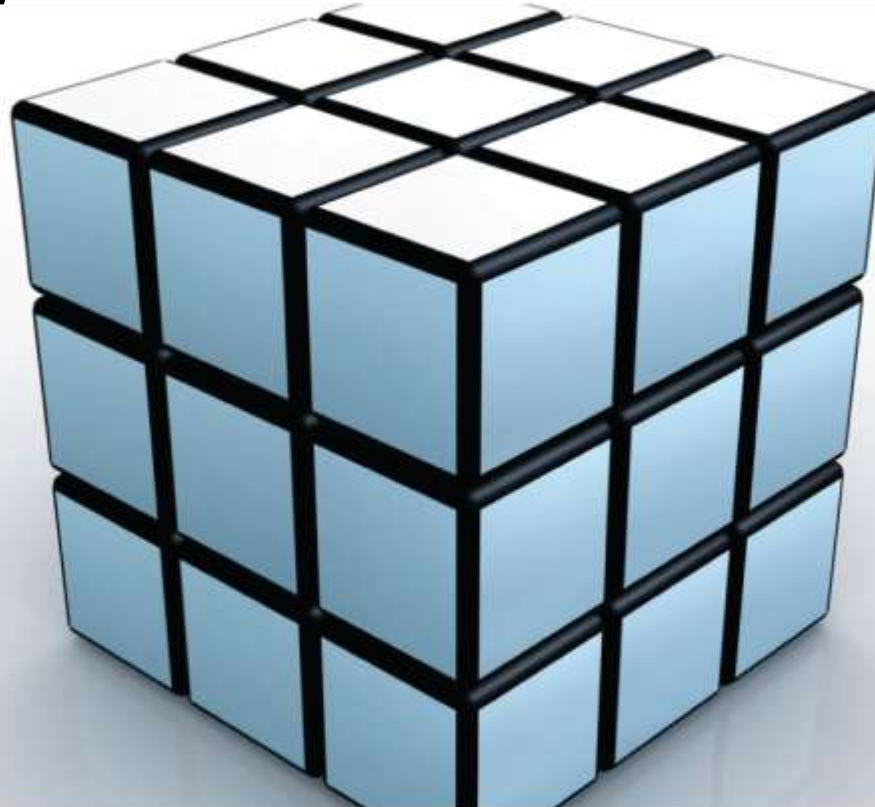




Redundancy and Termination Overview





Overview

Disclaimer

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Whilst every effort has been made to ensure that the information contained in this session is free from error and/or omissions, no responsibility can be accepted by CCIQ, its employees or any other person involved in the preparation of this presentation for any claim which may arise from any person acting on information contained herein.

This information is provided as general advice on the workplace relations system. It does not constitute legal advice and it is always advisable to seek further information regarding specific workplace relations issues.





Overview – Redundancy and Termination

>Overview

>Terms and Conditions of Employment

- NES

- Modern Awards/Enterprise agreements

- Contracts of employment –

- Written, Oral Partly Written/Partly Oral

>Unfair Dismissals -

>Redundancy –

>Options – consultation and agreement with work force – The conundrum of reducing business hours





Terms & Conditions of Employment

Main terms

The Fair Work Act & NES -
Modern awards & Enterprise Agreements
Contracts of employment





National Employment Standards

- > **Maximum ordinary hours**
- > **Requests for flexible working arrangements**
- > Parental Leave
- > Annual Leave
- > Personal Leave
- > Community Service Leave
- > Long Service Leave
- > Public Holidays
- > **Notice of Termination and Redundancy**
- > **Fair Work Information Statement**





National Employment Standards

>Maximum Weekly Hours

- 38 per week full-time
- Reasonable Additional Hours – though usually included as an express term in employment contract

>Flexible Working Arrangements requested by Employee.

