Session 15

DEVELOPMENTS IN THE LAW OF REDUNDANCY AND TRANSMISSION OF BUSINESS

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Introduction

Laws relating to redundancy developed significantly during the 1980s and 1990s amidst broad community concern that rapid technological change would lead to large scale staff reductions. Following the 1984 *Termination, Change and Redundancy Case*[1] redundancy provisions became standard inclusions in awards and collective agreements. In that case the federal commission ("AIRC") accepted that it was appropriate to impose obligations on employers relating to matters affecting job security. Commissions and courts were also increasingly willing to find such entitlements formed part of employees' contractual rights even where redundancy provisions were not expressly provided for in a contract of employment or an applicable industrial instrument.[2] In 1993 minimum conditions regarding the process of redundancy, change and termination were imposed by the *Minimum Conditions of Employment Act 1993* (WA).

In the decade that followed there was a shift away from the focus on protecting employee rights in redundancy situations. *Work Choices* was famously controversial for significantly reducing long standing protections of job security for Australian workers. The *Workplace Relations Act 1996* was amended to expressly exclude from unfair dismissal claims employees whose employment had been terminated for "genuine operational reasons" or reasons that included genuine operational reasons from making unfair dismissal claims. "Operational reasons" obviously includes redundancy. Coupled with the lack of any requirement for workplace agreements to contain redundancy provisions, and the lack of any federal minimum standard relating to redundancy a real gap existed in an area that had previously been the focus of protection and benefits for employees.

Under the *Fair Work Act 2008* the exclusion from unfair dismissal for termination for genuine operational reasons is abolished however dismissal due to genuine redundancy will not be grounds for an unfair dismissal claim. The inclusion of other redundancy related entitlements heralds a shift back towards greater protection of employees in redundancy situations.

What is Redundancy?

Redundancy occurs when an employee's employment is terminated for a reason that is not attributable to the employee's personal conduct or performance or any consideration unique to the employee, but because the employer no longer wishes

[1] (1984) 8 IR 34
[2] .For example see *Riverwood International Pty Ltd v McCormick* (2000) 177 ALR 193.

the job the employee has been performing to be done by anyone. There are particular definitions of "redundancy" contained in the *Fair Work Act 2008 (Cth),*[3] the 2004 *Redundancy Test Case*,[4] and the *Minimum Conditions of Employment Act 1993 (WA)*[5] each generally in line this description.

Redundancies can occur as a result of downturns in the economy or an organisation's business, the destruction of or insolvency of a business, internal reorganisation or restructure, market or structural changes resulting in changes in demand or production costs and from technological change.

Even in a case where an employer dismisses a worker and distributes the work to other employees or replaces the worker's job with a new position which includes some but not all of the duties the worker was performing, there is a dismissal by reason of redundancy.

Obligations of the employer to a redundant employee

The source of an employer's obligations to employees in redundancy situations may be the contract of employment, an award or other industrial instrument or legislation. The nature of such obligations include:

- Provisions for the giving of notice of redundancy or payment in lieu of notice
- Provisions for payment of severance or redundancy pay calculated according to length of continuous service
- Provisions requiring consultation with employees affected by change or their union
- Provisions requiring genuine attempts to be made to find suitable alternative employment prior to retrenching an employee
- Provisions entitling employees to take leave to attend job search and interviews.

Fair Work Act 2008

From 1 January 2010 the National Employment Standards ("NES") will come into effect. One of the 10 NES pertains to notice of termination and redundancy pay. In particular section 119 provides:

> "(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:
>
> (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
>
> (b) because of the insolvency or bankruptcy of the employer.

[3] Redundancy is defined as where the employer no longer requires the employee's job to be done by anyone due to changes in operational requirements.

[4] (2004) 129 IR 155 : "When an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and this is not due to the ordinary and customary turnover of labour."

