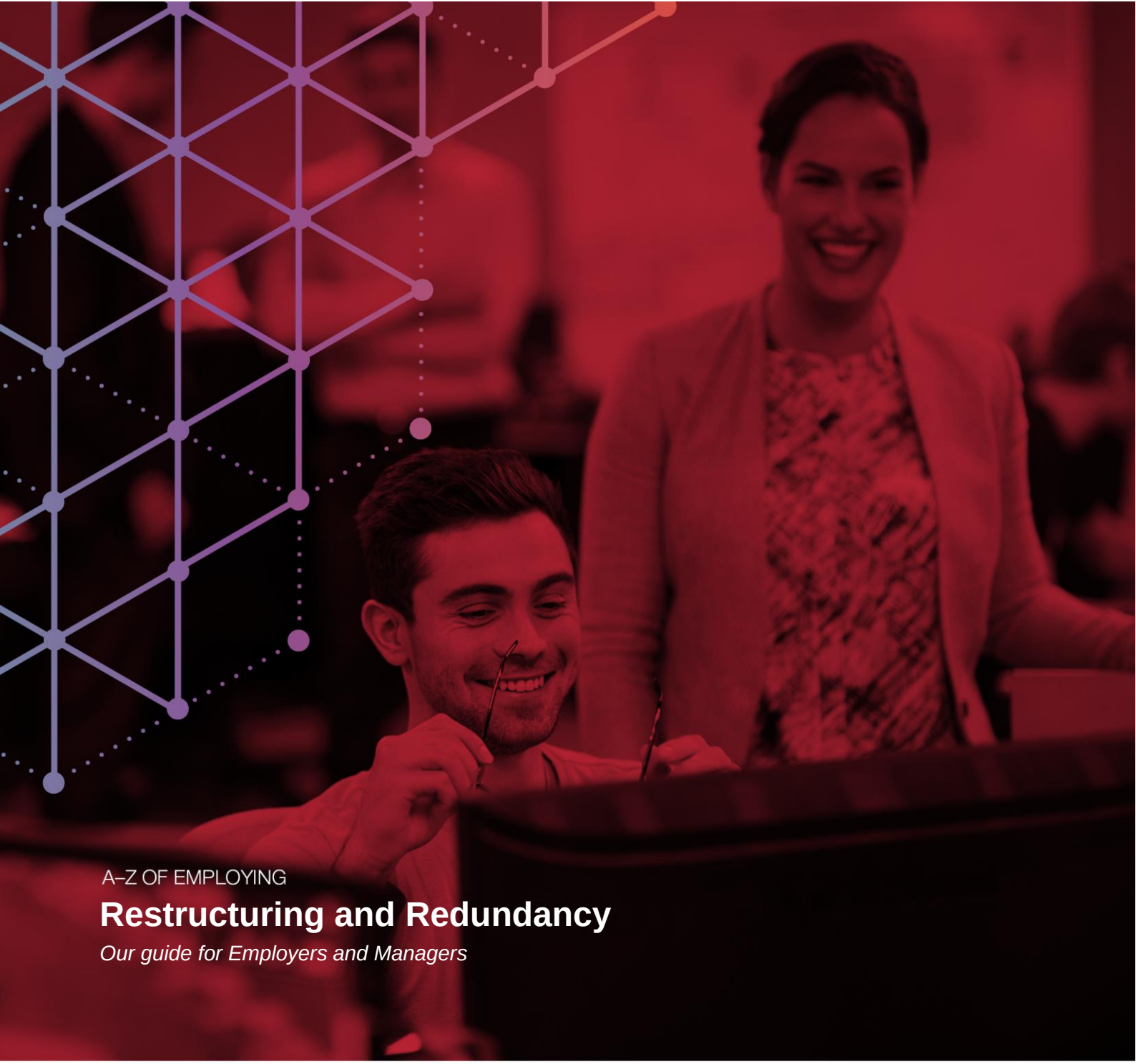

A–Z OF EMPLOYING

Restructuring and Redundancy

Our guide for Employers and Managers

SUPPORTING, FACILITATING & REPRESENTING BUSINESS

BusinessCentral

Restructuring and Redundancy

Our guide for Employers and Managers

Contents

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BusinessCentral

Restructuring and Redundancy

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Overview

Redundancy occurs because a position is surplus to the needs of the employer.

Restructuring is the reorganisation of the business or a specific role to meet the changing needs of the company.

Redundancy may result from restructuring or re-organisation of the business, or when an employer transfers, sells or contracts out whole or part of its business.

