

Redundancy Guide

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Making an employee's role redundant can be difficult and stressful. There are rules to follow, and the process must be fair and equitable. Get it wrong and your business could be hit with an unfair dismissal claim, so make sure you understand the many steps involved in the process.



In this guide you will learn about:

- How redundancy differs from other forms of termination of employment
- What your legal obligations are
- What to pay employees
- What notice to give
- Other employee entitlements
- How to implement a redundancy

There's also a redundancy checklist to make sure you have all bases covered.

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Introduction

Are you considering making an employee's role redundant? This guide explains what the law says, what employees' entitlements are, and answers common questions that may arise in redundancy situations. A full checklist for what to do is also provided.

Important note: Different provisions apply according to the size of your business. If you have 15 or more employees, there are more obligations to meet, and employees have more entitlements. The guide explains the differences in detail.



What is redundancy?

Redundancy occurs if you terminate someone's employment because you no longer require the job to be done by anyone, except where this is due to the ordinary turnover of labour (e.g. the employee voluntarily resigns), or because the business has become bankrupt or insolvent. This can be summed up as “changes in the operational needs” of the business.

Examples of redundancy:

- If you stop making a certain product or providing a certain service, the job (and employee) is no longer required.
- If you have five employees and decide to redistribute one employee's work among the remaining four, the employee is redundant. But if you reallocate work duties between jobs, make one employee “redundant” and hire a new employee to perform a redesigned job, that is not a “genuine” redundancy.
- If you automate a work process or task, you may no longer need a “human resource” to do the work.
- If you relocate the business and employees cannot move with it.
- If one of the above occurs and you cannot employ the person elsewhere in the business.

Which employees are covered?

Any employee can be made redundant, provided the definition of “redundancy” above is met. However, different entitlements and procedures apply according to the size of your business, type of employee/job, length of service and other factors.

For example, if the business has 15 or more employees, you are required to pay redundancy pay, but not if you have less than 15 employees.

If termination of employment occurs because of an employee’s conduct or capacity to perform the job, this is NOT a redundancy.

How do you calculate the number of employees?

The Fair Work Act 2009 (s.23) says a “small business employer” is one that employs fewer than 15 employees at that time.

To calculate how many employees you have, include:

- all full-time and part-time employees employed by you at that time
- the employee being made redundant
- any other employee whose employment is also being terminated.

Casual employees are NOT counted unless, at that time, they are employed on a regular and systematic basis.

Associated entities (e.g. grouped companies) are taken to be one entity.

What does the law say?

The National Employment Standards (NES), which are part of the Fair Work Act 2009, provide a statutory entitlement to redundancy pay for all full-time and part-time employees employed by a company that is not a small business (defined as one with fewer than 15 employees), including employees not covered by an award or enterprise agreement (such as most managers).

Small Business Fair Dismissal Code

Businesses with fewer than 15 employees may be exempt from the redundancy pay provisions, but they must comply with the [Small Business Fair Dismissal Code](#).

The code's checklist requires employers who make employees redundant to have complied with any requirements to consult with employees about potential redundancy and to consider possible redeployment options within the business or an associated entity. Those requirements are discussed in detail below.

Award and agreement provisions

If an employee is covered by a modern award, enterprise agreement or individual employment contract, you need to check that document in case it has more generous provisions than the National Employment Standards. Extra provisions may relate to severance pay, notice periods, consultation, or other forms of assistance.

Some awards provide for unions that cover employees to be notified and/or consulted re pending redundancies, for example when 15 or more employees may be retrenched due to major changes within the business.

Redundancy pay scales

The National Employment Standards set a scale of redundancy or severance payments based on an eligible employee's years of continuous service with the employer and the employee's age. This scale appears below.

Period of continuous service	Weeks of pay
At least one year but under two years	4
At least two years but under three years	6
At least three years but under four years	7
At least four years but under five years	8
At least five years but under six years	10
At least six years but under seven years	11
At least seven years but under eight years	13
At least eight years but under nine years	14
At least nine years but under 10 years	16
At least 10 years	12

Continuous service excludes any periods worked as a casual employee.

The reason redundancy pay is reduced after 10 years' continuous service is due to an assumption the employee is also entitled to long service leave pay at this point.

