

CR 2025/16 - The Trustee for Protect Severance Scheme No 2 - workers in receipt of severance payments

 This cover sheet is provided for information only. It does not form part of *CR 2025/16 - The Trustee for Protect Severance Scheme No 2 - workers in receipt of severance payments*



Status: **legally binding**

Class Ruling

The Trustee for Protect Severance Scheme No 2 – workers in receipt of severance payments

📌 Relying on this Ruling

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling sets out the income tax consequences for employees who receive severance payments from The Trustee for Protect Severance Scheme No.2, under the terms of the consolidated Trust deed of Protect Severance Scheme No. 2 – Default Termination Account and Voluntary Termination Account Workers (trust deed).
2. Details of this scheme are set out in paragraphs 9 to 19 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997), unless otherwise indicated.
4. Capitalised terms in this Ruling take their meaning from the trust deed.

Note: By issuing this Ruling, the ATO is not endorsing this product. Potential participants must form their own view about the product.

Who this Ruling applies to

5. This Ruling applies to you if you are a Default Termination Account (DTA) Worker, or a Voluntary Termination Account (VTA) Worker (collectively, the Workers) who receives a Severance Payment (Payment) from The Trustee for Protect Severance Scheme No. 2 (Trustee) under the conditions of this scheme.

When this Ruling applies

6. This Ruling applies from 1 January 2025 to 30 June 2030.

Status: **legally binding**

Ruling

Payments that are assessable as employment termination payments

7. The following payments are assessable to the Workers as an employment termination payment (ETP):

- payments made to VTA Workers
- payments of both Prescribed Amount components and Additional Amount components, made to DTA Workers, where the termination is for a reason other than a genuine redundancy
- payments of Prescribed Amount components in excess of the cap, made to DTA Workers under pension age, where the termination is due to genuine redundancy
- payments of Additional Amount components, made to DTA Workers under pension age, where the termination is for a reason other than genuine redundancy
- payments of both Prescribed Amount components and Additional Amount components, made to DTA Workers of pension age, where the termination is for a reason other than genuine redundancy.

Payments that are not assessable as employment termination payments

8. Where a payment of a Prescribed Amount component is made to a DTA Worker under pension age, due to the termination of employment by reason of genuine redundancy, that portion of the payment which is under the cap amount worked out using the formula provided in subsection 83-170(3), is not assessable as an ETP. Such a payment will be assessable as a genuine redundancy payment.

Scheme

9. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

10. Protect Severance Scheme No. 2 (Scheme) was settled on 21 June 2016 by trust deed executed by the Trustee and the Sponsors. The trust deed has been amended from time to time, most recently on 14 December 2021.

11. The Trustee is the trustee for the Scheme.

12. The Scheme has 2 'Sponsors', which have certain special rights under the trust deed:

- Victorian Branch of the Electrical Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (ETU), and
- National Electrical and Communications Association (NECA).

13. The ETU and NECA are entities covered by a table in Subdivision 50-A.

14. The ETU and NECA are Australian residents for tax purposes.

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Purpose of the Scheme

15. The Scheme involves employers within the relevant industry becoming members of the Scheme. The employers are required to make weekly contributions to the Trustee in respect of their Workers pursuant to obligations under relevant enterprise agreements.

16. The Trustee credits these contributions to an account in the name of each of the relevant Workers (Worker's Account). When a Worker's employment is terminated, the Trustee may be required to make a severance payment to the Worker (Severance Payment) subject to the Worker lodging a claim with the Trustee and the Trustee being satisfied that the Worker has met the relevant eligibility criteria prescribed in the trust deed.

Proposed amendments to the trust deed

17. The Trustee proposes to vary the Scheme's current operating model, which includes changing the conditions for eligibility that must be met for a Worker to receive a Severance Payment out of the Scheme. This necessitates certain amendments to the trust deed.

18. The proposed amendments to the trust deed are in the form of a deed of variation and a marked-up version of the trust deed.