Using redundancy to mask any other reason for terminating an employee's employment (e.g. poor performance) is not tolerated by the Employment Relations Authority or Court.

In the case of a company restructure that impacts on an employee's position, if a reasonable person would consider that there is a sufficient difference between their old positions and the new position that results from the restructure, then the employee's former position is redundant.

Employers are entitled to manage and organise their businesses and to determine which positions will be selected for redundancy as long as there are genuine reasons.

A redundancy must be implemented in a procedurally fair manner resulting from a restructuring process which involves a consultation process with the employees concerned.

Redundancy should be a last option therefore retraining and redeployment should be considered.

If an employment agreement is to provide for compensation for redundancy, then it should include a provision about technical redundancy.

An employee whose employment is terminated on the grounds of redundancy may have a personal grievance based on unjustifiable dismissal, if either the employment was terminated in a procedurally unfair manner, or the redundancy was not genuine, or both.

Certain classes of employees (defined as "vulnerable employees" under the ERA) can transfer to a new employer as of right in a situation where there is a restructure/sale of the business. If the new owner then makes that employee redundant they may become eligible for redundancy compensation.

Introduction

Restructuring and disestablishing roles can be a difficult task for all of the parties that are involved. There are several fundamental principles that are important to understand before conducting a restructuring and redundancy process.

This **A-Z Guide** provides you with grounding in what the courts consider redundancy to mean, and how it should be approached so that you comply with your obligations under the Employment Relations Act 2000.

Company Changes

Internal changes

A change that is made within an organisation, affecting its operations and consequently its employees, is described as an internal change. Internal changes which may give rise to redundancies include:

- The introduction of new technology;

- Rationalisations to increase efficiency (retrenchment);
- Restructuring of business operations;
- Out-sourcing/contracting out;
- Closures.

External changes

A change that is made outside an organisation but which may affect its operations and consequently its employees is an external change. The essence of the change being described here is control; when external changes are made to an organisation there is a change in who or what controls it. Not all external changes to an organisation necessarily result in redundancy.

Employees are not chattels and cannot be transferred from one employer to another. The right of an employee to choose his or her employer is a fundamental principle of the common law that only Parliament can legislate away.

Incorporated companies

An incorporated company under the Companies Act 1993 has a separate legal personality from its shareholders (owners), and the legal capacity to undertake business in its own right.

The ownership of shares, subject to a company's constitution, may be transferred or sold. When shareholdings (shares in a company) are bought and sold or transferred, all that changes in respect of the incorporated company is its ownership, not its legal personality. The shareholding of an incorporated company may change without the employment of its employees being affected. The incorporated company, as a separate legal entity, remains the same.

There is a distinction between the sale and/or transfer of an incorporated company's shareholdings and the sale or transfer of its business. An incorporated company, may sell a part or the whole of its business to another entity. If the employment of employees by that incorporated company is subject to change because of any transaction then it is possible that redundancies may arise.

If an incorporated company separates a part of its business and transfers that business to another incorporated company (usually a subsidiary or a related company which has a shareholding in common) or sells it to another unrelated entity, then the employees of the original incorporated company who are employed in positions connected with that business will be affected by the sale or transfer of that business.

If employees' positions become superfluous to the original incorporated company upon the sale or transfer of a part or whole of its business, then those positions will be redundant. The fact that redundant employees are immediately subsequently employed by the new entity does not alter the fact that their positions with the original incorporated company are redundant this is what is commonly referred to as technical redundancy.

Amalgamations

Two or more companies (that are registered under the Companies Act 1993) may amalgamated and continue as one company, which may be one of the amalgamating companies, or may be a new company. The effect of amalgamation is that the amalgamated company succeeds to all the liabilities

and obligations of each of the amalgamating companies. When companies are amalgamated, the employment of their employees will not change in spite of a change in the legal personality of the employer.

Merger

Two or more companies may merge and form a new company. A merger may be or may not be an amalgamation; the original companies may continue to exist but the business of each company is transferred to the new company. Therefore the employment of employees of the former organisation may not continue with the new organisation.

Sole-traders

If a self-employed person operating as a sole-trader is an employer of employees and the employer sells a part or the whole of its business to another entity, then the positions the employees are employed in will become superfluous to the sole-trader employer. Even if the entity that purchases the sole-trader's business immediately or subsequently employs the sole-trader's former employees on the same terms and conditions of employment, the employees' positions with the sole-trader will be redundant.

Redundancy V Restructure

Significant change to the role

The key difference between whether a role is restructured or made redundant is whether or not there is a significant change to the role.

