

ALERT

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NEW DEVELOPMENT IN REDEPLOYMENT OBLIGATION FOR EMPLOYERS

It is an unfortunate fact of doing business that employers need to make positions redundant from time to time. For example, retailing giant Woolworths recently announced it had made provision for up to \$50 million in redundancy costs this financial year as it considers removing approximately 1200 jobs from its workforce. For a redundancy to be lawful and not constitute an unfair dismissal, it must be a 'genuine redundancy' within the meaning of the *Fair Work Act 2009 (FW Act)*. One of the requirements for there to be a 'genuine redundancy' is that the employer must consider reasonable redeployment opportunities for the employee. This obligation was recently considered by the Fair Work Commission. In particular, the duty for an employer to consider redeployment within not just its own business but within the businesses of any related entities.

What is a "genuine redundancy"?

In summary, the FW Act provides that a dismissal will be a case of 'genuine redundancy' and therefore not give rise to an unfair dismissal if the following 3 conditions are met:

1. The employer no longer requires the job performed by the employee to be done by anyone due to changes in the operational requirements of the business;
2. The employer has complied with any obligation in an applicable modern award or enterprise agreement to consult with respect to the redundancy; and
3. The employer has considered any reasonable redeployment opportunities within the business and the business of any associated entity of the employer.

In past cases, the Fair Work Commission has established that the redeployment obligation can be quite onerous, and may include redeployment to positions in other States and Territories, less senior level positions on lower salaries, and more senior level positions for which a reasonable amount of training is required.

Recently, four mine workers brought unfair dismissal claims against their former employer, Kestrel Coal Pty Ltd, alleging that their dismissals were not cases of "genuine redundancy" (*Stickley v Kestrel*



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Coal Pty Ltd [2015] FWC 2884, *McDonell v Kestrel Coal Pty Ltd* [2015] FWC 2866, *Logovik v Kestrel Coal Pty Ltd* [2015] FWC 2883, *Cochrane v Kestrel Coal Pty Ltd* [2015] FWC 2885). The workers argued that their employer, a subsidiary of Rio Tinto Coal Australia (RTCA), had not discharged its obligation to consider reasonable redeployment as it had only considered redeployment within the RTCA group and not within the much larger Rio Tinto group.

In its defence, the employer conceded it had not considered redeployment within the much larger Rio Tinto group. However, it argued that it was under no legal obligation to do so as it did not have the managerial authority to redeploy within the wider group, only within the RTCA group. It alleged that the RTCA group is distinct from other entities within the Rio Tinto group.

The Fair Work Commission agreed with the employer, finding that the employer 'was not subject to overall managerial control from one member of the group outside RTCA, and there exists a lack of managerial integration between non-RTCA associated entities'. The Commission was satisfied that 'many of Rio Tinto Ltd's subsidiaries or associated entities have structured their companies as autonomous business units'.

Implications for employers

To constitute a 'genuine redundancy' and therefore not constitute an unfair dismissal, one of the requirements which must be met by employers is to consider suitable redeployment opportunities for their employees. This includes positions within their own business as well as the businesses of any related entities. However, the Kestrel Coal cases outlined above establish that this obligation

does not extend to any related entities over which the employer has no managerial control. If an employer can establish that it has considered suitable redeployment opportunities within its own business and those over any related entities over which it has managerial control, it should be sufficient to discharge its redeployment obligation under the FW Act.

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