



# The impact of the coronavirus on employees – job losses, stand-downs and dismissals

Arlou Arteta – 8 April 2020

# Acknowledgement

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We acknowledge the Jagera (Yuggera) and Turrbal peoples as the First Nations custodians of the land on which we work.

We pay our respects to their elders, past, present and emerging, and acknowledge the important role Aboriginal and Torres Strait Islanders continue to play in our society.

As this presentation is being viewed throughout Queensland and interstate, we also pay respect to the traditional owners of the land throughout the country and extend a warm welcome to any First Australians listening to this presentation.

# Disclaimer

- The information provided in this presentation is for professional development and education purposes only.
- The information provided in this presentation is not legal advice.
- The law is current to 7 April 2020.

# Poll

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- Knowledge of employment law concepts of:
  - Redundancy
    - Little or some knowledge
    - Have knowledge of
  - Stand downs
    - Little or some knowledge
    - Have knowledge of
  - Dismissals
    - Little or some knowledge
    - Have knowledge of

# Aims

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- This webinar will consider redundancies, stand downs and workplace dismissals in the context of COVID-19.
- Due to the unprecedented impact of COVID-19 advocates and lawyers are grappling with a range of issues for workers who have been dismissed from their workplace.
- By the end of this webinar you should feel equipped to identify issues relating to redundancy, stand downs and workplace dismissals arising out of COVID-19 related situations.

# Roadmap

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- Redundancy and what constitutes a 'genuine redundancy'.
- What is a stand down? When can employees be stood down?
- Considerations that employers may take into account prior to standing down employees and/or making redundancies.
- Options for employees who have been stood down or dismissed.
- Support for employees who have been dismissed.

# Redundancy

- Redundancy usually occurs when an employer does not need a job to be done by anyone or when an employer becomes insolvent or bankrupt.
- In the context of the coronavirus outbreak a redundancy may occur for one or a few reasons (not exhaustive):
  - There has been a downturn in demand for services, sales or production;
  - The business relocates;
  - The business closes or becomes insolvent or bankrupt; or
  - The duties previously performed by a position is reallocated/absorbed by other employees.

# Requirement to consult

- An award or enterprise agreement requirement has specific requirements to consult around major change in the workplace.
- The obligation to consult can include, for example: (see Clause 8 Hospitality Industry (General) Award):
  - Giving notice of the change to all employees who may be affected by it and their representative (i.e. union representative);
  - Discussing with the employees and their representatives:
    - The introduction of the changes, the likely effect of the change on employees; and measures taken to avoid or reduce the adverse effects of the changes on employee.
  - Commencing discussions as soon as practicable after a definite decision has been made.
  - Providing written information about all relevant information about the proposed change/s including:
    - The nature of the changes; their expected effect on employees; and any other matters likely to affect employees.
  - The employer must consider any matters raised by the employees or their representatives about the changes.



# Genuine Redundancy

- If an employee is made redundant, it must be a genuine redundancy (section 389 of the FW Act) in that:
  - operational changes in an employer's business mean that they no longer require the job to be done by anyone; and
  - the employer complied with any consultation requirement set out in an award or an enterprise agreement to consult with an employee or their union about the redundancy; and
  - it would not have been reasonable to redeploy the employee within another area of the employer's business or to a company associated with the employer's business.
- If so, an employee must be paid appropriate notice (see section 117 FW Act), redundancy pay (see section 119(2) FW Act), and any other entitlements owed to the employee.

# Stand down

- An enterprise agreement or employment contract may include a stand down provision, or provide that additional requirements are to be met by the employer before standing down an employee.
- FW Act provides a default right to stand down employees for a certain period (see sections 522–528 FW Act).
- No pay during stand down: section 524(3) FW Act.
- For employees on annual leave or parental leave or other authorised leave or absence are not stood down for the period of their leave or absence: section 525 FW Act.
- An employee's continuity of service and entitlements are not affected by a stand down.

