



Updated: August 2016  
Replaces: June 2015

# FACT SHEET Redundancy

## WHAT IS A REDUNDANCY?

A redundancy arises when an employer determines that a position in their workplace is no longer required to be undertaken by anyone. Such a determination is made for genuine operational reasons, such as for economic or financial circumstances.

It is important to note that it is the **position** that is made redundant, not the person holding the position. However, the result of a position becoming redundant is that the incumbent's employment is no longer required in that position. The redundancy is not due to any personal act or fault of the employee, or for disciplinary reasons.

### **Is the Redundancy Necessary?**

Before making the decision to make a position redundant an employer should have a clear idea of why a change is necessary as well as the impact of the change for the business, for example, is the proposed change likely to result in what the business needs to achieve? Is this the best/only way to get the desired business result?

A redundancy should not be approached as a 'quick fix' option for a business, but should be part of a well-considered strategic plan for the business to cope with the operational imperatives it faces. Communication therefore plays an important role.

## LEGISLATIVE FRAMEWORK

The National Employment Standards (NES) in the *Fair Work Act 2009* (the 'Act') detail the minimum requirements for redundancy pay which apply to ***all*** employers.

### **Operational Reasons and Unfair Dismissals**

A redundancy is not an alternative to performance management and employers who make a position redundant so they can terminate an employee's employment quickly – as opposed to addressing performance concerns by following a fair process – can find themselves facing an Unfair Dismissal claim before the Fair Work Commission ('FWC'). Where an employee believes the termination of their employment (as a result of the position being made redundant) was not for genuine operational reasons, the employee has the ability to lodge an Unfair Dismissal application on that basis.

The Fair Work legislation provides that an employee is excluded from making an Unfair Dismissal application if their position was made redundant for genuine operational reasons – that is, a genuine redundancy.

The onus is on the employer to then show the genuine operational reasons.

A valid operational reason may include:

- Financial difficulties – where the employer is no longer able to pay employees
- Restructuring of the Workplace
- Technological advances
- Industry downturn

Please note that employees may pursue other avenues where they feel that the redundancy is in breach of other workplace laws. Such avenues include, but are not limited to, adverse action, discrimination and other general protections as provided for in the Act.

*Refer: QHA's General Protections Fact Sheet*

*Refer: QHA's Unlawful Discrimination Fact Sheet*

### **What is a Genuine Redundancy?**

There are three elements to a redundancy being considered as genuine:

1. Section 389 of the Act provides that a genuine redundancy occurs where an employer no longer requires a person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
2. As per section 389(b), the employer has complied with any obligation in an award or Enterprise Agreement to consult with the employee about the redundancy of the position they hold; and
3. As per 389(2), an employee's dismissal will *not be* viewed as a genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:
  - The employer's enterprise; or
  - The enterprise of an associated entity of the employer.

An employer will need to provide the necessary evidence, such as financial documentation, to show the redundancy is genuine, the correct consultation process was followed, and that redeployment was considered as an option, and if reasonable, was actioned.

In cases where the dismissal is shown to be a genuine redundancy, the employee is excluded from pursuing the Unfair Dismissal claim. However, an employer must be able to show how they followed a proper and open process having regard to the above three criteria.

### **PROCESS**

Employers need to follow a process that is legally and procedurally fair when determining and making changes in their workplace. Awards will generally contain clauses that must be followed regarding Termination, Consultation Regarding Major Workplace Change and Redundancy.

The *Hospitality Industry (General) Award 2010* ('HIGA') provides at Clause 8 for a Consultation process that must be followed where a major workplace change is to be implemented.

*Refer: QHA's Consultation under the HIGA and RIA Fact Sheet*

Where an Award provides a process, an employer must follow that process. Such a process will generally require consultation with the employee/s affected by the change, and provide for notice of termination and severance payments, as well as other ancillary details.

Employers with an Enterprise Agreement (or other formally ratified workplace agreements) in place at their workplace must follow any consultation clause provided in the Agreement.

