

a-z of employing

- a managers guide

Redundancy

A guide for employers and managers

A-Z of Employing

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In this guide to **Redundancy**:

OVERVIEW	2
INTRODUCTION	2
DEFINING REDUNDANCY	3
Internal changes	3
External changes	4
Substantially similar positions	6
GENUINE REASONS	6
Relocations	6
TECHNICAL REDUNDANCY	7
EMPLOYER'S OBLIGATIONS	7
Employment Relations Act 2000	7
Consultation	8
Sample Consultation Procedure	10
Selection criteria	11
Redeployment	12
Procedural fairness	12
CONTRACTUAL ISSUES	14
Employee Protection Provision	14
Processes	14
Notice	15
Compensation	15
Fixed term employment	16
Redundancy Entitlements for Vulnerable Employees	16
UNJUSTIFIABLE DISMISSAL	17
Substantive justification	17
Procedural justification	17
OTHER ISSUES	18
Holidays Act 2003	18
Lockouts	19
Taxation of compensation	19
CONCLUSION	19

OVERVIEW

- 1 Redundancy occurs because a position is superfluous to the needs of the employer.
- 2 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.
- 3 Using redundancy to mask any other reason for terminating an employee's employment (e.g. poor performance) is not tolerated by the Employment Authority or Court.
- 4 In the case of a restructure of an employee's position, if a reasonable person, taking into account the terms and conditions of each position and the characteristics of the employee, would consider that there is a sufficient difference between the positions to break the continuity of the employee's employment, then the employee's former position is redundant.
- 5 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.
- 6 A redundancy must be implemented in a procedurally fair manner which involves a consultation process with the employees concerned.
- 7 Under the Employment Relations Act 2000 employers are required to deal with their employees, and any unions which represent those employees, in good faith.
- 8 The duty of good faith applies in particular to consultation about the effect on employees of changes to the employer's business, to proposals that might impact on an employer's employees, and to making employees redundant. This includes providing affected employees with access to information relevant to the continuation of their employment and about the decision with an opportunity to comment on the information to their employer before the decision is made.
- 9 There are no hard and fast rules of procedural fairness; a useful guide is to ask yourself how you would like to be treated if you were the employee being affected by redundancy. A proposal should be put to the employee for comment and feedback **before** a decision is made to make the position redundant.
- 10 Redundancy should be a last option therefore retraining and redeployment should be considered.
- 11 If an employment agreement is to provide for compensation for redundancy, then it should include a provision about technical redundancy.
- 12 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.
- 13 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

Making employees redundant need not be a complex or onerous undertaking; while it is not a pleasant exercise to undertake, some of the anxiety and aggravation can be taken out of the picture by understanding the principles of redundancy. 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.

DEFINING REDUNDANCY

The Employment Relations Act 2000 does not provide a definition of “redundancy” or “redundant” although the term does appear in section 4. The Labour Relations Act 1987 provided a definition of “redundancy” in section 184:

“Redundancy” means a situation where:

- ▶ A worker’s employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer.

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.”

In determining whether or not an employee’s employment is redundant the focus is on the position, not the person. 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. 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 this guide, when reference is made to an employee’s employment agreement, what is being referred to is the amalgamation of documents, practices, and law that together constitute the terms and conditions of the employee’s employment. In order to illustrate the point that redundancies can occur in a variety of situations and for the purposes of this guide, a distinction is made between redundancies that arise because of internal changes to an organisation and those that arise because of external changes to an organisation.

Redundancies arise in different situations. While in all of these situations, the employer’s obligations are essentially the same, understanding the mechanism in each situation by which the redundancies arise can be helpful.

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.

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; but

It does not include:

- ▶ The termination of a contract or arrangement under which the employer carried out work on behalf of another person; or
- ▶ 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
- ▶ Any contract, arrangement, sale, or transfer entered into, made or concluded while the employer is adjudged bankrupt or in receivership or liquidation.

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.

External changes include:

- ▶ The sale of a part or the whole of the organisation’s operations;
- ▶ The sale of a part or the whole of the organisation;
- ▶ The transfer of a part or the whole of the organisation’s operations;
- ▶ The transfer of a part or the whole of the organisation;
- ▶ The amalgamation of 2 or more organisations.

The information here is designed to provide a practical guide to employers about how the different kinds of organisations may be affected by external change.

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 primary reason for incorporating a company is to create a separate legal personality; a person who is self-employed as a sole-trader has the same legal personality as the organisation he or she trades as.

An incorporated company is owned by its shareholders. 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, which as already noted has a separate legal personality from its shareholders, 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.

The points covered in this guide are generally also applicable to other trading enterprises.

Substantially similar positions

If a restructure occurs within an organisation and a position is affected, it will usually be necessary to determine whether or not that change is substantial in order to determine if the position is redundant. In a restructure situation, if the change between a former and new position is substantial, then it is presumed that the former position is 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?”

GENUINE REASONS

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.

Relocations

If an employer decides to relocate its business but make no other changes, then whether or not 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.

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 EMA Advice Employment Relations Consultant. EMA 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.