# When can employees be stood down?

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Section 524 - FW Act

*524 Employer may stand down employees in certain circumstances*

***(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:***

- a) industrial action (other than industrial action organised or engaged in by the employer);*
- b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*
- c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.***

# When can employees be stood down?

- Section 524(1)(c) is yet to be determined in the context of COVID-19.
- Consider whether:
  - the employee cannot be usefully employed;
  - because of a stoppage of work; and
  - for any cause for which the employer cannot reasonably be held responsible.
- Employers should be mindful when relying on section 524(1)(c) FW Act as a downturn in work or demand for services does not meet the requirements of stand down where employees can for example, be redeployed to another position or modifications are made to the usual system of work.
- Stoppage of work - if an employer is temporarily forced to close to comply with COVID-19 government restrictions, or a large portion of the workforce had to self-quarantine leaving the remaining employees unable to be usefully employed, this is likely to fall within the stand down provisions.
- Note: a downturn in work or demand for services can be a reason for redundancy.

# When can employees be stood down?

Example:

*Mary works in a giftshop in a shopping centre. There is no current government direction for shopping centres to close. Her employer advises her that she is stood down from her work due to the downturn in sales and because they consider that they are unable to accommodate the government's requirement of social distancing rules of 1 person per 4 square metres.*

Poll: Is this an example of when an employee can be stood down?

- A. Yes
- B. No

# Options when an employee is stood down

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*Mary's scenario - challenging a stand down*

- Section 526 of the FW Act for stand-alone action for stand down; or
- Dispute resolution clause of the relevant enterprise bargaining agreement or contract of employment, an application for the FWC to deal with a dispute pursuant to section 739 of the FW Act.
- The FWC may deal with the dispute following ways:
  - By arbitration: under section 526(2) of the FW Act; or
  - May also deal with the dispute by mediation or conciliation, or by making a recommendation or expressing an opinion: section 595 (2) of the FW Act.
- The FWC in dealing with the dispute must take into account the fairness between the parties: section 526(4) of the FW Act.

# Options when an employee is stood down

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*Mary's scenario - challenging a stand down*

- Mary may have an unpaid wages claim if she is unlawfully stood down. She has 6 years to bring a complaint to the Federal Circuit Court or Magistrates Court for claims under \$20,000. See FWO guidance: <https://www.fairwork.gov.au/how-we-will-help/how-we-help-you/help-resolving-workplace-issues/taking-legal-action-in-the-small-claims-court>
- If her employer has become insolvent, employees are eligible for assistance from the Fair Entitlement Guarantee scheme. There is a 12-month time limit to apply. See link for further information on eligibility and making a claim <https://www.ag.gov.au/industrial-relations/fair-entitlements-guarantee/Pages/default.aspx>

# Considerations

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## *Redeployment to another position*

- Employers may consider whether an employee can be redeployed to another position or be redeployed to another related business either on a temporary or permanent basis.
- If an employer has other positions available, even at a lower level, that the employee has the skills to perform, the employer should not presume that the employee will refuse the position.

*Example: May works as a retail assistant at a post shop. Her employer lets her know that due to the increased demand on postal services that she will be redeployed to assist with sorting mail and packages at the local distribution centre temporarily until 30 June 2020.*



# Considerations

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## *Changes in roster or hours of work*

- Employers need to consult with employees about any changes to their regular rosters or ordinary hours of work in accordance with the requirements under the relevant award or enterprise agreement.
- Consultation must include:
  - information about the proposed change;
  - an opportunity for employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities or due to their age or disability); and
  - consideration of employees' response to the impact of the change.
- Note: Variation of the Hospitality Award, Restaurant Award and Clerks Private Sector Award to accommodate flexibility during the COVID-19 outbreak.

# Considerations

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## *Modifications to usual work to comply with social distancing directions*

- Some workplaces may be able to make modifications to their worksite to comply with social distancing directions.

*Example: John works in a warehouse that supplies groceries to supermarket chains. His employer has made modifications to the workplace by using yellow marking tape on the floor to mark distances of 1.5 metres to indicate where employees can safely stand or use machinery on site to comply with social distancing directions.*

## *Working from home*

- Employees can by agreement with their employer work from home provided the employees duties can be performed from home.
- Consider any relevant provisions in an award, enterprise agreement, contract of employment or workplace policy if employees are directed to work from home.