If a restructure occurs within an organisation and a position is affected, it will usually be necessary to determine whether or not that change to the role is substantial in order to determine if the position is redundant. If the change between a former and new position is substantial, then it is presumed that the former position has been disestablished and a new position created. Therefore the original position would be redundant.

However, if the new position is substantially similar to that which it replaces, then it is presumed that there is no redundancy.

When considering whether a position is substantially similar a number of factors, including but not limited to pay, location, work and the personal circumstances of the employee need to be taken into account. The objective test (approved by the Court of Appeal in *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597 and *McKenna v AFFCO NZ Ltd* [2001] 1 ERNZ 75) is:

> *"Would a reasonable person, taking into account the nature, terms, and conditions of each position and the characteristics of the respondent, consider that there was sufficient difference to break the essential continuity of the employment?"*

In *Kreider v Vodafone New Zealand Ltd* [2013] NZERA Auckland 189, Vodafone sought to disestablish the role of General Counsel and create a new Legal Director role. Vodafone considered the two roles to be significantly different therefore making Mr Kreider redundant. The Authority considered the

relevant skills and experience alleged to be essential to the new Legal Director role, including the volume of work, variety of work, and management skills. The Authority concluded that the two roles were "*the same or very similar in fact and degree*". Consequently, an order was made by the Authority for the appointment of Mr Kreider into the Legal Director role.

Redundancy

The Employment Relations Act 2000 does not provide a definition of "redundancy" or "redundant" although the term does appear in section 4.

In *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601, the Court of Appeal stated:

> *"Redundancy is a special situation. The employees affected have done no wrong. It is simply that in the circumstances the employer faces their jobs have disappeared and they are considered surplus to the needs of the business."*

However, many employment agreements contain a definition of redundancy. When this is the case, determining whether or not an employee is redundant necessarily involves an interpretation of the employment agreement that is applicable to the employee's employment.

In determining whether or not an employee's employment is redundant the focus is on the position, not the person.

Restructure

A definition of "restructuring" can be found in the Employment Relations Act. Restructuring in relation to an employer's business means:

Entering into a contract or arrangement under which the employer's business (or part of it) is undertaken for the employer by another person; or

Selling or transferring the employer's business (or part of it) to another person

However, the term "restructuring" is often used in practice to refer to any structural or contractual change to an employee's employment.

Procedure

Sample Procedure

Below is a sample process that could be used when considering disestablishing a role or making changes to roles and structures due to business needs. The employer should meet with the employee to discuss that the business is looking at restructuring.

Before the meeting:

- Invite the employee to a formal meeting with the chance for the employee to bring a support person or a representative or both.
- The invite letter should outline the purpose of the meeting, the date and time of the meeting and the proposal

- The proposal should state clearly what the business changes are, the requirement of the changes, the likelihood of this affecting the employees' current position and the likelihood of redeployment or redundancy
- Providing the employee with any other information relevant to the restructure so that the employee has a chance to review this and come up with any queries before the first meeting

At the first meeting:

- Discuss the proposal
- Tell the employee as much as possible about the situation, but never give the impression that a decision has been made regarding the restructure or redundancy.
- A restructure and a redundancy cannot be predetermined and options need to be explored and considered before making any decisions
- The discussion should be reasonably extensive and cover the reasons for the circumstances, which have arisen, and what avenues the employer has explored to address the situation or avoid changes to the present structure.
- The possibility of redeployment or/and redundancy should be raised as one option at this meeting.
- Give the employee a copy of any information relating to the proposal and ask for their comments and feedback on this.
- Arrange a further meeting with the employee (and his/her representative) to discuss his/her ideas.

After the meeting:

- Give the employee the opportunity to give the matter serious consideration (this may involve a period of several days) and request that he/she meet with you again to explore any alternatives he/she has thought of.

At the second meeting

- Ask the employee for his/her input – i.e. opinions, ideas, views and alternatives to the possible reorganisation.
- Give serious consideration to all the points raised by the employee and reassess the situation
- Looking at the business structure and what options may or may not suit may help to assist when determining whether a redundancy is necessary.
- Arrange another meeting with the employee (and his/her representative)

At the third meeting

- Inform the employee of your decision.
- If there is chance of redeployment this would also be discussed.
- In some circumstance's selection criteria may need to take place. This is when roles have been reduced, however several employees may have the same skillsets. They would need to reapply for this role (selection criteria is discussed below).
- If you have decided that the position will be made redundant, discuss the process that took place, what was considered in the process and if there was or was not chance to be redeployed

this would be discussed too. You can also discuss any assistance that the employer is prepared to provide, including:

- When the position will become surplus, i.e. when the redundancy would take place (check whether the employment agreement provides for any specific notice in the case of redundancy);
- What redundancy payment can be paid (if this is not dealt with in the employment agreement);
- Assistance with seeking new employment – e.g. assistance in preparing a resume; allowing time off to attend interviews; providing references, etc.
- Assistance with dealing with impact of the decision – e.g. ability of employee to come back at any time and talk about the issues; offering counselling and support services.