The Fair Work Commission (FWC) can reduce the amount of redundancy pay (which may be nil) when an employer obtains other acceptable employment for the employee, or if the employer cannot pay the amount which is legally payable. You must apply to the FWC to seek a reduction.

Note also that if an employee started work before the start date of the NES (1 January 2010) then the period of service for purposes of redundancy payment calculation will start on 1 January 2010.

Exclusions from length of continuous service

All employment time is counted as service, except for the following:

- any period of unauthorised leave
- any period of unpaid leave or authorised unpaid absence, other than community service leave and a period of employee stand-down (the latter means when the employer stops paying employees for whom it has no work, until work is again available, but the employee remains employed)

This means that any paid absence from work, such as annual leave, personal/carer's leave (including compassionate leave), a public holiday, jury service and long service leave counts as service for the purposes of calculating redundancy pay. However, unpaid absences, such as unpaid parental leave, leave without pay granted by the employer, unpaid carer's leave, or unpaid compassionate leave, do not count as service, and are excluded from its calculation.

Ordinary rate of pay applies

“Redundancy pay” is the employee’s “base rate of pay” for their ordinary weekly hours of work. That is the employee’s ordinary weekly rate of pay for the ordinary hours of work, excluding incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, any other separately identifiable amounts.

If an employee is covered by an award, enterprise agreement or individual employment contract, you need to check it in case there are more generous provisions.

Employees excluded from redundancy pay

The NES redundancy pay scale does not apply to an employee's termination of employment if, immediately before the date of termination due to redundancy, or at the time when the employee received notice of the termination:

- The employee's period of continuous service was less than 12 months
- The employee was dismissed for serious misconduct
- The employee was employed for a specific period of time or for the duration of a project or season
- The employee was a trainee engaged only for the length of the training agreement
- The employee was a casual employee
- The employee was an apprentice
- An industry-specific redundancy scheme in a modern award applies to the employee or is incorporated into a relevant enterprise agreement.

The scale also does NOT apply to employees of a business with fewer than 15 employees at the time of termination.

Notice periods

The minimum notice period set by the National Employment Standards is based on how many years of continuous service the employee has worked. Continuous service excludes any periods worked as a casual employee.

Period of employment	Minimum notice period
Less than one year	One week
One – three years	Two weeks
Three – five years	Three weeks
More than five years	Four weeks

Employees aged over 45 who have at least two years' continuous service are entitled to an extra week's notice (or pay in lieu).

An employee can either work out the notice period or else you must provide payment in lieu of notice, which is included in final pay as well as any applicable redundancy pay. Payment is at the employee's full pay rate (as if they had worked the minimum notice period), so must include applicable incentive-based payments and bonuses, loadings, allowances, overtime and penalty rates.

If a relevant agreement or employment contract sets longer periods, these apply instead. Note that you must provide both the appropriate minimum period of notice as well as payment of the relevant redundancy pay to the employee. **The two entitlements are mutually exclusive and must be treated and recognised separately.**

What else must you do?

Awards, agreements and individual employment contracts may contain extra provisions you must comply with when making employees redundant.

These may include:

- Genuine prior consultation with employees
- Evaluating whether the employee can be redeployed elsewhere in the business (another job or location)
- Job search assistance

There may also be provisions regulating how to select employees for redundancy.

These provisions are discussed further below.



Consultation with employees

Modern awards contain a standard provision requiring consultation with employees regarding major workplace changes that are likely to have significant effects on employees. “Significant effects” include termination of employment. The obligation to consult with employees will arise in most redundancy situations.

Note that consultation must be “genuine”, where options are explored (such as transfer to another job within the business) and no decision is made until after the employee’s responses have been considered.

Failure to implement genuine consultation, even when it is not specifically required, may result in claims such as unfair dismissal – because the employee may argue that the redundancy selection criteria were subjective, based on incorrect information, or discriminatory, and it was therefore not a “genuine redundancy”.

Even when consultation is not specifically required, failure to provide it runs the risk that the outcome will not be a “genuine redundancy”, with the same potential consequences as above.