19. As a result of the proposed amendments:

- Upon an account being opened with the Scheme in the name of a Worker, the Worker will be designated as a 'Default Termination Account Worker' or 'DTA Worker'. All existing account holders as of 1 January 2025 will also be designated as DTA Workers.
- DTA Workers will be permitted to receive a Severance Payment in the following circumstances, under Clauses 1 and 9.1 of the trust deed.
 - DTA Workers who have not yet reached their Pension Age will be entitled to receive a Severance Payment in consequence of the termination of their employment for any reason, excluding the voluntary termination of their employment.
 - DTA Workers who have reached Pension Age will be entitled to receive a Severance Payment in consequence of the termination of their employment for any reason.
- A DTA Worker that satisfies the above-mentioned eligibility criteria will be entitled to Severance Payments in the following Prescribed Amounts.
 - For those Workers who have not yet reached Pension Age:
 - If their employment is terminated by reason of a genuine redundancy – a Severance Payment equal to the tax-free amount calculated under subsection 83-175(3).
 - If their employment is terminated for any other reason other than voluntary termination – a Severance Payment of \$10,000.
 - For those Workers who have reached Pension Age at the date of their dismissal – a Severance Payment of \$10,000.

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- DTA Workers will be permitted to make an irrevocable election to become a 'Voluntary Termination Account Worker' or 'VTA Worker' under Clause 10 of the trust deed.
- VTA Workers will only be permitted to receive a Severance Payment in consequence of the voluntary termination of their employment, including by resignation or retirement, or due to death or Permanent Incapacity (as defined) under Clause 9.1 of the trust deed.
- A VTA Worker that satisfies the above-mentioned eligibility criteria would be entitled to a Severance Payment up to the entire amount standing to their credit in their Worker Account, at the Trustee's discretion, under Clause 9.2 of the trust deed (Prescribed Amount for VTA Workers).
- A DTA Worker or a VTA Worker whose employment is terminated may also be entitled to additional payments, provided there is still an amount standing to their credit in their Worker's Account, under Clause 9.2(b) of the trust deed. Those conditions are:
 - the Severance Payment is payable upon the Worker's Retirement, death, or Permanent Incapacity (as defined), or
 - the Worker has remained unemployed for 4 consecutive weeks commencing on the day after the termination of their employment, or
 - the Worker has ceased to be employed either in the relevant industry or by a member of the Scheme or has been promoted to an above-award position and remained in that position, for 39 consecutive weeks commencing on the day after the termination of their employment.

Commissioner of Taxation
19 February 2025

 Status: **not legally binding**

Appendix – Explanation

❶ *This Explanation is provided as information to help you understand how the Commissioner’s view has been reached. It does not form part of the binding public ruling.*

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Employment termination payments

20. Section 12-85 of Schedule 1 to the *Taxation Administration Act 1953* states that an entity must withhold an amount from a payment it makes to an individual, where that payment is an ETP, or would be one except that it is received more than 12 months after the termination of employment.

21. Section 995-1 states that ‘**employment termination payment** has the meaning given by section 82-130’.

22. Subsection 82-130(1) states that:

A payment is an **employment termination payment** if:

- (a) it is received by you:
 - (i) in consequence of the termination of your employment; or
 - (ii) after another person’s death, in consequence of the termination of the other person’s employment; and
- (b) it is received no later than 12 months after that termination (but see subsection (4)); and

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(c) it is *not* a payment mentioned in section 82-135.

23. In order for a payment to constitute an ETP, all the conditions in section 82-130 need to be satisfied.

24. Failure to satisfy any of the conditions will result in the payments not being considered ETPs. Furthermore, any termination payments received outside of the 12 months are taxed as ordinary income at marginal tax rates, unless the taxpayer is covered by a determination exempting them from the 12-month rule.

Payment received in consequence of the termination of employment

25. The phrase 'in consequence of' is not defined in the ITAA 1997. However, the courts have interpreted the phrase in a number of cases.

26. The High Court considered the expression 'in consequence of the termination of any employment' in *Reseck v Commissioner of Taxation (Cth)* [1975] HCA 38. Justice Gibb interpreted the meaning of the phrase as (emphasis added):

Within the ordinary meaning of the words, a sum is paid in consequence of the termination of employment when the payment **follows as an effect or result of the termination** ... It is **not in my opinion necessary that the termination of the services should be the dominant cause** of the payment ... In the present case the allowance was paid in consequence of a number of circumstances, including the fact that the taxpayer's service had been satisfactory and that the industrial agreements provided for the payment, but it was none the less paid in consequence of the termination of the taxpayer's employment.

