THE ARGYLE PARTNERSHIP
LAWYERS

HANDLING REDUNDANCY WITH A VELVET GLOVE

BEN SMITS
LAWYER
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"It is easy to think that mustering the courage to inform a long term employee that they are not needed as part of the team any more is the hard part of the job done, however sometimes, this can be just the beginning..."

How often do you think as an employer, we are simply behind the times? The market is now tired of our once innovative product? Competitors are making similar products cheaper.

One way to move forward is to change your technology and your systems. Another is that you become more efficient by cutting fixed costs such as staff that are no longer required or bring in fresh cheaper staff. On occasions you may take steps to structurally change your business without even knowing that you have made certain staff redundant.

What do you owe to someone whose position is no longer required? How should you approach the situation?

A failure to consult with an employee or union about the issue of redundancy may mean a termination on that ground is harsh, unjust or unreasonable. A termination may also be harsh, unjust or unreasonable because the employee may have been, but was not, offered suitable alternative employment with the employer. In redundancy situations an employer is obliged to:

1. give reasonable notice to employees and/or their unions;
2. adequately consult with employees and/or their unions on the impact of the proposed changes;
3. explore genuine alternative options for redundancy, such as redeployment or relocation;
4. ensure such options are fairly offered to the affected employees;
5. provide reasonable standards of redundancy benefits;
6. provide appropriate ancillary services, such as time off to seek alternative work, retraining opportunities, outplacement services or financial planning; and
7. ensure employees nominated for redundancy are fairly selected on an objective and unbiased basis.

A failure to meet these requirements opens a termination on the grounds of redundancy to a finding of unfairness. Notwithstanding the employer's obligations, there are certain reciprocal obligations on employees when confronted with genuine efforts by the employer to minimise the impact of potential redundancy. These obligations include:

1. a willingness to participate in consultation with the employer;
2. genuinely participating in exploring alternatives to redundancy;
3. not unreasonably refusing to accept retraining, alternative employment, redeployment or relocation.

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An employees redundancy entitlements

In light of the authorities and any individual employees circumstances, an employees redundancy entitlements will among other things depend on:

1. the number of years employed;
2. the varied, dynamic and complex nature of an employees of duties and responsibilities;
3. an employees final salary and package;
4. an employees age;
5. the proportion of an employees life dedicated to the role and/or industry;
6. the number of similar roles available in a close location proximity to the employees residence
7. the number of weeks written notice;
8. the approach taken by the employer with respect to the redundancy and to a lesser extend the response from the employee.

Operational requirements of employer — genuine redundancies

Even where the Commission considers a redundancy genuine, it can nonetheless make a finding that the termination is tainted by unfairness, that is it is foreseeable that there would be a situation which is both a redundancy and a harsh, unreasonable or unjust dismissal.

For example, it may be that in selecting employees for redundancy an employer unilaterally decides to terminate an employee of long and exemplary service over another employee. The facts of the case may demonstrate both redundancy of one position but unfairness as against the employee selected. Once that position is accepted then it follows that an employee is not necessarily incapable of suffering an 'unfair' dismissal in the context of a position becoming redundant.

The Amount of Severance/Redundancy Pay

The AIRC recently extended the severance pay scale from four years of service to ten years in reference to the safety net afforded to employees working under Federal awards. While the current scale reaches the maximum payment after four years of service, under the formula the AIRC decided that there will be increases in the amount of severance pay with each year of service between five and nine years. The scale will not go beyond 10 years of service.

The new severance pay scale is as follows:

Period of continuous service	Severance pay
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 years and less than 6 years	10 weeks' pay

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Period of continuous service	Severance 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 AIRC decision to increase severance payments for employees whose employment is terminated by reason of redundancy after five or more years of service was based, to a significant extent, on the loss of non-transferable credits. The largest non-transferable credit is long service leave which accrues at the rate of 13 weeks' leave for 15 years of service.

Of course the AIRC decision is not binding on State award parties, however it may be influential. In this regard, in cases where mangers have taken proceedings relating to redundancy in the past, the previous AIRC scale has been taken into account even though characteristically managers are not subject to awards.

Recently the Court was required to assess what benefits an employee in the appellant's position might reasonably expect to receive if the respondent had retrenched the employee after nine years of satisfactory service in a senior management position when, through no fault of the employee, that position had been made redundant. An amount was assessed which was the equivalent of six months' salary based on the appellant's annual salary.

Most of the measures discussed are common sense and protection can largely be afforded to an employer who momentarily puts themselves in the employees state of mind to consider the appropriate measures. There will always be the employee who lodges a claim despite the employer taking all apparent proper steps. Being mindful of the above should, however, dissuade those who are wavering over whether to commence proceedings.

Every profession and trade is susceptible to redundancy backlash, however it is normally those organisations that plan ahead and consult that are reaching for a warm goodbye handshake rather than a reply to a summons. Restructuring ordinarily occurs at a time when you are either seeking to take the organisation to a higher level or rationalise underperforming departments. It is important to remember that just because an employees position has become redundant, it does not mean that they are redundant.

This information has been provided by way of service to you to assist you in understanding your work relationship. Clearly there are other issues which might be relevant to your individual circumstances. Should you require any further information, please do not hesitate to contact any member of the Employment & Industrial Relations Team at The Argyle Partnership on (02) 8263 6600.

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