[5] Section 40 "***redundant*** means being no longer required by an employer to continue doing a job because the employer has decided that the job will not be done by any person"

(2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	**Redundancy pay period**
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

Business with less than 15 employees are excluded from these requirements. The NES otherwise applies to all employees except:

- Those employed under a contract of employment for a specified period of time or specified task
- Those serving a probationary or qualifying period
- Those whose employment is terminated for serious misconduct
- Casual employees
- Seasonal employees
- Trainee and apprentice employees.

The amount of redundancy pay may be reduced by FWA where the employer obtains suitable alternative employment for the employee or the employer is unable to meet the redundancy pay obligations due, for example, to financial difficulties.[6]

Contractual Entitlements

The express terms of the employment contract between the employer and employee may include terms relating to the respective rights and obligations in redundancy. Aside from the express terms though, in particular circumstances terms relating to redundancy and in particular redundancy pay may be either incorporated into a contract or implied.

A majority of the Federal Court in *Riverwood International Pty Ltd v McCormick*[7] held that redundancy pay provisions that formed part of an unregistered agreement between a Union and the employer were implied in the employee's contract of employment and therefore enforceable by the employee.

On the other hand, the Courts in *Dellys v Elderslie Finance Corporation Ltd*[8] the Supreme Court rejected the argument that there was an implied term in the employee's contract which required the employer to pay a redundancy pay. The Court stressed that the general contract law requirements regarding implication of terms need to be met in relation to employment contracts and were not in the circumstances of this case.

Whether there will be implied terms in a contract requires an analysis of the circumstances prevailing at the time the contract was entered into.

Awards and Workplace Agreements

Under Work Choices redundancy pay remained an allowable award matter but could apply only to employers of 15 or more employees, where the termination is at the initiative of the employer and on grounds of operational requirements or because the employer was insolvent.[9] Redundancy pay was not a "protected award condition" so if a workplace agreement was in place which prevailed over the award, the award provisions relating to redundancy had no effect.[10] Further provisions relating to notification and consultation were non- allowable award matters.

Under the *Fair Work Act 2008* redundancy is excluded from the 10 employment standards which may be the subject of awards.

State system parties- Minimum Conditions of Employment Act 1993(WA) and General Order

[6] Section 120
[7] (2000) 177 ALR 193
[8] (2002) 132 IR 385
[9] Sections 513(1)(k) and 513(4)
[10] Section 354

In the state system, the Minimum Conditions of Employment Act 1993 requires an employer to consult with employees regarding certain changes in the workplace. Section 41 is in the following terms:

> " Employee to be informed
>
> (1) Where an employer has decided to —
>
> (a) take action that is likely to have a significant effect on an employee; or
>
> (b) make an employee redundant,
>
> the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).
>
> (2) The matters to be discussed are —
>
> (a) the likely effects of the action or the redundancy in respect of the employee; and
>
> (b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,
>
> as the case requires. "

Section 42 entitles employees to up to 8 hours paid leave to attend interviews. Section 5 of the Act provides that these minimum conditions are taken to be implied in the contract of employment if the employment is not covered by an industrial instrument, or in an industrial instrument that applies to the employment.

A General Order of the Western Australian Industrial Relations Commission binds state system employers and employees in relation to redundancy. It contains provisions requiring consultation processes and payment for redundancy which is generally in line with the federal NES. Like the federal NES, small businesses are excluded from the requirement to pay redundancy pay.