27. Taking into account the courts' decisions on the meaning of the phrase, our view on the meaning and application of the 'in consequence of' test is set out in Taxation Ruling TR 2003/13 *Income tax: employment termination payments (ETP): payments made in consequence of the termination of any employment: meaning of the phrase 'in consequence of'*.

28. Paragraphs 5 and 6 of TR 2003/13 state that:

5. ... [T]he Commissioner considers that a payment is received by a taxpayer in consequence of the termination of the taxpayer's employment if the payment 'follows as an effect or result of' the termination. In other words, but for the termination of employment, the payment would not have been received by the taxpayer.

6. The phrase requires a causal connection between the termination and the payment, although the termination need not be the dominant cause of the payment. The question of whether a payment is received in consequence of the termination of employment will be determined by the relevant facts and circumstances of each case.

Payments of Prescribed Amount components

29. Under Clause 9.1 of the trust deed upon the occurrence of a Severance Event, a Worker (either DTA or VTA) (or a person claiming through or under such a Worker), will be entitled to a Severance Payment calculated in accordance with Clause 9.2, which sets out the relevant Prescribed Amounts, as follows:

9. Benefits payable to Workers

9.1 Upon the occurrence of:

- (a) a DTA Severance Event, a DTA Worker, or a person claiming through or under a DTA Worker, will be entitled to a Severance Payment calculated in accordance with Clause 9.2; and

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- (b) a VTA Severance Event, a VTA Worker, or a person claiming through or under a VTA Worker, will be entitled to a Severance Payment calculated in accordance with Clause 9.2

Subject to the Trustee receiving a written request, in a form prescribed or approved by the Trustee together with such evidence as is satisfactory to the Trustee, from the Worker or a person claiming through or under the Worker.

9.2 Subject to Clause 9.8, the Severance Payment payable to a Worker, or a person claiming through or under a Worker, shall be:

- (a) where the amount standing to the credit of the relevant Worker's Account at the time of the Severance Event is less than or equal to the Prescribed Amount, an amount up to and including the amount standing to the credit of the relevant Worker's Account, calculated at the time of the Severance Event and payable as the Trustee determines from time to time; or
- (b) where the amount standing to the credit of the relevant Worker's Account at the time of the Severance Event is greater than the Prescribed Amount:
- (i) an amount up to and including the Prescribed Amount, calculated at the time of the Severance Event and payable as the Trustee determines from time to time; plus
- (ii) an amount up to and including the balance of the amount standing to the credit of the relevant Worker's Account, calculated at the time of the Severance Event and payable as follows or as the Trustee determines from time to time:
- (A) where the Worker's Severance Payment is payable due to the Worker's Retirement, the Worker's death or the Worker's termination due to Permanent Incapacity, upon the occurrence of the Severance Event; or
- (B) where the Worker's Severance Payment is payable for any other reason whatsoever, upon the occurrence of the following:
- (1) 4 weeks after the Severance Event where the Worker has remained unemployed for 4 consecutive weeks commencing on the day after the occurrence of the Severance Event; or
- (2) 39 weeks after the Severance Event where the Worker has ceased to be employed either in the Industry or by a Member, or has been promoted to an above-award position and remained in that position, for 39 consecutive weeks commencing on the day after the occurrence of the Severance Event,

and a corresponding debit will be made to the Worker's Account.

30. Clause 1 of the trust deed 'Definitions and interpretation' provides the following relevant definitions:

Severance Event means any DTA Severance Event or VTA Severance Event.

DTA Severance Event means the termination of the Worker's employment for any reason whatsoever, excluding the voluntary termination of the Worker's employment prior to the Worker attaining Pension Age

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VTA Severance Event means the voluntary termination of the Worker's employment, or termination due to death or Permanent Incapacity.

