Employment, Workplace Relations & Safety

Update: Redeployment to Related Companies

Employers must have attempted to redeploy employees if seeking to prove that an employee's termination was the result of a 'genuine redundancy' following an unfair dismissal claim. The dismissal will not have been a 'genuine redundancy' if it would have been reasonable to redeploy within the employer's enterprise or within an associated entity of the employer.

GENUINE REDUNDANCY

Employers are currently able to defend unfair dismissal claims on the basis that a termination was a "genuine redundancy". In order to rely on this defence the employer must demonstrate that it no longer required the employee's role to be performed because of changes to the operational requirements of the employer's enterprise and it must have satisfied the consultation obligations in any modern award or enterprise agreement. In addition, it must not have been reasonable in all the circumstances for the employee to have been redeployed either within the employer's enterprise or within a related entity of the employer.

The scope of the requirement to redeploy within an associated entity has now become clearer with the findings of Commissioner Raffaelli in *Henry Jon Howarth and Ors v Ulan Coal Mines Limited* (12 July 2010). This key decision from Fair Work Australia sends a clear message that employers must proactively search and secure employment for employees whose roles are no longer required both within the employer's entity and within any other related entity if they wish to demonstrate a 'genuine redundancy'. It may not be sufficient for an employer to claim that related entities are separate operating companies and employers in their own right who are not able to be dictated to by other companies about who they should employ if genuine vacancies exist.

BACKGROUND

In 2009 Xstrata Coal Pty Ltd and its subsidiary, Ulan Coal Mines Limited restructured operations with a view to increasing the proportion of mineworkers with trade qualifications and outsourcing certain functions. The restructure resulted in the termination of employment of 14 Ulan employees, 10 of whom commenced unfair dismissal proceedings.

FWA found, following a successful appeal to the Full Bench, that the employees' jobs were no longer required and that the company had met its consultation obligations.

It was then left to Commissioner Raffaelli to consider the final limb of the genuine redundancy test in section 389(2) of the *Fair Work Act* which provides that a person's dismissal was not a case of 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.

EMPLOYMENT vs REDEPLOYMENT

Ulan's arguments focussed on the broad meaning it said should be attributed to the term "redeployment". It sought to persuade FWA that a practical and purposeful meaning was appropriate which focussed on the outcome rather than the act by which employment occurs.

On Ulan's definition, its obligation had been satisfied because some of the ex-Ulan employees had found jobs at Xstrata mines (which the parties accepted was a related entity). This was evidence of redeployment. The remaining employees had

not, claimed Ulan, found alternative employment due to their own actions or inactions.

Commissioner Raffaelli rejected Ulan's arguments and distinguished between "employment" and "redeployment". He held that the obligation in the *Fair Work Act* is to redeploy and, at a practical level, this requires the employer to arrange, to organise or to transfer the employee to a new role. Even if it means that the employee enters into a new contract of employment. By way of contrast, telling employees about job opportunities for which they can apply against a pool of other applicants merely constitutes "employment" and does not satisfy the obligation in the legislation to redeploy.

> *"Any action of Ulan to make some job vacancies known to employees, taking steps to have associated entities delay closing employment opportunities and then with those associated entities offering employment following an open selection process is not redeployment. It is merely assisting in the gaining of employment."*

INDEPENDENCE OF RELATED ENTITY

FWA was left unconvinced by Ulan's claim that the Xstrata mines were separate entities operating and employing in their own right and which could not be dictated to about who they should employ.

The Commissioner found that the Xstrata group consisted of many associated companies with direct management structures and which met regularly. The miners were told of job opportunities in the associated entities and in some cases encouraged to apply for them. Most importantly, at the time of the retrenchment of the employees Xstrata was in a position to require any of the mines with vacancies to engage the employees.

DISINTERESTED EMPLOYEES

Commissioner Raffaelli held that the employer's obligation to redeploy was satisfied if the employee was disinterested after being offered any available positions and such an offer was restricted to those who were to be retrenched. However it was not satisfied if the employee was disinterested in the role merely after being offered the opportunity to apply for a role in an open selection process.

