Who Do I Select to Make Redundant?

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With the general downturn in the economy over the last few years a number of employers have sought Addisons' advice regarding the method they should adopt in selecting employees to be made redundant. This usually arises where the employer has a number of employees performing the same type of work and the employer is restructuring its workforce and abolishing one or more of these positions. The question which we are asked is "How do I select the employees who are to be made redundant and not expose myself to a legal claim?".

The good news for employers is that Fair Work Australia has recently ruled that where a position has become genuinely redundant, the selection process by which the employer chooses the particular employee who is to be made redundant is irrelevant when it comes to determining the "fairness" of the dismissal or whether the redundancy is genuine.

This however does not mean that employers can now implement whatever method or make whatever decision they wish in determining which employees to make redundant. There are other legislative provisions which must be observed by an employer to avoid action being taken against the employer.

The Fair Work Act 2009 (FW Act) prohibits employees from making an unfair dismissal claim where the employee is terminated for reasons of a "genuine redundancy". However, to bring the employee's termination within the definition of a "genuine redundancy" the following requirements must be complied with:

- The termination must be for operational reasons, and the employee's position must no longer be required to be performed by anyone;
- The employer must have complied with any statutory award or agreement obligation to consult with the employee about the redundancy; and
- Where it is reasonable in the circumstances to do so, the employee must have been offered redeployment within the employer’s enterprise, or the enterprise of an associated entity.

The obligation to consult in circumstances of a redundancy is a requirement of every modern award. There have been many cases where employees, who have been made redundant for operational reasons, have successfully made claims for unfair dismissal against the employer, because of the employer's failure to comply with the consultation provisions of an award or enterprise agreement.

Further, the process which is used by an employer in selecting which employee is to be made redundant must not discriminate against the employee because of the employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. For example, choosing the most senior employees or the most junior employees to make redundant may give rise to a claim for age discrimination and even adopting a "last on, first off" policy could be argued as amounting to sex or age discrimination depending upon the previous employment practises of the employer.

When it comes to the methods of implementing a redundancy program, an offer of voluntary redundancy is the safest method in avoiding an action for unfair dismissal or discrimination, as employees who accept a voluntary redundancy package are unlikely to later challenge the termination.

The main problem with a voluntary redundancy program however is that the decision as to who should be made redundant is taken out of the hands of the employer and what often happens is that the employer's most experienced and valuable employees, who the employer can least afford to lose, are the ones who apply for voluntary redundancy. This is because more capable and experienced employees know it will be easy for them to find another job.

From the employer’s perspective, the best method is a performance based selection process, such as a "spill and fill" method. This method involves declaring all the affected positions vacant and requiring all the affected employees to reapply for the positions which remain available. This method allows the employer to retain those employees who the employer believes best meet the needs of the business whilst selecting for redundancy, those employees whose performance may be lacking.

If a "spill and fill" method is used, employers should ensure that they publish and provide to each of the affected employees:

- Job descriptions and the relevant prerequisites for the remaining positions;
- Clear information on how and when the affected employees need to apply for the remaining positions,
which should take into account if any of the affected employees will be on leave at the relevant time; and

- The selection criteria which will be applied.

Most importantly, the employer should strictly apply the published selection criteria and, if necessary, be able to give reasons to those employees who are to be made redundant as to why they were not selected for one of the remaining positions.

Redundancies always have the potential to be disruptive, stressful for the employees and undermine morale in the workplace. Although Fair Work Australia may no longer require an employer to establish “fairness” in the case of a genuine redundancy, the fairer and more transparent the process which is adopted the less likely that the employer’s decision will be challenged by those employees who are made redundant.

If you require any further information about redundancy or the matters covered in this article, please do not hesitate to contact me.

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¹ UES (Int’l) Pty Limited v Leevan Harney [2012] FWAFB 5241