

Employment Issues in an Economic Downturn

Jennifer Mills, Partner

Aaron Lloyd, Partner

Rochelle Price, Special Counsel

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MinterEllisonRuddWatts

LAWYERS

IT COULD BE WORSE
- WE COULD BE FIJI ...



Agenda

- Recent legislative changes
 - meal breaks and breastfeeding
 - KiwiSaver
- Restructuring and redundancy in the recession
 - the process
 - key points
- Alternatives to redundancy
- Impact on remedies
- Cases

Recent Legislative Changes (1)

- Employment Relations (Breaks, Infant Feeding and Other Matters) Amendment Act 2008
 - came into effect on 1 April 2009
 - paid and unpaid breaks now mandatory
 - breastfeeding breaks and appropriate facilities must be provided, where reasonable and practicable, and
 - amendments to KiwiSaver (further amendments by new Government in 2009 also)

Recent Legislative Changes (2)

- Breaks

- now mandatory
- observed as agreed between the parties, but in the absence of agreement, so far as reasonable and practicable, in the middle of work periods
- recent issue with air traffic controllers highlights potential issues with the legislation
- another potential issue is taking unpaid meal breaks during existing work hours
- the Prime Minister has called for a “common sense” approach

Recent Legislative Changes (3)

- Breastfeeding

- provide appropriate facilities and breaks
- limitation is “so far as reasonable and practicable in all the circumstances”
- “all the circumstances” includes the employer’s operational environment and resources
- recognises separate facilities will not always be available
- in addition to meal and rest breaks unless otherwise agreed
- unpaid unless otherwise agreed

Recent Legislative Changes (4)

- KiwiSaver

- from 1 April 2009 the following changes took effect
 - compulsory employer contribution increased to 2% (but doesn't continue to increase to 4%)
 - minimum employee contribution decreased from 4% to 2%
 - \$40 fee subsidy ceased and
 - employer tax credit of up to \$1,043 a year ceases for post March 2009 payments
- new Government has also made it clear total remuneration schemes are permitted

What is Redundancy?

- No fault termination, i.e., it is the position not the person that is no longer required
- Common law:
 - position is surplus to requirements of the business
 - position is changed by 20% or more
- Contractual position:
 - redundancy may be contractually defined, may be narrower than common law

Statutory Obligations

- Section 4 Employment Relations Act 2000 (**ERA**) – general duty of good faith
- 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

Substantive and Procedural Justification

- Substantive justification:
 - genuine business reasons for proposing disestablishment of position e.g. cost cutting or maximising efficiencies and *not* performance or misconduct
 - Court will be slow to interfere in the legitimate exercise of an employer's management prerogative
- Procedural justification:
 - adequate consultation (more than notification) 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 decision being made
- 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 in the Recession (1)

- 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 EAP?
- Is there an obligation to provide outplacement counselling?

Issues we are Seeing in the Recession (2)

- Directions received from international head office
 - how do you balance your obligations?
 - what if the decision is already made?
 - “sham” process?
- What if employees are on leave?
- What if employees’ representatives are not available?



Alternatives to Redundancy (1)

- Redundancy will cut costs quickly but may not be the best long term solution
- Issues to consider:
 - what message does it send to clients?
 - what message does it send to competitors?
 - will staff go and work for competitors?
 - what will the company do when things improve?
 - are there other alternatives?

Alternatives to Redundancy (2)

- Alternatives include:
 - directing taking accrued leave
 - offering unpaid leave
 - sabbaticals
 - study leave
 - agreed reduction in days/hours of work
 - agreed reduction in benefits
 - agreed deferral of bonuses
 - wage/salary freeze
 - job sharing
 - recruitment freeze

Issues to be aware of

- Policies can be amended unilaterally
- Need agreement to vary terms and conditions
- In this climate there may be more flexibility from employees
- Can have free and frank discussions and outline alternatives (provided no duress)
- Need to document any variations, particularly if arrangements are temporary

Impact on Remedies

- Likely to be an increase in applications for reinstatement given scarcity of jobs
- Potential increase in claims for lost wages (longer out of work)
- Duty to mitigate loss balanced against lack of available jobs – evidence of applications may be enough
- Focus is on process as genuine business reasons should be clear

Case Statistics (1)

- Compensation in 2008 redundancy cases:
 - *Blake v Senate Nursing Bureau* (October 2008): \$6,000
 - redundancy for genuine business reasons but not conducted fairly as redundancy “sprung” on employee without warning
 - *Hoyte v Hapag-Lloyd (NZ) Ltd* (August 2008): \$6,000
 - employer failed to meet employment agreement obligation to seek to find alternative employment for employee

Case Statistics (2)

- Compensation in 2009 redundancy cases:
 - *Teremoana v Counties Milk Ltd* (February 2009): \$4,000
 - process of notification and consultation about the prospect of redundancy were not followed and other issues such as misconduct and poor performance were considered
 - *Duncan v Harveys Floor Pride Ltd* (March 2009): \$5,000
 - not satisfied the company established Ms Duncan's position was genuinely superfluous and not satisfied actions were what a fair and reasonable employer would have done in the circumstances

Questions



Contact Details



Jennifer Mills

Partner

Tel: +64 9 353 9919

Email: jennifer.mills@minterellison.co.nz



Aaron Lloyd

Partner

Tel: +64 9 353 9971

Email: aaron.lloyd@minterellison.co.nz



Rochelle Price

Special Counsel

Tel: +64 9 353 9966

Email: rochelle.price@minterellison.co.nz