

Redundancies: Factors affecting costs for employers

As the economic landscape becomes more uncertain, there are various factors employers need to consider when making workers redundant.

In order to safeguard against a personal grievance, employers need to ensure their process is substantively fair. However, there are also various economic factors employers should consider before concluding that redundancy is the best solution.

Employers are currently battling rising costs. It is important to consider if redundancy is really the best option.

Currently, there are many factors contributing to rising costs for employers. Some of these include:

- Labour and skill shortages.
- Supply chain issues.
- Inflation.
- Immigration requirements.
- Wage increases.
- Increasing interest rates.
- Increases to employee sick leave entitlements.

While it is important that employees receive fair pay to match the economic circumstances we are currently experiencing, some employers may not be able to absorb increasing costs. The combination of increasing costs of labour and resources may result in employers beginning to pass these costs on to the consumer... This in turn, has a flow on effect on inflation and the cost of living. Spending in the retail and hospitality sector may be holding up for now, but that is expected

to take a downturn.¹ If employers are unable to absorb increased costs, there is risk of business closure.

There is suggestion that rising unemployment may combat the current need for employers to keep increasing pay due to the labour shortage. However, for small to medium businesses, particularly in retail and hospitality, this benefit needs to be balanced against the decrease in customer spending.

It has been suggested that the rise to minimum wage will have minimal impact on costs for employers, because the current skill and labour shortage has already forced wages beyond minimum wage.² However, small to medium sized business will wear the impacts of this the most.³ Raising the minimum wage has a ripple effect on other workers above minimum wage, who expect the relative difference between them and minimum-wage workers to remain. If labour shortages start to reduce and unemployment increases together with economic downturn, the relativity of the increased minimum wage rate may become an issue.³

One reason we are seeing a rise in redundancies lately is because the demand for services has reverted back to pre-Covid-19 numbers. Certain industries, such as the tech industry, saw an increased demand during Covid-19. Now, almost three years on from our first lockdown, those numbers have returned to baseline rates, and the number of staff is now surplus to the needs of the business. Or alternatively, roles that were required in response to Covid-19 demand are no longer needed.

The Government has recently announced that it will not proceed with the Income Insurance Scheme Act, which would have created security for workers, by effectively requiring contribution to a redundancy payment fund.

Against all of this economic uncertainty, employers contemplating redundancies should stop to consider if it

¹ [Inflation and rising interest rates remain key headwinds for the economy - Quarterly Predictions, December 2022](#)

² ['Small businesses will struggle' with minimum wage increase, BusinessNZ says](#)

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is really the best option. It is important to hold on to valuable employees, especially considering the fact that customer and client demand will eventually bounce back. The cost of training employees, and the damage to culture often caused by redundancies, are important considerations.

Regardless of your perspective, if an employer is relying on financial or economic grounds to disestablish roles in their business, they need to be transparent about their decision-making process, and they need to provide financial information evidencing that the redundancy is for a genuine business reason. It should be noted that just because some employers in the same industry are able to justify redundancies for economic reasons, it does not mean that other employers in that same industry will necessarily be able to as well.

Redundancy requirements – when can an employer make a role redundant?

A redundancy needs to be both justifiable and procedurally fair. Even if an employee only claims that one of those requirements were not met, the court will still examine both.³ The Employment Relations Act section 103A 'fair and reasonable employer in all the circumstances' test of justification also applies to redundancies.⁴

In regards to the procedure that needs to follow, the test for justification is what a fair and reasonable employer could have done in the circumstances. The courts will determine this on an objective basis.

Under section 4 of the Employment Relations Act, employers have 'good faith' obligations that need to be adhered to.⁵ If an employer's process throughout the redundancy procedure is found wanting, the employee will likely have a personal grievance, even if the redundancy dismissal itself is justifiable. Section 4(1A)(c) in particular requires employers who are

proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment, to provide:

- Access to information relevant to the continuation of the employee's employment, and to the decision.
- An opportunity to comment on the information to their employer before the decision is made.

Even in the exceptional circumstances of Covid-19 and its impact on employment, the 'fair and reasonable' standard test still applied. Maintaining this standard will also be expected of employers during difficult economic times. Simply stating that '*labour makes up the majority of company costs*' is not a sufficient reason to make roles redundant. An employer has to be able to show they considered all cost cutting measures including other overheads.

Furthermore, an employer has to make a role redundant for the reasons stated. For example, if an employer states that a role is surplus to the needs of the company, but actually selected that role because it would result in a significant salary saving, this may give rise to a successful personal grievance claim.⁶

Use of financial forecasting in justifying redundancies.