EMPLOYER'S OBLIGATIONS

In any redundancy situation the first place an employer should look to gain an understanding of its obligations to its employees is the applicable employment agreement. 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 Employment Relations Act 2000.

Employment Relations Act 2000

The Employment Relations Act 2000 provides some guidance on employers' obligations in situations in which redundancies may arise. 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.

This provision does not require the disclosure of confidential information that would otherwise be able to be withheld. Good reason to withhold includes:

- ▶ Statutory requirement
- ▶ Protecting the privacy of natural persons
- ▶ Protecting the commercial position of an employer from being unreasonably prejudiced.

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 \$5,000 for an individual or \$10,000 for a company.

These statutory requirements will need to be carried through into the consultation process. When the Court of Appeal considered the duty of good faith for the first time, it was in a case in where the employer had refused to disclose its selection criteria for redundancy. The majority of the Court of Appeal in *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, found that the ERA had not altered the already present obligation to act in good faith, and did find it appropriate to impose absolute requirements. It was stated:

"Although employment relationships to which the Act applies are defined broadly (s4(2)), the relation between employer and employee still rests on agreement (contract). It is in negotiating for and operating under that contract that obligations of good faith apply. The obligation to deal with each other in good faith is not so much a stand-alone obligation as a qualifier of the manner in which those dealings are to be conducted, and specifically (though not exhaustively) those dealings identified in s4(4)..."

In the judgment of the other members of the Court in *Aoraki*, referring to situations in which a genuine redundancy has arisen, it was said:

"A just employer, subject to the mutual obligations of trust confidence and fair dealing, will implement the redundancy in a fair and sensitive way."

Consultation

Generally speaking the meaning of consultation, and therefore what it involves, will depend on the circumstances of each situation. The level of consultation and forewarning will depend on the company's size and resources and whether the redundancies are due to a planned restructure or a response to crisis situation, however even in the most critical situation a minimum of effort is

required. Consultation involves discussing a proposal for 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 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.

Sample Consultation Procedure

Below is a sample process to follow, whenever dealing with the possibility of redundancy:

Where there is a possibility of redundancy, the employer should:

- ▶ Inform the employee that you wish to meet with him/her to discuss a possible restructuring of the organisation/future plans/losses being sustained, etc.
- ▶ Arrange a meeting time.
- ▶ Advise that the employee may seek representation or assistance.

At the meeting:

- ▶ Tell the employee as much as possible about the situation, but never give the impression that a decision has been made regarding the reorganisation or redundancy. 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 redundancy should be raised as one option at this meeting.
- ▶ Ask the employee for his/her input – i.e. opinions, ideas, views and alternatives to the possible reorganisation.
- ▶ 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.
- ▶ Give the employee a copy of any information relating to the proposal and ask for their comments on this.
- ▶ Arrange a further meeting with the employee (and his/her representative) to discuss his/her ideas.

- ▶ Give serious consideration to all the points raised by the employee and reassess the situation to determine whether a redundancy is necessary.
- ▶ Arrange another meeting with the employee (and his/her representative) and:
 - Inform the employee of your decision.
 - If you have decided that the position will be made redundant, discuss the options which are open to the employee with respect to his/her future employment with the organisation, e.g. redeployment, relocation, etc. and 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 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.

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. There is no absolute obligation to consult on selection criteria to be applied to any redundancy situation, unless the applicable employment stipulates so however it is recommended that affected employees are consulted about the selection criteria and process for its application both before and after it is implemented. 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.
- ▶ If you are not bound to apply specified selection criteria to a mass redundancy situation, then you may involve your employees in determining which selection criteria will be applied.
- ▶ 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.

Types of selection criteria include:

- ▶ length of service
- ▶ skills and experience
- ▶ competencies
- ▶ qualifications
- ▶ performance (an objective assessment of performance would need to be undertaken)
- ▶ voluntary

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.

The courts apply the same tests to redeployment as are applied to relocations to determine whether or not the new employment is substantially similar to the former and therefore if the former position is redundant.

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 gain 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, but only that it should be considered.

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.

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.

CONTRACTUAL ISSUES

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.

From December 2005 all employment agreements must contain an employee protection provision. An employer is bound to follow the process outlined in the employee protection provision in regards to the proposed redundancy and negotiation of on-going employment of affected employees. The provision also outlines the obligations an employer will have in regards to redundancy compensation (if any). For further information and a sample clause refer to the **A-Z Guide on Employee Protection Provisions**.

Processes

As already noted throughout this guide, if an employer is contractually bound to undertake a redundancy process in a particular way (for example as described in an employee protection provision), then it will be a breach of the relevant employment agreement for the employer to divert from that.

Before implementing any redundancy procedure you should consider relevant:

- ▶ Employment agreements; and
- ▶ Policies and procedures manuals; and
- ▶ Past practice.

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.

If a period of notice is not specified in a written employment agreement, and the parties to the employment relationship are unable to agree, the law implies a period notice that is reasonable within the circumstances. These factors can include:

- ▶ Employees' expectations in the circumstances; and
- ▶ The length of the employment relationship; and
- ▶ The length of time needed to re-train or seek re-employment; and
- ▶ The financial circumstances of the employer.

