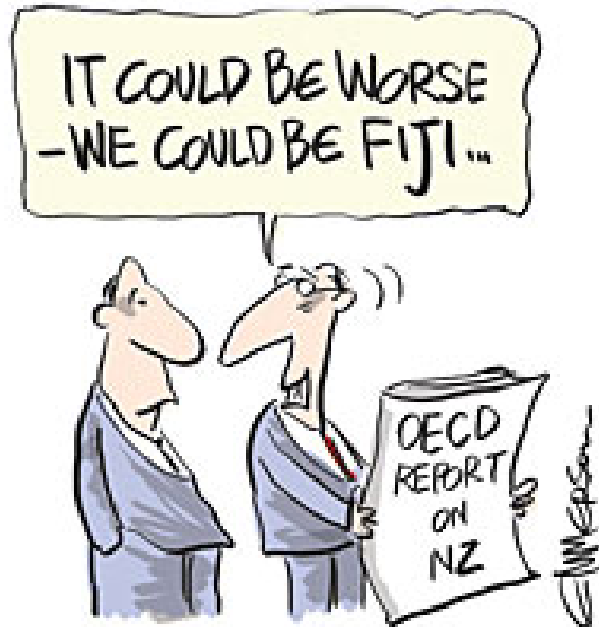


# Employment Issues in Insolvency



**Aaron Lloyd  
Partner**

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# Topics to be covered

- Redundancies
  - meaning of redundancy
  - alternatives
  - statutory requirements
  - common issues arising
- Business sales / continuity of employment
- Receivership situations
  - termination and adoption
  - liability for wages, notice etc
  - risk of reinstatement
  - compliance and penalties
  - preferential claims
- Other formal insolvency situations

# Redundancies

# What is redundancy?

- No fault termination
  - the position is redundant, not the person
- Common law
  - position is surplus to requirements of the business
  - position content is changed by at least 20%
- Contractual position
  - redundancy may be defined more narrowly in the employment agreement
- Single position v. from a pool
  - selection criteria where from a pool

# Alternatives to redundancy

- Redundancy will cut costs quickly but may not be the best long term solution
- Alternatives include
  - directing taking accrued leave
  - offering unpaid leave
  - sabbaticals, study leave
  - agreed reduction in days/hours of work, benefits
  - agreed deferral of bonuses
  - wage/salary freeze
  - job sharing
  - recruitment freeze

# Statutory obligations re redundancy

- Section 4 ERA – general duty of good faith
  - includes not being misleading or deceptive
- Section 4(1A)(c) ERA
  - access to information relevant to the continuation of the employee's employment
  - an opportunity to comment
  - before a decision is made
- Section 103A – test of justification for action or dismissal decision: what a fair and reasonable employer would do 'in all the circumstances'

# Substantive and procedural obligations

- Substantive justification
  - genuine business reasons for proposing disestablishment of position e.g. cost cutting or efficiencies, *not* performance or misconduct
  - Court will be slow to interfere in the legitimate exercise of an employer's management prerogative
- Procedural fairness
  - adequate consultation and provision of sufficient information
  - fair selection process (if downsizing)
  - offer of counselling and outplacement services
  - advice of right to legal representation and/or support

# Consultation

- Opportunity to comment on a *proposal* to disestablish the position *prior* to a decision being made
- Could be several points of “decision” during process
- Consultation
  - must be real, not a sham
  - is more than mere notification
  - must provide adequate information to enable employee to state a view
  - does not require employee’s agreement

## Issues we are seeing at present

- Undertaking a restructuring in a short timeframe
  - how long do you need to consult?
  - do you need to consult with employees in person?
- Is there an obligation to provide employee assistance or counselling, or outplacement?
- Directions received from international head office
  - how do you consult fairly when decision is already made?
- What if employees are on leave?
- What if employees' representatives are not available?

# Selling or transferring the business

- Part 6A of the ERA sets out processes for protecting employees during “restructuring”, including the sale or transfer of a business, or contracting out/in
- Different rules for ‘vulnerable’ and ‘other’ employees
  - vulnerable employees have a right to transfer on the same terms and conditions
- However, the definition of “restructuring” in this context does not include
  - any contract, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation

# Effect of a receivership situation

# Effect of receivership on employment agreements

- Generally, appointment of receiver does not immediately bring employment agreements to an end
- Situations when receivership will terminate employment agreements
  - appointment of receiver accompanied by immediate sale of company's business
  - Receiver immediately enters new employment agreements with employees that are inconsistent with previous agreements
  - where continuation of senior management employee's employment is inconsistent with role and function of receiver

