

Am I being treated fairly at work?

What are my employment rights?

Where do I go for help?

REDUNDANCY

DISCLAIMER

This infosheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information. This infosheet is designed for Victorian and national system employees in Tasmania and Queensland only. If you are not a Victorian employee or a Queensland or Tasmanian national system employee, you should obtain specialist legal advice about your case as soon as possible.

Who can use this infosheet?

This infosheet is designed for **Victorian** and national system employees in **Tasmania** and **Queensland** only.

If you are a **Victorian** employee, you can use this infosheet unless you were employed in a sector that provides essential services of core government functions, including state infrastructure services such as electricity and gas, and your employer is not covered by a nationally registered collective agreement.

If you are a **Tasmanian** employee, you can use this infosheet unless you were a State public sector employee not covered by a nationally registered collective agreement.

If you are a **Queensland** employee, you can use this infosheet unless you were a State public sector or local government employee not covered by a nationally registered collective agreement.

Introduction

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 i.e. you are not redeployed within your employer's business.

What is redundancy?

Redundancy usually occurs when, through no fault of your own, the job you have been doing is no longer required to be done by anyone. Effectively, to be a genuine redundancy, your job must cease to exist.

Your job is made up of many things including, for example, your job title, your pay, your hours, where your job is located and your 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;

© Job Watch Inc - August 2019

Employment Rights Information for Workers – 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 workers.

Hours: Mon-Fri 9am-5pm and Wednesdays until 8:30pm.

- the introduction of new technology;
- business relocation;
- the duties of your position are reallocated to other employees;
- the business merges with another business or is sold;
- an internal company restructure occurs; or
- your employer becomes insolvent or bankrupt.

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

What is retrenchment?

If you lose your job as a result of a redundancy, this is called a “retrenchment”. An alternative to retrenchment might involve, for example, you moving to a different position with the same employer. This is called “redeployment”.

Process for implementing a redundancy

There may be a consultation process that your employer is obligated to follow when implementing a redundancy. You should check to see whether any

- applicable modern award; or
- enterprise agreement; or
- employment contract (including policies and procedures of your employer)

Is your employer required to consult with you before making your job redundant?

requires your employer to consult with employees and/or the relevant union(s) before implementing a redundancy. If these provisions exist, you may be able to argue that they are legally enforceable obligations with which your employer must comply. A failure to comply with a required consultation process under a modern award or enterprise agreement may mean that you can make an unfair dismissal claim even where your job is no longer required to be done by anyone. You have **21 days** from the date of your dismissal (retrenchment) to file an unfair dismissal claim at the Fair Work Commission (FWC).

My job is made redundant and I am redeployed

What are my entitlements?

While most permanent employees are entitled to notice of termination of employment, for other employees, things are different. For instance, **casual employees** are generally **not entitled** to notice, or pay instead of notice, or redundancy pay. Also termination for serious misconduct does not require notice. (For more information on notice see JobWatch’s “**Notice of Termination**” infosheet).

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 no longer exists. This applies whether you are offered redeployment to another position (whether that is with more, the same or less pay), or you are retrenched.

Pay instead of notice

However if you are being redeployed to a position which pays less than your previous job and you are being paid 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 during the notice period.

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.

Minimum period of notice

The minimum notice period required by law varies depending on how long you have continuously worked with your employer. The minimum notice periods are set out below:

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

Period of continuous service	Minimum period of notice
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.

Do I get redundancy pay?

If your job is made redundant and you accept an offer of redeployment with your **current employer**, you are not entitled to redundancy pay. If your current employer’s offer of redeployment is not acceptable because, for example, it represents a significant demotion in pay or status, you may be entitled to reject the offer and claim redundancy pay. You should obtain legal advice before rejecting an offer of redeployment because your employer may refuse to pay you redundancy pay on the basis that it made you an acceptable offer of redeployment – see ‘Where to get help’ – page 8.

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.

Accept job offer with new employer

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 for redundancy purposes, or is legally obligated to recognise your length of service, you are generally **not entitled to redundancy pay** from your old employer so long as your terms and conditions of employment remain the same or substantially the same.

Warning: You can lose your entitlement to redundancy pay.

Reject job offer with new employer

If you do not wish to accept a job with the new employer because you do not think that the new job is acceptable 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.

Nevertheless, it is possible in certain circumstances, e.g. where the job offer from the new employer doesn’t recognise your length of service and/or is a significant reduction in status and entitlements, to accept the new job and still claim some or all of your redundancy pay from the old employer.

You should obtain legal advice about this before accepting or rejecting a job offer in these circumstances.

Old employer refuses to pay

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 (FWO), an eligible Court or under the Fair Entitlements Guarantee (FEG) (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. For information about FEG, see page 8.

