Guide to Managing Redundancy

4th edition
October 2012

Jobs Australia
Community Sector Industrial Relations

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ABOUT THIS GUIDE

All employers need to ensure that dismissal due to redundancy is lawful and fair.

This guide has been produced by Jobs Australia Ltd to assist employers in:

- **Understanding their legal obligations arising from redundancy**
- **Defining redundancy**
- **Justifying redundancies**
- **Consulting with employees**
- **Ensuring that selection procedures are carried out lawfully and fairly**

DISCLAIMER

This Guide is prepared exclusively for the general information of Jobs Australia Ltd members and subscribers to Jobs Australia's *Community Sector Industrial Relations Service*. While it directs attention to, and comments upon, aspects of industrial relations and employment law, it is not intended to provide legal advice in this area. Information is current at the date of publication. Further advice should be sought prior to acting upon information conveyed in this Guide.

Preface to the 2012 Edition

Whilst some general rules regarding redundancy have changed since the 3rd edition of this guide, most of the guiding principles and advice for best practice remain the same. The introduction and phasing in of Modern Awards has led to more consistency in the approach to redundancy across the Australian workforce. However there are some transitional arrangements affecting award entitlements. This transitional period will end in 2014. Before pursuing any restructure and/or redundancy process it is always advisable to contact the Jobs Australia Industrial Relations team.

The *Guide to Managing Redundancy* provides a summary of the principles of fair restructuring and redundancy processes, in the context of Australian industrial law as it stands in October 2012, following the implementation of the *Fair Work Act 2009* and having regard to the referral of some state IR systems to the Commonwealth during 2010/2011.

Apart from the ethical requirement that employers should treat affected employees fairly, good processes also send important signals to other staff. The negative impact of a badly managed restructure can have a destabilising effect on those employees who are not selected for redundancy and remain with the employer. The morale of the remaining employees may be critical to the success of the restructure and the viability of the organisation.

In addition a flawed process can lead to a successful challenge to the genuine nature of a redundancy through an unfair dismissal claim. Whilst even the best processes cannot remove an employee's ability to take action against an employer in the Fair Work Australia Tribunal, a good process increases the chances of successfully defending a claim. In addition employees who are involved in the decision making process, are fully informed and treated using best practice principles, are less inclined to make claims.

As always, the Industrial Relations Team at Jobs Australia welcomes any feedback about this Guide, and is always available to assist with any issue that might arise in managing employees.

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Introduction

This Guide provides up to date information and guidance on handling the difficult task of managing redundancies in the workplace. It will assist managers to focus upon both their industrial obligations and good management principles governing procedures in redundancy situations. Sample letters and other materials are provided to assist you in the implementation of change.

Uncertainty and change are facts of life for the nonprofit community sector. Funding ebbs and flows, and programs come and go. From time to time organisations need to cease or reduce particular programs with the result that positions may become redundant. However these factors do not reduce the obligation on nonprofit organisations with regards to redundancy. Nonprofit organisations have the same obligations to follow the Fair Work Act 2009, appropriate awards and other relevant legislation as any other employer.

This Guide is not intended as a substitute for specific professional advice, nor is it necessarily applicable to every redundancy situation. To ensure the best possible outcome, further advice should be sought from Jobs Australia prior to acting on any aspect of the contents.

Ring your Jobs Australia Industrial Relations Adviser on (03) 9349 3699 or 1800 060 098.

What are your obligations?

Broadly, a termination of employment due to redundancy will arise if:

a: The employer decides that it no longer wishes the job an employee has been performing to be done by anyone;

b: The decision is not due to the ordinary and customary turnover of labour;

c: It leads to the termination of the employee's employment; and

d: The termination is not due to any personal act or omission of the employee.

In addition, termination due to redundancy may be a consequence of:

- A substantial change or reduction in duties or responsibilities;
- A significant change in location or
- A transmission of business due to the sale or merger of the organisation.

Redundancy is an outcome of structural change within the organisation. If a position has become redundant, a further consequence is that the employee who fills that position has become potentially redundant. If there is no other suitable work available for that employee, it may be necessary to terminate (retrench) that employee. But termination is not the only possible outcome.

Other outcomes can include:

- An agreed reduction in hours; or
- Redeployment to a different position within the organisation, possibly together with some retraining; or
- Redeployment to an acceptable position outside the organisation.

The law requires organisations to appropriately consider these other options. Not doing so may lead to a redundancy being considered to be not 'genuine'.

As with most employment issues, employers need to balance a range of considerations. In the case of redundancy these factors can include:

Industrial	• Requirements of the relevant award or agreement • Unfair dismissal laws • Equal opportunity and anti-discrimination laws • Occupational health and safety laws • Contractual obligations to employees • Organisational policies and procedures
Organisational Values	• Fair treatment of employees • Acting consistently with, and not undermining commitment to, the values of the organisation • Responsible and accountable management of the organisation
Strategic Management	• Processes intended to maximise the likelihood of making the right business decisions • Financial imperatives • Fostering employee commitment and motivation • Retention of key skills and knowledge • Maintaining and improving quality of service delivery

The next few sections provide some commentary about each of these sets of factors. Getting the right balance between the competing constraints, rights and responsibilities is the key to a successful redundancy process.