- 12 months continuous service
- Child under school age
- Disabled child under 18
- Request in Writing
- Refusal on Reasonable Business Grounds





National Employment Standards

> Notice of Termination and Redundancy

- **Written notice**
- **Provide notice or payment in lieu**
- **If position is redundant, may be entitled to payment**

> Fair Work Information Sheet

- All NEW employees





Modern Awards

Modern awards are industry or occupation-based minimum employment standards which apply in addition to the National Employment Standards. They were created to establish one set of minimum conditions for employers and employees across Australia who work in the same industries and occupations.

Section 138 states that a modern federal award may only include terms to the extent necessary to achieve the “modern awards objective”, which speaks of providing a “fair and relevant minimum safety net of terms and conditions”. This makes it clear — as had long been established by judicial interpretation of previous legislation — that awards set minimum standards that parties are free to improve upon by private agreement.

A contract to accept less than an award, on the other hand, will be unenforceable, regardless of whether the employee in question has consented to the arrangement.





Breach of a Modern Award

Section 45 of the *Fair Work Act 2009* (FW Act) provides that a person must not contravene a term of any modern award that applies to them.

In practical terms, proceedings for breach of award are almost always brought against employers, given that awards are predominantly concerned with employer obligations. It has also become common for the Fair Work Ombudsman (and formerly the Workplace Ombudsman) to seek redress against directors or managers who were sufficiently connected with a contravention. This may be especially important where an employing company has gone into liquidation and may not have the assets to meet any judgment against it.

The Federal Court and Federal Magistrates Court may also make any order that it considers appropriate, if satisfied that a person has contravened or proposes to contravene a civil remedy provision (s 545(1)). Such orders may include an injunction to prevent, stop or remedy the effects of a contravention, an order to pay compensation for any loss a person has suffered, or an order for the reinstatement of a person (s 545(2)).

Pecuniary penalties

The maximum penalty that may be imposed in respect of **each contravention** of a term of an award is **\$6,600 for an individual, or \$33,000 for a corporation** (s 539(2), 546(2)).

In each case, the court must consider what penalty would be “just and appropriate”.





Modern Awards

- Terms that must be included in a Modern Award

- Coverage terms
- Flexibility terms
- Terms about settling disputes
- Ordinary hours of work
- Outworker/pieceworker terms (if applicable)
- Automatic variation of allowances
- Take Home Pay orders
- Who will be covered
- Award Reviews
- Award Free Employees





Your Modern Award

- Key terms for today's discussion

Timber Industry Award 2010

- **Clause 8** – Award Flexibility
- **Clause 9** - Consultation regarding major workplace change
- **Clause 12** - Employment categories
- **Clause 27** - Hours of work
- **Clause 14** – Termination
- **Clause 15** - Redundancy





Flexibility Arrangements

Clause 8 - Award flexibility

- > Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:
 - arrangements for when work is performed;
 - overtime rates;
 - penalty rates;
 - allowances; and
 - leave loading.
- > The employer and the individual employee must have genuinely made the agreement without coercion or duress.





The agreement between the employer and the individual employee must:

- be confined to a variation in the application of one or more of the terms listed in clause 8.1; and
- result in the employee **being better off overall than the employee would have been if no individual flexibility agreement had been agreed to.**

The agreement between the employer and the individual employee must also:

- be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;
- state each term of this award that the employer and the individual employee have agreed to vary;
- detail how the application of each term has been varied by agreement between the employer and the individual employee;
- **detail how the agreement results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and**





IFA continued

- detail how the agreement results in the individual employee being **better off overall** in relation to the individual employee's terms and conditions of employment; and
 - state the date the agreement commences to operate.
- > The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.
 - > Except as provided in clause 8.4(a) the agreement must not require the approval or consent of a person other than the employer and the individual employee.
 - > An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.



IFA - cont 2

- > The Individual flexibility agreement may be terminated:
 - by the employer or the individual employee giving four weeks' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or
 - at any time, by written agreement between the employer and the individual employee.
- > The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.