If notice for redundancy is given to an individual employee, but before the employee's employment is terminated (at the conclusion of the notice period) the circumstances that brought about the decision to make the employee's position redundant changes or reverses, the employer may still be able to rely on the notice of termination.

Refer to the **A-Z Guide on Termination of Employment** for a discussion of notice and payments instead of, or for, notice periods, and the **A-Z Guide on Restraints of Trade** for information on that topic which can apply to 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. An employee protection provision which must be included in all agreements by December 2005 must include a clause stating what entitlements (if any) will be available to staff who do not transfer to a new employer in the event of a restructure.

Statistics

In the EMA *2007 National Employers Wage & Salary Survey Report*:

- ▶ 66.8% of participating employers' employment agreements included a redundancy provision, of which:
 - 42.8% provided compensation for redundancy (33.4% did not), of which:
 - The most common formula was 4 weeks pay for the first year and two weeks pay for every subsequent year of service. (in 26.4% of responses).
 - There was a very wide range of formulae, with 57 separate formulas, ranging from 2 weeks (1) to the most generous - 8 weeks for the first year, 10 weeks for the second year, plus 12 weeks for each year after that (1).

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, which is related to the first, is 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 will be liable to pay the redundant employee for the full term of the agreement.

Refer to the **A-Z Guide on Fixed Term Employment** for more information.

Redundancy Entitlements for 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. 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. Refer to the **A-Z guide** on **Vulnerable Employees**.

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.

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, then the primary remedy is reinstatement. 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. If reinstatement is not appropriate in the circumstances, then reimbursement of lost wages and compensation for humiliation, loss of dignity, and injury to the feelings of the employee may be awarded.

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.

OTHER ISSUES

The topics covered under this heading arise from time to time in respect of redundancies.

Holidays Act 2003

The Holidays Act provides minimum entitlements of annual holidays, public holidays, and special (including bereavement) leave.

Section 85: Presumption that employment continuous if employee dismissed and re-employed within 1 month.

Section 85 stipulates that where the employer dismisses an employee then re-employed that employer within one month, the employment of the employee shall, for the purposes of section 11 (which provides for an entitlement to three weeks annual holiday on pay after each year of employment) and for calculating holiday pay, be deemed to have continued as if the termination had not occurred.

Section 85 does not apply if a Labour Inspector has certified in writing that he or she was satisfied that in terminating the employment the employer acted in good faith and not for the purpose of evading or attempting to evade any obligation imposed by this Act or any payment required to be made under it. Determinations of Labour Inspectors may be appealed in the Employment Relations Authority.

Refer to the **A-Z Guide on Annual Holidays** for more information.

Lockouts

The Employment Relations Act 2000 provides a definition of a lockout, and prescribes which lockouts will be lawful and which will be unlawful under the Act. Lawful lockouts are those lockouts that occur in respect of collective bargaining where the employer has a view to compel its employees (or another employer's employees) to accept terms and conditions of employment or comply with demands made by the employer.

Where employees' employment is terminated on the grounds of redundancy, but the real motive behind the dismissals is to impose new terms and conditions of employment, the dismissals may be stayed (a halt is put on them until the issue is resolved) or reversed on an interim or permanent basis. It is unlawful to lockout employees if an applicable collective agreement is in force.

The basis for reinstatement or preservation of employment is twofold; firstly, the obligation of parties to employment relationships to deal with each other in good faith in collective bargaining may be undermined by this tactic, and secondly, the courts will not countenance termination of employment on the grounds of redundancy where there is no genuine reason to end the employment permanently.

Refer to the **A-Z Guide on Strikes and Lockouts** for more information on lockouts.

Taxation of compensation

The Income Tax Amendment Act (NO.4) 1992 provides that redundancy compensation is taxable as assessable income in the hands of the recipients. Redundancy compensation payments are treated as a lump sum payment in terms of PAYE but are not liable for the ACC earner levy or FBT. Redundancy compensation payments are however subject to student loan deductions.

The appropriate tax rate depends on the grossed up annual value of the employee's last 4 week's earnings and the payment. The tax rate applicable to the payment where the combined total of the payment and the grossed up value of the employee's income for the previous four weeks are:

- ▶ \$38,000 or less – is 21% or 21 cents in the dollar;
 - ▶ Between \$38,000 and \$60,000 – is 33% or 33 cents in the dollar;
 - ▶ Greater than \$60,000 – is 39% or 39 cents in the dollar.
- Tax rates should be checked with IRD www.ird.govt.nz

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 managed, needs to be made. If you are bound by any contractual constraints then these must be factored into your plans.

EMA 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 EMA Advice on 0800 800 362 or 09 367 0909 or AdviceLine@ema.co.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.emadvice.co.nz regularly.
- ▶ Attend our member briefings (held every 4 months) to keep up to date with all changes.
- ▶ Send your staff to EMA Learning courses and conferences designed for those who manage employees.

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