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Job Watch Inc is...

an independent, not for profit, employment rights legal centre. It provides a free, confidential telephone information and referral service and other assistance to Victorian workers

HOURS:

Mon - Friday
9.00am-5.00pm
 (closed Tuesday
 12.00noon - 2.00pm)
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This infosheet is about what it means when your job is made redundant. It also explains what your minimum rights and entitlements may be under the National Employment Standards (NES) if your job is made redundant and you are then retrenched. This information is of a general nature only and is not intended to cover all your potential rights and entitlements. You should also obtain legal advice before acting on any of the following information which is only applicable to Victorian employees.

What is Redundancy?

Redundancy occurs when, through no fault of your own, you are no longer required to work in the job you have been doing. This usually happens because your employer no longer requires your job to be done by anyone, except where this is due to the ordinary and customary turnover of labour.

In order to be a genuine redundancy, the job that you were employed to do must no longer exist i.e. your employer no longer

requires anyone to do the job that you were doing. The job is made up of many things including, for example, the title, pay, hours, location and duties. Consider all of these factors together when you ask yourself whether your job has truly ceased to exist.

Redundancy may occur for a number of reasons, for example:

- a downturn in production, sales, or the economy generally;

- the introduction of new technology;
- business relocation;
- the duties of your position are re-allocated to other employees;
- the business merges with another business or is sold;
- an internal company restructure occurs; or
- due to employer insolvency or bankruptcy.

Remember, it is the *job* that becomes redundant, not you.

What is Retrenchment?

If you lose your job as a result of a redundancy, that is called a **retrenchment**. At this point there is a termination of employment.

An alternative to retrenchment might involve, for example, you being *redeployed* to a different position but still with the same employer.

What are my entitlements?

My job is made redundant but *I am not retrenched*

Notice of termination

If you are a permanent employee and you are eligible, your employer must give you notice of the fact that your job will no longer exist. This applies whether you are offered a transfer to lower paid duties (i.e. you are offered redeployment with less pay) or you are retrenched.

However, in the case of redeployment, if you are paid in lieu of (instead of) notice, you would only normally be paid the difference between what you were earning in the position that was made redundant and what you earn in your new redeployed position. This is subject to more

generous provisions in any applicable industrial instrument e.g. an enterprise agreement.

Your redundancy becomes effective either on the final day of the notice period or immediately if your employer pays you instead of giving you notice.

The minimum notice period required by law varies depending on how long you have continuously worked with your employer.

Additionally, regardless of whether you are a permanent or casual

employee, you are entitled to be given a written notice notifying you of the day of the termination of your

employment before the termination takes effect.

The minimum notice periods are:

<u>Period of continuous service</u>	<u>At least</u>
Up to 1 year of service	1 week
1 – 3 years of service	2 weeks
3 – 5 years of service	3 weeks
More than 5 years of service	4 weeks

If you are over 45 years of age with a minimum of 2 years of continuous service, your employer must give you an additional week of notice.

Remember, these are minimum entitlements to

notice. You may be entitled to a longer notice period under an award, enterprise agreement or your common law employment contract (which may include policies and procedures of your employer).

Generally, casual employees are not entitled to notice or pay instead of notice of termination or redundancy pay (see also JobWatch's Notice of Termination infosheet).

Process for implementing a redundancy

You should check to see whether any applicable award, enterprise agreement or employment contract (which may include policies and procedures of your

employer) require your employer to consult with employees and/or the relevant union(s) before implementing a redundancy. If there are any such provisions, you

may argue that they are legally enforceable obligations with which your employer must comply.

My job is made redundant but *I am retrenched*

If your job is made redundant and you are retrenched, you will at least be entitled to the following (payments will be on a pro rata basis for permanent part-time employees):

- Notice of the termination or payment in lieu of (instead of) the notice. (See the section on "notice" above.) Note, if you continue to work during your notice period, you continue to accrue your

entitlements such as paid annual leave and long service leave right up until the last day);

- Wages for all hours worked;
- Payment for any accrued annual leave; and
- Payments for any applicable accrued long service leave entitlements (subject to completion of the necessary period of continuous service with your employer).

You may also be entitled to receive redundancy pay (see page 3) and any other entitlements arising under the NES, an award, enterprise agreement or your common law employment contract (which may include policies and procedures of your employer).

Redundancy pay

An entitlement to redundancy pay (also called **severance pay**) may arise under the NES, an enterprise agreement, your common law employment contract or as a policy of your employer.

As redundancy entitlements may vary, you should check the relevant provisions that apply to your job.