Suitable alternative employment

In some cases the redundancy pay provisions in the relevant contract or industrial instrument provide that there is no entitlement to redundancy pay if the employer has arranged or obtained acceptable alternative employment for the employee. The onus will be on the employer to adduce evidence demonstrating that the alternative employment is "suitable" or "acceptable." Whether particular employment for an employee is suitable or acceptable must be determined according to objective standards. Consideration of the issue involves assessment of pay levels, hours of work, seniority, fringe benefits, workload and speed, job security and travelling time, remuneration structure and key functions and skills.[11]

An example of a situation where the Australian Industrial Relations Commission held that an employer was not excused from paying redundancy pay was in *National*

[11] *Von Bibra v Robina Autovillage Pty Ltd* (2007) 59 AILR 100-671

Union of Workers v Tontine Fibres – Moorooolbark Site Enterprise Partnership Agreement 2005.[12] In that case the Full Bench held that although the employer offered alternative employment to employees following relocation of its factory site, the employment offered was not acceptable having regard to the considerable additional travelling time and costs associated with the alternative employment, particularly having in light of the family responsibilities of employees. The AIRC did however agree to reduce the redundancy benefits payable.

Another recent example is *Allman v Teletech International Pty Ltd*,[13] a decision of Marshall J of 2 December 2008. In that case ex-employees of Teletech claimed to be entitled to severance pay under their AWAs. Teletech alleged that it was excused from the obligation to make the payments because of the exclusion in the AWA if Teletech arranged acceptable alternative employment for the employees. Teletech operated a call centre for the purposes of fulfilling a contract with Telstra. Telstra advised Teletech that it was not renewing the service agreement with Teletech as it was intending to bring the call centre operations in house. Teletech then engaged in discussions with Telstra regarding the employment of its employees and obtained a commitment from Telstra to give all employees the opportunity to apply for employment with Telstra.

Teletech terminated the employees, all of whom were subsequently offered and accepted employment with Telstra commencing the day after the termination with Teletech. The Court held though that Teletech's assistance and encouragement of employees to work at Telstra did not amount to "arranging" that employment and so the exclusion was not available. Marshall J held that arranging alternative employment means bringing about that employment should the employee choose to accept it. The availability of work with Telstra arose not because of Teletech's actions but because Telstra required labour. The encouragement and facilitation of a process was not the same as doing everything possible to ensure a result.

Marshall J also went on to compare the terms and conditions of employment with Telstra to conclude that the new employment with Telstra was not sufficiently comparable or "acceptable" to enable Teletech to rely upon the exclusion anyway. Teletech were therefore required to pay the severance pay provided for in the AWA.

Advising a redundant employee that he or she may apply for an alternative or newly created position will not generally be enough to avoid redundancy pay obligations.

Criteria for selecting redundant employees

In the *Termination, Change and Redundancy* cases the Australian Industrial Relations Commission identified that the factors considered by parties in determining which employees are to be terminated in redundancy situations include the skill, experience, physical ability to perform the work, length of service and age/residual working life or the relevant employees. In the past, two methods of selection became common practice: the "last on, first off rule" and voluntary redundancies. With the exclusion of employees terminated for operational reasons from the unfair dismissal jurisdiction, reasons for selection have not of late been the subject of any scrutiny by

[12] (2007) 168 IR 143
[13] (2008) 178 IR 415

the AIRC. However the following issues should be borne in mind in relation to these particular practices.

Last on, first off
The convention of selecting those most recently employed for redundancy crept into awards in some industries. It is now recognised that this rule can operate in a discriminatory manner leading to unlawful termination or breach of anti-discrimination laws. In particular they may operate to discriminate against younger employees or female employees depending on the demographic make up of the particular workplace.[14] Selection criteria must be reasonable and non discriminatory.

Voluntary redundancy
Often employers will "advertise" to staff their intention to reduce the workforce and give staff the option of nominating for voluntary redundancy. It is hoped that this process will avoid the difficult task of selecting employees for compulsory retrenchment. It should be noted that:

- Representations made regarding the "package" an employee will be entitled to upon taking up a voluntary redundancy can be legally enforceable if the employee relies upon the representation in electing termination by voluntary redundancy.
- An employee enquiry about potential benefits of voluntary redundancy and even negotiations to increase the amount of the benefit does not constitute an election of voluntary redundancy.[15]
- This method of selection tends to lead to the most skilled employees, who are more likely to find alternative employment easily, taking up voluntary redundancy.

