

8 September 2025

High Court rejects Peabody's appeal against 'genuine redundancy' decision

The High Court has [unanimously rejected](#) Peabody's appeal against 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 Federal Court decided that it would have been "reasonable in all the circumstances" for the company to terminate third-party contractual arrangements and to change its business model to create suitable vacancies for the employees whose positions had become redundant.

In upholding the Federal Court's judgment, the High Court emphasised that the expression "in all the circumstances" in s 389(2) of the Act is very broad. In the lead judgment, Gageler CJ, Gordon and Beech-Jones JJ stated:

"[A]ll the circumstances" can include the attributes of the otherwise redundant employee, such as their skill set, experience, training and competencies. "[A]ll the circumstances" can also include those attributes of the employer's enterprise that concern its workforce, such as: its policies, including appetite for risk; plans; processes; procedures; business choices, such as a decision to terminate a contract in the future and a decision to persist with using contractors; decisions regarding the nature of its workforce, such as whether it has a blended workforce of both employees and contractors; contract terms, such as whether they are "as needs" contracts and whether the contractors are on daily work orders or on some long-term fixed commitment; practical concerns, such as whether redeployment would require the employee to undergo further training; and anticipated changes, such as another employee going on parental leave or retiring, a contract expiring, or a position being performed by a contractor while waiting for an employee to be hired. These are "circumstances" of how an employer uses its workforce to operate its enterprise, or why it does so in that manner, which can, depending on the circumstances of the case, bear on whether it would have been reasonable to redeploy an employee within the enterprise. These circumstances are not directed at the size, scope or nature of the enterprise, which are fixed at the date of dismissal.

The meaning of 'genuine redundancy' adopted by the Federal Court, and now the High Court, has widespread implications. For example, an employer may need to consider whether any of the following options could be implemented to avoid dismissing an 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 going on parental leave or 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:

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