



NO CONSULTATION? NO GENUINE REDUNDANCY!

AUTHORS // MURRAY PROCTER & ASHLEE MILLER

FEBRUARY 2017

WILLIAMS & ORS v STAPLES AUSTRALIA PTY LTD [2017] FWC 607 – 3 FEBRUARY 2017

The Fair Work Commission recently reinstated four employees who had been made redundant. The decision reinforces the importance of following consultation obligations under enterprise agreements and awards prior to making employees redundant.

BACKGROUND

Staples Pty Ltd (a national supplier of business and office products) is an employer of over 1,700 people in Australia. This issue arose at its distribution warehouse at Erskine Park. There were 60 permanent employees in the warehouse and a casual labour hire workforce of 90 to 100 individuals.

Staples is covered by the *Staples Enterprise Agreement 2014-2016* (the “**Agreement**”). Three separate provisions of the Agreement require Staples to consult with employees regarding “major workplace change” and redundancy. Two of the provisions are based on legislative model terms, and the third commits Staples to include their “Joint Consultative Committee” (“**JCC**”) in decision making for major changes affecting employees. Although the Agreement provides that Staples should include the JCC in decision making, Staples retained the right to make any final decision.

CONSULTATION PROCESS UNDERTAKEN

On 5 July 2016, Staples decided to reduce the number of permanent warehouse employees by between 10 to 14, to reduce the operating costs of the warehouse.

On 11 July 2016, the decision to implement redundancies for permanent warehouse employees was announced to a meeting of the JCC.

Following the JCC meeting, Staples held meetings with various permanent warehouse employees to convey the news of the redundancies. Several one on one meetings were also held with the relevant manager and individual permanent warehouse employees.

All employees were provided with a letter notifying of the impending redundancies. The letters confirmed that all employees would be assessed by use of a “selection matrix” by 13 July 2016.

On 12 July 2016, a meeting was held on site attended by union officials, delegates and Staples management. The union complained there had not been proper consultation regarding the redundancies.

On 13 July 2016, 12 employees were advised by letter they had been selected for redundancy, and unless alternative employment was obtained, their employment

ClarkeKann is a commercial law firm with offices in Brisbane and Sydney. Our expertise covers commercial & corporate transactions, employment & IR, financial services, litigation, risk management and insolvency, property transactions and resources projects, across a range of industries. For a full list of our legal services, please visit our website at www.clarkekann.com.au. To update your contact details or unsubscribe to any of our publications, email us at publications@clarkekann.com.au.

This bulletin is produced as general information in summary for clients and subscribers and should not be relied upon as a substitute for detailed legal advice or as a basis for formulating business or other decisions. ClarkeKann asserts copyright over the contents of this document. This bulletin is produced by ClarkeKann. It is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters. Liability limited by a scheme approved under professional standards legislation.

[Privacy Policy](#)

would cease on 20 July 2016. Each of the employees were provided with a list of vacancies within Staples.

It was this 2 day period between announcement and implementation that was critical to the FWC's conclusion the Agreement's consultation obligations had not properly been observed.

REDUNDANCIES

Of the 12 employees selected for redundancy:

- . three employees advised Staples they did not wish to pursue redeployment and their employment was terminated with effect from 14 July 2016;
- . five employees expressed an interest in being redeployed however their employment terminated with effect from 20 July 2016; and
- . seven employees were made redundant on a "non voluntary basis" with effect from 20 July 2016.

All employees were paid their redundancy entitlements.

Four employees commenced unfair dismissal claims. Staples raised a jurisdictional objection that the redundancies were "genuine redundancies" within the meaning of section 389 of the *Fair Work Act 2009*.

FAIR WORK FINDINGS

The FWC was critical of Staples. Commissioner Cambridge held that the approach to consultation was "unduly hasty and largely tokenistic", and that management "did not engage in genuine or meaningful consultation with its employees and representatives" but rather "made disingenuous gestures which it sought to portray as consultation".

Other criticisms of the consultation process found by the FWC included:

1. There was no evidence the under performance of the warehouse had been conveyed to workers. Employees were told about the redundancy on one day, and selected for redundancy on the second day.
2. This short time frame could not, on any reasonable and objective contemplation, provide for the discussion and provision of relevant information as contemplated in the consultation obligations under the Agreement.

3. There was no proper opportunity for discussion about measures that might avert or mitigate the adverse effects of the decision to implement redundancies in the warehouse (for example, part time working options could have been discussed).
4. At no stage did Staples invite employees to give their views about the impact of the change and consider any views about the change.
5. The JCC was not included in the decision making process connected with the redundancies. This contravened the Agreement.

The FWC concluded that Staples' actions regarding implementing the redundancies "were so significantly non compliant as to be grossly deficient".

Further, in December 2016, Staples engaged 19 new permanent employees in the jobs that had previously been made redundant. Staples engaged the 19 permanent workers under a term of the Agreement that provided "Staples commits to the hire of 20 permanent Associates...between 1 January 2014 and 31 December 2016".

The FWC held the implementation of the redundancies in July 2016 defeated the spirit of Staples' commitment to hire 20 new staff before 31 December 2016.

Further, the FWC said it would have been reasonable to redeploy the employees into positions which were, in effect, pending and required to be filled by virtue of the commitment under the Agreement.

The failure to consider reasonable redeployment, and the non compliance with the consultation obligations, meant the dismissals were not "genuine redundancies" within the meaning of the *Fair Work Act 2009*. It followed that the FWC could consider whether the dismissals were harsh, unjust or unreasonable. The FWC held:

- . the process for selection of the employees failed to provide those individuals with any opportunity to challenge the basis for their selection;
- . there was no opportunity to question or scrutinise the score they individually received in the selection matrix. This could have resulted in error; and
- . the process was so severely flawed that the consequential dismissals of the employees were entirely unreasonable.

The individuals were reinstated to their former positions, with provision for lost pay (less any amount paid for redundancy).

LESSONS FOR EMPLOYERS

The statutory exemption from an unfair dismissal claim on the ground of “genuine redundancy” requires the observance of any consultation provisions of an enterprise agreement or modern award.

The exemption is important because it allows an employer to avoid scrutiny by the FWC of the selection of particular individuals on the ground of “fairness”, which can often be open to debate.

However, the exemption can only apply where consultation procedures have been followed. So, for award or enterprise agreement covered employees, employers should, before implementing redundancies:

1. Plan the process. Too often HR is given a “decision” to simply “implement”. Hasty implementation creates obvious tension with consultation obligations.
2. “Consultation” need not mean “collaborative

decision making”; but it also does not mean simply delivering a message from senior management.

3. Analyse what information must be provided. Usually what is required is information about the change, and the effect of the change. Commercial in confidence information need not be provided.
4. Does the obligation require the employer to “include” a JCC or other representatives in decision making? Or is the obligation derived from the statutory model clause, which is less onerous?
5. “Consultation” means employees should be given a period to understand the information and respond. The time frame will usually differ depending on the size of the business, the change proposed and the work performed.
6. The other aspects of the statutory exemptions for “genuine redundancy” should also be considered, including whether it is reasonable to redeploy the person in the business, or the business of an associated entity of the employer.

FOR MORE INFORMATION, PLEASE CONTACT:



MURRAY PROCTER //
Partner

T 61 7 3001 9225

E m.procter@clarkekann.com.au



ASHLEE MILLER //
Lawyer

T 61 7 3001 9245

E a.miller@clarkekann.com.au