# Personal liability for wages/salary

- Section 32 of the Receivership Act 1993 says that
  - a receiver is personally liable for the payment of wages/salary that, during the receivership, accrue under an existing employment agreement
  - however, personal liability will not arise where notice of termination is *lawfully* given within 14 days of receiver's appointment
  - position of a director who is also an employee of the company is different from that of other employees

# Termination of employment in receivership

- Notice of termination need not comply with employment law to be “lawful”, but there will still be consequences of failing to comply with employment agreements and employment law
  - notwithstanding receivership, employees have same rights and remedies as if there had been no receivership
  - therefore, where termination necessary, it is advisable to follow correct legal procedures
  - redundancy procedures particularly relevant

## “Lawfully” given notice

- *Re Weddel New Zealand Ltd (In Receivership and In Liquidation)*
  - 3 days after receivers appointed, employees given notice of immediate termination
  - employees said receivers personally liable (claimed notice not “lawfully” given)
  - Court of Appeal: **lawful** means in accordance with the Receivership Act and with the terms of the receiver’s appointment (not “in accordance with the terms of the employment contract”)
  - held receivers not personally liable for salary/wages

# Reinstatement in receivership

- If dismissal unjustified, reinstatement is in theory awarded unless employer can show it is not “practicable” in the circumstances
- In receivership reinstatement generally not “practicable” when employer has ceased trading
  - *Hunter v Nationwide Computers (NZ) Ltd*
    - inappropriate to reinstate employee to manager role given receivership and the fact that company had ceased trading
    - reinstatement futile as no role for employee to fulfil and no salary could be paid
  - *Zois v Dawe and Sons (Te Puke) Ltd (In Rec)*
    - claim of unjustified dismissal from employment as truck driver upheld
    - but for the fact that company had ceased trading reinstatement would have been awarded

# Penalties

- Note one ‘rider’ on the *Wedell* position
- Failure to comply with employment agreements could make the receiver (in addition to the company) liable for a penalty under the ERA
- Every person who “incites, instigates, aids, or abets” a breach of an employment agreement is liable to a penalty of up to \$5,000 for an individual and \$10,000 for a company
- *Peacock v NZ Performance etc Union (CA)*
  - Receiver dismissed all employees for redundancy, did not notify union in advance as required by the award
  - Receiver personally liable for penalty for breach of an award committed while managing a company
  - Receiver liable for aiding and abetting the commission of the offence
- Relatively rare

## Preferential claims

- For employees, various listed payments operate as preferential claims (section 30)
  - all wages/salary owed from 4 months **before** receiver's appointment
  - holiday pay
  - compensation for redundancy
  - amounts deducted from wages/salary of an employee in order to satisfy obligations of the employee
  - any reimbursement or payment provided for, or ordered by, the Authority, Employment Court or Court of Appeal
- Preferential claims capped at \$16,420 per employee
- Excludes those who were directors in last 12 months

## Wages / Salary

- Period of preference given to wages/salary ends when the employment agreement is actually terminated, not when receiver gives notice of termination
- **Wages or salary** is consideration for work done or to be done under employment agreement
  - does not include payment in lieu of notice where employment is terminated immediately
  - includes situations where employee required to work out period of notice or required to take “garden leave”

# Contractor v. Employee

- Receiver must distinguish between employees and independent contractors as only employee claims are given preferential status
- Real nature of the relationship taken into account
- Label parties give to relationship not determinative
- Courts approach
  - the Control Test
  - the Fundamental (or Economic Reality) Test
  - the Integration Test

## Receiver's liability in tort

- Statutory duty to ensure preferential payments are properly made out of inventory or accounts receivable
- Receivers liable in tort if, when they are or should be aware of preferential claims, they distribute assets to secured or unsecured creditors without first satisfying preferential claims

# Other formal insolvency processes

- Voluntary administration
  - same 14 day period for adoption of employment contracts as receivership, duty of good faith etc.
  - no preferential debts, as administrators do not make distributions - but any composition via a deed of company arrangement should reflect relative liquidation entitlements
  - no exemption from employment continuity regime in Part 6A (presumably a legislative oversight)
- Liquidation
  - automatic termination unless liquidators need to trade on
  - same preferential debt regime

# Questions



## Contact Details



Aaron Lloyd  
Partner (Employment/White Collar Litigation)  
Tel: +64 9 353 9971  
Email: [aaron.lloyd@minterellison.co.nz](mailto:aaron.lloyd@minterellison.co.nz)



Mark Sandelin  
Partner (Head of Litigation)  
Tel: +64 9 353 9813  
Email: [mark.sandelin@minterellison.co.nz](mailto:mark.sandelin@minterellison.co.nz)