### Consultation

As every redundancy circumstance is different, it is strongly recommended that further advice be sought immediately before proceeding with the consultation process. Employers need to refer to the relevant award/industrial instrument for the consultation process they are required to follow.

QHA suggests that any consultation process involve the following steps:

- notify employee/s as soon as practicable after the decision has been made to make position/s redundant;
- outline the reasons for the redundancy eg industry downturn;
- outline possible measures to avoid or minimise the redundancy and its effects eg redeployment, and seek employee feedback on alternatives; and
- give employee/s, as soon as practicable, written confirmation of the redundancy. Refer below to the section titled 'Documentation'.

Where 15 or more employees are terminated as a result of redundancies, an employer may be required as part of the consultation process to notify Centrelink. The notification must be made in writing.

Where the redundancy process involves the compulsory selection of an individual or individuals for redundancy, it may be difficult for employers to determine which of the positions to make redundant, in particular where the positions held by the employee are similar in many aspects.

Traditionally employers used to adopt the approach of 'last-on-first-off' for selection of redundancy. However, it is now less commonly applied by employers who prefer to select on the basis of merit according to performance and skills set, and also because of the risk of discrimination claims.

Therefore the development of an objective and genuine selection criteria is important when implementing compulsory redundancies – subjective criteria such as attitude, motivation and loyalty should be avoided. The following four-step process is recommended:

1. Identify the skills and qualifications (if any) required for the remaining positions;
2. Identify which employees have those skills;
3. Rank those employees in order from most to least skilled; and
4. Verify the results of the employer's provisional assessment.

Please refer to Appendix A of this document for a sample selection matrix which is provided as a guide to members of the type of criteria that might be considered when implementing redundancies. The results of the employer's assessment should be discussed with the affected employee(s) to ensure that they are provided with an opportunity to respond to the assessment.

Employers are reminded that a **final decision should not be made** until all information is considered – this includes considering the employee feedback and responses during the consultation process.

## Notice Periods

An employer must give the following notice of termination to an employee (excluding those engaged on a casual basis) when their position is made redundant:

Not more than 1 year of continuous service	<b>1 week</b>
More than 1 year but not more than 3 years	<b>2 weeks*</b>
More than 3 years but not more than 5 years	<b>3 weeks*</b>
More than 5 years of continuous service	<b>4 weeks*</b>

\* If an employee is 45 years old or over, and has completed at least 2 years' continuous service, they are entitled to an additional week's notice.

An employer can require an employee to work out the period of notice, or, if the redundancy takes effect sooner, the employer must pay the notice period (less any notice worked) to the employee.

Refer to the relevant award for the timelines of the final termination payment.

Where an employer requires an employee to work the notice period and the employee refuses to do so, the employee forfeits the right to payment of the notice period. Some awards provide that an employer can withhold the value of the notice period from an employee's final pay. Note that this can only be done if the relevant award specifically allows for withholding.

Where an employee is being redeployed or being transferred to lower paid duties by reason of redundancy, the employee is still entitled to the same notice period as they would have received if the employment had been terminated.

## Time Off During Notice

An employee whose position has been made redundant is entitled to paid time off for the purposes of seeking alternative employment. Please refer to the relevant award for details of the timeframe.

## Redundancy Pay

In most cases an employee whose position has been made redundant is entitled to redundancy pay (other than those engaged on a casual basis). The relevant award will contain a redundancy payment schedule that provides for payments based on years of service.

Further the Act contains redundancy pay provisions which form part of the National Employment Standards. Therefore all employees, where eligible, will be entitled to redundancy pay regardless of whether an award provides for redundancy pay or not.

Redundancy pay under the NES is as follows:

<b>Employee's period of continuous service with employer on termination</b>	<b>Redundancy pay period</b>
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 years	16 weeks
At least 10 years	12 weeks

### ***Variation of Redundancy Pay for Employment or Incapacity to Pay***

If an employer obtains other acceptable employment for an employee whose position has been made redundant or cannot pay the amount of redundancy pay prescribed, the employer may apply to the FWC to have the amount of redundancy pay reduced to a specified amount (which may be nil) that the FWC considers appropriate.

