



Am I entitled to redundancy pay if my employer provides me with an alternative job?

The *Fair Work Act* (2010) (the “Act”) contains the **National Employment Standards (“NES”)** which outline certain minimum entitlements of employment payable to most employees in Australia (with some minor exceptions). Some workers may have further entitlements negotiated in an individual employment contract, an award or a collective agreement but in this blog, the information is in relation to the minimum entitlements.

The Act and the NES include entitlements to redundancy payments which are payable if your employment is terminated either:

- at the employer’s initiative because the employer no longer requires the employee’s job to be done by anyone (except where this is due to the ordinary and customary turnover of labour); or
- because of the insolvency or bankruptcy of the employer.

The Act and NES outline the amount of redundancy pay payable based on the period of service. Employees with less than 1 year of service are not entitled to redundancy pay.

Employees that are not entitled to redundancy pay are employees of a business which has:

- fewer than 15 employees;
- in some instances, persons that are employed on a casual basis;
- persons that employed on a fixed term contract;
- persons where the termination results from the “ordinary and customary turnover of labour”;
- and apprentices.

A worker is also entitled to “notice” of the termination of their employment or payment in lieu when their position is made redundant.

When a worker’s position is made redundant, the employer is required to consider whether there are opportunities to redeploy the worker either within the employer’s organisation or within an “associated entity”.

The question here is, if the employer offers redeployment to another job, or has facilitated an offer of employment by another organisation , are they still required to pay redundancy pay?

The Act provides that an employer can make an application to the Fair Work Commission (“FWC”) for an Order that they are not required to pay redundancy pay, or for a reduction in the amount of redundancy payable if they *“obtain other acceptable employment for the employee”*.

The question of whether alternative employment is “acceptable” depends on a number of factors including:

- the nature of the work;
- the pay in the new position;
- working hours;
- skills;
- duties;
- seniority; and
- the location of the work.

So for example, if a worker whose position is made redundant is offered an alternative position with the same rate of pay, similar or the same level of responsibility and seniority, at the same location or close by, then the FWC would, in all likelihood, consider that that employment was “acceptable” and would make an order that the employer is not required to pay redundancy pay.

However, if the job which is offered is at a lower rate of pay, less secure (for example, a casual position), less responsible, and/or located significantly further away, then it is unlikely that the job would be considered to be “acceptable”. In that situation, the FWC might order that there should be a redundancy payment but at a reduced rate.

In many cases, the employer cannot simply decide on their own initiative not to pay redundancy pay, or to reduce the redundancy pay payable. Instead, in most cases, the employer is required to make a formal application to the FWC and the redundant worker would have the right to address the FWC and have their views heard.

In situations where the employer's business is bought or taken over by another organisation or new owner, the rules are slightly different. In that situation, once the ownership of the business changes, the existing workers become redundant and are entitled to redundancy pay.

However the Act provides that if the new owner of the business offers employment to a worker which:

- is on terms or conditions substantially similar to and, on an overall basis, no less favourable than the initial job; and
- recognises the employee's service with the old owner of the business,

then if the worker refuses that offer, they will not be entitled to receive redundancy pay.

In such a case, the employer (the "old" owner of the business) is not required to make an application to the FWC. However, if the worker makes an application to the FWC, it can order the old owner to pay some amount of redundancy pay.

If your position has been, or is about to be, made redundant and you have been offered alternative employment, the [**Andersons Employment and Industrial team lawyers**](#) can give you advice and assistance about your entitlements.

The Fair Work Act (2010) contains the National Employment Standards which outline minimum entitlements of employment payable to most employees.