

# An employee's workplace rights when the water rises

CLCQ Flood Webinar Series 2022

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 HOLDING REDLICH

*I respectfully acknowledge the Traditional Owners of the land on which we are speaking to you from, the Turrbal People and Jagera People, as the continuing custodians of this land. I recognise their continuing connection to Country, practices, knowledge systems and communities. I also acknowledge the traditional custodians of the lands on which each of you are living, learning and working from today. May we also pay our respects to Elders, past and present, and Aboriginal and Torres Strait Islander peoples who may be here today.*

# Overview

What if an employer has to temporarily close?

What are the alternatives to standing down employees?

Are employees able to take leave to take care of themselves or their family?

Health and safety – do you have to be a hero?

Employee concerns: What if they reduce my pay; redeploy me; make me redundant?

What type of employee are we dealing with?

What if a natural disaster happens before starting a new job?

Questions



What if an employer has  
to temporarily close?

# Stand down

***Fair Work Act 2009 (Cth) s 524(1)(c):***

## ***524 Employer may stand down employees in certain circumstances***

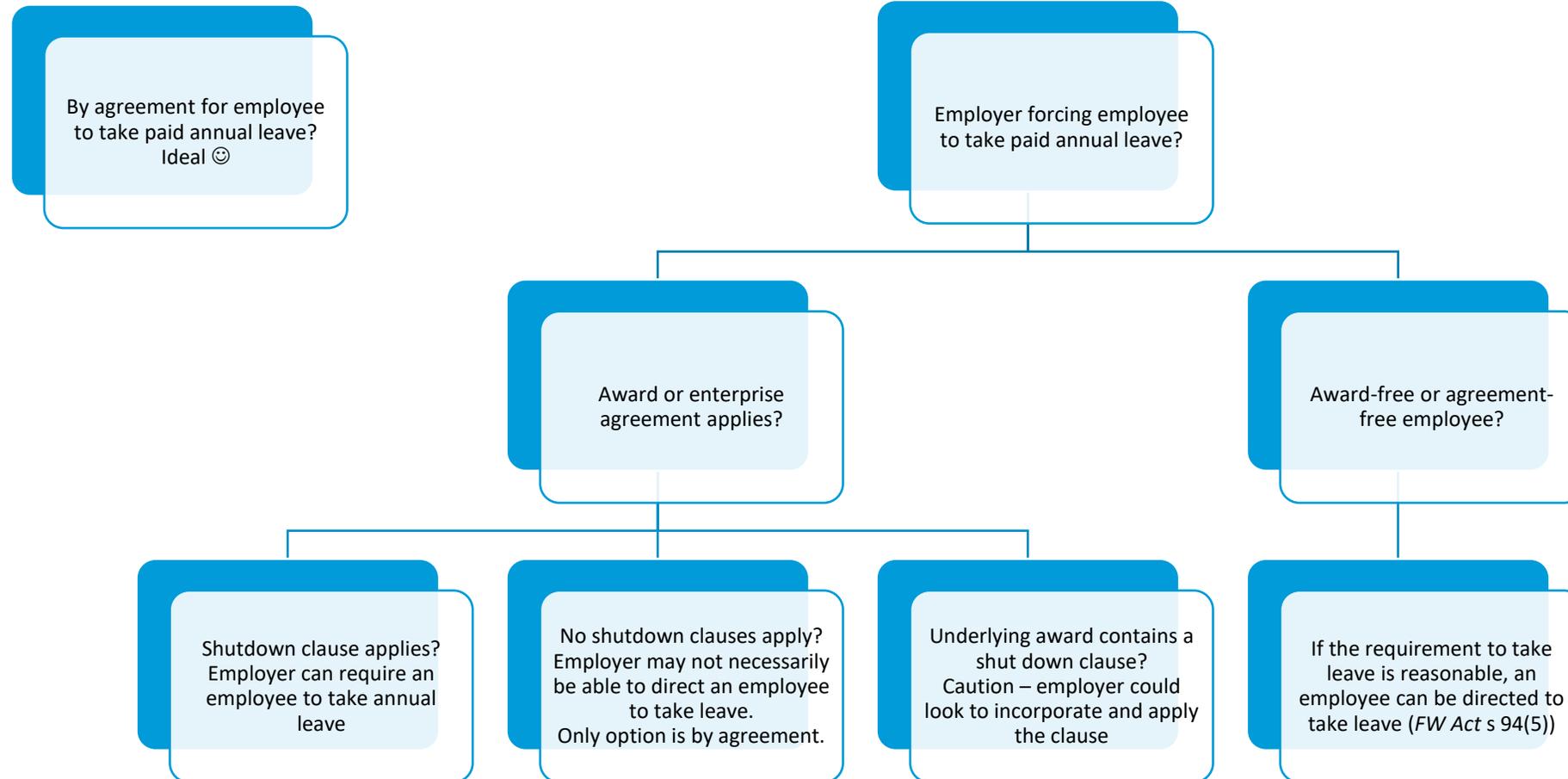
*(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:*

- (a) industrial action (other than industrial action organised or engaged in by the employer);*
- (b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;*
- (c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.*



What are the alternatives to standing down employees?