The difference between full-time, part-time and casual employment



To determine what pay and conditions an employee is entitled to, you need to know whether they are regarded as full-time, part-time or casual.

Full-time: employees generally work 38 hours a week, and have a continuing contract of employment. Benefits such as paid sick leave, annual leave, holiday pay, long service leave and carers or other types of leave apply.

Part-time: employees work regular hours each week, but fewer hours than full-time employees. They're usually given the same basic entitlements as full-timers, based on the hours worked (this is called pro rata).

If working full-time or part-time, any accrued entitlements such as annual leave should be paid when the employee leaves. If they're dismissed or made redundant, they may be entitled to notice of termination or payment in lieu of notice (except in cases of serious misconduct) and redundancy pay.

Casual: employees are usually employed on an hourly or daily basis and don't usually get paid sick leave or annual leave. They generally get additional pay called a casual loading to make up for this. True Casual workers are also less likely to have regular or guaranteed hours of work. Notice periods do not apply to casuals upon termination of employment.





Full time employment unless otherwise written agreement

- Clause 12 sets out the different types of employment available under the Modern award.
- Clause 12.1 - **Full-time employment**
All employees except those engaged as part-time, piecework or as casual employees **will be employed by the week** (unless otherwise specified in the award).
- Clause 12 .4 **Part-time employment**
An employee may be engaged to work on a part-time basis involving a regular pattern of hours which **will average less then 38 hours per week**.
- Before commencing part-time employment, **the employee and employer must agree upon the hours to be worked by the employee, the days upon which they will be worked and the starting and finishing times for the work.**
- The terms of the part-time work agreement, or any agreed variation to it, **will be in writing** and retained by the employer. A copy of the agreement and any variation to it will be provided to the employee by the employer.



Types of Employment - cont

- **Clause 12.2 - Casual employment**

A casual employee will be paid per hour 1/38th of the award rate applicable for the work performed plus a loading of 25% of the applicable rate of pay.
- **Clause 12.5 Piecework—General Timber Stream**
 - **Definition** -A **pieceworker** will mean an employee who is not a weekly employee but who is engaged **to work away from the employer's mill, yard or other place of business in or in connection with felling, snigging, hauling or other obtaining of logs, billets, chips or other timber** at rates of remuneration depending only on the amount of work performed, irrespective of the hours or times concerned.
 - **Remuneration** - Subject to Schedule E—Piece Rates for Workers in Specified Districts the remuneration payable to a pieceworker will be fixed by agreement between the employee and the employer at rates which would enable such an employee of average capacity to earn, for an ordinary week's work, **not less than 25% above the appropriate weekly base rate for the class of work performed.**



Employment types in Modern Award - Cont 2



Payment by Results—Wood and Timber Furniture Stream

- > An employer may remunerate any of their employees, engaged under the classifications in the Wood and Timber Furniture Stream, under any system of payment by results based on rates which would enable a worker of average capacity **working under conditions to earn at least 12.5% in excess of the appropriate weekly** prescribed by this award for an adult employee.
- > **An employee remunerated pursuant to this clause will, if ready, willing and available to work during the ordinary hours of the week, receive at least the weekly rate prescribed by this award for the class of work being performed.**
- > All employees working under a system of payment by results and doing the same operation in a factory or workshop whether they are adults, apprentices or juniors will be paid the same by results rate.
- > The base rate of pay in relation to entitlements under the National Employment Standards for an employee on a piecework rate is the minimum wage in clause 17.2 for the employee's classification level.
- > The full rate of pay in relation to entitlements under the National Employment Standards for an employee on a piecework rate is the minimum wage in clause 17.1 for the employee's classification level plus a loading of 12.5%.



What are the Ordinary Hours of work – 38hrs/ week for a full time employee.



