



How to make an employee redundant and avoid legal risk

AUTHOR // Ashlee Miller, Associate

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Redundancy is a legitimate reason for terminating employment. However, managers need to ensure proper process is followed to avoid unfair dismissal and adverse action claims under the *Fair Work Act 2009 (FW Act)*.

What is a redundancy?

Positions are made redundant, not people. Redundancy occurs when an employer no longer requires the **job** to be performed by anyone. This may arise because of:

- A restructure (a redistribution of duties amongst other existing roles, or the creation of a new, different role);
- Technological change (“tech sourcing” or automation);
- A downturn in work (reduction in “headcount”);
- A business relocates or shuts down.

A position can still be made redundant if the work continues to be performed, but the employer is now distributing the work differently. For example, this may arise when an employer has five admin staff, but redistributes the work to four (and makes one position redundant); or an employer decides to contract out the work. It can also occur when an employer upgrades a role to require new qualifications but it has similar duties. The question will be whether the previous position still exists.

A redundancy doesn't arise when you decide you want to keep a temporary staff member who was filling in for someone who was on an extended period of leave, or in a sham restructure (for example where you make a position redundant only to hire another person to do ostensibly the same job).

Having a real reason for the redundancy is important. If you don't, employees may be in a position to say that the real reason for their dismissal was for a prohibited reason, such as their sex, race, age or other discriminatory factor, or because of their performance or conduct.

I've decided some positions will be made redundant – now what?

In addition to having a real reason for the redundancy, employers must ensure the redundancy is “**genuine**”. This is relevant to employees who may be able to bring an unfair dismissal claim under the FW Act. A redundancy will be genuine if:

1. The employer has complied with consultation obligations; and
2. The employer has explored reasonable re-deployment opportunities for the employee.

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Consultation obligations

An employer must comply with any award or agreement obligation about consultation. You will need to examine the award or agreement for the process to be followed, however this will generally include:

1. Either speaking to or meeting with the affected employee/s and advising them of the relevant decision that will lead to the position/s becoming redundant;
2. Seek their input and feedback on ways to minimise to effect of the redundancies and give genuine consideration to that feedback; and
3. If you proceed, notify the employee/s that the employment will be terminated.

The consultation process doesn't always need to be a drawn out and lengthy. It could be done within a day or two. It will depend on the facts of each case.

Reasonable redeployment

Before dismissing the employee, to avoid a successful claim for unfair dismissal, employers should consider whether it is reasonable in all the circumstance to re-deploy the employee in the organisation. This would extend to any businesses of "associated entities" of the employer, including "related bodies corporate" (as defined in the *Corporation Act 2001*).

Matters to consider would include the nature of any available position, the qualifications required to perform the job, the employee's skills, qualifications and experience, the location of the job and the remuneration which it offered. You should notify the employee whether you have considered any re-deployment options.

Record keeping and entitlements

Contemporaneous notes should be kept at all stages of this process. This includes:

- Documents which support the reason for proposed redundancy (such as board minutes, sales figures and external reports);
- Conversations with the effected employees and their representatives during the consultation process;
- Enquiries regarding reasonable re-deployment; and
- The reasons why certain employees have been selected over others.

Consider whether redundancy pay is payable. This will depend on:

- The size of the employer;

- The length of the employee's service; and
- Whether the redundancy was due to ordinary and customary turnover of labour (such as, the loss of a client contract).

Notice, accrued annual leave and accrued long service leave (in some circumstances) are payable in addition to any redundancy entitlement.

For more information, please contact:



Ashlee Miller // Associate

T 61 7 3001 9245

E A.Miller@clarkekann.com.au



Murray Procter // Partner

T 61 7 3001 9225

E M.Procter@clarkekann.com.au