Prescribed Amount means

- (a) Where the payment is made in consequence of a VTA Severance Event, the amount standing to the credit of the relevant Worker's Account, calculated at the time of the Severance Event or such other amount as may be determined by the Trustee from time to time for the purposes of this definition; or
- (b) Where the payment is made in consequence of a DTA Severance Event, and:
 - (i) The relevant Severance Event is the termination of the Worker's employment by reason of a genuine redundancy – the tax free amount of a genuine redundancy payment calculated in accordance with subsection 83-175(3) of the *Income Tax Assessment Act 1997* (Cth) or such other amount as may be determined by the Trustee from time to time for purposes of this definition; or
 - (ii) The relevant Severance Event is the termination of the Worker's employment for a reason other than a genuine redundancy, the sum of \$10,000 or such other amount as may be determined by the Trustee from time to time for the purposes of this definition; or
- (c) In relation to a particular Division, where the Division Rules provided otherwise, the amount described as the prescribed amount in the Division Rules.

31. It is clear from the wording of the proposed amendments to the trust deed that the entitlement to the Payment (of a Prescribed Amount) crystallises only upon the occurrence of the relevant Severance Event.

32. The trust deed defines a Severance Event as any of the following:

- for DTA Workers – termination of employment for any reason, excluding voluntary termination prior to Pension Age
- for VTA Workers – voluntary termination of employment, or termination due to death or Permanent Incapacity.

33. It is clear from this that any Severance Event represents the termination of employment of the relevant Worker.

34. There is no entitlement to a Severance Payment without the preceding occurrence of a Severance Event. In other words, but for the termination of their employment, the Worker would have no entitlement to a Severance Payment from the Scheme, as a Severance Event would not have occurred. The termination of the Worker's employment is the necessary precondition for the Severance Payment to be made or received.

35. As such, there exists a causal connection between the termination of employment and the receipt of the Severance Payment by the Worker.

36. As such, Severance Payments made to Workers are received by those Workers 'in consequence of' the termination of their employment.

Payments of Additional Amount components

37. As can be seen from Clause 1 of the trust deed, the Prescribed Amount for VTA Workers will be the entire amount standing to their credit in their Worker's Account, or such other amount as is determined by the Trustee from time to time.

38. Accordingly, there should be no Additional Payments made to VTA Workers, unless the Trustee determines an alternative Prescribed Amount.

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39. Under Clause 9.2(b) of the trust deed, if certain additional conditions are met after a Worker's employment is terminated, that Worker is entitled to payment of an Additional Payment from the Scheme, equal to the balance standing to their credit in their Worker's Account.

40. The Worker's entitlement to the Additional Payment is dependent upon 2 conditions being met:

- the Worker's employment being terminated, and
- events stipulated under Clause 9.2(b) occurring.

41. For an Additional Payment to be made, the termination of the Worker's employment still has to occur – no Severance Payment is made because of the other events occurring, without termination first taking place.

42. As such, the necessary causal connection exists between the termination and the ultimate payment of the Additional Amount – the Severance Payment follows as a result of the termination of the Worker's employment.

43. In other words, but for the termination of their employment, the Worker would have no entitlement to an Additional Payment and the relevant Additional Payment would not have been received by the Worker.

44. Therefore, Additional Payments made to DTA Workers and VTA Workers are received by Workers 'in consequence of' the termination of their employment.

Payment received no later than 12 months after termination

45. Paragraph 82-130(1)(b) requires that the payment must be received no later than 12 months after the termination of employment.

46. Subsection 82-130(4) provides that the time limit does not apply, where the recipient is covered by a determination made by the Commissioner under subsections 82-130(5) or (7).

47. Subsection 82-130(5) states that the Commissioner may determine paragraph 82-130(1)(b) does not apply if the time between the termination and the payment is reasonable, having regard to the following:

- the circumstances of the termination, including any dispute in relation to it
- the circumstances of the payment
- the circumstances of the person making the payment
- any other relevant circumstances.

48. Subsection 82-130(7) states that the Commissioner may determine, by legislative instrument, that paragraph 82-130(1)(b) does not apply to a class of payments, or a class of recipients of payments.

49. We have issued *Income Tax: Employment Termination Payments Redundancy Trusts (12 month rule) Determination 2019* (Determination) in relation to this matter.

50. Section 5 of the Determination provides that paragraph 82-130(1)(b) does not apply to a 'late termination payment', as defined by that instrument, if:

- (a) the person whose employment was terminated was a member of a redundancy trust and an application for the payment was lodged with the trustee of the redundancy trust within 12 months of the person becoming entitled to the payment under the terms of the trust deed of the redundancy trust; and

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- (b) the payment was made by the trustee of the redundancy trust:
- (i) as soon as practicable after receipt of the application for payment; or
 - (ii) no later than 2 years after the termination of the person's employment that led to the entitlement;
- whichever occurs earlier.

