

# Case Alert

Shaping the future of insurance law

## Fair Work Commission releases first substantive COVID-19 decision

### *Australian Municipal, Administrative, Clerical & Services Union v Auscript Australia Pty Ltd*

7 APRIL 2020

#### AT A GLANCE

- On 6 April, the Fair Work Commission (FWC) handed down its first substantive decision regarding the COVID-19 crisis in *Australian Municipal, Administrative, Clerical & Services Union v Auscript Australia Pty Ltd*.
- The FWC's finding that Auscript had breached its consultation obligations is not good news for employers seeking to implement rapid changes to their workforce and serves as a timely reminder that employers cannot ignore their consultation obligations.
- Several other disputes have also been filed with the FWC regarding the actions taken by employers in response to the COVID-19 crisis.

#### BACKGROUND

Most employees in Australia are covered by modern awards or enterprise bargaining agreements. Those industrial instruments have "consultation obligations" that apply when an employer proposes to make significant changes to the business during times of economic uncertainty, like that caused by the coronavirus.

In *Auscript*, the employer was criticised for moving straight to a decision to implement large-scale redundancies before consulting, or having any direct discussion, with the employees who would be affected by those changes. The FWC stated that there were other potential options open to the employer, including use of federal wage subsidies, leave balances, reduced working hours, job sharing, stand down provisions, leave without

pay, leave at half pay, career holiday, leave of absence for personal development, and voluntary redundancies, as well as no longer relying on external contractors.

The FWC found Auscript had breached its consultation obligations in the industrial instrument, stating:

*"Whilst Auscript has determined that its future is unviable, there nevertheless remains an obligation to treat staff with dignity in this time of crisis. In this respect, I am of the view that the focus should be on putting in place processes to remedy the impact on employees, while limiting the impact on Auscript as much as reasonably practicable."*

The FWC accepted that an order was necessary to prevent Auscript from moving ahead with forced redundancies until it had properly met its consultation obligations.

### THE IMPORTANCE OF COMPLYING WITH CONSULTATION OBLIGATIONS

An employer is protected from an unfair dismissal claim if it is a “case of genuine redundancy”. If it is not and the employer has not complied with its consultation obligations, then the employee can proceed to sue for unfair dismissal.

Traditionally, even in circumstances where an employee has been able to demonstrate an employer has not properly consulted, the FWC has generally limited compensation to the period that proper consultation should have taken place. This means that compensation is usually limited to one or two weeks or in some cases, only a day or two.

However, with the proposed JobKeeper legislation the FWC may impose a higher onus on employers to demonstrate why retaining an employee on JobKeeper payments or other alternatives to redundancy, like the

ones described in the Auscript case, cannot be implemented as an alternative to redundancy.

In addition to the prospect of unfair dismissal claims, non-compliance with consultation obligations is also a breach of the industrial instrument, which exposes an employer to pecuniary penalties and compensation.

### IMPLICATIONS FOR INSURERS

Insurers are likely to see a rise in claims regarding compliance with consultation obligations.

Employers have moved quickly in the current environment to implement significant changes to their workforces. Whatever those changes may be, it is likely that a consultation obligation would apply to the employer. In their haste, there may be many employers who have not considered the issue of consultation. This will expose them to claims for unfair dismissal as implementing adverse changes to the terms of conditions of employment is in breach of their statutory obligations.

### NEED TO KNOW MORE?

For more information please contact us.



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