

Redundancy and Business Change

Redundancy is a word that conjures up negative images and it can cause serious heartache if not handled well. The Employment Relations Act 2000 (ERA) places particular responsibilities on employers when redundancy situations arise.

Employers also need to understand that similar responsibilities arise when other changes in the business are proposed that will affect staff. An employer is required to consult with employees in good faith about any matter affecting their collective employment interests, including the effect on those employees of any proposed change to the employer's business.

This particularly applies to any proposal by an employer to contract out work or to sell or transfer all or part of the business, but it also extends to other changes that might impact on employees such as expansion or contraction of the business or major changes in trading hours.

The Act does not specify that redundancy compensation is payable where an employee's employment is terminated on the grounds of redundancy. Such matters are best determined through negotiations for the collective or individual employment agreements or otherwise through negotiations and consultation at the time the redundancy arises.

Good Faith

The requirement to act in good faith is a fundamental principle of the ERA. The Act requires that all parties to an employment relationship (the employer, the employee and any union or employee representative) must deal with one another other in good faith.

Good faith is defined as not doing anything, directly or indirectly:

- (i) to mislead or deceive each other; or
- (ii) that is likely to mislead or deceive each other.

A useful working definition of good faith is:

All parties to an employment relationship are required to deal with one another on a basis of fair dealing and mutual trust and confidence in all aspects of the employment relationship.

The Act includes a list of specific matters where good faith applies. This includes the consultation process required between an employer and their employees and/or their union over any proposed redundancy or other proposals for change in the workplace.

Failure to follow a fair process and to consult with affected staff where any redundancy or significant change is proposed is likely to be found to be a breach of the Employment Relations Act and may mean that the employees have grounds for grievance action.

What is a Redundancy?

Redundancy is a situation where an employee's position has become, or is likely to become, surplus to the employer's needs, and the employee holding the position is likely to be dismissed as a result. A redundancy relates to the position, not the person.

If an employee made redundant feels the termination is unfair or wasn't handled properly, they may choose to issue proceedings against the employer for an unjustified dismissal. This can include injunctive action to restrain the employer from declaring the position to be redundant until the grievance is resolved, or for reinstatement if the employee has been dismissed and the Employment Relations Authority finds that the dismissal was not justified.

It is important that any redundancy is handled correctly to avoid a personal grievance but also because a badly handled redundancy will have a negative impact on the whole business. And it is essential to differentiate between a genuine staffing surplus and a "person-related" dismissal (e.g. for failure to perform or disharmony). It is unwise to dismiss by reason of redundancy when the real issue relates to the individual.

The long established principle of the employer's right to downsize staff where there are genuine business reasons, provided the change was achieved through a fair process, was not affected by the Employment Relations Act 2000. The legislative framework for good faith and consultation is new, but the essential requirement for consultation and fair dealing was well established under previous laws. Key decisions made on cases brought under the ERA have confirmed this.

How Do You Treat an Employee Fairly in a Redundancy?

The questions regularly asked by employers contemplating a change that is likely to lead to a redundancy include:

- Is the situation we have one where redundancies should be made?
- If it is, how do we handle it?
- Is the employee entitled to any redundancy payment?

If the employment agreement lays down procedures for dealing with redundancies the employer will usually be found to have acted properly if they follow the procedure in the agreement. Despite this, the employer must make sure the employee is treated fairly and take particular care with the consultation process.

There are three aspects of treating an employee fairly:

- The redundancy must be genuine.
- The procedure surrounding the redundancy must be fair.
- The treatment of the employee on leaving must be fair. This **may** mean that redundancy compensation needs to be paid.

Genuineness

An employer is entitled to make an employee's position redundant if there is a genuine commercial reason for the redundancy. The Court of Appeal confirmed that an employer is entitled to make their business more efficient. This means that if there is really no longer a job for the person the redundancy will be genuine.

It will not be genuine if the redundancy is decided because the person's performance is not up to scratch or there is an interpersonal difference between the employer and the employee or between employees.

Procedure

Case law suggests that an employer contemplating a redundancy should follow a two step process in consulting with any affected staff and/or their union.

Step one - Consult on the proposed change

As soon as the employer becomes aware that redundancy is a possibility the employer should inform the affected employees of the proposed change and give them an opportunity for input into the decision. If one or more of the employees is a union member, the union must also be advised and given the opportunity to be involved in the consultation process.

It is important to advise the employee that the proposal will not be finalised until the employer has had the opportunity to consider any submissions or suggestions they may make. The employees may have ideas as to how the problem may be solved without redundancy.

Consultation does not require that the parties reach agreement on any change, but the employer must be able to show that they have given careful consideration to employee's views before a final decision is made on the proposal.

