



# SOLUTIONS *for the* WORKPLACE

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## INDUSTRIAL RELATIONS NEWSLETTER

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### SOME QUESTIONS WE GET ASKED:

- How do I change the hours and days of work of my employees?
- What is the process for making an employee redundant?
- Why do I need a position description for the work of an employee?
- What is "adverse action"?

#### How do I change the hours and work of my employees?

As set out in previous newsletters an award applies to the work performed by the employee and when that work as defined becomes the "major and substantial work" of the employee.

The coverage of an award has no application to the title or designation of the employee it applies to the work they perform.

All awards have designated hours and days of work for the performance of work during ordinary working hours and days.

The majority of "modern awards" which came into effect in January 2010 set the ordinary hours and days of work as between Monday to Friday and a span of hours of approximately 7:00am to 6:00pm.

#### For full time weekly employees:

There are a large number of awards that provide for other spans of hours and days. The awards "in general" prescribe that for a weekly employee that is a full time employee who is employed for 38 hours per week or in some instances 37.5 hours or 36 hours per week that the employer can fix the hours and days of work within the scope of the award.

The employer can change those hours and days within the range of the scope of the hours and days of the award by giving the affected employee a notice period of a week or 7 days.

#### For part-time employees:

Part-time employees are "in general" a different matter as their hours and days of work are fixed by the terms of their contract of employment and "in general" can only be changed by agreement between the employer and the particular employee.

### For casual employees:

Casual employees are employed on a per engagement basis and the hours and days of work can be varied by the employer to suite operational requirements of the Company.

Casual employees have a minimum period of engagement or a minimum period of payment for each engagement.

**Please check with us for more information before acting and we usually do not charge for phone advice.**

### What is the process for making an employee redundant?

The following are the issues the Fair Work Tribunal or a Court will apply and employers are by necessity obliged to be able to substantiate the issues with evidence.

The issues the Tribunal or Court will consider as to a genuine redundancy are as follows:

#### Section 389 "Meaning of genuine redundancy"

- 1) **[Meaning of genuine redundancy]** A person's dismissal was a case of genuine redundancy if:
  - a) the person's employer no longer required the person's job to be performed by anyone because of the changes in the operational requirements of the employer's enterprise; and
  - b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
- 2) **[Exception where redeployment reasonable]** 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:
  - a) the employer's enterprise; or
  - b) the enterprise of an associated entity of the employer."

The provisions of the Fair Work Act that will be applied if the issue is not a genuine redundancy are the same as the unfair dismissal criteria along with some other issues and these are set out in the following:

Section 387 of the Act states;

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:

- a) whether there was valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employee's); and
- b) whether the person was notified of that reason; and
- c) whether the person was given the opportunity to respond to any reason related to the capacity or conduct of the person; and
- d) any unreasonable refusal by the employer to allow the person to have a support person present to

- e) assist at any discussions relating to the dismissal; and
- e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about the unsatisfactory performance prior to the dismissal; and
- f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- g) the degree to which the absence of a dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- h) any other matters that the FWA considers relevant."

The fact is it costs an employee approximately \$65.00 to file an application for adverse action or unfair dismissal and the evidentiary trail is critical for the employer when defending the application.

**Please check with us for more information before acting and we usually do not charge for phone advice.**

### Why do I need a position description of the work for an employee?

A position description must not be prescriptive in its wording and must contain wording that it is "in general" and must contain the wording "other duties as directed by the employer".

A position description sets out the responsibilities and role and reporting functions for the position and work of the particular employee such as:

- position overview
- main responsibilities
- general responsibilities
- the standards required to be met by the employer
- personal attributes

A position description must refer to the policies and procedures of the employer and/or the operational manual of the Company and that the employee will abide by and implement those procedures.

The fact is it is easier to change the policies and procedures/ operational manual then it is to change a position description and the contract of employment with the employee must state that the terms of the policies and procedures do not form part of the contract of employment.

### What is "Adverse Action"?

The Fair Work Act 2009 introduced by the current Government changed a number of provisions of the previous Workplace Relations Act and one of the most significant is a provision regarding "adverse action".

One of the most significant issues affected by the adverse action provisions is the protection against discrimination in

employment which are areas of law that were traditionally confined to Federal and State anti-discrimination laws.

The issue of adverse action and applications made under the provision is growing in significant number and must be regarded as the new area that employers must be aware of.

Adverse action occurs when an employer takes action against an employee for exercising or not exercising a “workplace right” and a workplace right is defined as:

- is entitled to benefit of or has a role or responsibility under a workplace law, instrument or order made by an industrial body (such as maternity leave);
- is able to initiate or participate in a process or proceedings under a workplace law or instrument;
- is able to make a complaint or inquiry to a person or body having the capacity under a workplace law to seek compliance with that law or the employee’s employment (such as award rates or penalty rates).

Employers are prohibited from taking adverse action against employees or prospective employees or in some instances contractors because of their race, sex, colour, sexual preference, age, disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or sexual origin.

The provisions also place a “reverse onus of proof” on the employer meaning it will be presumed the employer took the alleged action unless the employer can prove otherwise.

Adverse action is taken by an employer against an employee if the employer:

- dismisses the employee;
- injures the employee in their employment;
- alters the position of the employee;
- discriminates between the employee and other employees of the employer.

Employers must:

- have clearly documented procedures which are applied fairly and consistently across all employees;
- undertake a thorough investigation prior to dismissal or other disciplinary process that demonstrates that the actions of the employer are proportionate to the circumstances;
- provide clear reasons for any disciplinary action and that they are linked to the evidence arising from the investigation.

**As with all issues the evidentiary trail is critical for employers.**

### Who Can I Contact for More Information and Assistance?

If you would like to discuss any concerns you may have in relation to issues of employment or any other employment related issues you may have, please contact:

**John Tamplin** 0417 552 801  
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**Or go to our web-site at [www.johntamplinconsulting.com.au](http://www.johntamplinconsulting.com.au)**

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