Only the FWC can legally allow for a reduced or nil payment.

### ***Exclusions from Obligation to Pay Redundancy Pay***

In the event of redundancy, an employee is not entitled to redundancy pay if:

- immediately before the time of the termination, or at the time when the person is given notice of the termination (whichever happens first) the employer is a small business employer (i.e. employs less than 15 employees); *or*
- the employee has less than 12 months' continuous service; *or*
- where the employer no longer requires the job done by the employee to be done by anyone due to the ordinary and customary turnover of labour.

Note: A Full Bench of the Fair Work Commission (FWC) in *CFMEU, CEPU and AMWU v Spotless Facility Services Pty Ltd t/a Spotless* [2015] FWCFB 1162 determined 'that the abolition of a position as a result of ordinary and customary turnover *is* a redundancy, albeit one that does not give rise to an entitlement to redundancy pay'.

Please note that modern awards may also contain redundancy pay exclusions. Employers should refer to the relevant modern award for more details.

## **DOCUMENTATION**

QHA strongly recommends the documentation of the process followed, as well as file notes of all discussions with employees and other persons about the redundancy/ies. When discussing the likelihood of change and the implication being that a position may be made redundant, the employer should formalise this discussion by confirming:

- the date of the discussion;
- the reason/s the position is likely to be made redundant;
- possible alternatives; and
- a request for the employee to give written feedback on any alternatives by a certain date.

If, after this step the decision to make a position redundant is confirmed, the employer should formalise this in writing:

- confirming any feedback provided from the employee has been received;
- any alternatives presented have been considered, however, the alternatives are not suitable in the circumstances;
- advising the employee a decision has been made and what that decision is (ie the position will become redundant);
- confirming the reasons for the decision (eg industry downturn);
- the implications for the employee (ie employment is terminated due to the redundancy);
- timeframes involved, including the final date of work; and
- payment arrangements.

## **LOOKING AFTER THE EMPLOYEES WHO ARE LEFT**

Employers must consider the impact that a redundancy, or redundancies, will likely have on those employees who are not terminated and remain in employment, and look at how to manage the fall-out that may occur, such as decreased motivation and morale.

A transparent and holistic approach to managing redundancies will help to protect an organisation from internal morale meltdown and assist in maintaining productivity amongst remaining employees.

### **Further Assistance**

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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August 2016

## **APPENDIX A**

### **(EXAMPLE) SELECTION CRITERIA MATRIX**

*This matrix is a sample only. In designing a selection criteria matrix, employers should incorporate criteria that are relevant to the position and the needs of the business. When the process identifies unsatisfactory performance, the issues should only be included where a warning has previously been given.*

Employee Name: \_\_\_\_\_

Date: \_\_\_\_\_

<b>Category</b>	<b>Weighting</b>	<b>Criteria</b>	<b>Rating</b>	<b>Score (Weighting x Criteria)</b>
Job Knowledge	X 2	Operates flexibly across a range of functions		
	X 2	Demonstrates competence in standard tasks		
Qualifications/skills	X 2	Holds qualifications relevant to the needs of the business – [insert details]		
	X 2	Has special skills relevant to the needs of the business – [insert details]		
Supervision	X 1	Works independently without constant supervision		
	X 1	Responds appropriately to directions		
Communication Skills	X 1	Demonstrates communication skills relevant to the position		
OH&S Issues	X 1	Complies with safe work practices		
Quality	X 2	Demonstrates an understanding and acceptance of the need for quality control		
	X 2	Demonstrates an understanding of the importance of meeting the needs of internal and external customers		
Teamwork	X 2	Demonstrates a willingness to assist and co-operate with others		

#### **Total Score:**

Ratings: Consistently exceeds expectations (3)  
Mostly meets expectations (2)  
Needs improvement (1)  
Not applicable (N/A)

Other relevant factors:

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Comments offered by employee:

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Manager/Supervisor: \_\_\_\_\_

Date: \_\_\_\_\_