# Alternatives to stand down: Paid leave



# Alternatives to stand down: Working in some way

- › Changes to working arrangements:
  - › Flexible working arrangements
  - › Same work, different location
  - › Redeployment in alternative duties





Are employees able to take leave to take care of themselves or their family?

# NES Carer's or personal leave

## ***Paid leave***

- › 10 days' paid leave for each year of full-time service
  - › Providing care to immediate family member or household member due to an unexpected emergency
  - › Not fit for work themselves, due to personal illness or injury

## ***Unpaid leave***

- › 2 days' unpaid carer's leave
  - › Casual employees eligible
  - › All other employees eligible if paid personal/carer's leave exhausted
  - › Available to each occasion above

## ***Examples?***

- › Caring for child if child care closes due to flooding
- › Illness contracted from cleaning up flood damage, making an employee unfit for work

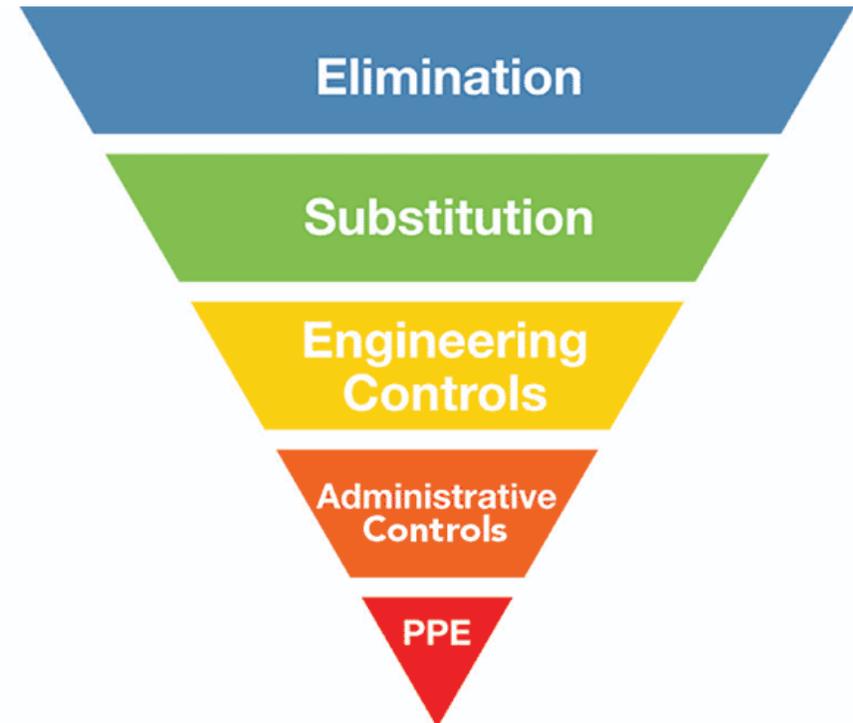


# Health and safety or do I have to be a hero?

Employers have work health and safety obligations including the risks for workers in conditions related to an emergency or disaster.

At a minimum, employers must consider the following questions:

- › Is it safe to travel to the workplace?
- › Can the workplace be safely accessed?
- › Are there additional risks in the workplace posed by the consequences of floods or fires
- › Will workers be undertaking new, different or undefined tasks and, if so, are they trained to do so?
- › Are workers trained to participate in any clean up and how can this be adequately supervised?
- › Can the need for travel in areas at risk of flooding, fire or other natural disaster be reduced or eliminated?



# Can my employer direct me to help with clean-up activities at my workplace?

- › Yes, if the work your employer requests you to do is **lawful and reasonable**.
- › This will depend on factors including your skills, experience, health and any disabilities.
- › Some tasks may also require specific safety training, equipment and procedures. While you are at work, your employer is required to ensure your health and safety.
- › You cannot be directed to perform work that is unsafe or where you do not have the necessary safety equipment and safety procedures in place.





