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Article Information

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When is a redundancy genuine? The necessity of timely consultation

The Fair Work Commission (FWC) has recently in Frederick Deon Du Preez v MSWA Limited issued a reminder of the importance of employers' consultation obligations. Significantly, the FWC considered the requirement for timely consultations, and what it takes for consultations to be "adequate".

Background

On 8 November 2023, a Finance Data Analyst (**Applicant**) employed by MSWA Limited (**MSWA**) was dismissed by way of redundancy. Following their employment ending, the Applicant made an unfair dismissal claim pursuant to section 385 of the *Fair Work Act 2009* (Cth) (**FW Act**), alleging that the dismissal did not comply with the section 389 definition of "genuine redundancy".

Prior to the dismissal, on 17 October 2023, the Chief Information Officer (**CIO**) of MSWA sent an email to the Head of Data Analysis and Reporting as well as other senior MSWA employees summarising changes to the Data, Analytics and Reporting Team (**Team**). This included stating that "*the position of Financial Data Analyst is too narrow in scope and skill set, so is redundant in the new structure*". The email further included a schedule for the rolling out of the changes. This occurred following the review and restructuring of the Team, which commenced as early as June 2023. The Applicant was not informed as an affected employee until 23 October 2023 when the CIO and Head of Data Analysis and Reporting advised the Applicant of their redundancy.

Satisfaction of consultation requirements

It is mandatory for Modern Awards and Enterprise Agreements to contain a consultation term requiring employers to consult with employees regarding major workplace changes that are likely to have a significant impact on the employees.

In this case, the relevant Enterprise Agreement stated that where MSWA *decided to take action* that was likely to have significant impact on an employee or make an employee redundant, the employee was entitled to be informed as soon as reasonably practicable after the decision had been made.

Following consideration of the consultation requirements, the Commissioner held that such provisions are enlivened once the decision to *take an action* has been made; not once the decision to make the role redundant has occurred: *"[c]onsultation is not merely telling an employee that they have been made redundant several months after a decision has been made to restructure their team*".

"Genuineness" of the redundancy and unfair dismissal claims

Under the section 389 definition of genuine redundancy, a dismissal does not constitute a genuine redundancy where the employer has failed to comply with applicable consultation requirements.

Despite the redundancy being otherwise genuine, the Commissioner was not satisfied that MSWA had fulfilled its consultation requirements. It was held that the lack of communication with the Applicant, even following a decision that triggered the consultation requirements being made, left the dismissal incapable of being classified as a genuine redundancy. Further procedural deficiencies – such as the CIO contacting every executive, senior and middle manager to understand the Team, yet not contacting the Applicant – contributed to the Commissioner's decision.

Although redeployment was unreasonable on the facts of this case, the Commissioner additionally noted that a failure to offer redeployment may amount to a redundancy being ingenuine. If it had been reasonable in the circumstances for MSWA to offer the Applicant redeployment into a position within the enterprise or any related entity, MSWA must have done so in order to satisfy the genuine redundancy provisions.

Further, the FWC held that the failure to consult with an employee pursuant to existing arrangements amounted to an unfair dismissal. The Commissioner found the failure to consult with the Applicant to be unreasonable upon the consideration of section 387 factors. This led to the satisfaction of the unfair dismissal test detailed in section 385 of the FW Act.

What does a compliant consultation process look like?

Under the standard Award and model Enterprise Agreement clauses, an employer is expected to commence consultation once a definite decision has been made to make a significant change. Consultation involves notifying the relevant employees of the change and disclosing all relevant information regarding the nature of the proposed changes, the anticipated impact of the changes on employees, any measures to avoid or reduce the adverse implications of the change, and any further matters that are likely to affect employees. This must occur once the decision to *take an action* has been made: not in the last step prior to the implementation of the change.

During consultation, an employer must explain the circumstances necessitating the change and whether all practicable alternatives to the proposed change have been considered. The employer must then seek input from the employee and consider the employee's response. Whilst the decision is ultimately the employer's, the objective of the consultation process is in part to allow employees the opportunity to propose measures to mitigate any negative affects of the change.

For more information on compliant consultation processes, we discuss this in Piper Alderman's Employment Relations Podcast.

Future consideration: the role of new delegates' rights

On 28 June 2024, as part of the "Closing Loopholes" changes to the FW Act, a Full Bench of the FWC finalised the "Modern Award delegate's right clause" for inclusion in all Awards. A workplace delegate is an employee who is either elected or appointed to represent union members in their workplace.

Under this clause, a recognised delegate can represent an eligible employee's industrial interests. This includes during consultations related to major changes, changes to rosters or hours of work, dispute resolutions, disciplinary processes, enterprise bargaining and the processes or procedures under an Award, Enterprise Agreement, or policy where the representation of an eligible employee is permitted.

From 1 July 2024, any Enterprise Agreement voted on by employees must either have its own provisions regarding delegates that are equal to or more beneficial than any of the same term in an otherwise appropriate Award, or the delegates provision from the Award will be applicable.

As a result of these changes, it is likely that employers will see a greater number of employees being represented by a workplace delegate throughout consultation processes. This will likely increase the pressure on employers to produce and uphold more stringent provisions in relation to consultation processes.

Lessons for employers

Getting consultation right remains imperative when employers make decisions that can have considerable impacts on their employees. This case, and recent changes to the FW Act, reiterate that:

- Consultation should occur as soon as reasonably practicable once a decision has been made that is likely to have a significant impact on an employee. This consultation should include a discussion of the likely consequences of the decision, including where employment may end.
- Employees may be represented during consultation processes, and employers must recognise those representatives.
- A failure to consult with the employee can result in a decision to dismiss them being deemed an unfair dismissal pursuant to section 385 of the FW Act, or expose an employer to civil penalties for non-compliance with the FW Act and relevant Enterprise Agreements or Awards.
- Where a decision could result in a redundancy, employers should consider any reasonable redeployment options within the enterprise or that of one of its associated entities.