Article Information

Author: Ben Motro
Service: Employment & Labour

BUPA didn't have to consult about 23 redundancies

Ben Motro, Special Counsel, and Emily Setter, Law Clerk, reflect on the recent decision of Australian Nursing and Midwifery Federation v Bupa Aged Care Australia Pty Ltd [2017] FCA 1246, in which Justice O'Callaghan of the Federal Court held that the consultation clause in an employer's enterprise agreement did not require consultation over matters found not to result in "major workplace change".

Ben Motro, Special Counsel, and **Emily Setter, Law Clerk**, reflect on the recent decision of *Australian Nursing and Midwifery Federation v Bupa Aged Care Australia Pty Ltd* [2017] FCA 1246, in which Justice O'Callaghan of the Federal Court held that the consultation clause in an employer's enterprise agreement did not require consultation over matters found not to result in "major workplace change".

Case Details

At the time of the decision, Bupa employed 53 Care Managers and 25 Clinical Managers across its 26 aged care facilities in Victoria. It made the decision to abolish those positions, and appoint 55 Clinical Care Managers. The result of this restructure would be that 23 existing Care Managers and Clinical Managers positions would, or may, be made redundant.

Bupa led unchallenged evidence that this restructure would result in reducing the administrative burden on employees occupying the new Clinical Care Manager role, and allow them to focus on resident care.

The Australian Nursing and Midwifery Federation (the ANMF) sought interlocutory and final orders preventing Bupa from taking any steps to abolish its Care Manager and Clinical Manager positions, as well as orders preventing Bupa from introducing the position of Clinical Care Manager at the nominated facilities.

The ANMF alleged that Bupa had breached clause 7 of its enterprise agreement by failing to consult with employees regarding a major workplace change, as well as the *Fair Work Act 2009* (Cth) insofar as it prohibits parties to an enterprise agreement from contravening the agreement. The latter of which is a civil remedy provision.

The consultation obligations under the enterprise agreement

The requirement to consult in respect of major workplace change, found at clause 7 of Bupa's enterprise agreement is substantially the same as the model consultation term contained within Schedule 2.3 of the *Fair Work Regulations 2009*.

Under both the model clause and clause 7 of Bupa's enterprise agreement, if an employer has made a definite decision to introduce a major change to production, operation, structure or technology in relation to its enterprise, and the change is likely to have a significant effect on the employees of the enterprise, the employer must notify the employees of the decision to introduce the major change. An employer is also required to discuss with employees the introduction of the change, its likely effect, and the measures an employer is taking to avert or mitigate the adverse effect of the change.

Both the model clause and clause 7 of Bupa's agreement indicate that a major change is likely to have a significant effect on employees if it results in, among other things, the termination of the employment of employees, major change to the composition, operation or size of the employer's workforce, or the diminution of job opportunities (including opportunities for promotion or tenure).

The parties' arguments

While the ANMF acknowledged that forced redundancies as a result of a decision will not automatically amount to a major workplace change, the ANMF alleged that the redundancies were a major workplace change because of the large number of roles to be made redundant and the seniority and importance of the roles within Bupa's operations.

Additionally, the ANMF contended that registered and enrolled nurses may be affected by the redundancies because they "work closely with", consult, and are supervised by the existing Clinical Managers and Care Managers, and would accordingly "lose the benefit of a role which provides them with supervision". The ANMF also submitted that the nurses would lose a promotional opportunity, and that there was a tangible risk that the redundancies would increase the workload of registered and enrolled nurses at each facility.

In response, Bupa submitted that the redundancy of 23 positions out of over 3000 employees did not amount to a major workplace change. Additionally, Bupa submitted that the employees performing the roles in question only worked 7.5 hours a day, five days a week, meaning the restructure would have a limited impact upon the business' 24/7 operations.

Bupa also gave unchallenged evidence that the proposed change would have no impact upon resident care or the workloads and functions of Bupa's registered nurses, enrolled nurses or carers/clinicians.

The Court's decision

The Federal Court dismissed the ANMF's claim, finding that Bupa's proposed restructure did not amount to major workplace change within the meaning of clause 7 of Bupa's enterprise agreement. Justice O'Callaghan noted that the decision to abolish the positions and replace them with Clinical Care Managers was not likely to have a significant effect on Bupa's employees within the meaning of the clause.

In arriving at the decision that the restructure was not "major workplace change", the Federal Court cited the case of *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* (2016) 248 FCR 18 with approval, and indicated the following factors were relevant to its determination:

- The number of redundancies in relation to the total number of employees;
- The seniority and importance of the employees in the employer's operations;
- The extent to which employees work in an integrated or disconnected manner;
- The consequences for continuing employees of the redundancies and consequent terminations; and
- The number of hours worked by the employees in the context of the business' hours of operations.

Accordingly, the Court held that Bupa was not obliged to consult with the relevant employees, in accordance with clause 7 of the enterprise agreement.

Lessons for Employers

Employers covered by a modern award or enterprise agreement will be required to consult with employees and their representatives concerning major workplace changes that are likely to have significant effects. This decision has clarified the scope of that obligation to consult in the context of potential redundancies and is important to keep in mind in considering what factors your organisation should take into account when determining what is major workplace change.

The implications the issues raised by this case can have in the context of unfair dismissal proceedings, should also be noted. Relevantly, a dismissal may be unfair if an employer cannot demonstrate that the redundancy is a "genuine redundancy" as prescribed in section 389 of the Fair Work Act.

Section 389 provides that a dismissal will be a genuine redundancy if, among other things (which includes an obligation to consider reasonable redeployment options), an employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment, to consult about the redundancy.

If a decision to make an employee (or a group of employees) redundant is not a major workplace change, an employer may not be obliged to consult with an employee concerning the redundancy in order for it to be "genuine" (however this will be dependent on the terms of the specific industrial instrument, as well as any contractual or other obligations that may contain obligations to consult).

Nevertheless, regardless of whether an employer has a legislative or contractual obligation to consult in circumstances of redundancy, consultation will often be a practical means of:

- ensuring employer's other obligations (e.g. the obligation to consider reasonable redeployment) are met; and
- genuinely examining whether there are any reasonable means for the company to avert or mitigate the adverse effects of redundancy.

Should you require any information about your organisation's obligation to consult, please feel free to contact our Employment Relations team.