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 otherwise acceptable in the circumstances, your employer may apply to the Fair Work Commission (FWC) 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.

My job is made redundant and I am retrenched

What are my entitlements?

If you are retrenched from a permanent position you will at least be entitled to the following (payments will be on a pro rata basis for permanent part-time employees):

- **Notice:** minimum notice of termination or pay instead of notice. (See the section on notice above and for further details, the JobWatch Infosheet on “**Notice of Termination**”. 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 that you work).
- **Wages:** wages for all hours worked.
- **Annual leave:** payment for any accrued but untaken annual leave.
- **Long service leave:** payments for any applicable accrued long service leave entitlements (subject to completion of the necessary period of continuous service with your employer).
- **Redundancy pay** (see below).

Redundancy pay

You may be entitled to redundancy pay:

- under the NES, **or**
- an enterprise agreement, **or**
- your common law employment contract; **or**
- as a policy of your employer.

Where does your entitlement to redundancy pay come from?

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).

Redundancy pay under the National Employment Standards

As a general guide, the NES contains the following redundancy pay obligations for employers with 15 or more employees (including employees employed by associated entities of the 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.

Recovery of entitlements

If your job has been made redundant and you have been retrenched and you believe that you are entitled to redundancy pay but your former employer refuses to pay, you can file a complaint with the FWO who can try to recover your entitlements for you. If the FWO can't recover your entitlements and will not take your matter to court, you have **6 years** from the date that your redundancy pay was due to you to file a claim in an eligible court.

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 genuine **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).

SMALL BUSINESS EMPLOYER
If your employer employs less than 15 employees (including employees of associated entities of your employer) you are not entitled to redundancy pay under the NES.

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. While they are not legally obliged to give you this statement, it may be helpful when you start applying for new jobs.

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 be the basis for a **General Protections Dispute claim** or a **claim of discrimination** under Victorian or federal antidiscrimination laws.

The process of your redundancy may have also breached a modern 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. **21 days** to make an unfair dismissal claim or General Protections Dispute termination claim.

Unfair dismissal

If your dismissal was **harsh, unjust or unreasonable** and **not** because of a genuine redundancy, or your dismissal was due to a 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 terminating your employment (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 at the Fair Work Commission (FWC) **within 21 days of the termination** of employment taking effect.

General Protections Dispute – Termination claim

In some circumstances, your retrenchment or redeployment may result in unlawful adverse action. Unlike unfair dismissal, you can bring a General Protections Dispute claim regardless of your length of service with your employer. If your dismissal (retrenchment) was unlawful adverse action by your employer, you have **21 days from the date of your dismissal to file a General Protections Dispute** claim at FWC. You may also have rights even if you were not dismissed, for example, where your redeployment was unlawful adverse action.

For further information see JobWatch's 'General Protections Dispute – Termination Claim' 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.

Liquidation

The liquidator's role is essentially to liquidate (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.

Bankruptcy

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.

Get listed as a creditor

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.

Fair Entitlement Guarantee (FEG)

If you lose or are about to lose your job or resign because of your employer's insolvency or bankruptcy, you should contact the **Department of Education, Employment and Workplace Relations** regarding the FEG as soon as possible because eligibility criteria and time limits apply - 1300 135 040.

Through FEG, in certain circumstances, you may be able to recover some or all of your unpaid legal entitlements to:

- **wages;**
- **accrued but unused annual and long service leave;**
- **pay instead of notice;** and
- **an amount of redundancy pay.**

Call FEG on
1300 135 040.

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 - a **Termination Advice**.

The Termination Advice should set out how much you are being paid out for wages, accrued annual leave, pay instead 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 and tax concessions usually apply when you receive redundancy pay.**

Where to get help:

Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission Helpline	1300 799 675
JobWatch <i>(Telephone interpreters available for non-English speakers.)</i>	03 9662 1933 1800 331 617
ACTU Worker Information line (for referral to a union):	1300 362 223
Victorian Equal Opportunity & Human Rights Commission	1300 292 153
Anti-Discrimination Commission Queensland	1300 130 670
Equal Opportunity Tasmania	1300 305 062
Australian Human Rights Commission	1300 656 419 (local call) or (02) 9284 9888
Fair Entitlements Guarantee (FEG)	1300 135 040
Legal Referral Service (Law Institute of Victoria)	9607 9311
Queensland Law Society (for referral to a lawyer)	1300 367 757
Law Society of Tasmania (for referral to a lawyer)	6234 4133

JobWatch acknowledges and is grateful for the financial and other support it has received from both the Commonwealth of Australia Attorney-General's Department, the Victorian State Government and Victoria Legal Aid.

JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.