Give the employee an opportunity to discuss these issues, to think about them further if necessary and to come back to you on these. Ensure that that any issues that remain outstanding or unresolved are followed up. Remember to take notes of all meetings and conversations with the employee either during or after, but preferably during the meeting or conversation.

Good Faith

If the agreement specifies a process or prescribes what must be considered in any decision that is to be taken, then you must abide by that, unless you and your employees have agreed to vary the agreement.

The fact that an applicable employment agreement specifies processes and procedures that are to apply to a situation in which redundancies may arise, does not limit the application of the good faith provisions of the Employment Relations Act 2000.

The Employment Relations Act 2000 good faith provisions provide some guidance for employers on their obligations in redundancy situations. It stipulates that parties to employment relationships must deal with each other in good faith. The duty of good faith applies (amongst other matters) to:

- A proposal by an employer that might impact on the employer's business, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employers business
- Making employees redundant

The parties to an employment relationship have to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are among other things responsive and communicative. In addition where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or her employees the duty of good faith requires an employer to provide employees with:

- Access to information relevant to the continuation of the employees' employment, about the decision, and
- An opportunity to comment on the information to their employer before a decision is made.

However employers are not required to provide an employee, whose position is subject to a redundancy proposal, with access to information relevant to the continuation of their employment where:

- The information is about an identifiable individual and providing access to that information would involve the unwarranted disclosure of the affairs of that individual

- The information is subject to a statutory requirement to maintain confidentiality
- It is necessary, for any other good reason, to maintain the confidentiality of the information (for example, to avoid unreasonable prejudice to the employer's commercial position)

Where information relevant to the continuation of the employee's employment is contained in a document that also contains confidential information, the employer must not refuse to provide access. Modifications must be made to the document to ensure the employee concerned can access the information without breaching confidentiality,

A penalty for a breach of the requirement to act in good faith can be applied if the failure to act in good faith was deliberate, serious and sustained or was intended to undermine the employment relationship. The penalty is up to $10,000 for an individual or $20,000 for a company.

Procedural fairness

Procedural fairness dictates that where an employee's position is to be made redundant the employee should be given advance notice of any meeting which is to be held in relation to that so that the employee can prepare his or her response and have the support person or representative of his or her choice. Furthermore, the outcome should not be pre-determined. Therefore, after informing employees of the current situation, redundancy should be put to them as a proposal for consideration. The decision to make a position redundant should not be pre-determined. Procedural fairness does not mean that counselling or career guidance must be offered in any redundancy situation, though it must be considered and is recommended.

Advance notice

Employees are entitled to advance notice of meetings you hold with them on an individual basis, whether these meetings are for communicating decisions of selection for redundancy or applying selection criteria to individual employees. When an employee is to be invited to a meeting to discuss any matter in relation to redundancy that concerns the employee as an individual, the employee should be given advance notice of that.

Advance notice should include details of:

- The reason for the meeting and the matters that will be covered; and
- Who will be present at the meeting; and
- That the employee may be accompanied by a support person or representative.

Advance notice is important in respect of redundancy situations; it allows an employee to prepare in order to be able to make any submissions on their own behalf and for the employee to summon any assistance that he or she considers appropriate.

Representation

If an employee is to be invited to a meeting to discuss any matter in relation to redundancy that concerns the employee as an individual, then employee should be given the opportunity to bring the support person or representative of their choice. A representative may make representations on behalf of the employee that assists the employee to understand the process being applied to him or her, or clarifies the employer organisation's position in respect to the employee.

When an adverse decision is delivered to an employee the presence of a support person or representative can be very important, particularly if the employee is shocked and/or upset by the

decision. At the very least, this person can ensure the personal safety of a distressed employee until the employee is united with his or her colleagues, friends, or family.

Counselling and EAP

There is no absolute obligation to provide counselling or career guidance in a redundancy situation, but the employer may feel it an appropriate action. It is not essential to make provision for counselling or any associated services in every redundancy situation, unless it would be a breach of an employment agreement not to. It is recommended that you do offer this however.

If provision for any of these types of services is made, then it is important to ensure that employees affected by redundancy are encouraged to avail themselves of such services. The failure to provide access to counselling and associated services will not make a genuine redundancy less genuine; however it may lead to a finding that an employee's dismissal was procedurally unjustified.

