The World of Restructuring and Redundancies

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Overview

Universities need to remain flexible to meet the challenges of global online universities and funding challenges.

Their capacity to restructure operations in financially viable ways will be crucial.
Overview

• The focus of our session today is on how to successfully restructure under the existing provisions of university enterprise agreements
  • consultation
  • selection for redundancy
  • what is a redundancy? and
  • how the transfer of business provisions might impact in some restructuring situations
• We also identify the critical steps in the process and address actions that need to be taken to achieve success
Overview

- Integrated approach that covers:
  - Leadership
  - Compliance and risk mitigation
  - Communication
  - Consultation
  - Engagement
  - Project management
  - Stakeholder management

- Focus of this session is compliance and consultation
Planning and Preparation

Matters we think need to be addressed at the planning stage:

• understand overarching goals and strategy of the organisation and organisational unit

• identify the goals and objectives of the restructure

• identify the leaders of the change process (and establish accountabilities)

• ensure you have protocols in place about creation of documents and communication. You do not want documents created within the university (eg emails) that will damage your case in Fair Work Commission or in Court in the event of an adverse action claim, dispute or other legal claim.
Planning and Preparation (Contd.)

• clearly identify what the proposed change is and be able to articulate the goals and rationale/reasons for the change

• get threshold advice on whether you can do it e.g. do you have restrictions on contracting out in your EB? Identify what you can do

• establish a team to project manage the process and clearly articulate the lines of authority;

• establish a budget for the change process and ensure it is properly resourced
Planning and Preparation (Contd.)

- identify when consultation must occur (e.g. will the change involve significant or substantial change, determine what the trigger in your enterprise agreement is for consultation);
- determine who will be affected by the proposed restructure and who therefore must be consulted;
- identify other "stakeholders" and their role and required communications and potential management
- establish realistic timelines for the process and identify key decisions points
Planning and Preparation (Contd.)

- prepare a consultation document (setting out the required information about the proposed change) that will be used for the purposes of consultation
- prepare a implementation plan and a communications plan (an element of which should be communicating with staff who won't be affected - "don’t scare the horses")
- undertake a rigorous review of financial information that may be required as a justification for the restructure
- verify data that may be used in the redundancy selection process
- determine fair and robust selection criteria (more later)
Planning and Preparation (Contd.)

- if the restructure might involve a transfer of business, determine whether it will trigger redundancy payments and also sort out the detail around transfer of entitlements;

- plan contingency including:
  - Flexibility in the plan
  - Communications
  - Operational
  - Industrial
  - If a dispute is notified under your enterprise agreement and the NTEU seeks to invoke the status quo.
Consultation

"Genuine opportunity to influence the decision maker"

Not joint decision making or consensus

The issue of consultation, with who, how and when is made complex by a number of legal issues including:

- the wording of the enterprise agreement provisions on consultation;
- section 389 of the *Fair Work Act* (see later); and
- the risk that any policies that you have about the consultation, redundancy or redeployment process may become de facto implied terms in staff members' contracts of employment (breach of which may give rise to significant damages claims - refer *Barker v Commonwealth Bank* (see later)).
Minimum EB consultation provisions usually involve:

• notification of the proposed major change once a firm proposal has been created (sometimes there is a requirement to notify and consult even at the "contemplation" stage);

• provision of information to staff and unions about the proposals regarding the restructure (in many agreements these information requirements are highly prescriptive);

• meetings with unions and affected staff and a consideration of responses provided by unions and staff about the proposals; and

• a decision about the proposed change and then further consultation about implementation of the change.
Genuine Redundancy

If not a "genuine redundancy" then claim for unfair dismissal can be made:

• If employer has not complied with provisions of its enterprise agreement about consultation about redundancy then not a genuine redundancy - section 389 of Fair Work Act

• UES (International) Pty Ltd v Leevan Harvey - if fail genuine redundancy test then the process for selection will be scrutinised in any unfair dismissal case
Barker v Commonwealth Bank

