Redundancy
What are an employer's obligations?

1. For an employer to make an employee redundant in New Zealand, the following are the required elements. These steps are based on case law, and the statutory requirement for employers to act in "good faith" in redundancy situations (section 4(4)(e), Employment Relations Act 2000 ("Act")). Under the Employment Relations Amendment Act (No. 2) 2004 ("Amendment Act"), the duty of "good faith" is broadened to require the parties to an employment relationship to be "… active and constructive in establishing and maintaining a productive employment relationship …", which includes being communicative and responsive.

2. Redundancy refers to a situation where an employee's employment is terminated because their position has become superfluous to the needs of the employer.

3. It has long been the position that an employee does not have a permanent right to retain his or her job if there are sound business reasons that render his or her position superfluous. However, any redundancy must be for genuine reasons and must be carried out in a procedurally fair manner. The reason for redundancy and the procedure followed are usually referred to as **substantive justification** and **procedural fairness**. For convenience, we adopt those terms here, although there is often some overlap between the two.

Substantive Justification

4. The decision to make an employee redundant falls within an employer's management prerogative. As such, the Courts are reluctant to interfere when a company has decided that it is necessary to take such a step. Therefore, if a redundancy is made for genuine commercial reasons, and the employer can demonstrate those reasons, then it will generally be substantively justified.

5. However, if there is no genuine commercial need for the redundancy, or if it is a step taken in a disciplinary setting where misconduct, serious misconduct or performance management actions would be more appropriate, then it is unlikely to be substantively justifiable. Therefore, any hint of performance issues must not form part of a decision to make an employee redundant.

6. A redundancy situation may arise in circumstances where an employer either "contracts out" a whole or part of its business or where an employer enters into an agreement to transfer business by way of, for example, a sale, merger, privatisation of state owned enterprises, leasing and franchising. "Contracting out" may sometimes be considered one type of transfer of a part of a business. The term "contracting out" is used in this paper to refer to the situation where a principal enterprise contracts with an outside provider for "services", where the enterprise have previously employed employees to perform those services.

Procedural Fairness

7. The Act specifically provides that parties to an employment relationship must deal with each other in good faith in the event of redundancies. This means that an employer may not do anything that might mislead or deceive the employee. This requirement will also usually necessitate consultation, an open selection process, and consideration of alternatives to redundancy.

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8. The vast majority of redundancy cases concern whether an employer followed a fair procedure. There are several steps that must be followed when making an employee redundant in New Zealand to ensure that the process is fair.

Consultation

9. One of the primary considerations when dealing with a redundancy situation is the extent to which the employer consults with the affected employees before making a final decision to implement a new structure. The Amendment Act requires employers who are proposing to make a decision that will, or that is likely to, have an "adverse effect" on the continuation of employment of one or more employees:

   (a) Access to information relevant to the continuation of the employees' employment about the decision; and

   (b) An opportunity to comment on the information to their employer before the decision is made.

10. However, an employer is not required to provide access to confidential information if there is "a good reason" to maintain the confidentiality of the information (ie, protecting the commercial position of an employer from being unreasonably prejudiced).

11. Consultation must begin with each individual employee being given the opportunity to comment on a proposal to disestablish his or her position. The proposal must be precise enough to enable the employee to provide useful comment, and is usually provided in written form so as to provide documentary evidence in the event it is required by the employer in litigation. It is important to phrase this as a "proposal" rather than a "decision", to demonstrate that the employer has not yet made a final decision.

12. Any feedback from the employee must then be carefully considered and taken into account before the final decision is made. This means that an employee should be informed of a potential change to his or her position before the employer makes a final decision. This will enable suggestions from the employee regarding possible alternatives to redundancy before a decision is made.

13. Section 4(1) of the Act provides that the parties to an employment relationship must deal with each other in good faith; and must not, whether directly or indirectly, do anything – to mislead or deceive each other, or that is likely to mislead or deceive each other.