Redeployment

The consultation provisions above require you to consider and discuss whether the employee can be redeployed elsewhere in the business instead of being made redundant. In small businesses, this will usually not be possible, but it must still be considered first.

When considering redeployment opportunities, factors to consider include:

- similarity of pay, other entitlements and working conditions (e.g. hours of work)
- location (e.g. is there extra travel time and costs?)
- type of employment (e.g. a casual or part-time job is not a suitable alternative unless the employee willingly agrees to it)
- nature of the work (does it suit the employee's skills and experience, and if not, can training be provided?)
- similar status and seniority of the job
- job security (is the new job likely to be permanent or temporary?)

If an employee refuses redeployment offers that are considered “fair” (that is generally equivalent or similar), the Fair Work Commission has ruled in some cases that the employee was not entitled to receive redundancy pay, or should receive a lower amount.

If an employee is pressured to accept a clearly inferior position, the employee may be able to argue that unfair dismissal has occurred. A genuine consultation process should be able to avoid such scenarios occurring.

Transfer to lower paid duties

Most modern awards provide that employees who are transferred to lower paid duties as an alternative to redundancy must receive the same period of notice as if their employment had been terminated. You may choose to pay an amount equal to the difference between the former ordinary time rate of pay and the new ordinary time rate of pay for the number of weeks' notice still owing.

Selecting employees for redundancy

Once the decision on how many employees to make redundant is made, selection of the employees should use criteria that are objective and are known in advance by employees.

Subjective criteria can be manipulated and are more likely to lead to disputes, such as discrimination or unfair dismissal claims. Subjective criteria are open to different interpretations and are harder to justify, such as personal likes and dislikes, trust, integrity, credibility, etc.

Instead, rely on factors such as skills, experience, training and performance, taking account of the current and future needs of the business. If that assessment rates employees equally, length of service could be considered, as could the impact on employees' personal circumstances.

Job search assistance

Most modern awards provide that an employee who is given notice of redundancy is allowed up to one day's time off with pay during each week of notice for the purpose of seeking other employment.

You can require the employee to provide proof of attendance at an interview (e.g. a statutory declaration) as a condition of being paid.

In any case, recommended practice is to provide employees with as much assistance as practicable to seek other employment, e.g. time off when requested.

Voluntary redundancy

Voluntary redundancy enables an employee to volunteer to have their employment terminated by redundancy.

However, it does NOT relieve you of your legal obligations relating to a termination of employment, as it is regarded as termination by the employer, not the employee.

Although a voluntary process, an employer has the final decision on whether to accept an employee's offer of voluntary redundancy. You need to ensure you make decisions that do not adversely affect operation and sustainability of the business. For example, good employees tend to apply for voluntary redundancy as they are confident of obtaining employment elsewhere, while experienced employees may be at an age where semi-retirement has become an option.

Therefore, you should retain final approval of who takes voluntary redundancy. If you control the process properly it can also be an opportunity to manage out those employees who are less productive without breaching unfair dismissal laws. Be as specific as possible in relation to the positions that will become redundant.

Voluntary redundancy can also be less stressful for employees than enforced redundancy, because they have greater say in and control over their departure.

What if the employee leaves before the notice period ends?

Most modern awards will usually provide that an employee may terminate their employment during the period of redundancy notice. The employee is entitled to receive the benefits and payments payable had they stayed until the notice period ended but is not entitled to payment in lieu of notice.

Employment Separation Certificate

This certificate is used by employees to apply for assistance from Centrelink, e.g. unemployment benefits. You must complete and give the form to any redundant employee who requests it, or if a government agency (usually Centrelink) requests it.

What if you cannot afford to pay redundancy pay?

You cannot on your own initiative reduce redundancy pay, but you can apply to the Fair Work Commission to have the amount of redundancy pay reduced.

The Commission can make a decision based on the circumstances of the case. However, it cannot do so if an award or agreement provides for coverage by an industry-specific redundancy scheme

Can you re-employ an employee previously made redundant?

Yes, but the employee still keeps his/her redundancy pay. But you should NOT agree at the time of termination to re-employ the employee at a future date, as that will prevent the redundancy payments from receiving concessional taxation treatment. Nor at time of termination should you make an arrangement for the ex-employee (or a company formed by the employee) to take on the role of an independent contractor to your business.

