A-Z Guide

VULNERABLE EMPLOYEES

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Overview

Groups of workers specified in Schedule 1A of the Employment Relations Act ("the Act") commonly referred to as vulnerable workers, have the right to elect to transfer to a new employer where restructuring occurs.

Restructuring has a special meaning under the law and there is a complex set of criteria that must exist before the law is triggered.

There are special redundancy rules that apply if the employer proposes to make an employee redundant for reasons relating to the transfer of employees or to circumstances arising from the transfer of the employees.

The Employment Relations Authority can in certain circumstances set redundancy payments and notice periods.
If there is a technical redundancy provision in a vulnerable employee's employment agreement and they elect not to transfer, no redundancy compensation is payable.

Introduction

Special provisions in the Act apply to a specified category of employees commonly referred to as "vulnerable workers". Part 6A Act provides protection to specified categories of employees if their employer proposes to restructure its business. The provisions apply where as a result of a restructure the employee is no longer required and the type of work they perform (or work that is substantially similar) is to be performed by the new employer. Vulnerable workers are given the option to elect to transfer to the new employer on the same terms and conditions of employment. If they are subsequently made redundant they may be entitled to compensation from the new employer as of right.

The following must exist before this law comes in to play:

- Employees must be providing the services specified in Schedule 1A of the Employment Relations Act
- There must be a "restructuring" as defined by this new law
- The employee is no longer required to do that work
- The type of work performed by the employee (or work that is substantially similar) is, or is to be, performed by employees of the new employer

Exempt Employers

From 6 May 2019, there will no longer be an exemption for small employers not to take on existing employees performing the work. All new employers are required to employ existing employees performing the work, if those employees elect to transfer to the new employer.

The Process Required

The obligation is one of good faith under section 4(1A) of the Act in situations of restructuring. In other words, where employers who employ vulnerable workers are losing work (selling a business or losing a contract to someone else) and where an employer is gaining work from an employer who employs vulnerable workers (buying a business or taking over a new contract).

Please note schedule 1B of the Act contains a special Code of Good faith for the public health sector which applies to district health boards, employees of district health boards, unions whose members are employees of district health boards, other employers, and their employees to the extent they provide the services to district health boards or the NZ Blood Service.

While the law does not prescribe a process as such, it does impose a number of obligations.

There are essentially two sets of obligations:

- The obligations for those who are losing work. For example, selling a business or losing a contract to someone else.
- The obligations for those gaining work. For example, buying a business or taking over a new contract.

In addition, the parties must meet the good faith requirements of the Act.

Vulnerable Workers

Vulnerable workers under Schedule 1A include the following categories of employees:

- Employees who provide the following services in the specified sectors, facilities, or places of work:
  - Cleaning services, food catering services, caretaking, or laundry services for the education sector (being the public and private pre-school, primary, secondary, and tertiary educational institutions)
  - Cleaning services, food catering services, orderly services, or laundry services for the health sector (being any hospital, as defined by the Hospitals Act 1957 and any hospital within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992)
  - 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 (as defined in Schedule 1 of the State Sector Act 1988) 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 (within the meaning of the Health and Safety in Employment Act 1992)
- Services in the security sector, including any 1 or more of the following in any workplace:
  - Guarding real or personal property belonging to another person
  - Monitoring in real time, from any part of a premises, images from a camera or similar device on the same premises
  - Services provided by a crowd controller employee (as defined in section 19 of the Private Security Personnel and Private Investigators Act 2010)
  - Escort duty and courtroom custodial duty as those terms are defined in section 3 of the Corrections Act 2004
  - Mobile security patrols
  - Collecting cash from any premises

Employees will be vulnerable workers if the work they do is integral to the services listed above. If the job is integral to the performing of the work of vulnerable workers, then it is included too. For example, dishwashing is integral to food preparation.

Some roles are closely related but are not integral to a vulnerable workers job and are excluded. For example, this could include bar staff who are not food catering staff. The test is based upon what the employee actually does, not the job description.

The Courts have interpreted Schedule 1A to include employees who are not necessarily "vulnerable". In *Matsuoka v LSG Sky Chefs New Zealand Limited* (NZEmpC 44) the Employment Court concluded that Mr Matsuoka had a right to transfer to a new employer even though he did not meet the general perception of a "vulnerable" employee. Mr Matsuoka was a supervisor who spent a few hours each day on food catering tasks. He had his own office and ability to sign cheques on behalf of his employer

and had generous employment conditions compared to other staff. The Court held that Part 6A of the Employment Relations Act did not actually refer to "vulnerable" workers, therefore whether or not an employee is "vulnerable" should not be relevant as to whether they were protected under the legislation. Further, the Court held that even though Mr Matsuoka only spent a portion of his day working on food catering tasks, he was entitled to transfer to the new employer as a full-time employee.

What is 'food catering services'?
This term has not been tested and is therefore uncertain. A similar term is used in liquor licensing and has been interpreted to mean the provision of food for a specific event or function.