Industrial Factors

For several years prior to the introduction of the Fair Work Act 2009 there were very few industrial constraints on most federal system employers in relation to how they could proceed with restructuring and implementing redundancies where necessary. In particular, there were few industrial obligations around consultation other than for some employers in some states. That has changed with the *Fair Work Act 2009*. This section outlines the new industrial obligations (which are not really new, just a reintroduction of old obligations) which apply to most employers.

We will also explain why, regardless of the specific industrial obligations that apply, and even where an employee will be precluded from pursuing an unfair dismissal claim, our advice to all employers is mostly the same:

It is prudent, ethical and good management sense to use a fair and consultative redundancy process.

Federal or state system?

It is important for every employer to know whether they are covered by the federal IR system or by the relevant state IR system. This means knowing whether or not you are in a state that referred its industrial relations powers to the Commonwealth at the end of 2010, and if not, then whether or not you are a **constitutional trading corporation**.

For nonprofit community organisations, until recently the answer to this question was often not straightforward. However, the table below summarises the changes that occurred as a consequence of states referring their industrial powers to the Commonwealth during 2010-11. This has simplified the situation.

Location	Constitutional trading corporation	**Not** Constitutional trading corporation
ACT, NT, Vic	Federal system	Federal system
NSW, Qld, SA & Tas	Federal system	State system until end 2010 Federal system from 1 January 2010 – some transitional arrangements through to 2014
WA	Federal system	State system

If you are in WA and do not know whether or not your organisation is a constitutional trading corporation, get a copy of our Guide *"What is a Constitutional Corporation?"* (available from our website) or talk to your IR Adviser at Jobs Australia.

Redundancy under the *Fair Work Act*

<u>Consultation</u>

Modern awards, which came into effect on 1 January 2010, have reinstated an obligation to consult around significant change in the workplace. In most cases consultation is required to be **in writing**. The consultation provisions are very similar to those which were previously in federal awards following test cases in the mid 1990s. The award provisions require employers to consult with employees and relevant unions regarding proposals for major change. Collective Agreements are also required to contain a similar clause. It is important to note that where redundancies or restructures flow from the loss of funding, these obligations are not reduced. Even where decisions are not in the hands of the organisation consultation is still mandatory.

Modern Awards require genuine consultation to include details of restructure and proposed redundancies to be provided in writing before any final decisions are made to make an individual position redundant or finalising any changes.

In any event, a reasonable consultation process is a prudent way of:

- Ensuring good decision making;
- Being fair to employees, including those who remain at the end of the process;
- Building a defence against claims of unfair dismissal, unlawful termination (for prohibited reasons such as discrimination) or discrimination under equal opportunity legislation.

In addition, federal minimum standards for maternity leave require that the employer communicate with employees on maternity leave where significant change is proposed.

In states that have referred their IR powers to the Commonwealth, some elements of state awards will be preserved through to 2014 to be read in conjunction with the NES. Many preserved state awards may impose further obligations on employers to consult when restructuring.

Minimum Statutory Entitlements

The *Fair Work Act* sets minimum notice periods for termination, as well as minimum standards for severance pay which will apply where employment is terminated due to redundancy. These provisions form part of the National Employment Standards (See Appendix A).

Relevant long service leave legislation may also prescribe pro rata payment of long service leave on termination.

Awards and Agreements

Most federal awards provide for severance pay of up to 16 weeks pay based on length of service.

For employers with fewer than 15 employees (see Appendix A for information on how this is counted), severance pay is not required under the National Employment Standards. However an award or a collective agreement could provide for severance pay for a small employer.

Some awards or agreements may provide more generous notice periods and severance pay than the minimum prescribed by the *Fair Work Act*.

Unfair Dismissal

Where an employer can show that an employee was dismissed due to genuine redundancy, they may be able to exclude an employee's unfair dismissal claim.

For this purpose, a *genuine redundancy* is defined as a termination where:

1. The job is no longer required to be done by anyone because of changes in operational requirements;
2. Any obligations to consult, under an award or enterprise agreement, have been complied with; and
3. It was not reasonable to redeploy within the organisation or any associated entities. In effect there is a positive obligation to explore options.

It should be noted that if an employer cannot meet all three of those requirements, an aggrieved employee may be able to make a successful unfair dismissal claim. However they will still need to be able to show the termination was harsh, unjust or unreasonable. It is important to note that an employee is always able to make such a claim. The best way to minimise the risk of a claim is to involve employees in decisions and consult regularly during the process.

The first requirement (the job is no longer required…) looks straightforward. But some "spill and fill" processes might not meet this requirement. For example, if a number of positions are spilled and an incumbent is unsuccessful in applying for what is really their job, so that another employee (perhaps more highly qualified) is appointed, there could be a problem. The unsuccessful employee would be able to dispute that it is a "genuine redundancy" as the job is clearly still being done by someone.

