

## Article Information

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# When is alternative employment suitable? Commission considers the scope of section 120

**The Fair Work Commission (FWC) refused an employer's application to reduce a worker's redundancy payment in Australian Cabling Solutions Pty Ltd T/A Australian Cabling Solutions [2024] FWC 2591, finding that an 88km increase in travel rendered an alternative role unsuitable.**

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### Legislation and Overview

Section 119 (1) of the *Fair Work Act 2009* (Cth) (**FWA**) states an employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

1. 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
2. because of the insolvency or bankruptcy of the employer.

Section 120 provides that, on application by an employer, the FWC may determine that the amount of redundancy pay is to be reduced to a specified amount (which may be nil) that the FWC considers appropriate if the employer:

- obtains other acceptable employment for the employee; or
- cannot pay the redundancy amount.

In a recent case, Australian Cabling Solutions Pty Ltd sought to reduce an electrical and cabling employee's redundancy entitlements, arguing it had offered him "other acceptable employment" under section 120 (1)(b)(i) of the *FWA* after the conclusion of a project. However, the FWC determined that the significant increase in travel time for the offered new role made it an unsuitable alternative, resulting in the employee retaining his full redundancy payment.

### Background of the Case

The electrical and cabling worker was employed by Australian Cabling Solutions for two years on a project that required a short commute of just 13 kilometres from his home. When the project concluded, the employer offered him a position at Wacol Correction Facility in Brisbane. However, this new job would demand a significantly longer commute of 101 kilometres, translating to an approximate commute of one hour and 16 minutes by car or two hours and 40 minutes by train.

The employee rejected the offer, and ultimately accepted a different role on the Cross River Rail Project in the Brisbane CBD—where he could take a train to work—he argued that the commuting requirements of the proposed Wacol Correction Facility job made it unviable for him, such that he should retain his redundancy entitlements.

### "Other Acceptable Employment"

The FWC has assessed what it means for an employee to procure "other acceptable employment" by reference to four factors:

1. **Objective Assessment:** Acceptable employment is determined objectively, meaning a role does not have to be subjectively accepted by the employee. Refusal of an objectively acceptable role can make an employee lose redundancy pay entitlement (*NUW v Tontine Fibres* [2007] AIRCFB 1016 at [23]).

2. **Not Identical Employment:** Acceptable employment may differ from the original role. Some inconvenience or changes in terms and conditions can still render a position acceptable.
3. **Cooperation Required:** Employees must actively engage with employers in exploring alternative positions and should not unreasonably refuse offers to access redundancy benefits (*Application by Spotless Services Australia Limited ('Spotless')* [2013] FWC 4484 at 14.).
4. **Comparison Factors:** To evaluate if reasonable alternative employment has been offered, various factors can be considered, including the nature of the job, pay, working hours, skills, duties, seniority, fringe benefits, workload, job security, travel time, ability to perform the job, work location (*UXC Connect v Moore* [2012] FWA 4296), and any loss of flexibility, such as to manage caring responsibilities (*Heath Family Trust T/A Focus People Pty Ltd* [2021] FWC 2779 at [21]).

### **The FWC's Findings**

Deputy President Lake found that the employee's previous role did not involve frequent travel to different locations, making the extensive travel for the Wacol Correction Facility job a considerable burden.

The FWC found that the proposed new job required a significantly longer commute compared to the employee's previous position. The travel time would have increased substantially, leading to considerable inconvenience.

The employee stated he would not have accepted the Wacol Correction Facility position if it required driving due to the lengthy commute. The FWC interpreted this as suggesting that the job offer did not represent a reasonable alternative.

Deputy President Lake concluded that the Wacol job did not qualify as "other acceptable employment." The Applicant was entitled to the full six-week redundancy payment.

### **Lessons for Employers**

This case highlights for employers when undertaking a redundancy process and considering whether to make a section 120 application that "other acceptable employment" does not mean *any* job offer. Factors like travel time, convenience, and the nature of the work play crucial roles in determining whether an alternative position is a reasonable alternative for that employee. It must be assessed on a case by case basis.