The above offers can be made, however, after redundancy has been implemented.

Redundancy checklist

The checklist below covers the steps required to implement a redundancy that complies with all legal and “good practice” requirements.

Sequence of tasks

Preliminary steps — Before making a definite decision to make a position redundant

1. Assess the motivating reasons for the redundancy. Do they amount to a genuine redundancy?
2. Do you no longer wish the job to be performed by anyone because of changes in the operational requirements of the business or due to insolvency or bankruptcy?
3. Are there reasons of an economic, technological, structural nature that necessitate a restructure of the business? Obtain data to support those reasons.
4. Consider alternatives to redundancy, such as transfers, retraining or redeployment (within the employer’s enterprise or the enterprise of an associated entity of the employer).
5. Do you still need to consider redundancies?

Selection of employee to retrench

6. Select employees for redundancy in a fair and non-discriminatory way.
7. Identify employees for redundancy by objective selection criteria which are applied consistently to employees whose position may be made redundant. Relevant factors may include a consideration of an employee’s qualifications, skill set, experience and job performance.

Consultation

8. Consider obligations contained in awards, agreements, contracts, legislation and employer policies that mandate consultation and notification with employee(s) and/or unions about the proposed redundancies before they take effect.
9. Consider whether you are obliged to, or will elect to, offer voluntary redundancies.
10. Discuss redeployment opportunities with employees.
11. Comply with obligations in awards, agreements, contracts and legislation.
12. Notify affected employee(s) and relevant unions (where required) of impending redundancies.
13. Ensure affected employee(s) understand the genuine operational reasons for the impending redundancies.
14. Notify the employee of his/her redundancy and final date of employment in writing.

Entitlements

15. Identify any entitlement to redundancy/severance pay an employee might have under an applicable award or agreement, contract of employment, employer policy or legislation.
16. Consider whether there are exclusions from paying redundancy pay under the applicable award or agreement, contract of employment, employer policy or legislation.
17. Discuss with an accountant or tax adviser any applicable tax free components of the redundancy/severance payments.
18. Consider whether you will offer additional severance payments to employees above their legal entitlements. If so, consider using a Deed of Release.
19. Check the applicable award or agreement, contract of employment and legislation for minimum notice periods. Comply with these notice periods.
20. Calculate termination entitlements.

General

21. Notify other parties affected by the redundancy, eg employee's superannuation fund, workers' compensation and other insurers (where relevant), other employees and managers, payroll, key customers etc.
22. Issue an employment separation certificate (if employee requests one).
23. Check the applicable award, agreement or contract of employment, employer policies and legislation to see whether you must issue a statement of service.
24. Notify Centrelink where a decision has been made to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature before termination.
25. Arrange the return of any property of the employer which is in the employee's custody, possession or control (eg company vehicle, mobile phone, laptop, business cards, office keys, security passes etc). Also, change any passwords and other security measures, which would allow the employee in question to continue to gain access to the business or its IT network.

Further assistance

HR can be tricky to navigate – but we've got your back.

Get your HR stuff sorted with My Business Workplace. Our user-friendly guided HR software empowers small business owners like you with the confidence that you're doing the people stuff right. My Business Workplace gives you step-by-step checklists and templated documents for hiring new starters, paying correctly, managing your team, and separating when the time is right. Easily create and assign contracts, keep up to date with award changes, remunerate employees correctly, and use our easy-to-follow guides and checklists to manage resignation, termination, misconduct, and redundancy. No matter the problem or whenever it strikes.

Get the unfun done and get on with business.





Letter to Employee - Termination Due to Redundancy

If an employee's position becomes redundant, you need to give written notice of the termination of their employment. This template will provide you with a letter outlining an employee's entitlements and redundancy date.



Redundancy Script

Not sure what to say during the redundancy meeting? Follow this script to guide you through the discussion with your employee.



Redundancy Checklist

Outlines the steps you should take before, during and after the redundancy meeting. This checklist will help minimize the risk of not meeting your obligations.

When you sign up to My Business Workplace, you can also access our Workplace Advice Line. Talk to a HR specialist for tailored advice relating to your business and your people.

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