The second requirement refers to the new consultation requirements in awards and agreements. The importance of this step should not be underestimated.

The third requirement means that simply identifying that a job is redundant is not the end of the story. There is an obligation to be able to show that redeployment options were actively explored before terminating employment. Usually this means exploring suitable alternative employment. This may include jobs that are significantly junior to their current position or even senior to their current position. There is no obligation to provide an employee with an unsuitable role, or a role that they are unable to fulfil, however should a claim be made it is important to be able to prove that all options were considered.

If an employer is able to demonstrate that a termination is a genuine redundancy, does this mean there is no need to worry about disputes at all? Not really.

A badly handled process can still be very disruptive to the organisation due to lower moral and disengagement of employees. Furthermore, there is a risk of other claims, and a good process can reduce that risk.

Alternative Remedies – General Protections

An aggrieved employee may make a general protections (or adverse action) claim, if they believe that the redundancy arose for a prohibited reason.

General protections claims can be made by any employee of any employer in Australia. This includes employees who are still in their probationary period, for example. A termination is unlawful if it is for a prohibited reason such as:

- sex, sexual preference, race, colour, political opinion, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, national extraction or social origin, or
- temporary absence due to illness or injury, or
- involvement in a union, or
- in response to complaints made by the employee, or where workplace rights have been breached
- absence on parental leave.

In the case of a general protections claim, the onus is on the employer to be able to provide evidence that the claimed prohibited reason was not a factor, and that the redundancy was genuine. This will be easier to prove if there has been a process involving objective assessment of the need for redundancy, and transparent, fair and objective processes for selecting which employees are to be terminated.

Similar considerations apply to applications made to anti-discrimination tribunals.

State system - Western Australia

Since 1 January 2010, only WA retains a separate state IR system. Organisations that are not constitutional trading corporations in WA are covered by the state system.

Consultation

Most relevant state awards prescribe consultative procedures, often including the relevant union, which need to be followed prior to deciding to terminate an employee due to redundancy.

Awards

State awards generally provide minimum notice and severance pay obligations. Some state awards also prescribe the consultative processes to be followed. Small employers (less than 15 employees) may also have an obligation to pay severance in some state awards.

Organisational values

Jobs Australia members and subscribers to our *Community Sector Industrial Relations* Service generally have a strong commitment to their communities, and often express this in terms of concepts such as social justice, equity, human dignity and fairness. Both faith based and secular organisations express these types of values, albeit with different emphases. These organisational values are important in framing the mission of the organisation, and in expressing a fundamental characteristic of community based organisations.

For these organisational values to have any real meaning, they need to be applied not only in relation to the clients of the organisation, but also to employees. The commitment to such values can often be severely tested in situations of financial pressure of the sort that leads to redundancy, but nevertheless those values have an important role to play in how redundancy is managed.

A genuine commitment to looking after your employees does not mean that redundancies can never occur. However, it does affect how the process is managed.

A commitment to such values may mean going beyond the bare minimum required by law. But a failure to act in accordance with the organisation's stated values:

- May be problematic from an ethical perspective;
- Is likely to send mixed signals to employees, be seen as hypocrisy, and undermine the commitment of remaining employees to the organisation's goals;
- Is likely to undermine other management strategies around quality of service delivery, recruitment and retention of skilled staff, and external reputation.
- May encourage an employee to make a claim in the Fair Work Tribunal as they are more likely to feel that they have been unfairly treated, even if they cannot identify where legislation has been breached.

There is a body of research evidence from Australian nonprofit organisations that some of the key drivers of organisational success in the sector are related to strength of purpose and consistent commitment to stated values.

Usually, a values-based approach to redundancy simply means involving employees in a consultative process, working to minimise the adverse effects while still meeting organisational objectives, and using fair and objective processes. This Guide will assist with those sorts of approaches.

Strategic Management

In addition to industrial constraints and organisational values, it usually makes sense to try to adopt "best practice" approaches to the management of restructuring and potential redundancy.

For small to medium sized organisations, this often simply means being prepared to invest some time and effort into processes which increase the chances of making the correct decisions for the organisation. Consultation with affected employees is one aspect of such a process, because the employees who do the work often have a clear idea of what can and cannot work in practice. They may also be quite creative in finding acceptable ways to minimise the adverse effects of restructuring, given that they have a real stake in the outcomes.

Obligations under the relevant legislation are not the only consideration in managing a redundancy process. Employers regularly do more than the minimum they can "get away with" in all sorts of areas, in the interests of quality, competitiveness, ethics and organisational morale.

A badly handled redundancy process, even though it might be able to be defended in the face of an unfair dismissal claim, can still do lasting damage to the organisation by undermining employee commitment, increasing stress levels and hastening the departure of other valued staff.

Transfer of Business

In some circumstances, part of the business of an employer may transfer to a different employer. For example, an organisation loses funding for a particular employment services program and a second organisation wins the tender to pick up that work. If employees transfer from the first employer to the second, the *Fair Work Act* will regulate how the transferring employees' industrial entitlements apply.