51. Section 6 of the Determination further provides that 'redundancy trust' means:

- (a) a fund that:
- (i) is endorsed as an approved worker entitlement fund under subsection 58PB(3) of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA); or
 - (ii) the entity that operates the fund is endorsed for the operation of the fund under subsection 58PB(3A) of the FBTAA; or
- (b) a fund that, just before 28 June 2011, was an approved worker entitlement fund under subsection 58PB(2) of the FBTAA.

52. The trust deed contains the following relevant definitions:

Approved Worker Entitlement Fund means an approved worker entitlement fund within the meaning of section 58PB of the Fringe Benefits Tax Assessment Act 1986.

Scheme means the trust created under this Deed and known by such name as is determined in accordance with Clause 12.

Reciprocating Scheme means:

- (a) any Approved Worker Entitlement Fund; or
- (b) any fund that was an Approved Worker Entitlement Fund at the time contributions were made to it,

as may from time to time be approved by the Trustee.

53. The Scheme is an approved worker entitlement fund. As such, it meets the definition of 'redundancy trust' under the Determination.

54. This means that subsection 82-130(1) will not apply to a late termination payment, as defined under the Determination, if

- an application is lodged with the trustee of the Scheme within 12 months of the Worker becoming entitled to the Payment under the terms of the Scheme's trust deed, and
- the payment is made by the Trustee as soon as practicable after receipt of the application for payment, or no later than 2 years after the termination of the Worker's employment that led to the entitlement to the Payment, whichever occurs earlier.

55. We are willing to accept these assumptions, so that subsection 82-130(1) does not apply to a Payment, where it is made later than 12 months after the termination of employment.

Not a payment mentioned in section 82-135

56. Section 82-135 provides that certain payments are not ETPs, including:

- unused annual leave and unused long service leave payments

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- genuine redundancy and early retirement scheme payments up to the tax free limit
- capital payments for personal injury as compensation for an inability to be employed.

57. In this case, the applicant has asked us to accept that, before making a Severance Payment, they will satisfy themselves, on a reasonable basis, upon the receipt of sufficient evidence, that the Worker's employment has been terminated in the manner claimed, whether that be voluntary termination, death, permanent incapacity, or genuine redundancy.

58. As per the definition of Prescribed Amount component in Clause 9.1 of the trust deed, depending on whether the relevant Worker is a VTA Worker, or a DTA Worker, and referencing the relevant Severance Event, Prescribed Amounts will only be received by Workers upon voluntary termination, death, permanent incapacity, or genuine redundancy.

59. Under the terms of the trust deed, Payments made to Workers are not excluded by section 12-35 of Schedule 1 to the *Taxation Administration Act 1953*, (with the exception of the Prescribed Amount payable to DTA Workers upon termination due to genuine redundancy).

60. Payments of Additional Amount components differ from Prescribed Amounts only in that certain further requirements have to be met, in order for the Worker to be entitled to such a payment.

61. Accordingly, all Severance Payments made to Workers (both Prescribed Amounts and Additional Amounts) will be considered to be ETPs, (with the exception of tax-free amounts of genuine redundancy payments made to DTA Workers, which are discussed in paragraph 63 of this Ruling).

62. ETPs have up to 3 tax treatments:

- tax free, if part of the payment is for invalidity, or work done before 1 July 1983
- concessional tax up to a certain limit, known as a cap
- taxed at the top marginal rate of 47% on the amount over the relevant cap.

Genuine redundancy payments

63. Section 82-135 provides that certain payments are not ETPs.

64. Paragraph 82-135(e) excludes from an ETP the part of a genuine redundancy payment worked out under section 83-170.

65. Section 83-175 defines a genuine redundancy payment. The section identifies:

- the conditions that must be satisfied for at least part of a payment to be treated as a genuine redundancy payment
- how to work out what amount of the payment is a genuine redundancy payment, and
- what payments are excluded from being a genuine redundancy payment.

