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REDUNDANCY ROADMAP – KEY ISSUES TO CONSIDER

Redundancies are on the increase due to the current financial pressures facing employers across the globe. When an employee is faced with job loss due to redundancy, the employer sometimes finds it is faced with legal action. Discrimination, unfair dismissal, breach of contract and award breach claims can all flow from terminations for redundancy reasons.

In this edition of Employment Alert, we review the basics of redundancy, including:

- When is a position genuinely redundant?
- Varying an employee's hours or duties to avoid termination
- Procedures to implement redundancies
- Entitlement to severance pay

With careful planning and adherence to appropriate processes, employers can minimise the risk of legal liability in redundancy situations.

Genuine redundancy

Currently, employers with workforces comprising 100 employees or fewer are exempt from unfair dismissal claims. The Government plans to remove this exemption from 1 July 2009.¹

For those employers who are at risk of unfair dismissal claims, the concept of genuine redundancy is important. This is because an employee may not bring an unfair dismissal application if his or her employment was terminated for reasons that include genuine operational reasons.

The following are examples of genuine operational reasons leading to redundancy:

- The business is restructured for reasons of efficiency or productivity. It is not enough simply to rename a position, or change a few of the duties;
- The employer reduces its workforce due to a general downturn in business. However, the employer must be able to produce figures to show a sustained decline in profits;
- The business is sold or outsourced, and the employees are not offered equivalent employment with the new owner (the terms of the sale of business and any applicable award or collective agreement can affect employee entitlements in this situation).

Redundancy can occur when the job performed by the employee is no longer performed by anyone, or when the duties are split up between other employees.

An employer cannot simply assert that a termination is for reasons of redundancy or poor performance or misconduct – the assertion must be backed up by the facts. This was illustrated in a recent case where the employer argued that a termination was not a redundancy (which would have resulted in the employee being entitled to a substantial severance payment under the contract of employment) but for poor performance. In its decision on 11 November 2008, the NSW Supreme Court held that, although the employer was motivated to remove the employee, “what it did was to make the position that he held redundant” (*Campbell v Encyclopaedia Britannica Australia Ltd*).

The *Fair Work Bill 2008* introduced into Parliament on 25 November 2008 includes some significant changes in this area. The Bill defines “unfairly dismissed” to include dismissals that are not genuine redundancies. In order for a dismissal to be a “genuine redundancy”, an employer will need to comply with any consultation requirements in an award or enterprise agreement. The dismissal will not be a genuine redundancy “if it

¹ For more information on proposed changes to unfair dismissal laws, see Moores Legal Employment Alert, October 2008

would have been reasonable in all the circumstances for the person to be redeployed” either within the employer’s enterprise or an associated entity. If the Bill is passed in its present form, this will mean that employers must consider redeployment options before dismissing an employee for redundancy reasons.

Employers wishing to effect genuine redundancies should ensure that they

- *Check notice and severance pay entitlements before taking action;*
- *Abolish the position (not just the title);*
- *Do not employ a replacement employee in a very similar role;*
- *Keep records to demonstrate the need for the restructure or reduction of the workforce.*

Variation of duties or hours

Employers seeking to avoid making job cuts sometimes spread the burden by reducing employees’ hours of work or transferring them to other roles.

Making significant changes to an employee’s duties or hours of work usually requires the employee’s agreement. If done without agreement, such changes can give rise to claims for breach of contract or unfair dismissal if the employee resigns in response (based on the notion of “constructive dismissal”).

However, in some cases employers have the power, under a written employment contract, to make substantial changes to an employee’s role.

Transferring an employee to lower paid duties may give rise to an entitlement to notice under certain awards.

If an employer wishes to make significant changes to employee roles or hours, the employer should:

- *Check whether an applicable award gives the employee or trade union any rights in relation to changes to the position;*
- *Check whether the employment contract empowers the employer to make changes without agreement;*
- *Alternatively, seek the employee’s agreement to the change and confirm the arrangements in a new employment contract.*

Procedures to implement redundancy

When an employer decides to terminate the jobs of 15 or more employees for redundancy reasons, the employer must notify Centrelink of its intentions.

Other procedures may be stipulated in an applicable award or workplace agreement, or in the employer’s own policies and procedures. Anti-discrimination legislation can also have a bearing on how a restructure is effected.

Employers must exercise care to avoid accusations of discrimination in selecting employees for termination, particularly where a number of similar positions are redundant.

Commonly, employers have adopted a “last on first off” policy. However, this may result in unlawful discrimination against female employees or young employees, depending on the recent recruitment patterns of the employer.

Employers should be mindful of employees who are on long term leave, such as parental leave, sick leave or WorkCover. The fact that the employee’s work is being done by other employees during their absence, should not automatically lead to the conclusion that their position is no longer required.

Calling for volunteers to accept redundancy packages can help employers to avoid such difficulties. However, this may lead to the most talented or productive employees leaving, as they are confident of obtaining work elsewhere.

In conducting a “spill and fill” of positions, employers should ensure they have:

- Clear position descriptions for the remaining positions;
- Clear and relevant prerequisites and criteria for each position;
- A fair process for employees to apply for remaining positions (including employees on long term leave).

Severance pay

When an employee’s employment is terminated, the employee is entitled to notice of termination. The amount of notice may be the minimum period set out in the *Workplace Relations Act 1996*, or a longer period stipulated in an award, workplace agreement or employment contract.

In addition to notice of termination, the employee may be entitled to severance pay where the termination is for redundancy reasons. However, there is currently no statutory entitlement to severance pay although the *Fair Work Bill* introduces an entitlement to severance pay for all employees of businesses with 15 or more employees.

Currently, a severance pay entitlement only arises if specified in an award, workplace agreement or employment contract. The standard award entitlement ranges between 4 weeks and 16 weeks’ pay, depending on the length of the employee’s service.

In the *Encyclopaedia Britannica Australia* case, the employer was found liable to pay 9 months’ combined notice and severance pay in accordance with a letter given to the employee when he was promoted to a new role. Failure to pay the severance pay was found to be a breach of contract

When terminating an employee’s employment on redundancy grounds, employers should:

- Find out whether an award applies;
- Check the employee’s entitlement to severance pay under any applicable award, workplace agreement or employment contract.

For advice on redundancy or any other workplace relations issue, contact the Moores Legal Workplace Relations team.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations contact the Workplace Relations team at Moores Legal.

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