Contractors Give Way? Redundancies and your redeployment obligations

Authors:
Ben Motro (bmotro@piperalderman.com.au – Partner), John Evans (jdevans@piperalderman.com.au – Special Counsel)

Practice Group: Labour and Employment

Date: 11/08/2025

The High Court has unanimously found that when considering whether it would be 'reasonable in all the circumstances' to redeploy an employee in the circumstances of a redundancy, it is permissible for the Fair Work Commission to consider whether it would have been reasonable to redeploy those employees to perform work being performed by contractors.

What employers need to know from the High Court's decision

- In determining whether an employee's dismissal is a genuine redundancy, the Commission can legitimately inquire into whether the employer could have made changes to how it uses its workforce to operate its enterprise.
- Whether it was reasonable in all the circumstances to redeploy an employee that would otherwise be dismissed due to redundancy is a broad inquiry albeit limited to the employer's enterprise or associated entity's enterprise.
- Prior to dismissing employees due to the redundancy of their roles, employers with both direct employees and contractors should consider whether it is reasonable to redeploy those employees to perform work being undertaken by contractors.
- Considerations of redeployment opportunities should not be confined to solely whether there are direct employment roles available. Depending on the employer's circumstances, consideration should include whether a change to how an employer uses its workforce to operate its enterprise might facilitate redeployment.
- It may still be unreasonable to make changes to an employer's enterprise to provide for redeployment and in those circumstances the immunity from unfair dismissal claims will remain.

Background to High Court decision

An employee is not unfairly dismissed if their dismissal was a case of 'genuine redundancy'. Section 389 of the *Fair Work Act 2009* (Cth) (**FW Act**) provides that a redundancy will not be a genuine redundancy if:

- the employee's job is no longer required by the employer to be performed by anyone because of changes in the operational requirements of the employer's enterprise;

- the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment, to consult about the redundancy; and
- it would have been 'reasonable in all the circumstances' for the person to be redeployed within the employer's enterprise or the enterprise of an associated entity of the employer.

In June 2020, whilst the COVID-19 pandemic was taking hold and coking coal demand was negatively impacted, the operator of a coal mine, Helensburgh Coal Pty Ltd, determined that 90 of its direct employees would be made redundant. 47 of those employees were subject to forced redundancies. Helensburgh Coal's contractor workforce would also be reduced by 40%. The dismissal of the direct employees were notified to those employees on 24 June 2020. 22 of those employees made unfair dismissal claims in the Commission.

In November 2019 Helensburgh Coal had entered into a service agreement with a contractor to undertake belt cleaning and belt improvement at the mine operated by Helensburgh Coal. Only 8 contract workers remained at the time the direct employees were notified of their dismissal. Another contractor at the site provided workers on a job-by-job basis, with no long terms of engagement. At the time of the dismissals, there were 60 contract workers performing work, in respect of which the 22 applicant employees argued they should have been offered redeployment.

Commissioner Riordan found both initially and on remittal following an appeal to the Full Bench that it was feasible for Helensburgh Coal to insource some of its work to the contractors at the same site. The Commissioner found that there would be no financial penalty associated with insourcing the work of one contractor, and there were no barriers to the insourcing of work of the other contractor.

In dismissing a judicial review application by Helensburgh Coal, the Full Court of the Federal Court noted that the FW Act's immunity from unfair dismissal remedies in cases of a genuine redundancy contemplate a qualification of some width, being whether redeployment in all of the circumstances would have been reasonable. An analysis was therefore required of the measures an employer could have taken to redeploy otherwise redundant employees. Even where a position is immediately unavailable, the Full Court held that did not necessarily protect the employer from a finding that the dismissal was not a case of genuine redundancy.

High Court finds that 'all the circumstances' is "unmistakenly broad"

The High Court has now confirmed in *Helensburgh Coal Pty Ltd v Bartley* [2025] HCA 29 that the Commission can have regard to whether it would have been reasonable in all the circumstances to redeploy an employee that would otherwise be dismissed due to redundancy to perform work being performed by contractors.

The immunity from unfair dismissal claims in circumstances of a genuine redundancy that is provided for in section 389(2) of the FW Act does not prohibit an inquiry into whether an employer could have made changes

to how it uses its workforce to operate its enterprise so as to create or make available a position for a person who would otherwise have been redundant. The proposition that there is a proscriptive rule that prevents the Commission from considering whether an employer could have made changes to its business (even where those changes would be operationally undesirable) was rejected.

The High Court decision means that for employers, consideration of whether there are reasonable redeployment opportunities must encompass consideration of the employer's actual enterprise and its attributes.

The Court's majority judgment contains an indication of some attributes that might be relevant to the question of whether redeployment is reasonable in all the circumstances. It is not only an employee's skills and competencies, but the employer's enterprise including attributes such as its "policies, 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". Those attributes to consider are broad ranging and go to the centrality of an employer's enterprise.

When considering redeployment, the reasonableness element is still a qualifying feature. As Steward J alludes to in his separate supporting judgment, if an employer demonstrates that a change to its enterprise would be inconsistent with its actual enterprise then it is likely that any change that could be made to achieve redeployment would not be reasonable.

What are the takeaways for employers?

Following the High Court's decision, an employer undertaking a restructure needs to ensure that it has broadly considered its redeployment obligations.

The impact of the decision is not confined to needing to consider whether direct employees could be redeployed to undertake work being performed by contractors. The impact is wider – where the Commission can legitimately consider circumstances including whether an employer could have made operational changes to ensure redeployment. Accordingly, employers need to be cognisant of their wider operational circumstances whilst meeting their redeployment obligations.

The circumstances of a particular employer's enterprise will remain the prevailing factual basis on which the Commission is to determine whether it would have been reasonable in all the circumstances to redeploy employees.

In any restructure, to ensure that an employer is immune from unfair dismissal claims, employers need to consider whether they could have made changes to how it uses its workforce to operate its enterprise so as to create or make available a position for an employee who would otherwise have been terminated due to redundancy. Simply asserting that the organisation gave consideration to open and available roles, is unlikely to satisfy the legislative requirements for a genuine redundancy.