ALLEN & OVERY

Employment Reorganisation Roadmap

New Zealand

1 April 2021

BELL GULLY

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Contents

1. Employee representation

1.1. What are the main forms of employee representation involved in restructurings?

Trade unions (organised at enterprise, sector or occupation level) represent employee groups. Consultation with unions may take place at the same time as with individual employees as there is no order of priority (unless unions have requested that they be consulted first). Both unions and individual employees may engage a representative.

1.2. Is there a system of employee participation rights?

Employees have no right to management or board-level representation.

2. Process on business sales

2.1. Are employees automatically transferred to a buyer by operation of law on a business sale?

There is no automatic transfer or assignment of employees by operation of law to a buyer on a business sale where this is an asset sale, except for the statutory exception described below.

Generally speaking, in order to effect a transfer of employees, the existing employer must terminate the employee's employment and the buyer/new employer must offer them new employment. The Employment Relations Act 2000 (ERA) requires all employment agreements to include an Employment Protection Provision (EPP) to protect the employment of affected employees in the event of a business restructuring (including where a business sells or transfers all or part of its business). While this provision does not provide for the automatic transfer of the employees, it must describe the process that the existing employer will follow in relation to negotiating whether affected employees will transfer to the new employer on the same terms and conditions and to determine what entitlements (if any) are available to employees who do not transfer.

The ERA provides special statutory protection to specified categories of employees where their work is to be performed by another person in the event of a restructuring. In these circumstances, protected employees have a statutory right to elect to transfer to a new employer on the same terms and conditions and with continuity of employment upon a restructuring and they can bargain for redundancy entitlements. A restructuring for these purposes includes the sale or transfer of a business (or part of it), contracting in, contracting out or subsequent contracting of the protected employee's work. The categories of protected worker are defined in the ERA and include employees who provide cleaning or food catering services in any place of work, and employees providing cleaning, food catering, orderly, laundry, and caretaking services in specified industries. The categories are expected to be expanded in mid-2021 to include security officers.

2.2. If so, in broad terms, what is the legal test for identifying which employees transfer?

Those categories of protected employees who have a statutory right to elect to transfer automatically to a new employer are defined in Part 6A and Schedule 1A of the ERA.

2.3. Can employees object to the automatic transfer of their employment and what are the consequences of an objection?

There is no automatic transfer of employment. Protected employees have a statutory right to elect to transfer (or not) to the new employer.

If a protected employee elects not to transfer, then their role with their "existing employer" may be made redundant if they cannot be redeployed within the business and there are no other alternatives to redundancy.

2.4. Do obligations to inform and consult employees or employee representatives arise on a business sale?

The process required of employers can be onerous. A business (asset) sale amounts to a cessation of (part or all of) the seller's business so the employment of all those employed in the business will be terminated upon completion. As a result, statutory consultation obligations will arise in relation to those employees pursuant to the ERA and the statutory obligation of good faith (which is supplemented by common law requirements). Consultation about the prospect of a business sale should occur before or at the time a potential buyer is identified. However, unless there are particular commercial sensitivities, information should be provided to employees about the prospect of a sale before this time. To meet its consultation requirements an employer should:

– provide the potentially affected employees (and the union, if applicable) with information regarding the proposed sale and how it might affect their employment if the sale proceeds

– give the employees (and the union) an opportunity to comment on the information and respond to the proposal, and

– consider, with an open mind, all feedback received before a final decision is made.

Affected employees are entitled to involve a support person or legal representative in the consultation process if they wish to do so.

An employer must also comply with any relevant employer policies or procedures as well as with the terms of each employee's employment agreement, in particular the EPP. Every employment agreement must contain an EPP, which is a clause specifying the process to be followed in relation to contracting-out, or the sale or transfer of the employer's business (or a part of it) to another person (although it does not apply to arrangements entered into while the employer is adjudged bankrupt or in receivership or liquidation). An employer cannot contract out of its statutory obligations, and so cannot rely on any term in such documentation that is inconsistent with the ERA.