If you have a policy about redundancy, redeployment, retrenchment or consultation then breach of the policy might give rise to a breach of an implied term of the contract of employment

- Implied term is duty of mutual trust and confidence
- Breach of the policy can give rise to significant damages
- It does not matter that the policy is not incorporated into the contract of employment
- Appeal pending
Penalties for breach of consultation provisions in enterprise agreements

• In *QR Litigation* significant damages for failure to consult (reduced on appeal from over $700,000 to $384,000)

• Swinburne University being prosecuted by NTEU for alleged failure to consult over closure of campuses
Risk of injunction to restrain retrenchments if breach of consultation obligations

- Under *Fair Work Act* injunctions can now be obtained for breach of industrial instruments (this right did not exist prior to the *Fair Work Act*)
- CFMEU claimed injunctions in relation to the Victorian Desalination plant staff reductions
- Impact of proposed amendments to the *Fair Work Act* requiring consultation in relation to roster changes?
Selection for redundancy

- Need to establish fair and rationally based selection criteria
- Different approaches for academic and professional staff?
- Focus on research outputs as selection criteria?
- If teaching outputs and performance are used do you have reliable data on the evaluation of teaching?
- Discrimination issues
When does redundancy give rise to redundancy payments?

- Is it redundancy if transfer of business?
- Usually a redundancy if after transfer the jobs change significantly
- Svitzer Australia Pty Ltd v MUA
- If employee declines work for a new employer and there is continuity of service and no change to the job then it is not a redundancy
- Importance of enterprise agreement containing clause that redundancy not payable where employer obtains acceptable alternative employment
- In Svitzer Full Bench speculated that section 122 of the *Fair Work Act* did not prevent obligation to pay redundancy for above NES redundancy entitlements (under an enterprise agreement)
Casual employees and redundancy entitlements

- *Williams v McMahon Mining Service Pty Ltd*
- No definition in legislation of casual employee - casual employees not truly casual if regular and systemic employment
- Entitled to redundancy pay?
Full Bench decision contradicts Williams V McMahon Mining Service Pty Ltd

- In *Telum Civil (Qld) Pty Limited v CFMEU* Full Bench said given regular casuals not entitled to redundancy pay
- Distinguished *McMahon Services* on basis of new legislation
- History of regulation of casual employment by the Federal Tribunal suggests there should be no double dipping (i.e. casual loading and redundancy)
- Point of distinction between *Telum* and many university enterprise agreements is that the *Telum* enterprise agreement expressly stated that the casual loading was compensation for all benefits, including redundancy
Superannuation entitlements on redundancy

*NTEU v The University of Melbourne*

- Question whether employer superannuation contributions are payable in respect of notice in severance payments
- Superannuation contributions are payable on notice but not severance
- However if notice is characterised as a genuine redundancy payment equivalent to the unexpired portion of the notice period, then superannuation not payable
- Review your enterprise agreement and clarify in this round of bargaining?
What is a redundancy?

_Gamboni v Bendigo and Adelaide Bank Ltd_

- Case law suggests that focus is on the substance of whether the job has changed
- Express contractual provisions permitting change in duties and reporting lines not crucial
- If there is an entitlement to redundancy (under a policy that is incorporated into the contract or under the contract of employment itself) then the focus is on whether the role has changed significantly and whether redundancy arises
- $240,000 awarded by Court to Mr Gamboni
Redeployment and genuine redundancy

- Section 389 requires the employer to consider redeployment opportunities, including in an associated entity of the employer.
- If the employer does not look at redeployment then it is not a genuine redundancy.
- FWA case (Aldred) found the employer of a construction employee in Victoria needed to look at job opportunities in the business in Queensland.
- Mere fact that the employee does not ask to be considered for redeployment does not relieve the employer of the obligation to explore redeployment alternatives.
Conclusion

• Adopt a PPCCC strategy
• Plan, prepare, consult, communicate and comply
Questions