In *Hau v SA & AC Lester Limited* [NZERA, an employee worked in a café and prepared food which at times was prepared on site and taken offsite to clients. The Employment Relations Authority held that due to the "comprehensive nature of the service the café provided", the employee's role was capable of being included in the definition of an employee providing "food catering services". This is a highly contextual area of law and it is recommended that you seek formal advice when assessing your specific circumstances.

Cleaning Services
In *Lend Lease Infrastructure Services (NZ) Limited v Recreational Services Limited* (NZEmpC 86) the Court was asked to determine whether park maintenance employees were providing cleaning services for the purposes of Schedule 1A, and therefore entitled to transfer to a new employer. The Court noted that Schedule 1A refers to cleaning services, not "cleaning". The Court considered this meant that:

> *"... it is the provision of this type of service, rather than an aspect of the role that requires cleaning to be undertaken, that is required to be performed. This requires assessment of the real nature of the role, which will include consideration of its focus and purpose. The frequency and importance of cleaning within the role will assist in determining if a cleaning service is being provided".*

The employees in question performed horticultural and parks maintenance roles. Although the employees were required to carry out some cleaning of vehicles, paths, barbeques, and playground equipment, the Court considered these tasks to be "incidental, preliminary, or merely preparatory". Consequently, the real nature of the roles was not the provision of cleaning services.

Security
As of 1 July 2021, employees who provide certain types of security services will be protected as "vulnerable employees" under Part 6A of the Employment Relations Act 2000.

Restructuring

The word "restructuring" has a special meaning in this law. It is not the usual type of restructuring associated with the word.

Definition
Restructuring:

a. means—
    I. (i) contracting out; or
    II. (ii) contracting in; or
    III. (iii) subsequent contracting; or
    IV. (iv) selling or transferring an employer's business (or part of it) to another person; but
b. to avoid doubt, does not include—
    I. (i) in the case of an employer that is a company, the sale or transfer of any or all of the shares in the company; or
    II. (ii) any contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation.

Example A (Contracting in)

A rest home carries on business in the age-related residential care sector. Instead of providing food catering services through its employees, it enters into an agreement with an independent contractor to provide those services.

The agreement under which the independent contractor provides those services to the rest home expires or is terminated. The rest home uses its employees or engages further employees to provide those services.

The employees of the independent contractor may elect to transfer to the rest home.

Example B (Contracting in)
The same as Example A, except the independent contractor has engaged a subcontractor to provide food catering services to the rest home. As a result of the agreement between the rest home and the contractor expiring or being terminated, the agreement between the contractor and subcontractor expires or is terminated.

Employees of the subcontractor may elect to transfer to the rest home.

Example C (Contracting out)
A school has employees who provide cleaning services. The school then enters into an agreement with an independent contractor to do that work.

The employees of the school may elect to transfer to the independent contractor.

Example D (Contracting out)
The same as Example C, except the independent contractor later decides to engage a subcontractor to clean the school. The employees of the independent contractor at that school may elect to transfer to the subcontractor.

Example E (Subsequent contracting)
An airport operator enters into an agreement with an independent contractor to provide food catering services at the airport. The contract later expires or is terminated.

The airport operator then enters in an agreement with a second independent contractor to provide food catering services at the airport.

Employees of the first independent contractor may elect to transfer to the second independent contractor.

If there is a delay between the contractor finishing and a new contractor starting the law will still apply even though the work has not immediately started. Section 69F (2) states *"To avoid doubt, this subpart applies even though the performance of the work by or on behalf of the other person does not begin immediately after an employee ceases to perform the work for his or her employer".*

Right to Elect to Transfer

A vulnerable employee may elect to transfer to the new employer. If only a part of the role is transferring, the employee will have the right to transfer to the extent that the job is transferring. In that situation the new employer would have to go through a redundancy process with the employee if they planned to do the work themselves.

Before an employer's business is restructured, the current employer must give the employees:

- A reasonable opportunity to exercise the right to make an election to transfer
- The date by which the right to make the election must be exercised, and
- Information sufficient for the employee to make an informed decision which includes:
    - Name of the new employer
    - Nature and scope of any restructuring
    - The date on which the restructuring takes effect
    - How they make their election

The Principal is under an obligation to give the employer the information required to meet their obligations.

If the employee is not told of these rights the Authority may impose a penalty on either the current or the new employer or issue a compliance order.

An employee may before they decide to elect to transfer to the new employer bargain with the old employer for alternative arrangements. If the parties agree on alternative arrangements these must be recorded in writing, and the person cannot later elect to transfer to the new employer.

Employees who elect to transfer to the new employer will become an employee of the new employer from the "specified date". The specified date is the date on which the restructuring takes effect. They will then be employed on the same terms and conditions by the new employer as applied to them immediately before the specified date, including terms and conditions relating to whether they are employed full or part time. Terms and conditions of employment can be both in writing, verbal, or those that have evolved through custom and practice.