With suggestions of a recession and worsening economic conditions, employers may be tempted to reduce staff for anticipated financial circumstances. However, it is not clear whether anticipated financial circumstances will justify redundancies.

When relying on financial forecasting, an employer has to be able to show the redundancy was for genuine business reasons. To determine if this is the case, the courts will look at all the information relied on in coming to a redundancy situation. Historically, the courts did not

³ *Crombie v Mossca Services Ltd* [2021] NZERA 518

⁴ Employment Relations Act 2000, section 103A

⁵ Employment Relations Act 2000, section 4.

⁶ *Hogan v SP Blinds Ltd* [2022] NZERA 88.

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enquire into the business reasoning of employers. However, a line of cases including *Grace Team Accounting Ltd v Brake* signalled a change.⁷

If an employer can prove that the dismissal was justifiable and for genuine business reasons, the Court is unlikely to substitute its judgment for that of the employer's.⁸ However, the Court must establish whether or not the actions taken were those a fair and reasonable employer could take in the circumstances. That will inevitably involve an analysis of the financial imperative for redundancies. It is likely that if the employer's justification for redundancy is purely based on financial forecasting, satisfying the Court that the decision was fair and reasonable in all the circumstances may be difficult.

Good faith obligations and trends in case-law suggest there will likely need to be real evidence of financial downturn already, if not in the near future. An employer would need to reasonably prove that the downturn they anticipate *will* happen. The Court will look at the information the employer provided the employee, and scrutinise whether it reasonably establishes the need for redundancies.

Procedural tips

First and foremost, it is important that an employer document every step of a redundancy process, and put all communications in writing, so that they can provide evidence of their reasoning and process if required.

We recommend the following steps:

1. Determine the plan for the business, and what needs to be achieved.
 - If cutting costs is needed, determine if costs can be saved in other areas of the business. As part of the duty to be a fair and reasonable employer, redundancies should be a last

resort. The employer should consider any alternatives to a full redundancy. It may be the case that only a 'technical redundancy' is necessary (where only part of a role is disestablished).

- If the relevant employment agreement has a redundancy provision, the procedure in that must be followed.
 - It is important to note that a redundancy is when the particular role you are seeking to disestablish is no longer needed, or is surplus to the needs of the business. This is distinct from a particular person not being wanted.
 - The employer should not have a pre-determined decision regarding redundancies. Whilst an employer is entitled to develop a plan for its business, it is important that an employer can show they have remained open to the possibility of changing their plan.⁹
2. Inform potentially affected employees of the proposal that may result in the disestablishment of their position, and invite them to provide feedback (either by submission or in person). If the feedback is given in person, they should be encouraged to bring a support person and/or take advice.
 - Employers need to provide the reasoning for their proposal, together with supporting information. The reasons given need to be genuine.
 - Sufficient information that provides evidence of the reasoning for the proposal should also be provided. This should enable the employee to understand the need for the business restructure.

⁷ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.

⁸ *Petrich v SMX Ltd* [2021] NZERA 32 at [46].

⁹ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [54].

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- If the employer is seeking to disestablish some but not all roles, then they must also provide the employees with the selection criteria they have established to determine successful applicants for the remaining positions. Failure to provide selection criteria to the employee may amount to a significant procedural error resulting in unjustified dismissal.¹⁰
3. After providing all relevant information, the employer, should then seek feedback from the employees. This includes the opportunity to suggest alternative options to redundancy.
 - The employer must give the employee a reasonable amount of time to provide such feedback.
 - The employer should not have pre-determined any decision regarding the proposed redundancy.
 4. Once the employee provides their feedback, the employer should be able to show that they have genuinely considered it. This includes considering any alternatives to redundancy, which may include but are not limited to: redeployment, re-training, or reduced hours/duties.¹¹
 - The employer is under an obligation to investigate such alternatives.
 5. The employer, considering all the information they have in addition to the employee's recommendations, can then come to a decision as to whether the proposed redundancy needs to go ahead.
 6. After receiving feedback, if an employer decides to modify its proposal, then it should consult again with potentially affected workers, receive and consider their feedback before making a final decision in relation to the modified proposal.

Want to know more?

If you have any questions about Redundancies please contact our specialist [Employment Team](#).

¹⁰ *Crombie v Mossscar Services Ltd* [2021] NZERA 518

¹¹ *Hogan v SP Blinds Ltd* [2022] NZERA 88 at [54].