There can be a range of benefits in transferring existing employees when acquiring new programs from other employers. The transaction costs of recruiting new employees can be minimised, experience and corporate knowledge can be retained. On the other hand there can be unanticipated costs if the new employer has not done their homework first.

Transfer of business is potentially complex and advice should be sought.

Some of the issues to be aware of include:

- The new employer may become bound by instruments such as enterprise agreements that applied to the transferring employees.
- Since modern awards apply on an industry wide basis, modern awards do not transfer – they would apply anyway.
- The employee's prior service will count for entitlements under the *Fair Work Act*.
- However, in some circumstances and subject to taking necessary action before the transfer occurs, the new employer can choose to not recognise prior service in relation to
    - Annual leave;
    - Redundancy severance pay and
    - The minimum employment period (relevant to unfair dismissal claims).

It follows that, as part of a due diligence process before transferring employees, employers should assess what industrial instruments apply, and check accrued entitlements before finalising the transfer.

Checklist – Expectations of tribunals for a fair process

So what are the features of a good redundancy process?

Some clues can be found by looking at how industrial tribunals deal with disputes about redundancy.

The general principles for getting a redundancy process right were summarised in a decision of the Industrial Relations Commission of NSW (*Neal v Shaw McDonald Pty Ltd and another* [2003] NSWIRComm 298, *Sams* DP, 22/09/2003). This decision drew on a range of earlier precedents in both federal and state jurisdictions. The principles also provide a good practical guide for maximising the chances of a good outcome in management terms for the organisation.

It was noted that both employers and employees have obligations – as listed in the following checklist. These obligations are explored in more detail in the subsequent sections of this Guide.

*Key points for **Employers** contemplating redundancy:*

1. Give reasonable **written** notice to employees and/or their unions, including the details of changes and the possibility of redundancy.
2. 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. It is important to consider all options for suitable alternative employment, and to be able to defend any decision not to offer other employment. Ensure such options are fairly offered to the affected employees.
4. Provide reasonable standards of redundancy benefits.
5. Provide appropriate ancillary services, such as time off to seek alternative work, retraining opportunities, outplacement services or financial planning.
6. Ensure employees nominated for redundancy are fairly selected on an objective and unbiased basis.

***Employees** also have reciprocal obligations, including:*

1. Being willing to participate in the consultation process.
2. Participating in exploring alternatives to redundancy.
3. Not being unreasonable about accepting retraining, alternative employment, redeployment or relocation.

Defining termination of employment due to redundancy

Industrial tribunals will generally uphold an employer's right to rearrange the structure of its business. This may include breaking up the functions of a single position and distributing them amongst other positions. An example is where the duties of a full-time employee are redistributed to several part-time employees. What is critical is whether the holder of the former position has, after the reorganisation, any substantial duties left to discharge. If there are no remaining duties or few remaining duties for that person to perform, his or her position becomes redundant.

However, an employer cannot "construct" a redundancy for the purposes of terminating the employment of an employee who has performed poorly or is disliked by other employees. Such action would be unfair, as the employer has failed to discuss with the employee the real grounds motivating the termination. Defending an unfair termination claim on the basis that a redundancy has been constructed will usually be far more difficult than simply following appropriate disciplinary processes.

Importantly, employers should be able to justify why a restructure required the termination of employment.

An employer may not be able to establish that it had valid reasons if, for example:

a: It failed to consider alternatives to the termination;

b: It did not consult in writing with the employees regarding possible strategies;

c: There was no evidence that the terminations led to a net reduction of costs;

d: The positions were immediately filled by other employees; or

e: The duties were distributed to other employees and led to significant increases in the remuneration of other employees.

Justifying the redundancy
In deciding to restructure its business an employer should carefully answer the following questions.

Q: What is the purpose of the restructure?
Does the restructure relate to the operational requirements of the business or is it simply a smokescreen to terminate a troublesome employee?

Q: If the purpose involves increasing the efficiency of the business or cutting costs, will the goals be served by effecting redundancies?
Have alternative cost-cutting measures been considered? Has the employer consulted employees who can suggest alternatives?

Q: Do the benefits of the restructure justify taking the harsh step of terminating employment?

Q: Are there any alternatives to redundancies?
For example, will the purposes of the restructure be served by offering job-sharing or converting full-time positions to part-time positions?

Employers should prepare an internal policy document which answers each of the above questions. It may later be required to justify the decisions and it will help the employer to show that it made its decision in good faith and there were no ulterior motives for the restructure.

Further, it makes good management sense to establish clear goals for the restructure before developing criteria for selecting which employees will be made redundant. Redundancy cannot be justified for its own sake. It has to be viewed in the wider operational context.

Consultation

In addition to the requirements contained in awards and collective agreements that employers consult with employees, it is still an important principle of fairness that as soon as an "in principle" decision has been made to restructure, the employer should consult with its employees and, in some cases, any unions to which they belong.

Consultation does not mean that agreement has to be reached.
But consultation does mean that there is a genuine opportunity for the affected employees to influence the final decision.

