GENERAL GUIDANCE NOTES

MANAGING REDUNDANCY

These notes apply to national system employers who are governed by the *Fair Work Act 2009* (Cth) ("**Act**"). They are general in nature and are designed to bring to your attention to matters that you may not have considered before and/or are outside of the scope of advice you requested from us. As such they do not constitute specific advice but are provided as general information.

WHAT IS A REDUNDANCY?

Redundancy means the person is terminated because the person's employer no longer requires the person's job to be performed by anyone. This might be because of changes in the operational requirements of the employer's business (such as a general downturn in business, an organisational restructure or loss of commercial contracts) or closure of the business. Redundancy might affect all employees doing a particular job, or it might mean that the number of positions for a particular job is to be permanently reduced. If a person's employment is terminated for these reasons, the employee is sometimes referred to as 'being made redundant'.

ARE THERE ANY TYPES OF EMPLOYEE WHO CANNOT BE MADE REDUNDANT?

Apprentices and trainees have special arrangements under their training contracts. The precise rules vary in each state, but employers should not consider the redundancy of a trainee or apprentice without taking specific advice about it.

As a general observation a casual employee is not made redundant because the nature of their contract of hiring was never one based on a permanent position (please see our General Guidance Notes – Casual Employment for more information). Some employees on fixed-term contracts may not be made redundant without paying the balance of their fixed-term contract, unless their contract terms allow for early termination of the contract because of redundancy. This will depend on a range of factors and specific advice should be sought if such a situation arises.

WHAT OPTIONS GENERALLY ARISE FROM A REDUNDANCY SITUATION?

The options for an employer include redeploying surplus employees into other positions, or termination of employment on the grounds of redundancy. Enterprise agreements might have specific provisions that describe or limit the available options, so it is vital to check.

The Act requires reasonable redeployment options to be considered, including positions available at associated entities of the employer and even currently outsourced work. A failure to consider redeployment can result in an unfair dismissal claim. Positions at a lower level must also be considered; if the employee has the skills, knowledge and experience required for such an available role, the position must be offered to the employee.

Note that under the section of the Act that deals with redundancy pay, "termination" may occur even if the employee remains employed in a different role afterwards. This will depend on the specific circumstances, so employers should always seek advice.

In some circumstances, allowing employees the opportunity to make an expression of interest in voluntary redundancies can have a number of advantages for minimising adverse effects and maintaining better control of the composition of the workforce. The employer should set fair and consistent rules about who can apply for a voluntary redundancy, and maintain the final say on any voluntary separations. Whether voluntary separations are a reasonable mechanism to open up redeployments will depend on the circumstances.

In some circumstances it may be reasonable to redeploy an employee to a position held by a contractor. Whether such redeployment is reasonable will depend on consideration of a number of factors. It is not always clear-cut so specific advice is recommended.

THE PROCESS OF MAKING A DECISION

An employer is generally entitled to make decisions about its business structure,[1] including which positions exist and how many employees are required, so long as they are made on genuine and lawful grounds. The business case for a restructure should be determined in advance. Once a definite decision has been made, the award consultation obligations noted below are triggered and they must be commenced as soon as practicable. Employers will need to check their enterprise agreements to determine at what stage their consultation obligations may be triggered, as it might be earlier. A failure to consult in compliance with the enterprise agreement or award can result in an unfair dismissal claim.

[1] We note though that some enterprise agreements stipulate staffing levels.

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THE OBLIGATION TO CONSULT

Where an employee is covered by a modern award or an enterprise agreement, the employer must ensure as a minimum that the consultation and notification terms in those instruments are met. If they are not, it provides an affected employee with access to the Fair Work Commission ("**FWC**") for an unfair dismissal claim, or grounds for unions to prosecute for breach of award/agreement or to have the restructure process slowed down or restarted. The award/agreement will set out the minimum consultation obligations, and the kind of information that must be given to employees and their representatives. If the employer has its own policies about consultation, these must also be followed to avoid claims for breach of those policies. Additionally, in certain situations involving the termination of 15 or more employees, the Act requires consultation with relevant unions and advice to CentreLink. Employer policies cannot override any award/agreement redundancy and termination obligations.

Even if the affected employees are award-free, or they are senior managers, we recommend an appropriate consultation process for all affected employees. Implementing a redundancy with a senior manager should be treated carefully. Contractual terms, explicit and implied, will generally still require a level of consultation with the affected employee. Failure to properly consult could also lead to workers compensation claims for psychological-related illnesses, e.g. stress.

Employers should always take advice about the content of any communication – especially where they discuss options for changed roles or redeployment – as these may have an impact on an employee's entitlement to redundancy pay.

IDENTIFYING WHICH POSITIONS ARE REDUNDANT

It is up to the employer to identify which *positions* it has decided are no longer required. This is separate from the selection of *individuals* in those positions.

IDENTIFYING WHICH INDIVIDUALS ARE AFFECTED

If the intention is to reduce the number of employees, this will require a formalised process of selection to identify which employees will remain employed and which will have their jobs made redundant. Selection is not necessary where only one employee occupies the affected position.