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Clause 27 - Ordinary hours of work—day workers

Ordinary hours of work will be worked between the hours of 6.30 am and 6.00 pm Monday to Friday in one of the following manners:

- 38 hours within a work cycle of one week;
- 76 hours within a work cycle of two weeks;
- 114 hours within a work cycle of three weeks; or
- 152 hours within a work cycle of four weeks.

Different methods of implementation of a **38 hour week** may apply to various groups or sections of employees in the establishment concerned. Where **agreement exists** the ordinary hours of work can be worked on any day of the week, Saturday and Sunday inclusive.



Changing hours of a Full Time Employee – Perils of a forcing a 4 day week



- Unless otherwise specified – Employees are likely to be engaged as full time employee with expectation that they will be engaged for full 38 hour week.
- If an employer **decides** that it would prefer a full time employee to work only 4 days or say 30 hours due to lack of work, then **Full Time Employee may have an ongoing right to receive payment for full time weekly hours. Despite only working reduced hours**
- **Any unilateral change from 38 hours to say 30 hours is likely to be viewed as being a forced change from Full time to Part time employment. Where such change is forced upon an employee without agreement – this will likely be viewed as amounting to the termination of the fulltime employment and a new engagement as a part time employment.** Therefore , the employer risks unfair dismissal applications, being asked to pay Notice for Termination and Redundancy payments .





True Agreement to change status of employment

In contrast, where there has been actual agreement between an employer and employee to alter the terms of the employment relationship, and it is not a decision forced upon the employee by the employer, then by properly recording any change to the ongoing basis of employment agreement may limit the risk of an employee later arguing that they have in effect been terminated by the employer, and the risk of claims of redundancy may be reduced issue if it can be shown that such a change was made by true agreement, and it was not a decision or change solely imposed by the employer or made under duress.

Any agreed upon change of status of employment should be recorded in either a new letter of appointment or letter properly recording the variation and the parties agreement. It will still likely be viewed as the ending of full time employment and a new contract of part time employment but is less likely to be viewed as amounting to a constructive dismissal or forced termination.

If there is no real alternative (ie the offer is really an ultimatum) but to accept a change in employment status, say from 5 days full time to 4 days part time – then this may still be viewed as a redundancy



Requirement to Engage in Consultation

Clause 9 of your Modern Award states -

Consultation regarding major workplace change

> Employer to notify

- Where an employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must notify the employees who may be affected by the proposed changes and their representatives, if any.
- **Significant effects** include termination of employment; major changes in the composition, operation or size of the employer's workforce or in the skills required; the elimination or diminution of job opportunities, promotion opportunities or job tenure; **the alteration of hours of work**; the need for retraining or transfer of employees to other work or locations; and the restructuring of jobs. Provided that where this award makes provision for alteration of any of these matters an alteration is deemed not to have significant effect.



Consultation Continued

Employer to discuss change

- > The employer must discuss with the employees affected and their representatives, if any, the introduction of the changes referred to in clause 9.1, the effects the changes are likely to have on employees and **measures to avert or mitigate the adverse effects of such changes on employees and must give prompt consideration to matters raised by the employees and/or their representatives in relation to the changes.**
- > The discussions must commence as early as practicable after a definite decision has been made by the employer to make the changes referred to in clause 9.1.
- > **For the purposes of such discussion, the employer must provide in writing to the employees concerned and their representatives, if any, all relevant information about the changes including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees provided that no employer is required to disclose confidential information the disclosure of which would be contrary to the employer's interests.**





Summary as to Consultation

1. Any decision to alter agreed work hours will require consultation to occur.
2. Consider whether the change amounts to a redundancy, and if so the likely impact.
3. Best practice is to advise as to reasoning, and engage in discussion as possible alternatives or **measures to avert or mitigate the adverse effects of such changes** on employees and **must give prompt consideration** to matters raised by the employees and/or their representatives in relation to the changes.
4. If agreement can be reached, then record new agreement in writing!





Unfair Dismissals

>What is a dismissal?