# Reducing pay?

- Reducing the remuneration of an employee requires the employee's consent.
- Before accepting a reduction in pay:
- national minimum wage (currently \$672.70 per 38-hour week net)
- consult modern award, enterprise agreement or contract of employment to satisfy themselves of the minimum pay and entitlements (such as overtime, penalty rates and allowances) you are entitled to receive.
- In *Piggott v Wellpark Holdings Pty Ltd (t/as ERGT Australia)* [2016] FWC 3188 Senior Deputy President Hamilton endorsed the approach taken by a business to engage with staff and ask them to accept a 10% pay cut to save their jobs and the business.
- Most of the workforce agreed to the temporary pay and had their full pay restored once the cash flow problems facing the business were overcome.
- In his decision, Senior Deputy President Hamilton said at [13]:

*"This is a legitimate course of action taken by the employees and employer, and no criticism should be made of it in my view. Indeed it might be said that it appears to be the sort of joint effort by employees and employer which should be encouraged by this tribunal."*

# Redeployment

- Redeployment is the transfer of an employee to another job within the same organisation.
- If a disaster means your job no longer exists, but the employer is able to redeploy you into another suitable position with their business or an associated business, there will be no termination of employment.
- You can only be redeployed to another role as an alternative to termination of your job if it is contemplated by your employment contract, or you expressly consent to this.
- If there has been no such consent, a unilateral decision by an employer to redeploy an employee will likely amount to a repudiatory breach of the contract of employment and may result in a claim for damages for breach of contract.



relation to whether redeployment within an employer's enterprise or the

# Redeployment and unfair dismissal

The concept of redeployment is expressly referred to in Part 3-2 of the FW Act which provides for remedies in relation to unfair dismissal.

A person's dismissal will not be a case of genuine redundancy, and leave open the option of an unfair dismissal claim, if it would have been reasonable in all the circumstances for the employee to be redeployed within:

- The employer's enterprise.
- The enterprise of an associated entity of the employer.
- (*Section 389(2).*)

A number of matters can be relevant including:

- The nature of any available position.
- The qualifications required to perform the job.
- The employee's skills, qualifications and experience.
- The location of the job in relation to the employee's residence.
- The remuneration which is offered.

# Casual, contractor or employee?

A permanent **Employee** – has the various entitlements we discussed earlier i.e. personal leave, annual leave and so on.

## An **independent contractor**:

- Normally no obligation to provide regular, on-going work.
- No statutory entitlements such as annual leave or any other type of leave during a natural disaster
- Contractor bears the risk and is responsible for their own insurance
- Contractor will usually provide their own equipment.

## A **casual** employee:

- generally work only when their employer offers shifts which the employee then works.
- tend to work irregular shifts and their hours change from week to week.
- Casual employees under an Award or Enterprise Agreement should be paid pay rates which include a casual loading.

# Casual conversion

- › Casual employees may be able to request that their employer converts their employment to full-time or part-time (permanent)
- › Casual employees who have worked for their employer for 12 months **must** be offered the option to convert to full-time or part-time (permanent) employment by their employer.
- › Certain eligibility requirements need to be met for this to occur.

To be eligible to request casual conversion, a casual employee:

- needs to have been employed by the employer for at least 12 months
- needs to have worked a regular pattern of hours on an ongoing basis for at least the last 6 months
- could continue working these hours as a full-time or part-time employee without significant changes.

(unless you work for a small business employer)

# SMALL BUSINESS CASUAL

- Small business employers aren't required to *offer* casual conversion to their casual employees but worker can still ask!
- employers need to write to them within 21 days and tell the employee if they have or haven't accepted their request.
- Employers can't refuse a request unless they have consulted the employee and have reasonable grounds to refuse the request.
- Reasonable grounds for deciding not to make an offer can include that, in the next 12 months:
  - i. the employee's position won't exist
  - ii. the employee's hours of work will significantly reduce
  - iii. the employee's days or times of work will significantly change, and that can't be accommodated within the employee's available days or times for work.
  - iv. employer would have to make a significant adjustment to the employee's work hours for them to be employed full-time or part-time.

# What if a natural disaster happens before I start a new job?

- An employer may withdraw an offer of employment at any point before it is accepted, without having to give notice or make a payment in lieu of notice.
- Once an offer has been accepted, and any preconditions attached to it met (for example, receipt of references satisfactory to the employer and confirmation of professional qualifications), an employment contract is in place, even if the employee has not yet started work.
- The employer is unable at this stage to withdraw the employment offer and, instead, has to terminate the contract. This will be done by giving the contractual notice or making a payment in lieu of notice.
- Failure to give the requisite notice or, where contractually permissible, pay in lieu, will give rise to a breach of contract claim.
- Ordinarily an employee's loss will only begin to accrue after the employment start date, and therefore if an employer terminates the contract one week before work is due to start, and the employee has a four-week notice period, damages will normally be limited to three weeks' earnings.
- However if an employment contract contemplates a longer period of employment (for example, via the promise of a new title or increase in remuneration after a specified period of time) it is possible that a court will factor that future employment loss into its assessment of damages.



# Thank you

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