Alternatives to redundancy such as redeployment, re-training, voluntary redundancy, or transfer to another area of work should be carefully considered. For example, if a practice can no longer sustain a position for a full-time practice nurse, the employee may consider acting as part-time receptionist combined with part-time practice nurse.

Where a redundancy may affect one or more of a group of staff, consideration needs to be given at this stage to the criteria for selection. It is worth advising affected staff at the earliest stage what the selection criteria could be. Unless the employment agreement includes specific selection criteria, the employer can determine the criteria that will apply and the weighting they may give to any of those criteria.

It is also worthwhile taking the time before the meeting to set out the elements of the proposal and the consultation process in a brief paper which can be left with each affected employee at the end of the meeting. This assists to ensure that all those affected have a clear outline of the proposal and the action plan.

Step two - Consult with affected individuals

Having consulted on the proposed change and reviewed the input from staff you are then in a position to make the decision on the changes to be made and the individuals to be affected. This decision can then be advised to the employees directly affected.

It is essential that this process be dealt with in a procedurally fair way. Meetings with affected staff should be set up in advance and the employee offered the opportunity to have a support person of their choice at the meeting. If any of the affected staff are union members, they should have the opportunity of bringing a union representative to the meeting.

The purpose of the meeting is to advise them of your decision and to discuss with them the practical options available under all the circumstances that apply. This includes the timeframe for the employment to end and the support available to the employee in the meantime and when they leave.

If the employment agreement specifies a notice period for termination, this is the minimum that will apply. In the absence of a specified period of notice referred to in the employment agreement, the courts have held that a term specifying 'reasonable notice' will be implied into all employment agreements. How long 'reasonable notice' is can depend upon the position held, the length of time the person has been employed, how likely it is they will be able to find a new job, and how old the person is. The purpose of a reasonable notice period is to give the employee an adequate opportunity to adjust to his or her changed circumstances or to seek a new job.

If the employment agreement provides for it, or if the parties agree, some or all of the notice period can be allowed as wages in lieu of notice. If practicable, allowing the employee to work at least part of the notice is a useful part of the adjustment process.

The consultation should also cover any redundancy compensation to be paid and any other support that may be reasonably given to the employee. This may include assistance with redeployment including counselling and assistance with job search through a suitable agency, and the way the decision will be communicated to colleagues, patients and other people that the employee interacts with.

Don't underestimate the importance of these non-monetary aspects to ensure that the employee feels satisfied that all reasonable steps have been taken to assist them.

Redundancy Compensation

There is no automatic right to monetary compensation for redundancy unless the employment agreement specifies this or it is agreed as part of the consultation process. The national practice nurse and medical receptionist collective agreements both contain redundancy formulae.

If no sum is agreed, there is discretion to pay compensation and some employers do prefer to do this if they are able to do so. In assessing the compensation that may be paid, we suggest the following factors are taken into consideration:

- The length of service
- The reason for the redundancy
- The means of the employer to pay
- The employer's usual practice in redundancy situations
- The period of notice

Where the practice is a party to the national collective employment agreements, the formula for redundancy contained in those agreements may be a reasonable benchmark for good practice in this industry.

The tax to be deducted from redundancy payments is set out in the PAYE guide. Advice can also be sought from the IRD on 0800 377 772, or call your accountant or tax advisor.

Technical Redundancy

A technical redundancy arises on the sale or transfer of the business and an employee's employment to a new owner. In the context of medical practices, this often arises where a practice is being sold.

If the employee loses his or her job as a result of a sale, there will be a redundancy in the normal sense. Even if the employee is offered and accepts a job from the new employer, there will be a 'technical' redundancy.

The employer has a duty to consult with all affected employees before final decisions are made as outlined above. If it is intended that all or some staff are to transfer from the vendor medical practitioner's practice to the purchaser medical practitioner's practice, these arrangements should be reflected in the sale agreement to avoid any misunderstandings.

You may also be able to reach agreement so that any job offer with a new employer is entered into on the basis that the employee waives their right to a redundancy pay out. In return the employees service should be seen as continuous.

Consultation on Other Changes Affecting Employees.

The ERA requires employers to consult with affected employees on any change that might impact on the employer's employees. There are few precedents available to cover the extent of change that will trigger this requirement.

In the interim, we recommend that employers adopt a realistic approach and seek to involve staff in the development of proposals that will have a significant impact on the work they do and their role in the business. This is simply good management practice. Staff who are committed to their work and enjoy an open and professional relationship with their employer can often make a positive contribution to the process.

The process of consultation should follow the two step process outlined above, ie. First advise and consult with all staff in the business or unit affected on the overall change

proposal; and second, consult with staff directly affected on how the changes will be implemented in their case.

Where staff involved are union members, the opportunity should be given for them to involve the union if they wish to do so.

Need more help?

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