If an applicable industrial instrument or contract of employment specifies mandatory selection criteria or processes, these must be strictly followed. Selection criteria should accurately reflect the future operational requirements. Criteria must not discriminate, directly or indirectly, on unlawful grounds. Employees and representatives should be given an opportunity to consider and respond to the selection criteria *before* its implementation and to consider and respond to the selection results *before* a termination is made. An employee is only entitled to their own assessment results, not other employees' assessments.

The process should be well documented so that evidence of the decision-making process is clear should it be challenged. We recommend that employers take advice about the construction of appropriate selection processes and criteria relevant to their circumstances.

CAN THE PROCESS BE DISPUTED OR STOPPED?

Yes. Although an employer has the right to restructure its business on lawful grounds, if the consultation process is not conducted properly, employees and unions may be able to apply to the FWC for an order to halt the process and for the employer to comply with its obligations.

IF AN EMPLOYEE'S EMPLOYMENT IS TERMINATED OR THEY ARE REDEPLOYED, WHAT REMEDIES DO THEY HAVE TO OVERTURN THE DECISION?

Employees are unable to bring claims of unfair dismissal if the termination is a result of a genuine redundancy and the consultation and redeployment obligations have been complied with. If any of these three criteria are not met, the employee may make a claim for unfair dismissal and if successful can be awarded reinstatement or compensation on the basis that the termination was unfair.

Employees can also claim that any part of the employer's decision making was for a prohibited reason – this is known as a 'general protections' claim. In these cases there is a reverse burden of proof - the onus falls on the employer to prove that the reason for the decision to dismiss the employee did not include the prohibited reason. The Court may impose any order it considers appropriate in relation to such claims and the financial penalty is uncapped for these breaches.

In some specific circumstances, even if the employee is redeployed to a different role, they may still be able to make an unfair dismissal or general protections claim or be entitled to redundancy.

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HOW DOES THE CONCEPT OF TERMINATION WITH NOTICE WORK IN A REDUNDANCY OR REDEPLOYMENT SITUATION? IS REDUNDANCY PAY SEPARATE?

The appropriate period of notice must be provided or paid in lieu if employment is terminated. Notice must also be provided if the employee transfers to a lower paying position. Some employers believe that once consultation begins, the notice period is running. This is not correct - the notice period only starts when the consultation and assessment is complete and the individual employee is actually given written notice of termination with a specific termination date. Awards and enterprise agreements often include specific provisions around notice for a transfer to lower paid duties.

In addition to notice, an employee terminated for redundancy will be entitled to redundancy pay and/or other conditions provided by the Act, Award, Enterprise Agreement or contract of employment.

WHAT ARE AN EMPLOYEE'S ENTITLEMENTS UPON TERMINATION, AND HOW ARE THEY CALCULATED?

This will depend on any enterprise agreement, award or contract of employment and the minimum National Employment Standards ("**NES**") of the Act. As well as notice and redundancy pay, an employee will generally be entitled to accumulated untaken annual leave and long service leave if they meet the criteria for length of service. Certain types of employees may not be entitled to redundancy pay. These may include casual employees, employees with less than 12 months service or employees of an employer with fewer than 15 employees. Some special situations might affect redundancy entitlements. These include securing work with another employer (or another role with the current employer) and transfer of business situations (e.g. involving the sale of a business, outsourcing, etc.).

We recommend that employers take advice about the calculation of notice and redundancy pay, to prevent errors or oversight. Special conditions may apply if an employee was not entitled to redundancy pay as at the commencement of the NES in January 2010.

WHAT ARE THE TYPICAL TRAPS OR ISSUES ARISING FROM NON-AWARD OR NON-AGREEMENT EMPLOYEES?

Employers often believe that the consultation processes do not apply to managerial staff, and try to exit redundant managers or non-award staff as soon as possible. There are many awards that apply to white collar professions and it's easy to wrongfully conclude that there are no consultation obligations.

Where there is no award or agreement applying employers should still comply with any consultation policies that are contained in their own procedures or in the employee's contract of employment. Award-free employees earning less than the high income threshold (as defined and indexed in accordance with the Act) can still make unfair dismissal applications, and all national system employees can make general protections claims. In some cases, executives may sue for breach of contract, so it is vital to follow an objective and lawful process. Calculation of executive termination payments can also be problematic, and we recommend taking advice on such issues.

SPECIFIC ADVICE

EMA Consulting can provide you with assistance, advice and representation specific to your business objectives and in relation to any of the above issues.

SUGGESTED BEST PRACTICE PROCEDURES, TOOLS AND TEMPLATES

We offer a variety of tools, procedures and templates that may assist your management of this process in the future. This will depend on your business situation. Your EMA Consultant can provide further information about these. They include:

- Restructure/Redundancy Project Plan
- Presentation for management outlining the key industrial relations steps and employer obligations
- Presentation outlines for communication with various stakeholders
- Template Letters to employees and their representatives

Require further information/assistance?

If you require further information or advice, please contact your Consultant.