If an employee who elects to transfer is a member of a union and bound by a collective agreement and the new employer is not a party to the collective agreement, the new employer will become a party of the collective agreement from the date the employee transfers but only in relation to, and for the purposes of, that employee.

Transfer and Liability for service-related entitlements

For the purpose of all service-related entitlements whether legislative or otherwise, the employment of an employee who elects to transfer must be treated as continuous. All sick leave, annual leave and any other leave balances are transferred. It is unlawful to cash up annual leave on transfer.

In restructurings for which agreements are concluded after 6 March 2015, an outgoing employer is required to transfer money to the incoming employer for those employees who are transferring to cover service-related entitlements the employee would have received had they resigned. This does not include sick leave, redundancy or benefits such as pro-rated long service leave even though those liabilities do transfer to the new employer, unless the employment agreement specifies they are paid out on resignation.

There is also now an implied warranty by the employer of transferring employees that the employer has not, without good reason, changed the terms and conditions of employment of the affected employees during the period between when the employer is informed about the restructure and when the restructure takes effect.

Disclosure of employee transfer costs information

A potential new employer may request from the current employer transfer costs information. The current employer must provide the new employer with information on costs relating to the transfer in reasonable time for the purpose of deciding whether to terminate an agreement or let it expire; or negotiate an agreement; or decide whether to enter into an agreement; or tender for an agreement. The information includes:

- The number of employees who would be eligible to elect to transfer
- The wages or salary payable in a stated period
- Total number of hours worked
- Cost related to service of employees whether legislative or otherwise
- Cost of any other entitlements of the employees including entitlements already agreed but not due until a future date

This must be provided in aggregate form and in a form that protects privacy and must be updated if changes occur.

Disclosure of individualised employee information

When a contract changes hands and employees transfer, the outgoing employer is required to disclose to the new employer individualised information about the employees that are transferring. This information includes:

- Any personnel records relating to the employee.
- Information about any disciplinary matters relating to the employee.
- Information about any personal grievances raised by the employee against the employer.
- Information about an employee that the employer is required to keep under legislation, such as employment agreements, wages and time records, holiday and leave record, tax code declaration, KiwiSaver information, and student loan and child support deductions.
- Individualised employee information must be provided as soon as is practicable, but no later than when the restructuring takes effect. Otherwise, the current and new employers can agree on any later date.

Fixed term employment

Vulnerable employees employed on fixed term agreements by employers who are restructuring who have as part of their agreements terms that are linked to the expiry or termination of the agreement under which their employer performs the work are entitled to elect to transfer to the new employer and:

- If the transfer is a sale or a contracting in, the fixed term nature ceases to apply
- If the transfer is a contracting out or a subsequent contracting, the fixed term is deemed to be fixed until the expiry of that new contract arrangement

Redundancy Entitlements

There are special redundancy rules which only apply if the new employer proposes to make an employee redundant for reasons relating to the transfer of employees or to circumstances arising from the transfer of the employees.

What if there is no job for staff transferring?
The person is deemed to be an employee and the law around consultation applies the same as it does for existing employees. Refer to the **A-Z Guide** on **Redundancy.**

Do I have to pay redundancy?

- If the employment agreement the employee transfers on provides a redundancy formula, the new employer must pay that formula.
- If the employment agreement the employee transfers on specifically states no redundancy compensation will be paid in the event of a sale or contracting, then none is paid.
- If the employment agreement the employee transfers on is silent on the payment of redundancy compensation in the event of a sale or contracting, the parties must bargain for redundancy. If they are unable to agree, the Employment Relations Authority is able to set the payments and any notice periods.
- An express exclusion in an employment agreement to monetary redundancy entitlements will not preclude entitlement to bargain for non-monetary entitlements such as retraining.

If the employment agreement provides for redundancy, can a technical redundancy clause protect us from paying any money if the employee chooses not to transfer?
If the employee decides not to transfer, the employee is disqualified from redundancy if there is a technical redundancy clause in the employment agreement.

What is a technical redundancy clause?

This is a provision in an employment agreement that says the employee does not receive redundancy if they are offered another similar job on the same or similar terms and conditions. It would be wise to include the scenario of a transfer under this to ensure you can rely on that provision not to make a redundancy payment.

Can an employee transfer and demand redundancy from the old employer?

No.

Conclusion

Employers with employees who fall into the specified categories of "vulnerable workers" should be aware of the special rights they have to elect to transfer their employment to the new employer in the case of a restructure. Employers have an obligation to inform their employees of this right and give them a reasonable opportunity to transfer. Employers taking on work carried out by "vulnerable workers" should also be aware of their obligations. The provisions of the law are very complex and therefore it is advisable that you seek advice from the EMA AdviceLine on 0800 300 362, your EMA Employment Relations Consultant or formal legal assistance.

Remember

- **Always call AdviceLine on 0800 300 362 to check you have the latest guide.**
- **Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your 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.**

This guide is not comprehensive and should not be used as a substitute for professional advice.

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