

Redundancy payments—mistakes can be costly

Employers must exercise caution and understand their legal obligations when handling redundancy payments. Paying too little may result in legal action by or on behalf of the employee. Mistakenly paying too much may be an unnecessary expenditure that cannot later be recouped.

In this edition of Employment Alert we look at redundancy entitlements and review a recent case in which an employer mistakenly made a redundancy payment to an employee.

What constitutes redundancy?

A job or position is redundant where the employer no longer requires it to be done by anyone, except where this is due to ordinary and customary turnover of labour.

If a position is redundant, the employer should consider redeployment options. If the employee cannot be redeployed, then his or her employment may be terminated. It is only then that an entitlement to redundancy pay (also known as severance pay) may arise.

When are employers required to make redundancy payments?

Employees may be entitled to redundancy pay under the *Fair Work Act 2009* ('the Act'), an Award or Enterprise Agreement, an employment agreement, or by reason of custom and practice.

The Fair Work Act

Before the commencement of the National Employment Standards ('NES') in the Act, there was no general entitlement to redundancy pay. This meant that award-free employees had no entitlement to redundancy pay, unless there was a severance pay provision in an employment agreement, or an obligation arose from custom or practice.

Since 1 January 2010, the NES have prescribed minimum redundancy pay entitlements for national system employees who meet the following criteria:

- Full-time or part-time employee;
- With 12 months or more of continuous service with the employer;
- Employed by an employer that is not a 'small business employer' (ie. employs 15 or more employees).

The Act sets out a number of categories of employees who are **not** entitled to redundancy pay, including:

- Casual employees;
- Employees employed for a specified time, task or season;

- Employees under certain training arrangements;
- Employees with less than 12 months of continuous service;
- Employees of small business employers.

The Act also contains specific provisions regarding redundancy entitlements in transfer of business situations.

Where an employee is entitled to receive a redundancy payment, the employer must consider the employee's length of service to determine the amount payable by reference to a table set out in the Act.

It is important for employers to note that an employee's service prior to the introduction of the NES (1 January 2010) is counted when calculating redundancy pay but **only** where the employee had a pre-existing entitlement to redundancy pay. A pre-existing entitlement may be due to an award, enterprise agreement or employment contract, for example.

Where an employee did not have a pre-existing entitlement, their redundancy pay will be calculated by reference to their length of service from 1 January 2010.

Awards and Enterprise Agreements

Employers must also check whether the employee is covered by a modern award or enterprise agreement at the time of the redundancy. Most modern awards simply refer to the NES entitlements to redundancy pay. However, some include additional entitlements. For example, the *Building and Construction General On - site Award 2010* provides for an industry-specific redundancy scheme.

Contractual entitlements/custom and practice

Finally, employers must remember to comply with any obligations in the employment agreement between the organisation and the employee. These obligations may be in the written employment contract (if any) but may also be contained in company policies which are sometimes 'incorporated' into the employment contract. Care should be taken in drafting employment agreements to ensure that no terms are inadvertently incorporated into the agreement from policies or elsewhere.

Employers should also consider custom and practice within the organisation when making redundancy payments to employees: in particular, whether there has been a consistent trend regarding the amount of redundancy pay employees have received upon termination in the past.

Can an employer claw back an over-payment of redundancy pay?

Occasionally, employers make redundancy payments to employees who are not entitled to payment, or overpay employees due to calculation errors. An employer may not be able to claw back a mistaken redundancy payment where the employee has changed his or her position in reliance on the payment.

The employee must be able to show that the redundancy payment led to a change to their position to an extent greater than the mere payment of ordinary living expenses, and that it would be inequitable for the court to require the employee to repay the redundancy payment to the employer.

Case study

The recent case of *TRA Global Pty Ltd v Kebakoska*¹ illustrates how a mistake as to redundancy pay obligations can be very costly for an employer.

Here, the employment of a senior manager was terminated for reasons of genuine redundancy. Upon termination, TGA Global Pty Ltd mistakenly paid the employee, Vesna Kebakoska, a 12 week redundancy

¹[2011] VSC 480 (27 September 2011)

payment (\$27,318.48) believing it was obliged to do so pursuant to the Clerk's Award (note that the NES was not in effect at the time of the redundancy).

Ms Kebakoska subsequently took action against TRA Global for contractual bonus entitlements. TRA Global counterclaimed, seeking restitution of the redundancy payment as it was paid by mistake.

Ms Kebakoska argued that because of the redundancy payment, she had been denied Centrelink benefits and was consequently forced to rely on her redundancy payment during her 8 months of unemployment.

The Victorian Supreme Court upheld the employee's argument and found that the employer was not entitled to recoup the mistaken payment.

Steps employers should take to avoid mistaken payments

To avoid exposing themselves to disputes regarding incorrect redundancy payments made to employees, employers ought to:

1. Check employment agreements and company policies before considering redundancies. If these documents give employees entitlements to severance pay or notice in excess of the NES, consider amending them and entering new agreements with employees;
2. Understand the redundancy provisions and requirements under the NES, including which employees are entitled to redundancy payments;
3. Be aware of any applicable awards or enterprise agreements that may affect redundancy entitlements.

Seeking assistance

Moores Legal can provide comprehensive advice in relation to redundancy payments owed to employees and assist employers in understanding their legal obligations surrounding redundancy in general.

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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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