- Employer terminates
- Constructive Dismissal

>Not a dismissal for purposes of unfair dismissal if:

- specified period of time, for a specified task, or for the duration of a specified season and employment was terminated at the end of the period, task or season;
- a training arrangement applied; or
- demoted without involving a **significant reduction in pay or duties**





Unfair Dismissals

- What is an Unfair Dismissal?

- The person has been dismissed
- Harsh, unjust, unreasonable
- Not genuine redundancy
- Not consistent with small business code





Unfair Dismissals

- Harsh,
- unjust or unreasonable?

- Valid reason
- Notified of valid reason
- Opportunity to respond
- Support person
- Warnings about performance
- Size of organisation
- HR Specialist
- Any other matters





Unfair Dismissals

Genuine redundancy

- Job no longer required
- Modern Award/Agreement
- Discriminatory

Who can apply for Unfair Dismissal?

- Employees who have completed a minimum employment period and are covered by:
 - Modern Award; or
 - Enterprise Agreement; or
 - Earn less than high income threshold





Unfair Dismissals

Minimum Employment Periods

- One year for small business
- Six months if not a small business

Small Business Test

- Head Count of 15 from 1 Jan. 2011 (s23 of act)

Period of employment = continuous service





Unfair Dismissals

Applications

- To Fair Work Australia
- Lodge within 14 days of dismissal





Unfair Dismissals

Procedure through Fair Work Australia

- Consider merits of the case
- Must hold a conference or hearing if there are contested facts
- Can be represented
- Only limited grounds for appeal

Small Business Code

- Less than 15 employees
- Not compulsory to follow





General Protections

- > Workplace rights
- > Adverse actions & Coercion
- > Industrial activities
- > Discrimination & Temporary absence due to illness or injury
- > Bargaining Service Fees
- > Sham contracting arrangements





Redundancy and Termination

What is Redundancy?

Redundancy occurs when an employer decides that a position within the workplace is no longer required to be performed by anyone. This decision may be due to:

- Technological changes
- Restructuring of the workplace
- An employer's inability to pay employees
- The sale of a business, where employees are not kept on by the new owners

A position is not redundant when it is slightly restructured or renamed. The key to determining whether a position is redundant is to consider whether that particular role will continue to be done by anyone. The decision should be based on circumstances other than the ordinary and customary turnover of labour. It is always the position that is redundant, **not** the person.

Redundancy Provisions and Where to Find Them

Redundancy is provided for in the Fair Work Act 2009 ('the Act'), and is contained in the National Employment Standards (NES). Awards, workplace agreements and employment contracts may also provide for redundancy, only if provisions are more generous than those in the NES. These instruments stipulate the level of consultation, notice and redundancy payment required to make an employee redundant. For Timber Industry Award 2010 - see clause 15. You also need to be careful of any more generous entitlements in any Notional Agreement Preserving State Award - NAPSA

Redundancy and Unfair Dismissal Claims

Under the Act, an employee who is made redundant can pursue an unfair dismissal claim as long as certain criteria are met. Fair Work Australia (FWA) will determine if the dismissal was due to genuine operational reasons, and if such reasons exist, the claim should not proceed.

Exemptions From Redundancy Payments

A number of exemptions exist, including automatic exemptions for small businesses, casuals and fixed term employees. An employer can also apply to FWA for an exemption on the basis of incapacity to pay, the employee turning down comparable employment in another position, or if they have found suitable alternate employment for the employee.

Small Business Exemption

Under the Act, a small business employer is not required to pay redundancy. A small business employer is an employer who, immediately before or at the time of giving notice, employs fewer than 15 employees, inclusive of any employees whose employment is being terminated. (exclusive of irregular casuals)

Specific Employees

Fixed term, seasonal and casual employees are not entitled to receive notice or payment in the event of redundancy. However, casuals engaged on a regular and systematic basis are eligible to claim unfair dismissal if they meet the minimum employment period, so employers should remain mindful of best practice to ensure the dismissal cannot be viewed as harsh, unjust or unreasonable.