As the employer, if a suggestion from employees does not make operational sense, there is no obligation to adopt it.

But on the other hand, it makes little sense to reject sensible suggestions. Often, it will be useful to agree to a modification of the original proposal, provided the main organisational objectives are still met. A negotiated modification to the original plan may be a good way of protecting morale and commitment among remaining employees – and might even be an improvement on the original plan.

The consultation should include: discussion regarding alternatives which may lessen the number (or impact) of terminations; and, giving employees time to deal with the emotional, family and domestic stresses of a potential termination. It is important that such consultation is backed up with written materials such as fact sheets, letters, meeting minutes or any other documentation that can be relied on should their be a dispute. Consultation should also include absent employees who may be on WorkCover, maternity leave or any other kind of leave.

In particular, the employer should:

1. Prepare written advice to all affected employees outlining why there needs to be change, and the nature and purpose of the proposed restructure. This should be followed by face-to-face meetings;
2. Clearly explain how the proposed restructure would affect positions in the organisation and the employees;
3. Explain how it proposes to select employees for new or restructured positions and therefore those employees whose employment will be terminated;
4. Prepare a timetable for each stage of the restructure;
5. Ensure that employees are given the opportunity to comment on the restructure and suggest any alternatives, which may avert or mitigate its adverse effects; and,
6. Appoint a liaison person to deal with any enquires or comments from employees.

Employees should not be selected or given notice of the termination of their employment until the above steps have been implemented.

Selection Issues

A selection issue will usually arise in circumstances where several employees occupy the same or similar positions and the employer intends to make redundant some, but not all of these positions.

A selection issue may also arise where the employee who occupies the redundant position has skills which are transferable to a different position with minimal (or no) further training. The fact that an employee occupies the position that is being made redundant does not necessarily mean that it is fair to terminate the employment of that employee in all cases.

Employees on leave

Employers also cannot avoid selection issues by targeting employees who are temporarily absent from work. These employees must be considered equally with other employees. In fact, an employer who selects an employee for redundancy simply because that employee is on maternity leave, or performing light duties whilst on workers compensation (or is otherwise temporarily absent from work due to injury or illness) will breach both state and federal law.

Not only must employers ensure that absence on these grounds has no part to play in the redundancy, but also that it does not result in the employee ending up redundant because the employee was not fully appraised of the restructuring and was not given an opportunity to apply for any available positions for which the employee may have been qualified.

Offers of voluntary redundancy

Whilst there is no legal requirement to do so, offers of voluntary redundancy may assist an employer to avoid having to make a selection amongst employees. Employees who accept a voluntary redundancy package are unlikely to challenge the fairness of the termination. A problem may arise if an offer is made unconditionally. The employees who will be the most valuable in meeting the employer's future operational requirements may accept the offer of voluntary redundancy. Once accepted the employer will be bound by the agreement and must allow the employee to take the voluntary redundancy package.

For this reason, employers should call for *expressions of interest* from employees prior to an offer. This allows the employer to assess the interest of employees against the genuine operational requirements of the organisation. However, if an employee does volunteer for redundancy, the employer must seriously consider this request. Where most of the affected employees are equally satisfactory, a failure to seek or accept volunteers may also be unfair.

Employers who offer a voluntary redundancy package must have regard to the following:

a: The package must, at the very least, comply with any applicable contract, award or industry standard.

b: The employer must clearly explain to its employees the contents of a redundancy package and the implications of acceptance. Its terms should be in writing. To avoid confusion a calculation sheet should be provided setting out exactly what the employee will receive upon termination before and after tax.

c: Employees must be given sufficient time to consider these terms and discuss them with their families. They should also be encouraged to seek their own independent advice. Employers may wish long-serving employees to sign an acknowledgment that they have done so.

d: An employer must not pressure an employee to accept redundancy. Employers must also be careful when targeting particular employees for voluntary redundancy. An employer may later be called upon to justify why a particular employee was targeted.

For example, targeting an older employee may give rise to an allegation of discrimination on the basis of age.

Case Study

Why consult, how much do we consult and what alternative employment needs to be considered?

An organisation decides to consolidate its sales and promotional areas into one central office rather than several in regional areas. This is due to the loss of contracts and also partly due to a belief that this streamlining will remove double handling. One small regional office has been running with 2 temporary workers and a Team Leader. The company seeks legal advice as it is concerned about the Team Leader taking clients with him when he leaves. The company is advised that it must consult but to keep the period short to reduce the amount of time that the individual has access to files before he leaves.

The company feels that although they haven't invited the Team Leader to any of the meetings about the restructure, he has received circulars and is aware of general moves to consolidate some services and the loss of contracts. The Team Leader was offered a position in what will be the main office 3 months earlier however at the time he was not aware that he was to be made redundant and stated that he did not wish to move towns to do so. They approach him on Friday morning stating that his position is likely to be redundant, and ask him if he would like to discuss this. The Team Leader states that he would like a reference and does not involve himself in further conversation. The company feels that it would be better to offer to pay out his notice period and terminate him as soon as possible. They seek further legal advice and are informed that they should provide him with his formal letter of termination and summary of entitlements by the end of the day, to avoid possible loss of clients.