Best Practice

In addition to the points made so far, in handling any potential redundancy situation:

- Tell your employee(s) as much as possible, as soon as possible, about the situation;
- Do not predetermine the outcome, the possibility of redundancy should be put to employees as a proposal for consultation;
- Consider all alternatives to redundancy that you are bound to, or have agreed to consider;
- Provide your employee(s) with the opportunity to discuss the impact of any decision;
- Ensure any outstanding issues are resolved;
- Keep comprehensive diary notes of all meetings and events related to the process.

Consultation

Consultation involves discussing a proposal for restructure or redundancy with employees *before* a decision is made. Employees should never be told they are being made redundant without first having had an opportunity to provide feedback and alternatives for consideration. The Employment Court has offered the following propositions on the meaning of consultation:

- The word "consultation" does not require that there be agreement.
- On the other hand it clearly requires more than mere prior notification.
- If there is a proposal to make a change, and such change is required to be preceded by consultation, it must not be made until after consultation with those required to be consulted. They "must know what is proposed before they can be expected to give their views".
- This does not involve a right to demand assurances, but there must be sufficiently precise information given to enable the person to be consulted to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- The requirement for consultation is never to be treated perfunctorily or as a mere formality. The person or body to be consulted must be given a reasonably ample and sufficient opportunity to express views or to point to problems or difficulties: "They must be free to say what they think".
- Consultation must be allowed sufficient time.
- Genuine effort must be made to accommodate the views of those being consulted.
- Consultation is to be a reality, not a charade.

- Consultation does not necessarily involve negotiation towards an agreement although this not uncommonly can follow as the tendency in consultation is to seek at least consensus.
- Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses, and then deciding what will be done.
- The party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh.
- There are no universal requirements as to form or as to duration of consultation.
- Consultation cannot be equated with negotiation in the sense of a process which has, as its object, arriving at agreement.

Consideration

If an employer has undertaken to consult with its employees about changes to its business, then consultation must involve consideration of the viewpoints or proposals put forward by employees. This consideration does not mean that the parties will agree on any outcomes. The obligation to consult does not mean that an employer is not entitled to run and organise its business as it sees fit, as the case law shows.

Mass redundancies

The meaning of consultation, and therefore the obligation to consult, is not the same in a mass redundancy situation as it is in an individual redundancy situation. In *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 the Court of Appeal found that where there were too many employees to consult individually, therefore the employer was entitled to determine the most practicable method.

But this does not remove the employer's obligation to follow any consultation obligations specified in the employment agreement. *In New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd* (Unreported) AC 53/02; 30 August 2002; Colgan J, the employer breached the collective agreement, when it failed to "meaningfully consult with the affected employees and their unions" when it insisted on consulting directly with individual staff, and not the unions (which many staff had directly nominated to represent them)

Individual redundancies

If only one or a small number of employees are to be affected by redundancy then the obligation to consult about the impact of that decision on the employee is greater. Whether there is a greater obligation to consult about the initial decision will depend on the circumstances.

Selection criteria

Where it is necessary to make several positions redundant within a larger pool (e.g. 50 per cent of your salespeople), a fair process for selection of the people who are to become redundant is necessary. In regards to selection criteria, the following points are useful to note:

- If you are bound (by an express or implied term of the employment agreement) to apply specified selection criteria to a mass (where two or more identical positions will be affected) redundancy situation, then you will be in breach of that agreement if you do not.
- If you are not bound to apply specified selection criteria to a mass redundancy situation, then you can adopt any selection criteria that best suits the needs of your organisation so long as it is not unfair or unreasonable.
- When you apply selection criteria to individual employees and that process involves an evaluation of the employees' performance to date, employees should be given clear information about the criteria being applied and the opportunity to make representations on their own behalf.

Selection criteria generally falls into two categories – **quantitative and qualitative.**

Quantitative

This is where you have criteria which are based on factual numerical data.

It is objective, easier and less likely to be challenged. However, it does not always deliver the results of the best person for the job.

Some examples of quantitative criteria are:

- Number of absences
- Number of late attendances
- Number of customer complaints
- Length of service

You can use a number of these and combine them together. Although if you use length of service, it is usual for that to be used as a stand-alone criteria (i.e. last on first off).

Qualitative

Some examples of qualitative criteria are:

- Skills to do the job
- Good customer service skills
- Teamwork
- Experience

In using qualitative criteria you need to consider how you will make the required assessment.