# Considerations

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## *Flexible work arrangements/ reasonable adjustments*

- Under the FW Act, employees (other than casual employees) who have worked more than 12 months with their employer can request flexible work arrangements: section 65 FW Act
- Reasonable adjustments may be provided to employees due to their age, disability, family or carer responsibilities: *Anti-Discrimination Act 1991* (Qld) or relevant Federal Anti-Discrimination laws:
  - *Disability Discrimination Act 1992* (Cth)
  - *Age Discrimination Act 2004* (Cth)
  - *Sex Discrimination Act 1984* (Cth)

*Example: Tasmin's school aged children are on an extended school holiday break due to COVID-19 restrictions. Tasmin sews clothes for a local clothes manufacturer. Tasmin has requested reasonable adjustments to work from home, bring a work sewing machine home and vary her start and finish times so that she can assist with home schooling her children.*

# Temporary illness or injury

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- Employees must not be terminated from their employment due to temporary illness or injury: section 352 FW Act.

*Example: Ken works as a night-fill restocking grocery shelves for a supermarket. Ken has developed mild flu like symptoms with a temperature, cough and runny nose. Ken calls in sick and goes to the doctors. His doctor provides him with a medical certificate for a week to recover from his symptoms.*

*Ken contacts his manager to let him know that he will not be coming into work for a week and will provide a medical certificate. Ken's manager says to him "Don't bother providing the medical certificate we have plenty of new staff coming on and we can't risk having you back if you have symptoms of coronavirus."*

# Options when an employee is dismissed – General Protections

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*General protections complaint: 21 days from date of termination of employment (section 366 FW Act)*

- Adverse action taken because of a protected reason (some examples):
  - Workplace right: section 340 FW Act.
  - Discrimination: section 351 FW Act.
  - Temporary illness or injury: section 352 FW Act.
  - Undue influence or pressure: section 344 FW Act.
- Workplace rights include (section 341 FW Act):
  - any benefit a person has under a workplace law, award or enterprise agreement;
  - the ability to make a complaint in relation to their employment.

# Options when an employee is dismissed – General Protections

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*General protections complaint: 21 days from date of termination of employment (section 366 FW Act)*

- Adverse action is taken by an employer against an employee if the employer (section 342 FW Act):
  - dismisses the employee; or
  - injures the employee in his or her employment; or
  - alters the position of the employee to the employee's prejudice; or
  - discriminates between the employee and other employees of the employer.
- No minimum employment period for a person to be employed to bring a general protections claim.
- Casuals have coverage under general protections provisions.

# Options when an employee is dismissed – General Protections

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*Consider Ken's scenario – temporarily away from work due to illness*

*Example: Ken works as a night-fill restocking grocery shelves for a supermarket. Ken has developed mild flu like symptoms with a temperature, cough and runny nose. Ken calls in sick and goes to the doctors. His doctor provides him with a medical certificate for a week to recover from his symptoms.*

*Ken contacts his manager to let him know that he will not be coming into work for a week and will provide a medical certificate. Ken's manager says to him "Don't bother providing the medical certificate we have plenty of new staff coming on and we can't risk having you back if you have symptoms of coronavirus."*

- General protections claim under section 352 FW Act - dismissal due to temporary illness or injury and section 340 – workplace right, taking personal leave for illness.
- However, if the total length of Ken's absence due to illness or injury is more than 3 consecutive months, or a total of more than 3 months over a 12 month period and he only took unpaid leave or a combination of paid and unpaid leave, he may not be protected from dismissal: 3.01 (5) FW Regulations

# Options when an employee is dismissed - Unfair Dismissal

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## Unfair dismissal

- Threshold requirements:
  - Minimum period of employment completed (section 383 FW Act)
    - 6 months; or
    - 12 months if employee employed in a small business (less than 15 employees)
- Covered by modern award or enterprise agreement; or earns less than \$148,700 (not including superannuation)
- For an unfair dismissal claim:
  - An employee must be dismissed by the employer; and
  - the dismissal was harsh, unjust or unreasonable; and
  - The dismissal was not consistent with the Small Business Fair Dismissal Code (if applicable); and
  - The dismissal was not a case of genuine redundancy.



