to employees terminated after the completion of 10 years service. Accordingly, employees made redundant after 10 or more years are entitled to a redundancy payment of 12 weeks pay (compared to 16 weeks pay for employees terminated after nine years) to reflect this partial mitigation of their loss.

The following standard now applies to all award employers other than small businesses:

Period of continuous service	Redundancy payment
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 year 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

The Commission did not consider it appropriate to extend redundancy entitlements to casual employees, or to exclude insolvent businesses from this increase.

Small businesses

The Commission found that the losses suffered by employees made redundant from small employers were no less than those suffered by the employees of larger businesses. For that reason, the Commission decided that employees of small businesses should have minimum redundancy entitlements set out in the awards. However, taking into account the ability of small businesses to pay out redundancies, the Commission decided that the old standard redundancy requirement should apply to small businesses, with the limit being set at eight weeks redundancy pay for employees terminated after four or more years service.

Employer groups and the Federal Government criticised the Commission's initial decision on the basis that small businesses, who had not had the opportunity to provide for this contingency, would be unable to meet the new requirements. In its supplementary decision, the Commission decided that for the purpose of calculating this new entitlement, the period of service should be taken to start from 8 June 2004, instead of from the employee's date of commencement. The effect of this is to prevent the decision from having retrospective effect on small business.

Small businesses who are incapable of complying with the standard may make an application to the Commission for individual exemptions.

Awards covered by the Redundancy Test Case

The decision affects the following Awards:

- Business Equipment Industry – Technical Service – Award 1999;
- Clerical and Administrative Employees (Victoria) Award 1999;
- Graphic Arts – General – Award 2000;
- Information Technology Industry (Professional Employees) Award 2001;
- Liquor and Accommodation Industry – Restaurants – Victoria – Award 1998;
- Metal, Engineering and Associated Industries Award 1998 – Part I;
- Retail and Wholesale Industry – Shop Employees – Australian Capital Territory Award 2000;
- Rubber, Plastic and Cable Making Industry – General – Award 1998; and
- Storage Services – General – Award 1999.

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Focus on the NAB

By Jennifer Holdstock, Solicitor, Russell Kennedy

The National Australia Bank (**NAB**) is a public listed company incorporated in 1893.[1] Its registered office is at 500 Bourke Street, Melbourne and it is subject to both the *Banking Act* 1959 (Cth) and the *Corporations Act* 2001 (Cth).[2] The NAB is led by a CEO and a board of directors. The Board is responsible for the corporate governance of the NAB and its controlled entities.[3]

The NAB has almost 800 branches, 152 banking centres and has an agreement with just under 2000 licensed Australia Post outlets across Australia.[4] In the year ending 30 September 2002, the NAB Group as a whole achieved a net profit of $3,373 million.[5]

There are about 110 members of the in-house legal team across the country. About 70 of these are solicitors. To sneak a peek into life as a NAB in-house solicitor, Erin McLeay a third-year solicitor, who is part of Legal Southern and Central at 271 Collins Street, Melbourne, shares her experiences.

Erin has been in-house with the NAB for almost 12 months. She has a background as an associate to two South Australian Supreme Court judges, together with experience as an insolvency lawyer from her time at one of Adelaide's leading commercial law firms.

Erin is one of four lawyers within the Legal Advisory team. In addition to the Legal Advisory team, Legal Southern and Central has a Documentation Unit and a Dispute Resolution Unit. Working in the Legal Advisory team means Erin advises any banker from any branch in Victoria, South Australia, Tasmania and the Northern Territory who calls or emails with a legal query. She dispenses telephone advice or written advice, often in an email format. Her work exposes her to not only banking and corporations law, but also to insolvency law, family law and elements of criminal law, including restraining orders, forgeries and fraud. With changes to privacy laws in recent years, Erin finds herself advising on privacy issues quite a bit and often deals with complaints made to the Banking and Financial Services Ombudsman which relate to a wide range of issues. She also deals with powers of attorney issues and often has to deal with legal matters arising out of the deaths of customers.

She is the most junior member of her team, which consists of the principal counsel for the region who has over 10 years experience, together with two other experienced lawyers. In the legal advisory team, almost all of the legal work is done in-house, whereas the dispute resolution team has greater involvement with external solicitors.

Erin said the differences between working in-house at a corporation compared with working for a private firm, include not having to use timesheets, although she says, "you still have to be accountable for your day". She mentioned getting a breadth of experience across many areas of law, which you may not be exposed to in private practice. She also states that the culture is vastly different, with the NAB promoting a healthy work-life balance.

Erin recommends an in-house position especially in a bank setting as being a good grounding for someone who wants to work in the law overseas, but recommends having a developed area of expertise to build on. She says, "Having worked in an insolvency specialisation prior to joining the bank has provided a good grounding for my current work".

In terms of career development, Erin says, "Once you are in the bank, there is room for movement to other areas of the legal department and to other areas of the bank." She says, "The breadth of experience gained in 12 months at the bank is phenomenal, because you do specialise so much when you're in private practice". She describes her current position "as feeling a bit like a sole practitioner, as you are in charge of your own files and create your own (internal) client base".

Erin's final words of wisdom to people contemplating a move from private practice are: "Don't ever rule out in-house. It is fantastic. You get such a broad range of work and experience." ■

1. See www.nabgroup.com/0,,32714,00.html, accessed 15 April 2004.
2. See www.nabgroup.com/0,,32714,00.html, accessed 15 April 2004.
3. Concise Annual Report 2002 p33.
4. Concise Annual Report 2002 p10.
5. Concise Annual Report 2002 p42.

Disclosure: Russell Kennedy acts for NAB.

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Effect of the decision

While this decision only applies to the above nine awards at present, it is expected that the revised redundancy benefits will eventually flow through to all Award employees. This is particularly interesting in the context of the *Federal Awards (Uniform System) Act* 2003 (Cth), which commenced on 17 December 2003. As of 1 January 2005, the Commission will have the power to declare that a federal award will apply by common rule to all Victorian employees performing the kind of work described in the award, even those employees whose employers are not currently respondent to the award.

Currently, Victorian employees have no entitlement to redundancy payment unless it is covered in their contract of employment, award or certified agreement. However, through the application of common rules, it appears likely that the increased standard redundancy payments and the removal of the small business exemption will apply to the majority Victorian employees.

Responses to the decision

The ACTU welcomed the Commission's initial decision as a great result for Australia's workers, but was disappointed that there will be a four year delay before employees of small businesses would enjoy the benefits of their new entitlement. The Federal Government had intended to legislate in response to the initial decision, however both it and the employer groups are satisfied with the supplementary decision, and it appears unlikely that such legislation will be pursued. ■