
COVID-19: Restructuring and Redundancies



COVID-19 will undoubtedly have a significant impact on businesses in New Zealand and will naturally result in many employers needing to look at restructuring and redundancies.

Government COVID-19 Wage Subsidy

The Government is offering a wage subsidy to assist employers who are struggling with the financial impact of COVID-19. While employers are being encouraged to make use of the scheme ahead of making any decision regarding restructuring and redundancies, it is recognised that the wage subsidy scheme will not shield businesses from the full impact of COVID-19. Ultimately, if employers cannot afford to retain staff for the full 12-week subsidy period, they are not obliged to do so. However, any termination on the grounds of redundancy must be substantively justified and procedurally fair, in all the circumstances.

There is an exception to this for employers who applied for the wage subsidy after 4 pm Friday 27 March 2020. Employers who fall into this category are required to retain those employees for the duration of the 12-week subsidy period meaning that staff cannot be made redundant during this period (although notice of termination can in our view still be given to employees before the end of the subsidy period). This change to the wage subsidy declaration is not retrospective in its application meaning it does not apply to employers who applied for the subsidy before 4 pm Friday 27 March 2020.

A genuine reason?

A significant downturn in sales/revenue, a loss of customers/suppliers, and/or a shift in market requirements, could amount to a genuine reason for restructuring or redundancies. However, it's important to ensure that an employer's business case and reasons are documented, with supporting evidence. Further guidance is available at <https://www.employment.govt.nz/workplace-policies/workplace-change/workplace-change-process-outline/>.

A fair and reasonable process?

In all their dealings, employers and employees must deal with each other in good faith.

Employers must follow a fair process, which includes:

- complying with the terms of employment agreements and policies ("step 1" for employers should be to review employment agreements and policies, and particularly any provisions regarding restructuring and redundancy);
- being open, communicative and constructive;
- documenting the employer's business case, reasons and proposals;
- providing all relevant information to employees;
- giving employees a reasonable opportunity to consider and respond to any proposals;
- considering alternatives, which could include:
 - reaching a mutual agreement with employees to vary the terms of their employment;
 - considering whether employees may be willing to take unpaid leave or work reduced hours;
 - considering whether any employees are subject to a 90-day trial period, and can be dismissed in reliance on that;

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- accessing the wage subsidies and other support offered by the Government (see further information at <https://duncancotterill.com/publications/important-updates-to-the-government's-covid-19-financial-support-package>); and
 - genuinely taking the employees' responses into account before coming to a decision.

What's a reasonable process in the light of COVID-19?

Whilst we would ordinarily recommend consultation meetings with employees during the process, the reality is that such meetings may not be possible, particularly if employees are working from home or in isolation.

Ultimately, an employer must be able to show that its actions were "what a fair and reasonable employer could have done in all the circumstances at the time".

In the current situation, that may mean:

- communicating with employees via videoconference, telephone, or in writing; and
- if change is particularly urgent, working to shortened timeframes during the consultation process.

If you are unsure about what is reasonable in the circumstances, or would like guidance throughout the process, we're happy to assist.

For more information, please contact Kirsty McDonald or Olivia Lund.



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