# Options when an employee is dismissed – Unfair dismissal

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Unfair dismissal – genuine redundancy

*Example: Kim owns a fine dining restaurant. The restaurant usually provides a lunch and dinner dine in service. Due to the government's direction relating to non-essential services, Kim briefly considered whether they should provide a takeaway service instead. However, due to the significant downturn in customers Kim decides to close the restaurant. She lets her staff know that she is letting them go.*

Is this a case of genuine redundancy?

- A) Yes
- B) No

# Options when an employee is dismissed - Discrimination

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## Discrimination complaint:

- If an employee is dismissed because of an attribute i.e. disability/impairment, age, race, family responsibilities in the area of employment.
- A redundancy process may use a discriminatory basis for choosing people for redundancy for example, persons who have family responsibilities are not chosen for redeployment.
- Possible avenues of complaint:
  - Discrimination complaint under section 351 of the FW Act (21 days from the date of termination of employment).
  - Discrimination complaint to Federal or State Human Rights Commission:
    - Complaint to the Australian Human Rights Commission (6 months from the date of the conduct); or
    - Complaint to the Queensland Human Rights Commissions (12 months from the date of the conduct).

# Options when an employee is dismissed

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*Consider Tasmin's scenario – request for flexible work arrangements/reasonable adjustments*

*Example: Tasmin's school aged children are on an extended school holiday break due to COVID-19 restrictions. Tasmin sews clothes for a local clothes manufacturer. Tasmin has requested reasonable adjustments to work from home, bring a work sewing machine home and vary her start and finish times so that she can assist with home schooling her children.*

*Tasmin's employer refuses her request for flexible work arrangements/reasonable adjustments because they say sewists have to work on site and they are unable to supervise her if she is working from home. Her employer has told Tasmin if she is unable to come into work they will have no choice but to terminate her employment. Tasmin comes to you for advice.*

# Options when an employee is dismissed

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*Consider Tasmin's scenario – request for flexible work arrangements/reasonable adjustments*

- If Tasmin is dismissed from her employment she may have recourse to:
  - General protections claim (21 days from the date of termination of employment)
    - Adverse action claim – breach of workplace right for requesting flexible work arrangements (section 346)
    - Discrimination claim – on the basis of family responsibilities (section 351 FW Act)
  - Discrimination on the basis of family responsibilities in the area of work:
    - Complaint to the Australian Human Rights Commission (6 months from the date of the conduct); or
    - Complaint to the Queensland Human Rights Commissions (12 months from the date of the conduct).
- If Tasmin feels like she has no choice but to resign from her employment she may decide to bring:
  - Unfair dismissal complaint (21 days from the termination of employment)
- Note: Tasmin may have a few options available to her, but may only bring one complaint based on the same facts and circumstances.

# Support for employees

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- National Debt Helpline on 1800 007 007 <https://ndh.org.au/debt-problems/covid19/>
  - Emergency Relief
  - Centrelink support
  - Maintaining rent or mortgage
  - Payment priorities
  - Making repayment arrangements
  - Accessing superannuation early
- Mental Health information <https://headtohealth.gov.au/covid-19-support/covid-19>
- ACCC – Consumer guidance <https://www.accc.gov.au/consumers/consumer-rights-guarantees/covid-19-coronavirus-information-for-consumers>

# Useful links

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- Fair Work Ombudman COVID-19 guidance: <https://coronavirus.fairwork.gov.au/>
- JobKeeper payment: <https://treasury.gov.au/coronavirus/jobkeeper>
- JobSeeker payment: <https://www.servicesaustralia.gov.au/individuals/services/centrelink/jobseeker-payment>
- Coronavirus resources: <https://communitylegalqld.org.au/resources/coronavirus-resources>



**Questions?**

**Thank you for listening and  
participating!**

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