After this point 2 new positions are created in the main office, and administrative position and a junior sales position.

The Team Manager lodges an unfair dismissal stating that it was a constructed dismissal not a redundancy as he was not offered alternative employment and was not consulted. He also states that he feels that the closure of the office was solely to terminate his employment as he was not liked. He states that the new team leader in the main office should have been displaced for him to take the role as he had been employed for a longer period.

Finding at the Tribunal

The Tribunal finds that merely talking to someone does not fulfil the requirement to consult as the Award states that consultation must occur in writing. It is also stated that 1 day of consultation was likely to have been manifestly inadequate in any case. The Tribunal also finds that the Team Leader should have been offered the two junior positions (Administrative Assistant and Junior Sales) despite the fact that they were significantly lesser roles than that which he had been undertaking. The Tribunal does not find that the new Team Leader should have been displaced, as there is no requirement to displace workers to find a position for a retrenched worker, regardless of qualifications, time of service or seniority.

The tribunal finds that the redundancy was not genuine and that the failure to make offers of alternative employment or consult meant that the termination was harsh. However, the commission does not accept that the termination was constructed to target the employee.

The Tribunal orders the Company to pay the Team Leader 8 weeks compensation.

Establishing fair selection criteria

Voluntary redundancy is not always an option. Sometimes there will be no alternative to forced redundancy. The employees whose employment is to be terminated on the grounds of redundancy must be selected in a fair manner:

1: The weight and priority of each selection criterion should be determined in advance and documented.

2: The selection criteria should reflect the goals of the restructure and operational requirements of the business. For example, where the employer is merging several positions into one, the selection criteria should be aimed at determining which employee is best suited to perform the duties of the restructured position. It will assist the employer to prepare a job description and job requirements.

3: The employer may take into account subjective assessments of the employee, such as their view of the employee's attitude to work and past performance (see below), but the main criteria should be objectively assessed.

Discrimination

The criteria must not discriminate on unlawful grounds. These grounds include age, sex, pregnancy, race, marital status, disability, union membership, sexual preference, marital status, family responsibilities, religion, political opinion, national extraction or social origin.

Employers must also be careful not to indirectly discriminate against employees. Indirect discrimination will occur if an employer relies on a factor which, on its face may not appear to discriminate unlawfully, but when applied has a disproportionate impact on one class of persons over another. The factor must also be unreasonable.

For example, an employer may decide to retain all employees who have had the least amount of time off work for any reason. This may in practice disadvantage women who have had time off work for reasons such as maternity leave. The imposition of this condition may also be unreasonable and therefore discriminatory if the remaining positions can be performed successfully notwithstanding time off work for such purposes. It is not a defence that the employer did not intend to discriminate. Employers should give each employee the opportunity to address the selection criteria.

Past performance as a selection criterion

Employers can take into account the past performance of an employee provided they keep the following in mind:

a: The performance issue must have a basis in fact, this usually means being able to provide documentation.

b: Employers should not take skeletons out of the closet.
The performance issue must have been raised with the employee and dealt with at the time that it arose. Otherwise an employee may be unable to respond to any new issues.

c: The performance issue must be relevant to the remaining positions.
For example, it may be unfair if the employer takes into account an employee's failure to meet job placement targets if the remaining position does not involve job placements.

d: Employers should distinguish circumstances where the motivating factor for the termination is poor performance and circumstances where performance is only taken into account in selecting which employee will be made redundant.
In the former case, the poor performance must of itself be sufficiently serious to justify termination. In the latter case, the performance issue may be marginal, but may operate to distinguish two employees who are otherwise equal.

Procedural fairness – opportunity to respond
Even when the selection criteria do not involve performance or conduct, it may be unfair if the employer fails to discuss the ultimate basis for selection with the affected employees. This is particularly the case if there is a possibility that the employee may raise factors which the employer should have properly taken into account, and in so doing persuade the employer to act differently. The principles of fairness oblige an employer to raise with the employee whose employment was being terminated the factors which founded the employer's opinion that another employee who was not being dismissed was better and more efficient and to give the employee an opportunity to answer that assertion.

In short fairness requires an employer to:

a: Apply selection criteria in good faith;

b: Discuss with each employee the selection criteria and the basis for its selection; and,

c: Give the employee an opportunity to respond to the basis for the selection before the termination takes effect.

Last on, first off?

In the past, selection decisions in some industries have been made on the basis of seniority. In this type of process the most recently hired employees are the first chosen for retrenchment. Our advice is that this is not an appropriate method of selection and it should not be used. There are at least three key reasons for this:

1. The selection criterion of seniority is arbitrary and is not consistent with the fair selection criteria discussed above;

2. In some cases this approach has been found to be discriminatory – for example in some workplaces women are less likely to have long service than men (because of the gendered nature of the work and the likelihood of career breaks for women with children) and so are disadvantaged by such a process; and

3. From a management perspective this approach does not address strategic considerations such as skills mix and taking account of employee preferences such as voluntary redundancy or changes to hours.