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66. A payment made to an employee is a genuine redundancy payment if it satisfies all the conditions set out in section 83-175. This section states:

- (1) A ***genuine redundancy payment*** is so much of a payment received by an employee who is dismissed from employment because the employee's position is genuinely redundant as exceeds the amount that could reasonably be expected to be received by the employee in consequence of the voluntary termination of his or her employment at the time of the dismissal.
- (2) A ***genuine redundancy payment*** must satisfy the following conditions:
 - (a) the employee is dismissed before the earlier of the following:
 - (i) the day the employee reached pension age;
 - (ii) if the employee's employment would have terminated when he or she reached a particular age or completed a particular period of service—the day he or she would reach the age or complete the period of service (as the case may be);
 - (b) if the dismissal was not at arm's length—the payment does not exceed the amount that could reasonably be expected to be made if the dismissal were at arm's length;
 - (c) at the time of the dismissal, there was no arrangement between the employee and the employer, or between the employer and another person, to employ the employee after dismissal.
- (3) However, a ***genuine redundancy payment*** does not include any part of a payment that was received by the employee in lieu of superannuation benefits to which the employee may have become entitled at the time the payment was received or at a later time.

67. As can be seen in paragraph 66 of this Ruling, for a payment to be a genuine redundancy payment, subsection 83-175(1) requires:

- the payment to be received by an employee who is dismissed because their position is genuinely redundant, and
- the payment to exceed the amount that could reasonably be expected to be received by the employee if their employment was terminated voluntarily at that time.

68. For a genuine redundancy payment to exist, both elements need to be satisfied.

69. We have issued Taxation Ruling TR 2009/2 *Income tax: genuine redundancy payments*, which outlines the requirements to be satisfied before any payment made to a person whose employment is terminated qualifies for treatment as a genuine redundancy under section 83-175.

70. Paragraph 11 of TR 2009/2 states:

There are four necessary components within this requirement:

- The **payment** being tested must be **received in consequence of an employee's termination**.
- That termination must involve the employee being **dismissed from employment**.
- That dismissal must be **caused by the redundancy** of the employee's position.
- The redundancy payment must be made **genuinely** because of a redundancy.

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Component 1: payment 'in consequence of' termination

71. As stated in paragraph 34 of this Ruling, in line with our view as per TR 2003/13, it is considered that none of the relevant Severance Payments would have been made, without the Worker's employment first having been terminated.

Component 2: 'dismissal' from employment

72. Our view is that a genuine redundancy can only arise where there is no suitable job available for the employee with the employer, meaning that he or she must therefore be dismissed.

73. Dismissal requires a decision to terminate employment at the employer's initiative without the consent of the employee.

74. Determining whether an employee has consented to their termination requires an assessment of the facts and circumstances of each case.

Component 3: dismissal caused by 'redundancy'

75. Section 83-175 further requires that the dismissal be caused by redundancy of the employee's position, and not for some other reason.

76. The reason for a dismissal is to be established in light of the facts and circumstances of each case.

Component 4: 'genuine' redundancy

77. Contrived cases of redundancy will not meet the conditions in section 83-175. Whether a redundancy is 'genuine' is determined on an objective basis.

78. The fact that an employer and employee have an understanding that a payment on termination is caused by redundancy or that the employer treats the payment as a redundancy payment for tax purposes does not of itself establish genuine redundancy.

79. Regarding components 2, 3 and 4, the applicant has requested that we make an assumption that the Trustee will, before making a Severance Payment, receive sufficient evidence to satisfy itself, on a reasonable basis, that their employment has been terminated in the manner claimed, including where that claim is in relation to a genuine redundancy.

80. We agree to make this assumption.

Additional requirements

81. In addition to the basic requirement for a genuine redundancy payment found in subsection 83-175(1), the further conditions for genuine redundancy payment treatment in subsections 83-175(2) and (3) require that:

- the dismissed employee is not older than the specified age limits
- the termination is not at the end of a fixed period of employment
- the actual amount paid is not greater than the amount that could reasonably be expected had the parties been dealing at arm's length, in the event that

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the employer and employee are in fact not dealing at arm's length in relation to the dismissal

- there is no arrangement entered into between the employer and employee or the employer and another entity to employ the dismissed employee after the termination, and
- the payment is not in lieu of superannuation benefits.

