



Can I be made redundant if my employer is using labour hire workers?

Author: [Margaret Kaukas](#)

Email: enquiry@andersons.com.au

Phone: 08 8238 6636

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Sometimes people lose their jobs due to [redundancy](#); despite the fact that their employer is using labour hire companies to perform the work.

Labour hire companies provide workers to companies on a daily, weekly or monthly basis. These workers are employed by the labour hire company and are not employees of the companies who they perform the work for (the “host business”).

Many businesses use labour hire workers as it gives them flexibility to increase or decrease staff quickly and easily without having to pay the entitlements available to permanent employees.

In these circumstances, it is not surprising that the person made redundant may take the view that labour hire staff should be laid off before the direct employee's position is made redundant.

The Fair Work Commission has considered this scenario in a number of cases, including in a decision of *Brown & Ors v Clermont Pty Ltd trading as Clermont Open Cut* [2015] NFC 3862.

Under the *Fair Work Act 2009* if a person's position is made redundant, they cannot bring an [unfair dismissal claim](#) if the dismissal satisfies the definition of “genuine redundancy” contained in the Act.

The Act defines a "genuine redundancy" as:

1. the employer no longer requires the person's job to be performed by anyone, or to fill the position in question because of changes in the employer's operational requirements;
2. if there is a modern award or enterprise agreement that requires the employer to consult with staff about the redundancy, the employer has done so; and
3. it was not reasonable in all of the circumstances for the employer to re-deploy the employee to a different role within the employer's organisation or an associated organisation.

In a number of cases workers who have been made redundant while the employer continued to use labour hire staff, have argued that the redundancy was not a "genuine redundancy" because the employer should have re-deployed them to the role filled by a labour hire worker.

In the Clermont Open Cut case the employees who were made redundant argued that labour hire workers should have been displaced to accommodate re-deployment of the employees who had been made redundant.

However, the Fair Work Commission did not accept this argument.

The employer had argued that the ability to use labour hire provided flexibility which was necessary in running the business. For example, the employer argued that the use of labour hire workers allowed flexibility which enabled them to cover employee absences due to leave, and during peak production times.

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The Fair Work Commission accepted this argument and concluded that, in the circumstances of that case, it was not reasonable to re-deploy the workers to the positions filled by labour hire workers. As a consequence, the dismissal was a "genuine redundancy" and the employees were unable to proceed with their claims.

In an earlier decision of *Pettet & Ors –v- Mr Arthur Cole Pty Ltd* [2015] FWC 2851, a similar argument about labour hire workers was raised.

In that case the employer argued that, in order to re-deploy the redundant employees to the roles filled by labour hire workers, they would have had to re-train those employees. The employer argued that the cost of re-training the permanent employees to fill the roles currently filled by labour hire workers was excessive and would have cost more than the redundancy payments which were due to the redundant employees. In those circumstances the Fair Work Commission found that it would not have been reasonable to re-deploy the redundant employees to the roles filled by labour hire workers.

These cases indicate that the simple fact that there are labour hire workers employed at the time permanent employees are made redundant does not mean that the dismissal is not a "genuine redundancy".

However, the Fair Work Commission is required to take all circumstances into account. That is, there may be cases where, due to the circumstances, the Fair Work Commission would conclude that it **IS** reasonable to re-deploy redundant employees to a role filled by a labour hire worker.

If you have been made redundant and believe that your redundancy was not a “genuine redundancy” or was harsh, unjust or unreasonable, please contact [Andersons](#)’ specialist [industrial](#) lawyers for legal advice.

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