Spill and fill

Where a restructure involves a reduction in the number of roughly similar positions in an area, employers may consider the option of a "spill and fill" procedure. This involves declaring all affected positions vacant, and then inviting the affected employees to apply for the remaining positions. Each employee is then interviewed and assessed for each position on his/her own merits.

A “spill and fill” process is not appropriate in all circumstances and advice should be sought first. It does not mean inviting applications from employees outside the affected area, or from outside the organisation. It should also not result in employees who are not directly affected by the restructure having their employment placed at risk.

If handled badly a spill and fill process can be disruptive and create stress and uncertainty. Employees may not appreciate having to reapply for their positions and being made to compete with each other, particularly if they perceive that management has already made its decisions and is just “going through the motions”.

Nevertheless, a spill and fill may be appropriate in some circumstances, particularly if alternatives such as voluntary redundancy and redeployment are not practicable and a number of similar positions are affected. If it is decided to use a spill and fill process, the principles outlined above regarding development of selection criteria and ensuring fair process still apply.

Alternative positions

Once the employer selects which employees will lose their positions, the employer must properly consider whether any alternative positions are available. The potentially redundant employees should be given preference for alternative positions provided that they can reasonably satisfy the job requirements. Employers should not advertise for external candidates unless they have considered the suitability of internal candidates who are potential redeployees. If necessary, an employer must consider providing reasonable training to assist redeployment. This will involve weighing up the cost and disruption of retraining, against the impact of termination on the employees.

Redeployment is a way of retaining staff who know the organisation, and a way of demonstrating commitment to employees. Proposed redeployment processes should also be discussed with the affected employees before proceeding.

Where redeployment to a position requiring different skills is considered, the employer should consider allowing the employee to work in the alternative position for a trial period. If the trial is unsuccessful, the employee would retain their redundancy entitlements.

Failure to fully consider redeployment options can lead to a successful challenge to the genuine nature of a redundancy.

Termination of employment

Once alternative options have been exhausted and a decision has been made to terminate the employment, the employer must give the required period of notice of termination or payment in lieu of notice. This notice period must at least comply with any requirements under a contract, award and legislation. A schedule of some of the common statutory requirements regarding notice and severance pay is provided in **Appendix A.**

In addition, on termination employees may be entitled to payment for accrued annual leave (and leave loading in most cases), long service leave (subject to qualifying periods), accrued time in lieu and any wages owing to the date of termination. The relevant award or agreement should be checked and advice sought if unclear.

Consideration should be given to whether it is in the best interests of the organisation for the employee to work the full period of the notice or simply make the payment in lieu of notice. It is sometimes easier for employees to find alternative work whilst they are in employment. Alternatively,

if having a disgruntled employee work out a notice period represents a real risk to the employer, then it is more prudent to make a payment in lieu of notice.

The employer should also consider providing assistance to each employee to find alternative work. This may include providing references and outplacement assistance. Employees should be allowed to call prospective employers and attend interviews during working hours. Please note that this may already be prescribed in an award or agreement.

Conclusion

The negative impact of a badly managed restructuring can have a destabilising effect on those employees who are not selected for redundancy and remain with the employer. The morale of the remaining employees may be critical to the success of the restructure and the viability of the organisation.

Restructures which result in redundancy are always difficult. But a well managed, transparent and fair process should minimise the risks to the organisation and maximise the likelihood of a successful restructure.

Appendix A: Notice of Termination and Redundancy Entitlements

Statutory Notice Periods

The *Fair Work Act* sets minimum notice periods in accordance with the following Table.

Employee's period of continuous service with the Employer	Period
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

An employee who is over 45 years of age and who has at least 2 years continuous service will be entitled to an extra week of notice.

Most federal awards reproduce the notice periods in the above Table. It should be noted that some awards and collective agreements may provide notice periods which are more generous.

Most state awards provide similar notice periods.

Severance Pay - Federal standard for employers with more than 15 employees

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 yeas	8 weeks' pay
5 years and less than 6 years	10 weeks' 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

Some awards or collective agreements may vary the above severance pay, but this reflects the entitlements provided by the awards used by most Jobs Australia members and subscribers.

The measure for 15 employees includes all full time, part time **and casual** employees at the date of termination or notice of termination, including the redundant employee.

When does the NES redundancy severance pay standard apply?

The NES for redundancy will apply to all employees covered by the *Fair Work Act,* although there are some transitional issues. These transitional issues relate to pre-2010 redundancy entitlements and service.

- Most Jobs Australia members and subscribers have historically been bound by awards which provided an entitlement to severance pay where there were more than 15 employees. For those employers, where they are covered by the *Fair Work Act*, there will be little practical change. Continuous service prior to 2010 counts for the purpose of redundancy severance pay.

- Employers who provided a redundancy entitlement through contracts (including where policies are incorporated into contracts), or agreements will also be covered by the NES. Continuous service prior to 2010 counts for the purpose of redundancy severance pay.