Age-based limits

82. Under paragraph 83-175(2)(a), an employee must be less than the pension age at the time of dismissal for a redundancy payment to qualify as a genuine redundancy payment.

83. The trust deed defines 'Pension Age' as having the meaning provided by section 995-1.

84. Pension age is defined in section 995-1 as follows:

pension age has the meaning given by subsection 23(1) of the *Social Security Act 1991*.

85. Subsection 23(1) of the *Social Security Act 1991* defines pension age as 'having the meaning given by subsections (5A), (5B), (5C) and (5D)'.

86. Subsections 5A, 5B, 5C and 5D of the *Social Security Act 1991* provide that the pension age for both men and women, born on or after 1 January 1957, is 67 years of age.

87. The applicant has requested that we make an assumption that the Trustee will, prior to making a Severance Payment, satisfy itself on a reasonable basis of the Worker's age.

88. We agree to make this assumption.

Not the end of a particular period of employment

89. Under subparagraph 83-175(2)(a)(ii), a payment made at the end of a fixed period of employment cannot normally be a genuine redundancy payment.

90. The applicant has asked us to make an assumption that there exists no agreement or arrangement under which the Worker's employment would be terminated when they completed a particular period of service.

91. We agree to make this assumption.

Arm's length amount

92. This condition only needs to be met if it is established that the employer and employee are not dealing at arm's length in relation to the dismissal.

93. The applicant has asked us to make an assumption that the Worker and the Employer dealt with each other at arm's length in relation to the termination of the Worker's employment, or otherwise the Payment does not exceed the amount that could reasonably be expected to be made if the termination was at arm's length.

94. We agree to make this assumption.

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No stipulated arrangement to employ

95. Under paragraph 83-175(2)(c), an arrangement to employ an employee after his or her termination prevents a dismissal giving rise to a genuine redundancy payment if that arrangement is entered into between either:

- the employer and the dismissed employee, or
- the employer and another entity.

96. The applicant has asked us to make an assumption that there exists no agreement or arrangement to employ the Worker after the termination of their employment.

97. We agree to make this assumption.

Payments not in lieu of superannuation benefits

98. Under subsection 83-175(3), a payment is not a genuine redundancy payment to the extent that it is made in place of superannuation benefits due at the time or in the future.

99. The applicant has stated that, under the trust deed, the Prescribed Component is not paid in lieu of superannuation benefits to which the Worker may have become entitled at the time the payment was received or at a later time.

Amount of Severance Payment

100. The other requirement under subsection 83-175(1) is that the payment exceeds the amount that could reasonably be expected to be received by the employee if their employment was terminated voluntarily at that time.

101. In order therefore for subsection 83-175(1) to apply, it must be demonstrated that the payment is, or includes, an amount which exceeds what the Worker could reasonably be expected to receive in consequence of the voluntary termination of their employment at the time of dismissal.

102. We consider the application of subsection 83-175(1) in TR 2009/2.

103. The term 'voluntary termination' as utilised in subsection 83-175(1) is not defined in the ITAA 1997. The terms 'dismissal' and 'redundancy' in the context of the subsection are discussed in TR 2009/2 at paragraphs 18 and 25, however, where it is stated:

18. Dismissal is a particular mode of employment termination. It requires a decision to terminate employment at the employer's initiative without the consent of the employee. This stands in contrast to employment that is terminated at the initiative of the employee, for example in the case of resignation.

...

25. An employee's position is redundant when an employer determines that it is superfluous to the employer's needs and the employer does not want the position to be occupied by anyone. Accordingly, it is fundamentally the employer's decision that a position is redundant. On occasion the decision may be unavoidable due to the circumstances surrounding the employer's operations.

104. Having regard to the ordinary definitions of 'voluntary' and 'termination', it could be said that 'voluntary termination' refers to a member ending their employment because of their own choice or on their own accord. Most notably, this would include resignation and retirement.

Status: **not legally binding**

105. Accordingly, what must be determined in this case is whether a payment, or part thereof, made by the Trustee to a Worker, due to genuine redundancy, is in excess of what would be paid under voluntary termination at the time of dismissal, such that the payment or part thereof should be treated as a genuine redundancy payment under subsection 83-175(1).