Will you do interviews of all staff, make assessments based on your existing knowledge, allow staff to make submissions on themselves, etc? It is best practice to raise these issues in your consultation process. Developing a fair process to select employees to be made redundant is complex and you are advised to seek advice.

Employers should be aware that employees may be entitled to access and comment on the selection criteria and the results formulated before the decision to make an employee redundant is made. The obligation of good faith requires employers to provide employees affected by redundancy with access to any information relevant to the continuation of their employment. However, employers are not required to provide access to information that could prejudice the employer's commercial position or

confidential information about another identifiable individual if doing so would involve an unwarranted disclosure of the affairs of that individual. Employers should seek advice if unsure what information should be disclosed to employee's for comment.

Discrimination

Clearly, in developing and applying selection criteria for redundancy it will be important to be aware of the prohibited grounds of discrimination in employment as provided for in the Human Rights Act 1993 and the Employment Relations Act 2000. The selection of an individual employee for redundancy based on a prohibited ground of discrimination will render the termination of that employee's employment an unjustifiable dismissal.

Refer to the **A-Z Guide** on **Discrimination in Employment** for more information.

Redeployment

Redundancy should be considered a last resort. If an employee's position is selected for redundancy, it may be possible that the employee can be redeployed to another position and the employer should consider redeployment. In some instances this may necessitate some retraining. In other instances, retraining and/or redeployment will not be feasible.

In the *Totara Hills Farm* case, the Employment Court concluded that where an employee could be redeployed to a role for which they had adequate skills and experience, a fair and reasonable employer should offer the new role to the employee, rather than invite the employee to apply for the role.

The Courts apply the same tests to redeployment as are applied to relocations to determine whether the new employment is substantially similar to the former and therefore if the former position is redundant.

Relocations

If an employer decides to relocate its business but make no other changes, then whether the relocation will constitute a redundancy for any of the employer's employees will depend on the circumstances of the situation, including what is expressed in the employment agreement. Other factors to be considered include:

- The distance between the former site and the new site;
- The times of work and working patterns of employees;
- The availability of public transport services;
- Employees' current arrangements for getting to and from work;
- Cost of relocation for employees;
- Provisions in the employment agreement for compensation and/or reimbursement.

Relocation is very contextual, and as a result no hard-and-fast rules exist. For example, a relocation of 60km was considered by the courts to constitute a redundancy, because it involved transport difficulties for the employees, whereas in another case, relocation from one suburb of Christchurch to another did not, because it did not involve any greater distance from employees' homes.

Some agreements allow the employer to change an employee's location of work. For example, in *NZ Post Office Union v NZ Post Ltd* [1990] 3 NZILR 913, the relocation of a depot worker from the North Shore of Auckland to Auckland City was permitted under her employment contract. When she refused to carry out her duties lawfully assigned to her in the new location she was justifiably dismissed.

Reasoning

Genuine Reason

It is very clear from the case law that an employer is not permitted to terminate an employee on the grounds of redundancy if that employee's position is not redundant. Using redundancy to mask any other reason for terminating an employee's employment will render the employee's dismissal an unjustifiable dismissal.

The courts have made it clear that an employer is entitled to improve the organisation's efficiency, and that an employee does not have a right to the job if the business can be run more efficiently without him or her, but the courts may examine the employers accounts to ascertain whether this was in fact the case.

In the *Totara Hills Farm* case, the Employment Court made it clear that an employer simply asserting that a redundancy stemmed from a genuine business reason does not place the employer's decision beyond reproach from the Authority or the Court. Chief Judge Colgan outlined that although the Authority is not entitled to substitute its business judgement for that of the employer surrounding what is a genuine business reason to conduct redundancies, the Authority and the Court would assess whether the decision to disestablish roles, and how that decision was reached, were what a fair and reasonable employer could do.

Contractual Issues

Technical Redundancy

Technical redundancy is only relevant if an employee is to be made redundant, and under the applicable employment agreement that employee is entitled to compensation for redundancy. The effect of most technical redundancy clauses is such that if an employee, whose employment is to be terminated by reason of redundancy, is offered alternative employment which is substantially similar to the employment which is to be lost, then the employee is not entitled to receive compensation for redundancy. Theoretically, technical redundancy is applicable to redundancies that arise from both internal and external changes to an organisation; however it is more often considered when redundancies arise from external changes to an organisation.

Best practice

It is strongly recommended your employment agreements include a technical redundancy clause if those agreements will include provision for compensation for redundancy. If your employment agreements provide for compensation for redundancy, but do not include a technical redundancy clause, you should contact your Business Central Advice Employment Relations Consultant. Business Central Advice can provide you with assistance with the sale or transfer of your business and may be able to manage your obligation to pay compensation for redundancy.