Redundancy Payments

Redundancy Processes

Employers should follow the process specified in the Modern Awards for consultation regarding major workplace change, which specifies that when a definite decision to introduce major change has been made, such as making positions redundant, the employer must notify all employees potentially affected and their representatives as early as practicable. The employer must also provide to the employee in writing all of the relevant information regarding the redundancy as detailed in the above-mentioned process.

To prevent or defend any unfair dismissal claims, it is important to demonstrate procedural fairness throughout this process. This means that an employer's actions should be transparent and communication open with regard to any redundancy situation. Employers can achieve this by notifying affected employees as soon as possible, providing clear and rational explanations for the redundancy, allowing employees to ask questions and answering any questions honestly.



Selecting employee for Redundancy

Where the number of similar positions is being reduced and therefore only one or some employee/s in these positions will be redundant, an employer should ensure they use a well documented, merit based selection process to justify which employees were terminated.

Seek advice if unsure on how to select – Documentation is important.

In addition, there is also a requirement under the Fair Work Act to show that the employee could not have been redeployed elsewhere in the employer's business or an associated entity of the employer.

Employers who are making 15 or more employees redundant have an obligation to notify external parties such as Centrelink or the relevant union in certain situations. Employers who are making more than 15 employees redundant should contact CCIQ for assistance.





Notice of termination

Notice of Redundancy or Termination

The notice period for redundancy is the same as the notice period for termination. The Act prescribes the following minimum periods of notice:

Period of continuous service

Not more than 1 year

More than 1 year but not more than 3 years

More than 3 years but not more than 5 years

More than 5 years

Notice period

1 week

2 weeks

3 weeks

4 weeks

If an employee is over 45 and has completed 2 years or more continuous service, they are entitled to an additional week of notice.

An employer may require the employee to work during the notice period, or may elect to pay the employee in lieu of serving the notice period. Should an employee serve the notice period, they are entitled to the equivalent of one day's time off without loss of pay for the purpose of seeking alternate employment. This is to be at a time or times mutually agreed between the employee and employer.





Redundancy Payments

Redundancy pay is separate and in addition to the notice of redundancy or payment in lieu thereof specified above. The minimum amount of redundancy payable to an employee is set out in the air Work Act. Redundancy is payable at the base rate of pay for the employee's ordinary weekly hours of work. The Act prescribes the following amounts of redundancy payable to redundant employees on termination:

> Period of continuous service	Redundancy Pay
> 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

Employees may have more generous provisions under any Div 2B State Award entitlement or NAPSA Entitlement.

Strongly suggest seek legal advice about manner and extent of entitlements if considering embarking upon a redundancy process.





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For further information:

CCIQ Law – 1300 405 711

Fair Work Australia Website - www.fairwork.gov.au

Fair Work Australia - 1300 799 675

Fair Work Ombudsman - 13 13 94



CCIQ Can Help Your Business Succeed

Our highly experienced Legal Services and Workplace Relations Consultants can assist you:

- > Provide Modern Award comparisons with your current industrial instruments to see if you are better off making an agreement now or not at all
- > examine your existing practices & recommend cost effective, practical solutions
- > Draft appropriate employment contracts.
- > plan & implement appropriate solutions to ensure your business meets all its legislative requirements
- > Draft & negotiate Enterprise Agreements
- > Interpret Awards & Agreements
- > Ensure your policies & procedures are correct, support business operations & attract & retain the right people
- > Represent your business at commissions, courts & tribunals for unfair dismissal, anti-discrimination, & other Workplace Relations & Workplace Health & Safety prosecutions
- > Conduct mediation & workplace investigations



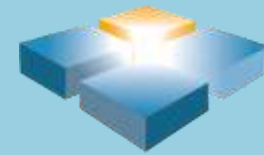
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