106. The calculation of the amount payable under voluntary termination needs to have regard to the terms of the trust deed, any relevant industrial award, any relevant workplace agreement or any other terms or conditions which could provide a basis for a payment under a voluntary termination.

107. The applicant has asked us to make an assumption that the respective enterprise agreements under which each of the Workers is employed, does not entitle those Workers to any payments upon the voluntary termination of their employment, other than, and in addition to, an entitlement to a payment in respect of a notice period, the payment of accrued unpaid entitlements, or both (for example, accrued annual leave).

108. We are willing to make this assumption.

109. The Trustee has submitted that the amount could reasonably be expected to be received by a DTA Worker in consequence of the voluntary termination of their employment is nil, as DTA Workers are not entitled to receive a Severance Payment due to the voluntary termination of their employment.

110. The trust deed refers to payments only being made as a result of a Severance Event. In the case of a DTA Worker, a Severance Event is defined as 'the termination of the Worker's employment for any reason whatsoever, excluding the voluntary termination of the Worker's employment prior to the Worker attaining Pension Age'.

111. As such, it is clear that the amount that could reasonably be expected to be received by a DTA Worker, in consequence of the voluntary termination of their employment, is nil.

112. Under Clause 10 of the trust deed, DTA Workers may elect to become VTA Workers, as follows:

10 Worker may elect to be a VTA Worker

10.1 A Worker may, at any time, by written notice to the Trustee in such form (if any) as the Trustee approves, elect to become a VTA Worker.

10.2 An election made under Clause 10.1 is irrevocable.

113. However, from the date of the election, such Workers (as they are now VTA Workers) would only be entitled to a Severance Payment upon the voluntary termination of their employment, a VTA Severance Event being 'the voluntary termination of the Worker's employment, or termination due to death or Permanent Incapacity'. Such Workers have no entitlement to a payment on genuine redundancy.

114. Similarly, if a Worker's employment is terminated due to a genuine redundancy, their entitlement to a Severance Payment (and the amount of that Severance Payment) will be determined by whether they are a DTA Worker or VTA Worker at that point in time, as follows:

- If the Worker is a DTA Worker, they will be entitled to a Severance Payment equal to the tax free amount calculated under subsection 83-175(3).
- If the Worker elected to become a VTA Worker, they will not be entitled to a Severance Payment.

Status: **not legally binding**

115. As DTA Workers are not entitled to a Severance Payment in the case of voluntary termination, but are entitled to a Severance Payment due to genuine redundancy, the amount they receive is in excess of the amount they could reasonably expect to receive upon the voluntary termination of their employment.

116. As such, the amount of this payment (up to the tax-free cap) is not assessable income, nor exempt income, of the Worker.

Note: Where the DTA Worker has reached Pension Age, the payment will be taxable as an ETP, as the requirements of a genuine redundancy would not have been met.

Status: **not legally binding**

References

Related Rulings/Determinations:

TR 2003/13; TR 2009/2

Legislative references:

- TAA Sch 1 12-35
- TAA Sch 1 12-85
- ITAA 1997 Subdiv 50-A
- ITAA 1997 82-130
- ITAA 1997 82-130(1)
- ITAA 1997 82-130(1)(b)
- ITAA 1997 82-130(4)
- ITAA 1997 82-130(5)
- ITAA 1997 82-130(7)
- ITAA 1997 82-135
- ITAA 1997 82-135(e)
- ITAA 1997 83-170
- ITAA 1997 83-170(3)
- ITAA 1997 83-175
- ITAA 1997 83-175(1)
- ITAA 1997 83-175(2)

- ITAA 1997 83-175(2)(a)
- ITAA 1997 83-175(2)(a)(ii)
- ITAA 1997 83-175(2)(c)
- ITAA 1997 83-175(3)
- ITAA 1997 995-1
- Social Security Act 1991 5A
- Social Security Act 1991 5B
- Social Security Act 1991 5C
- Social Security Act 1991 5D
- Social Security Act 1991 23(1)

Cases relied on:

- *Reseck v Commissioner of Taxation (Cth)* [1975] HCA 38; 133 CLR 45; 75 ATC 4213; 5 ATR 538; 49 ALJR 370

Other references:

- Income Tax: Employment Termination Payments Redundancy Trusts (12 month rule) Determination 2019
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ATO references

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