- Employers who prior to 2010 provided more generous severance pay will become covered by the less generous NES, However if the more generous entitlements were contained in a contract they will continue to apply as a contractual matter. If the requirements were less generous, the new NES requirements will now apply.

- An employer who prior to 2010 did not have any obligation to pay severance pay on redundancy will become covered by the NES from 1 January 2010. This could be the case, for example, if the work was previously award free. For those employers, only continuous service from 1 January 2010 will count for the purpose of severance redundancy pay. So, for example if a previously award free employee who started in 2005 is terminated due to redundancy on 1 June 2011, only the 17 months since January 2010 will count for this purpose and they will be entitled to 4 week's severance pay.

These transitional matters are potentially complex and advice should be sought.

Severance pay - State Standards

State awards may provide for different amounts of severance pay. Often employers with fewer than 15 employees will be exempt. Check your award for details.

State awards preserved in the federal system as a result of the referral in 2010 must be read in conjunction with the NES. Where the severance pay entitlements differ, the more generous provision will apply.

Appendix B: Sample letter: Advising of restructure

Dear (*name of employee*)

This is to advise you that the Management of *(name of your organisation)* has decided that there will be major changes in relation to the *(program, organisational structure and/or technology of the organisation)***.**

The decision to introduce change in the workplace has been brought about by a number of factors, which include: *(List factors such as funding cuts, or lack of success in a tender that have resulted in this decision)*

▪

We plan to hold discussions with all affected employees on these issues, including the likely impact of such decisions on organisational structure, the hours of work and positions of employees, and the possibility of redundancy. We will also consider, where appropriate, strategies to minimise any negative impact of the changes. This letter does not constitute notice of termination of employment.

The *proposal/options* that will be the basis for the discussions *is/are* as follows:

▪

You are therefore invited to attend a meeting on *(specify date, time and place)*.

If you wish to put written submissions or suggestions to us either before or at this meeting, please do so.

The (*relevant*) union has also been invited to send a representative to this meeting. If you are a union member you are invited to seek the assistance of your union throughout this period of change.

The management of *(your organisation)* values your input into this process and looks forward to a productive and constructive meeting.

COMMENT: This paragraph is relevant where required by an award, agreement, or organisational policy to consult with the relevant union, or simply as a practical matter of good industrial relations where there is a significant union presence in the workplace – delete if not relevant.

Yours sincerely

Chairperson (or Manager)
(*date*)

Appendix C: Sample letter: Potential redundancy of position & redeployment options

Dear (*name of employee*)

As you are aware, the (*name of organisation*) has introduced changes to the structure of the organisation. As a result, your position is potentially redundant. This letter does not constitute notice of termination of employment.

Management has decided on a revised structure for the organisation. This structure contains one/a number of new positions. A copy of the new position description(s) and structure is attached for your consideration.

(*Use whichever of the two paragraphs below is appropriate*)

You are invited to express interest in being considered for *(any of*) the new position(s). Expressions of interest should be forwarded to the CEO/Chair of the Board by (*date*).

or

You are invited to apply for any position for which you believe you have the requisite skills, knowledge and experience. Please return your application in writing, addressing the selection criteria, to the CEO/Chair of the Board by (*date*).

Should you wish not to apply/express interest in (any) position(s) you should advise the CEO/Chair of the Board of this by (*date*). You should be aware that:

- if you are not interested in/applying for a position, that as your current position will no longer exist after (*date*) your employment will be terminated;
- if we do not receive any response from you, it will be assumed that you are not interested in any of the new positions at (*the organisation*); and
- if you are not successful in your application, your employment will also be terminated.

Subject to the outcome of the selection process, we plan to formally give any notices of termination of employment to all affected staff on (*date*) with the terminations to take effect on (*date*).

Yours sincerely

Chairperson (or Manager)
(*date*)

Appendix D: Sample letter: Termination of employment due to redundancy

Dear (*name of employee*)

We refer to the letters to you dated (*date*) and the consultative meeting held with the staff, Union and CEO/Chair of the Board of (*organisation*) on (*date*).

(*Use whichever of the two paragraphs below is appropriate*)

- After consideration, the Management of (*organisation*) has determined that at present there are no viable alternative positions available in which to offer you continuing employment.

- After consideration, the Management of (*organisation*) has determined that your application for the position of (*position title*) has been unsuccessful.

You are hereby given (*number of weeks*) notice that your employment with (*organisation*) will terminate on (*date*). All entitlements due to you under the (*name of Award/Agreement*) will be paid at the end of the notice period, and you will be provided with a statement of service.

The (*organisation*) manager has been asked to investigate outplacement counselling and services for all affected staff, and you will receive more information when arrangements have been finalised.

The (relevant) Union has been advised of the above situation, and you may contact the local branch of that Union on (phone number) for further assistance and advice if you wish.

The Management Committee/Board regrets that it is necessary to take this action, and would like to thank you for the dedicated service you have given (*organisation*). We wish you well in your future endeavours.

Yours sincerely

Chairperson (or Manager)
(*date*)