



Case note

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cbp

Shedding staff in times of financial woe; Risk Management for Business

As we know, the financial crisis is impacting not just banks and the economy but all businesses generally.

Businesses will often contact their accountant to discuss strategies to reduce costs to help the business survive. One area is often retrenchment of staff.

Accountants need to be aware that retrenching staff is not simply a guillotine process. Not only are there financial consequences, there are social, legal and psychological consequences for a business, particularly if the process adopted in restructuring is not properly considered and executed.

Businesses need to be aware that there are legal obligations and morale consequences for remaining staff.

Some aspects of this process that business should consider when formulating a strategy are outlined below:

Have an overall strategy

Retrenchments give a business an opportunity to consider greater change in the operations of its business. What work was being performed by staff who are to be terminated may still need to be done by others. Given the economic imperatives and the requirements of a business to shed staff, a business may find that it

has an opportunity of changing work practices, relationships and obligations. But any radical change needs to be done in a manner which minimises risk.

The redundancy process itself needs to take into account the manner in which the decision to shed staff is communicated, the impact on a business in the marketplace and its relationship with remaining employees into the future.

Redundancy – what does it actually mean?

The accepted legal definition of a redundancy is "that an employer ... no longer wishes the job the employee has been doing to be done by anyone."¹

This is the basic concept that employers should consider when selecting staff to be retrenched. Simply, the question that should be asked is "...is the job that is being performed no longer to be available".

Employers can be comforted in the knowledge that as the law currently stands their decision to select an employee for redundancy is difficult to challenge. Fundamentally the decision to shed a person's job is a management prerogative. That is enshrined and respected in the *Workplace Relations Act 1996* at section 649. The full bench of the Australian Industrial Relations

¹ Rv Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Limited (1977) 16 SASR 6 at 8.

Commission held in 2007 in *Carter v Village Cinemas Australia Pty Limited*² that the wording in section 649 gave employers an almost unchallengeable mandate to select staff for redundancy. This selection was outside the bounds of challenge that is possible under the Unfair Dismissal provisions of the *Workplace Relations Act 1996*. In essence, it meant that selection of a person for a genuine redundancy was not capable of review by a Tribunal.

Don't mix your drinks

The temptation is often there to terminate a poorly performing staff member who is doing a job that needs still needs to be undertaken. Making a poorly performing person redundant and then immediately replacing them would not be genuine. If that person's job was capable of review under the unfair dismissal laws, then the "operational requirements" defence under section 649 may not be available.

If an employee is to be made redundant, then there must be genuine reasons backing that up. In reality, determining those genuine reasons is not hard. A properly prepared employer can easily achieve this outcome. An employer who does not prepare may make admissions which could cost it dearly in a legal challenge.

Redundancy has a cost

An employee who is terminated on the grounds of redundancy will be entitled not only to a notice of termination under a contract of employment (if there is no written

one, then they will be entitled to "reasonable notice"), they will also be entitled to a severance payment if they are an employee who has an instrument upon which they can rely. Generally, lower level employees have the benefit of an award which generally will have a severance scale for which they are eligible to be paid depending on their period of service and age.

More senior executives and managerial employees are unlikely to have a severance pay scale upon which they can rely. Those employees, even if terminated on the grounds of redundancy, would only be eligible to notice or pay in lieu. There would be no separate entitlement for severance pay.

Sometimes, if an employer has a policy or a custom and practice of making an ex gratia severance payment, then it may end up being required to make that extra payment in future rounds of job shedding. These issues need to be carefully considered should there be a further challenge.

Check all contracts

An employer will be in a significantly stronger position to negotiate an exit with employees if there is a written contract of employment with each of them. Generally a written contract will provide for some notice to be given or paid in lieu to an employee.

If there is no written contract, then "reasonable notice" will need to be given. This exists

² 15 January 2007 (PR975821)

in all written contracts as it is an implied term in unwritten contracts of employment. What reasonable notice means can often be anyone's guess. It will be dependant on the seniority, period of service and age of the employee in question.

Even if there is a contract of employment, business people should check that the contract is valid and relevant. Often employees are promoted or will have their job profoundly changed from the job they were initially hired for.

The seminal case of *Quinn v Jack Chia* (1992) is illustrative. In that case, the employee had a contract of employment which allowed termination on two weeks notice. The employee in question was promoted from being a project manager to the CEO of the company.

The Court held that the terms of the contract had so profoundly changed that the original written contract no longer applied. In this case, the employee was granted 12 months pay in lieu of notice on termination of his employment by the Court.