Employee Protection Provision

The purpose of an employee protection provision is to provide protection for the employment of affected employees if their employer's business is restructured. It includes:

- A process that the employer must follow in negotiating with a new employer about the restructuring to the extent that it relates to affected employees; and
- The matters relating to the affected employees' employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and
- The process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer.

All employment agreements must contain an employee protection provision. An employer is bound to follow the process outlined in the employee protection provision in regard to the proposed redundancy and negotiation of on-going employment of affected employees. The provision also outlines the obligations an employer will have regarding redundancy compensation (if any). For further information and a sample clause refer to the **A-Z Guide** on **Employee Protection Provisions**.

Notice

Usually notice of termination is expressed in employment agreements. Some agreements provide for a different notice period where employment is terminated because of redundancy. Where a written employment agreement provides for notice, it may also provide for payment in lieu (instead) of notice, or payment for the period of notice.

The notice period will commence from the date that the employee is advised that their role is being disestablished.

Refer to the **A-Z Guide** on **Termination of Employment** for a discussion of notice and payments instead of, or for, notice periods.

Compensation

There is no legal obligation currently to provide a redundant employee with compensation for his or her redundancy. However an employer is bound by any contractual obligation to provide redundancy compensation (if any) contained in the employee's employment agreement.

Tax

Redundancy compensation payments are treated as a lump sum payment in terms of PAYE but they are not liable to the ACC earner levy or to FBT (but they may be subject to other deductions). The appropriate tax rate depends on the grossed up annual value of the employee recipient's last 4 week's earnings and the payment.

Fixed term employment

There are two issues in respect of fixed term employment and redundancy. The first is to do with redundancy as a ground for terminating an employee's employment. The second is to do with what is payable when an employee's fixed term employment is made redundant.

The Employment Relations Act 2000 stipulates that before an employer and an employee agree that employment for a fixed term will end in any way specified in the agreement, the employer must have genuine reasons based on reasonable grounds for the specifying that the employment is to end in that way.

If the employment agreement for a fixed term employment does not provide for redundancy but the employment is terminated for redundancy then the employment will not have been terminated for genuine reasons: *New Zealand Merchant Services Guild Inc v Pacifica Shipping* (1985) Ltd (Unreported) WA 26A/01; 24 August 2001; GJ Wood.

The employment agreement may provide for termination of employment by reason of redundancy even if it is not expressed in a written employment agreement: *Clarke v Norske Skog Tasman Limited* (Unreported) AC 42/03; 26 June 2003. However, it is recommended that all of your employment agreements, particularly those that are for fixed term employment, provide for redundancy in writing.

If a fixed term employment agreement is silent about redundancy and the employment is terminated for that reason, the employer organisation may be liable to pay the redundant employee for the full term of the agreement. (*Williams v Attorney-General in Respect of the Secretary for Justice* [1999] 2 ERNZ 457 (EC))

Vulnerable Employees

A special category of employees known as vulnerable employees (as defined by the Employment Relations Act) are protected in the event of a restructure/redundancy of their position. A vulnerable employee includes the following categories of employees:

- Cleaning services, food catering services, caretaking or laundry services for the education sector
- Cleaning services, food catering services, orderly services, or laundry services for the health sector
- Cleaning services, food catering services, orderly services, or laundry services in the age-related residential care sector
- Cleaning services or food catering services in the public service or local government sector
- Cleaning services or food catering services in relation to any airport facility or for the aviation sector
- Cleaning services or food catering services in relation to any other place of work

A vulnerable employee has the right to elect to transfer to a new employer in the event of restructuring. For example, if the company the employee works for is sold or loses the contract the employee is employed to work towards.

The new employer must decide how to best manage their resources. This may involve making transferring vulnerable employees redundant. If this should occur these employees are eligible for redundancy entitlements.

Employers with 19 or fewer employees are exempt from the requirement to take on employees of the outgoing employer. However an exempt employer must provide a written warranty to the outgoing employer stating that they have 19 or fewer employees.

Employers subject to a restructure must provide vulnerable employees with: information about whether they have a right to make an election to transfer to the new employer, an opportunity to exercise the right to make an election, sufficient information for the vulnerable employee to make an informed decision, and the date by which the right to make an election must be exercised.

Vulnerable employees must exercise their right to make an election 5 days after receiving the information above, or at later agreed date.

There is now also a requirement for an outgoing employer to transfer money to the new employer to cover the cost of service related entitlements the employee would have received had they resigned.

