

### REDUNDANCY TEST CASE

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The Australian Industrial Relations Commission handed down its decision in the Redundancy Test Case on 26 March.

#### THE APPLICATIONS

A full bench of the Commission considered 25 applications, by the ACTU and several registered organisations of employers, to vary the standard provisions governing termination of employment in safety net awards.

The 'TCR standard' clause provided a maximum of eight weeks' severance pay (for employees with four years' service or more). Casual employees and small businesses were excluded from the provision. This standard was set in the landmark *Termination, Change on Redundancy* case of 1984 (TCR case), in which the Commission introduced minimum award standards for termination of employment, workplace change, and redundancy.

#### KEY CHANGES

The key changes introduced by the 2004 Redundancy Test Case are:

- an increase in the redundancy severance pay scale (for the first time since 1984); and
- the extension of the severance pay entitlement to employees of small businesses (capped at eight weeks).

#### SEVERANCE PAY

The ACTU sought a revised severance pay formula that would increase the maximum severance payment on redundancy from eight weeks' pay after four years' service, to 16 weeks' pay after six years of service, with an additional 25 per cent loading on severance pay for an employee over the age of 45, in line with current New South Wales 'Fisher Principle' standards.

Employer groups and the Federal Government opposed this claim. Employers, represented by the Australian Chamber of Commerce and Industry (ACCI), sought to

increase the years of service necessary to qualify for the existing severance pay entitlements.

The full bench was not persuaded that the rationale behind the TCR case was incorrect, or that the level of severance pay then established was manifestly inadequate. However, it found that the scale did not adequately take into account the effect of redundancy on employees with long periods of service, because the maximum amount of severance pay was reached after four years' of service. On this basis, the bench extended the severance pay scale from four years' of service to 10 years.

The pay scale in the TCR standard clause for employees with four years or less service, in which eight weeks' pay is the maximum, remains the same. The new severance pay scale is as follows.

#### SMALL BUSINESS EXEMPTION

In another significant reform, the Commission partially removed the small business exemption from severance pay. The severance pay scale in the TCR standard clause, before its extension (that is, up to eight weeks' pay after four years' service), now applies to federally-covered employers who employ fewer than 15 employees.

According to the Commission, the evidence demonstrated that small business employees suffer broadly the same losses upon being made redundant as do persons employed by medium and larger businesses. Although some small businesses have less ability to bear the costs of severance pay than larger businesses, the evidence before the full bench was that, between 1997 and 1998, 'some 70 per cent of small businesses which reduced the number of persons they employed made a profit'. Businesses that are unable to meet their redundancy pay obligations still have recourse to the 'incapacity to pay' provision.

Period of continuous service

Less than 1 year  
1 year and less than 2 years  
2 years and less than 3 years  
3 years and less than 4 years  
4 years and less than 5 years  
5 years and less than 6 years  
6 years and less than 7 years  
7 years and less than 8 years  
8 years and less than 9 years  
9 years and less than 10 years  
10 years and over

Severance pay

Nil  
4 weeks' pay  
6 weeks' pay  
7 weeks' pay  
8 weeks' pay  
10 weeks' pay  
11 weeks' pay  
13 weeks' pay  
14 weeks' pay  
16 weeks' pay\*  
12 weeks' pay\*\*

\* The maximum severance payment has been doubled to 16 weeks' pay for employees with nine years of service.  
  
\*\* Employees whose position is made redundant after 10 years or more of service will receive only 12 weeks' pay, to avoid 'double counting' for employees who receive pro rata long service leave entitlements.

EMPLOYERS' INCAPACITY TO PAY

The Commission agreed with ACCI that applications for variation of the severance pay obligations, on the basis of the incapacity of an employer to pay, should only be able to be made by employer organisations, rather than by individual employers. However, for relief to be granted, incapacity must be shown in the case of each employer.

REJECTED CLAIMS

A number of the parties' other claims for amendment of the TCR standard clause were rejected by the Commission.

- The ACTU sought to extend the standard termination benefits to casuals other than short-term casuals. The Commission stated that this amendment would lead to 'double-dipping' in some industries, and retained the current standard, which does not require employers to afford any termination benefits to casual employees.
- The ACTU's claim for a new award obligation upon employers to pay redundant employees \$300 to cover the cost of professional and counselling services, or to provide such services, also failed.
- The Australian Industry Group (AIG) failed to convince the Commission that, if severance pay entitlements were increased, the

severance pay of employees of insolvent companies should be limited to that currently provided by the TCR standard clause (a maximum of eight weeks).

- The claim of ACCI and AIG that the TCR standard clause should operate to the exclusion of redundancy and severance pay provisions in state laws and awards did not succeed. The Commission held that the TCR standard clause should not 'cover the field'.

COMMENT

The changes to the TCR standard clause in the awards under consideration in the Redundancy Test Case come into effect 28 days from the date of the decision (i.e. 23 April 2004).

The Redundancy Test Case has drawn the expected responses:

- unions have claimed that the case gives a just and economically responsible outcome for all employees; and
- employer groups have argued that the decision's effects—on small businesses in particular—will be dire.

Until the Redundancy Test Case, the federal redundancy safety net had been unchanged for 20 years. Employers and unions alike will watch with interest as the practical consequences of the Commission's decision, for business and for employees, are revealed.

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