Consultation

This is a commonplace requirement of many awards. Under these awards, an employer is obliged to engage in some sort of consultation process with employees who are likely to be made redundant before a final decision is made. The logic behind the requirement is that it gives

affected employees a say in the process and in theory at least gives an employee a chance to save their job. Ignoring an Award requirement to consult, could be used as an excuse by recalcitrant and resentful terminated staff in legal action.

Quite apart from this, my experience has been that employers undertaking a thoughtful and sympathetic consultative process tend to have fewer problems.

Consultation is not just a rubber stamp to a predetermined conclusion. Employees who are facing the termination of employment usually have very well concentrated minds. They can smell when an employer is contriving the process.

The consultation process is all about ensuring integrity of the process and affording employees procedural fairness. It is possible that an employee could make a case for the necessity of their position remaining. They should be given that chance.

Ultimately, it is up to an employer to make a decision and whatever decision they make, especially as the law currently stand is probably beyond scrutiny.

If a genuine process of consultation is adopted, then this will ensure that the relationship of trust and confidence between the parties is maintained.

Select employees fairly

If there are numerous people who are doing the same job, then the selection of redundancy should not be at random. Criteria with respect to skills, qualification, training, experience and service are all criteria that can be objectively assessed.

Criteria should not include unlawful matters such as age, sex, pregnancy, race, marital status, disability or union membership. Selection on this basis (even if it is not directly or even consciously done) can lead to litigation. For example, selecting on a "last on first off" basis, may have a disproportionate discriminatory effect. If the last few employees say were all female or say, Tongan for example, then a case of discrimination could be easily mounted.

Payments to employees being made redundant

A calculation should be made to the employees being made redundant which reflects their legal entitlements. Usually this will include the following:

- (a) All pay to date of termination;
- (b) Pay in lieu of notice. This will either be stated on the contract or it needs to be negotiated with the employee who does not have a written contract. Employers need to be also aware of the minimum standards under section 661 of the Workplace Relations Act which provides a gradual scale depending on period of service and age.

- (c) Severance pay. This will be dependent on whether the employee in question is able to rely upon an Award or if the employer has a policy or custom and practice of paying a severance payment.
- (d) Any accrued and unused statutory entitlements such as annual leave and long service leave.

If an employer provides a package which is more generous than the strict legal obligations, then it would be advisable to invite the employees to execute a deed of release so when the employment relationship ends and there is then no further possible consequences of the termination of the employment.

Employers should note that whilst there is no statutory obligation to provide severance pay (severance pay only being payable pursuant to an Award, policy or custom and practice), from 1 January 2010, the *Workplace Relations Act* is likely to contain a general requirement to provide redundancy pay in accordance with the specified scale which rewards length of service.

Risks for employers

Even though there are several legal avenues open to employees, they are largely difficult and expensive to execute. Nevertheless, employers who have not fully planned or are mistaken in their assumptions need to be aware that a challenge is possible.

The sources of these challenges are as follows:

(a) Unfair dismissal claims

Whilst it was common prior to the Work Choices reforms, employers who have fewer than 100 employees and/or a genuine operation reason for redundancy are largely now protected from this sort of challenge.

However, if it is a blatant case of an employee being terminated ostensibly for redundancy but in reality not so, then the termination could be challenged by an employee.

(b) Breach of contract

An employer could be exposed to a simple breach of contract claim in a Court where there is no written contract allowing for defined notice. Where there is no written contract, a employee will be entitled pursuant to reasonable notice. That will be dependant on the length of service, age and seniority of the employee. It means that an employee has greater bargaining rights in the circumstances.

(c) Discrimination/unlawful termination

An employee may be able to bring such a claim if the selection for redundancy was not objective and fair.

(d) Trade Practices

The Trade Practices Act 1974 prohibits employers from misleading and deceptive conduct in relation to employment especially when offering employment and contractual negotiations.

In *O'Neill v Medical Benefits Fund of Australia (2002)*, the employee successfully argued that he had been dismissed in breach of a representation made to him about the security of his tenure. The employee in question had been head hunted from another position and told that the new position would be secure. He was able to recover substantial damages.

Summary

Restructuring the business during times of economic difficulty is a reality that must be dealt with by business. Going through a proper process with integrity and respect for the dignity of those people being terminated, will pay a dividend in the long term for an employer. Getting advice and following best practice will maintain morale, reduce risk and help a business survive and progress to its next stage.

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