14. Section 4(4) provides that this duty applies in the following situations that are relevant to contracting out or sale/transfer of a business:

   (a) Consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees collective employment interests, including the effect on employees of changes to employer's business.

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

   (c) Making employees redundant.

15. Parties to employment agreements may enforce section 4 by a compliance order under section 137 of the Act in the Employment Relations Authority.

Consideration of Alternatives

16. Alternatives to redundancy should be carefully considered, ideally in consultation with the employee. Transferring an employee to other work sites, retraining, early retirement, positions in other companies within the same group and voluntary redundancy are all options that should be considered.

17. It is important that evidence of these considerations is available, such as letters to the employee, notes of meetings etc.

Fair Selection Process

18. If the restructure requires that only some employees be made redundant from a group of employees performing the same or similar functions, the method used to select those to be made redundant should be fair. The Employment Court has noted that a redundancy situation is not a "general warrant for singling out employees who are unpopular with their managers".

19. When choosing criteria upon which to select the employees to be made redundant, performance considerations may be taken into account, but those criteria should be able to be objectively assessed by the employer and involve a minimum of subjectivity. Generally, employees should be notified that they will be assessed before any such assessment takes place, and be shown/given an opportunity to contest the criteria upon which they will be assessed.

Informing the Employee

20. When an employee is being informed that they are to be made redundant, the news should not come as a surprise. If a fair procedure has been followed, the employee should already be aware that their job is at risk and the employer will have considered his or her comments and suggestions regarding the situation.

21. Ideally an employee should be informed of the decision in a face to face meeting. The employer should give the employee a final opportunity for feedback and if the employee raises new issues, these should be considered by the employer.

22. Care and attention should be paid to the employee's feelings at what may be a difficult time. The employer should arrange appropriate support for the employee. This may include counselling, career advice or support or workshops to enable the employee to seek further employment.

Notice and Redundancy Compensation

23. Upon being made redundant, the employee will be entitled to notice and payment of redundancy compensation if they have a contractual entitlement to it. Where the employment agreement is silent on the issue of redundancy compensation, no redundancy payment is required, although legal advice should be taken as to whether some payment in the circumstances might be in order as this is currently a developing area of case law.

24. Where the employment agreement does not provide for notice, reasonable notice must be provided. The extent of a "reasonable" amount of notice depends on a number of factors, including length of service and seniority.

25. Technical redundancy arises on the sale of a business (other than by way of share transfer). This concept gained importance a few years ago when the Courts recognised that employees who were offered employment with a purchaser are "technically redundant" to the vendor/employer because their contracts terminate at the point of sale, and they become superfluous to the vendor/employer's needs. Under section 69A of the Act a higher level of statutory protection is provided to specified categories of employees who are considered particularly vulnerable to, and disadvantaged by, a proposed change of employer. The specified categories for employees are set out in Schedule 1A of the Act and primarily comprise employees working in cleaning services and food catering services. This section applies where all or part of a business is sold or transferred, where work is contracted out, or where a new contractor is chosen. In these cases, employees can elect to transfer to the new employer on the same terms and conditions of employment. Section 69M requires that all collective agreements and individual employment agreements for other employees which are entered into after 1 December 2004, must contain an "employment protection provision". This is defined in 69I of the Act.

Remedies for Unjustified Dismissal

26. If the Employment Relations Authority or the Employment Court determines that a dismissal for redundancy is unjustified, there are several remedies available, including:

    (a) reinstatement in the employee's former position (or placement in a position no less advantageous);

    (b) reimbursement of all or part of the wages or other money lost;

    (c) compensation for:

        (i) humiliation, loss of dignity, and injury to feelings; and

        (ii) loss of any benefit which the employee might reasonably have expected but for the dismissal.

27. Under the Employment Relations Act 2000, reinstatement is the "primary remedy" in respect of a dismissal. If requested, reinstatement must be provided as a remedy wherever practicable. There have been cases of employees being reinstated to their employment even where they were made redundant and a position no longer exists.

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