The purpose of redundancy pay is to compensate an employee whose job has become redundant for things such as lost personal leave (including sick and carer's leave) and long service leave, as well as for the inconvenience and hardship imposed on the employee. This may include compensating for things such as loss of seniority, loss of security of employment and other kinds of losses. Where an employee is entitled to redundancy pay, this should be given in addition to notice or pay instead of notice.

As a general guide, the NES contains the following severance pay provisions for employers with 15 or more employees, the calculation of which includes employees employed by associated entities of your employer:

Period of continuous service	Redundancy pay (based on the ordinary time rate of pay)
Less than 1 year	Nil
1 year and less than 2 years	4 weeks' pay
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

NOTE: Employees with over 10 years of service have diminished redundancy pay due to the availability of long service leave entitlements.

IMPORTANT

Many Victorian workers only became entitled to redundancy pay on or after 1 January 2005. For these employees, only service after they became award-covered counts for the purpose of calculating redundancy pay.

After 1 January 2010, all eligible permanent Victorian workers became entitled to redundancy pay under the NES. Nevertheless, for employees who only became entitled to redundancy pay under

the NES, i.e. who were not entitled to redundancy pay before 1 January 2010, the period of service for the purpose of calculating redundancy pay starts on 1 January 2010.

General exclusions to redundancy pay

You are not entitled to redundancy pay under the NES if your job is made redundant and you are:

- an employee employed for a specified period of time, for a specified task, or for the duration of a specified season (unless a substantial reason for employing an employee as described was to avoid redundancy pay obligations);
- a casual employee;
- an apprentice;
- an employee to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;
- an employee to whom an industry-specific redundancy scheme in a modern award applies; or
- an employee to whom a redundancy scheme in an enterprise agreement applies if:
 - ◊ the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from time to time) into the enterprise agreement from a modern award that is in operation; or

- ◊ the employee is covered by the industry-specific redundancy scheme in the modern award.

Modern awards and the Fair Work Act (2009) regulations may provide further exclusions to redundancy pay.

If you are not entitled to redundancy pay under the NES, you may still be entitled under an enterprise agreement or other applicable industrial instrument (if any) or your common law contract of employment (which may include policies of your employer).

Reason for dismissal

Under the NES, you are entitled to be given notice of your dismissal in writing. Additionally, you may ask your employer for a short written statement as to the reasons for your termination. There may be no legal obligation to provide you with this statement, however, such a statement may be helpful when you start applying for new jobs.

Employee Separation Certificate and final pay statement

When you actually finish work, your employer should provide you with an Employment Separation Certificate, and a statement with details of your final payment (termination advice). This should set out how much you are

being paid out for wages, accrued annual leave, payment in lieu of notice, redundancy pay etc. It is important that each entitlement be distinguished because the Tax Office does not treat Employment Termination

Payments (i.e. payments upon termination) in the same way as regular income.

The Employment Separation Certificate is necessary if you need to apply to Centrelink for social security benefits.

Can I challenge or seek compensation for my dismissal?

In some situations an employee who is retrenched because their position is made redundant may have grounds to file an unfair dismissal claim.

Additionally, being retrenched or redeployed for discriminatory reasons

may give rise to a General Protections Dispute claim or a claim of discrimination under Victorian or federal anti-discrimination laws.

Retrenchment may also result in the breach of an award or enterprise agreement.

If in doubt, you should seek specific legal or union advice about the particular circumstances of your case as quickly as possible because strict time limits apply e.g. **14 days** for unfair dismissal.

Unfair dismissal

If your dismissal was harsh, unjust or unreasonable and not because of a genuine redundancy or your dismissal was due to a genuine redundancy but your employer failed to consult in breach of a modern award or enterprise agreement and/or it was reasonable to redeploy you in the circumstances, you may still be eligible to make an unfair dismissal claim.

Please refer to JobWatch's '*Unfair Dismissal*' infosheet to see if you are eligible to make a claim.

In claiming unfair dismissal, you would need to show that your employer did not have a valid reason for the termination (i.e. that the redundancy was a sham) or that you could have been redeployed within your employer's business

or the business of an associated entity of your employer and/or your employer failed to consult about your redundancy in breach of a modern award or enterprise agreement.

Unfair dismissal claims must be filed with Fair Work Australia (FWA) within 14 days of the termination of employment.

General Protections Dispute - Adverse action

In some circumstances, a retrenchment or redeployment may result in unlawful adverse action. Unlike unfair dismissal, a General Protections Dispute is available as a claim regardless of your length

of service with your employer.

If your employer's unlawful adverse action against you was in the form of your dismissal, you have **60 days** from the date of your dismissal to file a General

Protections Dispute claim at FWA. You may also have rights even if you were not dismissed.

