18 June 2024

High Court asked to consider the meaning of a 'genuine redundancy' for the purposes of the unfair dismissal laws

Peabody has applied to the High Court of Australia for special leave to appeal a decision of the Full Court of the Federal Court of Australia about the meaning of the 'genuine redundancy' exclusion in the unfair dismissal laws.

Under s 389(2) of the Fair Work Act, 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 an associated entity.

In April 2024, the Full Court of the Federal Court ruled that the dismissal of a group of employees at Peabody's Helensburgh Coal Mine was not a case of 'genuine redundancy' because it was reasonable in all the circumstances for the employees to be redeployed (*Helensburgh Coal Pty Ltd v Bartley* [2024] FCAFC 45). Katzmann, Snaden and Raper JJ reached this conclusion despite there being no relevant vacancies at the time when the employees' positions became redundant.

The Court decided that it would have been reasonable for the company to terminate third-party contractual arrangements and change its business model to create suitable vacancies for the employees whose positions had become redundant. The following extracts from the joint judgment of Katzmann and Snaden JJ are relevant:

> *12 During consultations with workforce representatives (including officials of the employee respondents' union), the applicant was asked to mitigate the impact of its decision upon employees by reducing its reliance on contractors such as Nexus and Mentser. It was suggested that the work performed by contractors could, instead, be performed by the applicant's existing employees, thus minimising any need to reduce their number. Although some "insourcing" was agreed to, there was no agreement to terminate the arrangements (or the bulk of the arrangements) that had been struck with Nexus and Mentser.*
>
> - - -
>
> *59 Section 389(2), by contrast, requires that the possibility of redeployment should be assessed according to what "would have been" reasonable. That necessarily envisages some analysis of the measures that an employer could have taken in order to redeploy an otherwise redundant employee. In its proper context, "redeployed" can only refer to the prospect that an otherwise redundant employee might be taken from a position no longer required and deployed to the discharge of other tasks. If, in a given case, there were measures that could have been taken and which, in all of the circumstances, could reasonably have led to redeployment, that will suffice to engage the exemption to the immunity.*
>
> - - -
>
> *63 The applicant's contention to the contrary was undermined somewhat by its concession during the hearing—properly given, we add—that s 389(2) of the FW Act might be understood to contemplate that dismissals will not amount to*

"case[s] of genuine redundancy" in circumstances where employees could be maintained in their employment for a short period if that would obviate the need for dismissal. With respect, that must be right. There is no reason to think that s 389(2) could not cover circumstances in which an employer dismisses employees on operational grounds where those employees could be redeployed to positions which are not currently available but are about to become available, for example, where it knows that other employees are soon to retire or that a contract with a third party for the performance of work is soon to expire.

64 *A similar analysis would apply to an employer who preferred dismissal over retraining. If, in a given case, there is a position to which an otherwise redundant employee might be redeployed; but for which he or she is unqualified for want of appropriate training, the possibility that he or she might undertake that training (and, thereby, obtain that qualification) is a circumstance that is apt to inform whether the alternative of dismissal would qualify as "a case of genuine redundancy". The fact that there might be some barrier that makes redeployment more difficult or more involved than it otherwise could be—whether that barrier takes the form of a need for retraining or, as here, the pre-existing occupation of roles by contractors—is not to the point. Whether redeployment "would have been reasonable in all [of] the circumstances" requires analysis of what an employer could have done apart from dismissing the employee.*

65 *That being so, the immediate unavailability of a position to which a redundant employee could conveniently have been redeployed does not necessarily inoculate an employer against a charge that a dismissal was "not a case of genuine redundancy". Naturally, it is a circumstance that, in any given case, might well favour a conclusion that redeployment would not have been reasonable. Whether that is so, however, will depend upon "all [of] the circumstances".*

The meaning of 'genuine redundancy' adopted by the Federal Court has widespread implications. The dismissal of an employee due to redundancy may not be a 'genuine redundancy' for the purposes of the unfair dismissal exclusion despite their being no suitable vacancies at the time. For example, an employer would need to consider whether any of the following options could be implemented to avoid dismissing the employee whose position has been made redundant:

- Discontinuing the engagement of a labour hire employee,
- Discontinuing the engagement of an independent contractor,
- Retraining the employee to enable them to perform a different role, or
- Continuing to employ the employee for a short period because another employee in a similar role is retiring shortly.

For further advice or assistance on any termination of employment issues, please contact Stephen Smith, Principal of Actus Workplace Lawyers on 0418 461 183 or Email: stephen.smith@actuslawyers.com.au.