For an effective tendering process, the current employer must provide sufficient information to enable others to effectively cost the operations they would inherit. When a contract changes hands and employees transfer, the outgoing employer must disclose to the new employer individualised information about the employees that are transferring.

Refer to the **A-Z guide** on **Vulnerable Employees** for more information.

Unjustifiable Dismissal

If an employee is dismissed by reason of redundancy, the Employment Relations Act 2000 provides that an employee who believes that he or she has a personal grievance may pursue that grievance under the Act. A personal grievance means a claim that an employee has against the employee's employer or former employer that he or she was (among other things):

- Unjustifiably dismissed; or
- Disadvantaged by some unjustifiable action.

Procedural justification

If a dismissal for redundancy is found to be procedurally unjustifiable it is because the redundancy is genuine, but the manner in which it was implemented was unfair. A consultation process of a reasonable duration should be conducted before a decision to make an employee redundant is made. This will involve a consideration of any feedback and alternatives the employee has (see above). If the redundancy is not conducted in a procedurally fair way, it will be unjustifiable. It has also been noted at several points in this guide that a failure to abide by a term of an employment agreement in respect of a redundancy process may render the dismissal of an employee an unjustifiable dismissal.

The Court of Appeal's decision in *Coutts* (above) should be treated as authoritative, when the employer's actions, which fell short of the standard required of a reasonable employer acting fairly, resulted in the finding of unfair treatment. The dismissal lacked procedural justification.

Remedies for personal grievance

It is possible, as has been noted, for a dismissal that is substantively justifiable to be procedurally unjustifiable. Remedies for an unjustifiable dismissal for redundancy in these circumstances, where

the redundancy is genuine, are limited to compensation for humiliation, loss of dignity, and injury to the feelings of the employee. Neither reimbursement of lost wages nor reinstatement may be awarded because in spite of the employer's flawed procedure the employee's former position is still superfluous to its requirements.

Refer to the A-Z Guide on **Personal Grievances** for further information.

Substantive justification

If a dismissal for redundancy is found to be substantively unjustifiable, either because it is not genuine or the process applied to selecting the employee for redundancy was so flawed that it cannot justify the redundancy of that particular employee, the employee will have a personal grievance for unjustifiable dismissal.

In *Mahauariki v Te Roopu Manaaki I Te Hunga Haua Charitable Trust* (Unreported) AA 310/03; 15 October 2003; RA Monaghan, the Employment Relations Authority determined that Ms Mahauariki's dismissal was substantively unjustifiable when it was not satisfied that the selection criteria for redundancy were not properly formulated or applied.

It is not possible for a dismissal for redundancy to be substantively unjustifiable but carried out in a procedurally fair manner. If a dismissal is found to lack substantive justification there is no further inquiry into procedure.

Remedies for personal grievance

If an employee is terminated for redundancy and is found to have been unjustifiably dismissed for want of substantive justification, the remedies available to the employee include reinstatement to the former position or a position no less advantageous to the employee, reimbursement of a sum equal to the whole or any part of wages lost by the employee as a result of the grievance, and payment of compensation to the employee for either humiliation, loss of dignity and injury to the feelings of the employee, and/or compensation for loss of any benefit which the employee might reasonably have been expected to obtain if the grievance had not arisen. Even if an employee is reinstated, an award for lost wages may be ordered for the period between the dismissal and reinstatement, and an award for compensation for hurt feelings may be made.

Conclusion

Redundancy is a significant topic in employment and there are many reasons why understanding the principles of redundancy are important. When embarking on any process that may result in employees being made redundant, whether it is an internal restructure or a sale of a portion of a business, a determination of who will be involved in any decision making that is to take place and how the process will be manage, needs to be made. If you are bound by any contractual constraints, then these must be factored into your plans.

Business Central Advice strongly recommends that employers seek advice earlier rather than later in respect of any potential redundancy situation. Setting out all the factors that should be taken into consideration and mapping out a process, before getting under way, with the assistance of an experienced professional is an enormous advantage and relief.

You can contact one of our employer advisors for telephone advice and assistance: **0800 800 362;** or email the Business Central AdviceLine at advice@businesscentral.org.nz

Business Central Legal has developed a **Practice Kit on Restructuring and Redundancy** to assist employers who have to navigate this complicated area of employment law so they can reduce their risk of exposure to costly personal grievance claims. To purchase this, get in touch with our membership team today: call (04) 473 7223 or email membership@businesscentral.org.nz.

Remember:

- Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.
- Visit our website www.businesscentral.org.nz regularly.
- Attend our member briefings to keep up to date with all changes.
- Send your staff to Business Central Learning courses and conferences designed for those who manage employees.

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