Transmission of Business & Redundancy

In the 1984 *Termination, Change and Redundancy Case* the Australian Industrial Relations Commission expressed an intention that redundancy provisions would not apply in circumstances of a transmission of business- it did not "envisage severance payments being made in cases of succession, assignment or transmission of business."[16]

The High Court in *Amcor Ltd v CFMEU* arrived at a result which was consistent with that general intention. In that case, the employer was party to a certified agreement which contained certain redundancy provisions. The employer was part of a group of companies which engaged in a corporate restructure, part of which involved termination of the employees from their employment with one group company and reemployment with another group company. Employees were given notice of termination of their employment on one day concurrently with and an offer of employment with the new company to commence the following day. The new company then continued to carry out the same business within the new corporate structure.

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[14] In *Brooks v Flight West Airlines Pty Ltd* 1995 AILR 9-006 the Queensland Industrial Relations Commission held the dismissal of an employee to be unjust because the selection was discriminatory, having an inherent tendency to cause the selection of younger employees.
[15] *Beardmore v Tyco Australia Pty Ltd* (1999) 46 AILR para 4-105
[16] (1984) 8 IR 34 at 75

The workers' union claimed that these events triggered a liability to pay redundancy payments. The High Court considered the nature of redundancy against the legislative background and the 1984 *Termination, Change and Redundancy Case* to glean that redundancy provisions do not apply in cases of transmission of business. The fact that the legislative transmission of business provisions have the effect of preserving certain employee entitlements in cases of transmission was considered relevant. The Court concluded that the "position" was the position in the business and no "position" was redundant in the circumstances regardless of the identity of the company conducting the business. The "position" or jobs continued to exist.

The *Fair Work Act 2008* expressly excludes the requirement to pay NES redundancy pay in circumstances where an employee transfers to a new employer under a transfer of business and the new employer recognises the employee's prior service with a previous employer[17]. It also excludes payment of the NES redundancy pay where a business is transferred and an employee rejects an offer of employment with a new employer on substantially similar terms and conditions and the new employer recognises the prior service.

Transmission of Business under *Fair Work Act 2008*

The transmission of business rules under Work Choices provided that the industrial instruments which covered employees at the time a business is sold would continue to cover those employees and the new employer but only for a period of 12 months. This restriction will not apply under the *Fair Work Act 2008.* The relevant provisions are contained in Part 2.8 of the Act.

It is thought that the *Fair Work Act 2008* may also potentially expand the circumstances in which a new employer will be bound by instruments that bound the old employer. Judicial interpretation of the current provisions is that if the character of the business is the same, there is likely to be a transmission of business. The new rules set out slightly different criteria so that a business will be deemed to be "transferred" when:

- An employee of the old employer has had his or her employment terminated;
- The employee becomes employed by the new employer within three months;
- The employee performs the same, or substantially the same, work for the new employer as for the old employer; and
- There is a relevant connection between the old employer and the new employer.

Such a relevant connection will be established where:

- there has been a transfer of assets between the two employers
- the old employer outsources work to the new employer that is performed by the transferring employees as employees of the new employer
- transferring employees perform work for the new employer that they had performed for the old employer because it had been outsourced from the new employer, but which the new employer no longer outsources to the old employer; or

[17] Section 122

- the new employer is an associated entity of the old employer.

The federal government has described these changes as aimed at protecting employees' terms, conditions and entitlements in a "broader range" of corporate restructuring activities including movements to associated entities and some outsourcing and in sourcing arrangements.

Where a business is "transferred" in accordance with these provisions, an employee's service with the old employer counts as service for the purpose of calculating NES entitlements and also for the purposes of the qualifying period for making an unfair dismissal claim.

FWA is empowered to stop or vary the effect of an award or agreement that comes into effect because of a transfer of business, having regard to the impact of the instrument on the new employer's business.