For further information see JobWatch's '*General Protections Dispute - Termination*' infosheet.

What if my employer is in receivership, liquidation or is bankrupt?

If your employer has gone, or is likely to go, into receivership, liquidation or bankruptcy, it may be difficult to obtain all your entitlements upon redundancy including notice, redundancy pay (if eligible) and accrued leave.

If your employer's company is in **receivership** it may still have the capacity to trade its way out of financial trouble.

If your employer's company has gone into **liquidation** (commonly referred to as being 'wound up') then it ceases trading and a liquidator is appointed.

The liquidator's role essentially is to realise (turn into cash) any remaining company assets and pay any outstanding debts to creditors (including employees). Often the liquidator will find that the company's financial position is such that there are not enough assets to cover the debts owed to creditors (including employees).

Whether you as an employee should be paid ahead of other creditors (i.e. people who are owed money) can be a complex issue to resolve.

It is advisable to get legal or union advice as soon as possible in relation to your entitlements.

Where your employer is not a company but is a partnership or individual that gets into financial trouble, the outcome may be that they become bankrupt. In practical terms **bankruptcy** is similar to liquidation of a company. However, instead of a liquidator being appointed, a *trustee* will be appointed to realise assets of the employer and distribute them to creditors.

It is very important that you find out the name of the receiver, liquidator or trustee in bankruptcy who has been appointed to administer the affairs of your employer. You do have some rights. You should ensure that you are listed as a creditor (i.e. a person who is owed entitlements) with the receiver, liquidator or

trustee. You will have to provide proof of debt i.e. the basis of your entitlements.

If you lose your job or resign because of your employer's insolvency or bankruptcy, you should contact the General Employee Entitlements and Redundancy Scheme (GEERS) - 1300 135 040.

Through GEERS, in certain circumstances, you may be able to recover unpaid legal entitlements to:

- Wages (up to 3 months' worth);
- accrued but unused annual and long service leave;
- pay in lieu of notice (up to 5 weeks worth); and
- an amount of redundancy pay (provided you are able to show an entitlement to redundancy pay, up to 16 weeks' worth).

What happens in a transfer of business situation?

Generally a transfer of business occurs when one employer takes over a business or part of a business of another employer, for example, where there is a sale of business.

Under the NES, if you accept a job with the new employer in a transfer of business, and the new employer recognises your length of service with your

old employer, or is legally obligated to recognise your length of service, you are generally not entitled to redundancy pay from your old employer.

If you do not wish to accept a job with the new employer because you do not think that the new job is suitable or reasonable in the circumstances, you should obtain legal advice to see if you will still be

entitled to redundancy pay before rejecting the new job. This is because, if an employee rejects an offer of alternative employment in certain circumstances (for example, where there will be little or no change to the employee's position, wages and entitlements), they may not be entitled to redundancy pay from their old employer.

Additionally, your old employer may simply refuse or be unable to pay your legal entitlements meaning you will have to make a claim to the Fair Work Ombudsman, an eligible Court or GEERS (as the case may be) in order to attempt to recover your entitlements. This may be something worth considering in deciding whether or not to

accept an offer of alternative employment in a redundancy situation. Obviously, you can ask your old employer whether you will be paid redundancy pay if you don't accept the offer of alternative employment.

Similarly, if you refuse to accept an offer of redeployment within your employer's business or the business of an

associated entity of your employer that is suitable and reasonable in the circumstances, your employer may apply to Fair Work Australia to be excused from paying you some or all of your redundancy pay.

In all of these scenarios, you should seek legal advice as soon as possible.

Where to get help

JobWatch Inc
Metro: (03) 9662 1933
Rural: 1800 331 617

Fair Work Australia Helpline (Unfair Dismissal)
 1300 799 675

Fair Work Infoline
 (Office of the Fair Work Ombudsman)
13 13 94

ACTU Worker Information line
 (for referral to a union):
 1300 362 223

Law Institute of Victoria
 (for referral to a lawyer):
 (03) 9607 9550

Victorian Equal Opportunity & Human Rights Commission
 (03) 9281 7111
 1800 134 142

Australian Human Rights Commission
 (02) 9284 9600

General Employee Entitlements & Redundancy Scheme (GEERS)
 1300 135 040

If you are unsure about any information in this infosheet, it is important to obtain legal advice as soon as possible.

DISCLAIMER

The information in this infosheet is of a general nature only. It is not a substitute for professional legal advice. Readers should not act on the basis of any information contained here without first obtaining legal advice relevant to their particular employment situation.



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