PROXIMITY OF ALTERNATIVE ROLE

Ulan's argument that its obligation to redeploy did not extend to offering employment in mines in distant locations was rejected.

Commissioner Raffaelli stated that this proposition might only be valid if, on being offered a position, an employee had declined to take it up or if an applicant had made it clear that they would not be prepared to travel.

This issue was also considered in *Manoor v United Petroleum Pty Ltd* [2010] FWA 2571 where it was held that a transfer from Melbourne to Brisbane in which the employer would be required to assume the relocation costs would not be reasonable. However if the employee had agreed to bear their own costs then FWA may have arrived at a different result.

EXCLUDED EMPLOYEES

FWA found that it would not be reasonable to redeploy four of the employees within other Xstrata mines due to particular circumstances relating to each individual. He excluded an employee who was on light duties, an employee who expressed that he was reluctant to travel and preferred weekend shifts and employees who wanted to work locally.

ALTERNATIVE ROLES

While the legislation clearly confers an obligation on an employer to attempt to redeploy it is not clear how closely any new role must resemble the employee's previous role.

Several other cases are instructive on this point and in particular the decision of *Julianne Downes & Michelle Srnec v Workpac Pty Ltd T/A JP Nurseforce* [2010] FWA 5164 in which it was held that redeployment does not envisage promotion to a more senior role even if the employees are capable of performing that role.

The Explanatory Memorandum to the *Fair Work Act* provides an example of when it might not be reasonable to redeploy which includes a situation in which there are no positions available for which the employee has suitable qualifications or experience.

Until these provisions are considered further by FWA, employers would be justified in limiting their redeployment search to those roles which exist at the time of the retrenchment and for which the

employee has suitable qualifications or experience or could be reasonably trained to perform.

CHECKLIST

Before effecting a redundancy employers should:

☑ Ensure that the role is no longer to be performed by anyone due to a change in operations (e.g. to improve efficiency or due to a downturn in business).

☑ Identify and comply with all consultation obligations arising from an award or enterprise agreement.

☑ Consider any roles within the employer's enterprise at the time of the retrenchment for which the employee has suitable qualifications or experience or could be reasonably trained to perform.

☑ Identify all related entities and proactively search for and offer any available roles to the employee even if they are of lesser status or remuneration and, subject to the cost of relocation, even if they are not proximate to the employee's current place of work.

In addition, if a decision has been made to make 15 or more employees redundant, section 530 and 531 of the Fair Work Act 2009 (Cth) require that you:

☑ Notify any relevant unions who have employees who are members and who are entitled to represent their interests of the dismissals including the number of employees, the reasons for them and when the dismissals will take place;

☑ Provide any relevant union with an opportunity to consult on measures to avert or minimise the proposed dismissal and measures to mitigate the adverse effects of the proposed dismissals; and

☑ Notify Centrelink in a prescribed form of the dismissals.

These requirements must be complied with as soon as practicable after making the decision but before the employees are dismissed.

For further enquiries contact:

Melbourne

Chris Hartigan
Partner
chartigan@herbertgeer.com.au
Phone: (03) 9641 8745

Louise Russell
Partner
lrussell@herbertgeer.com.au
Phone: (03) 9641 8657

Luci Mummé
Partner
lmumme@herbertgeer.com.au
Phone: (03) 9641 8661

Sydney

Malcolm Davis
Partner
mdavis@herbertgeer.com.au
Phone: (02) 9239 4525

Gary Punch
Special Counsel
gpunch@herbertgeer.com.au
Phone: (02) 9239 4570

Paul Ludeke
Special Counsel
pludeke@herbertgeer.com.au
Phone: (02) 9239 4565

Richard Lund
Special Counsel
rlund@herbertgeer.com.au
Phone: (02) 9239 4501

Brisbane

Andrew Cardell-Ree
Special Counsel
acardell-ree@herbertgeer.com.au
Phone: (07) 3853 8822