For protected employees, an employer must advise them of their statutory right to elect to transfer to the buyer, provide them with information sufficient for them to make an informed decision, and the date by which any right to make an election must be exercised. The information must include the name of the buyer, the nature and scope of the transaction, the date on which the transfer will take effect, and the way in which the right to make an election may be exercised.

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

Although rare, a penalty can be awarded for serious and sustained breaches of the duty of good faith by a failure to inform and/or consult with affected employees. The penalty for a breach of the duty of good faith is NZ$10,000 for an individual and NZ$20,000 for a company, per breach.

Employees (usually through a union) could also bring proceedings seeking an injunction restraining completion of the transaction pending the employer following a proper process. A "technical redundancy" clause may operate to nullify these obligations and rights if the employee is offered employment consistent with the terms of the clause.

An employee who considers that they have been unjustifiably disadvantaged or unjustifiably dismissed, including as a result of a failure to consult, may bring a personal grievance claim and be entitled to a variety of remedies (see **section 6 – Process on individual dismissals**).

3. Process on share sales

3.1. Do obligations to inform and consult employee representatives arise on a direct share sale (ie, on the sale of the company itself)?

A change of corporate ownership of the employer alone would not normally affect the continuation of an employee's employment. There is therefore no requirement to consult on a share sale. However, employers owe a statutory duty of good faith to all of their employees and it is usual practice to provide information to employees and unions about a share sale even if such communication is simply to indicate that the share sale is occurring and it is "business as usual".

3.2. Do obligations to inform and consult employee representatives arise on an indirect share sale (on the sale of a company's direct or indirect holding company)?

A change of corporate ownership of the holding company is unlikely to affect the continuation of an employee's employment. Therefore there is no requirement to consult on an indirect share sale where the employing company itself is unaffected.

4. Process on outsourcings

4.1. Are employees transferred by operation of law in the following scenarios: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services?

Protected employees (who provide cleaning or food catering services in any place of work, and employees who provide cleaning, food catering, orderly, laundry, and caretaking services in specified industries) have a statutory right to elect to transfer by operation of law on their existing terms and conditions of employment and with continuity of employment in a restructuring situation. For these purposes, a restructuring means the contracting out, contracting in, subsequent contracting, or selling or transferring of an employer's business (or part of it). This would include an initial outsourcing, a change of supplier, or an insourcing.

However, employees who are not protected employees do not have the same protection and will not transfer by operation of law. Instead, any transfer in a restructuring situation affecting them will be a matter for negotiation between the employer and the new supplier or transferee. The employment agreements for these employees will need to include an EPP relating to the negotiations between the existing employer and the new employer about the potential transfer. A restructuring for these purposes means contracting out or selling or transferring an employer's business (or part of it), but does not mean contracting in or subsequent contracting. Therefore, it would include an initial outsourcing, but would not include a change of supplier or an insourcing.

4.2. Do obligations to inform and consult employees or employee representatives apply in any of these scenarios?

Employers owe a statutory duty of good faith to all of their employees.

For protected employees, the ERA requires the employer to provide all affected protected employees with information regarding their statutory right to make an election to transfer to the new employer. The protected employees must be provided with enough information to allow them to make an informed decision and must be provided with a reasonable opportunity to exercise that right.

For employees who are not protected, the EPP will set out the process that an employer must follow in negotiating with a new employer, including the matters to be negotiated and the process to be followed to determine what entitlements, if any, are available for employees who do not transfer to the new employer.

5. Process on collective dismissals

5.1. Is a "collective dismissal" (or "mass layoff") defined by law?

There is no concept of collective dismissals, nor any specific regulations regarding collective dismissals. As to individual redundancy dismissals, see **section 6 – Process on individual dismissals**.

5.2. Do obligations to inform and consult employee representatives arise on a collective dismissal?

There is no concept of collective dismissals.

5.3. Do obligations to inform and consult the competent authorities arise on a collective dismissal?

There is no concept of collective dismissals. Please see the answer to **6.2** in relation to consultation obligations on individual redundancies.

5.4. When are these obligations triggered?

There is no concept of collective dismissals. Please see the answer to **6.2** in relation to consultation obligations on individual redundancies.

5.5. What are the penalties for non-compliance with information and consultation obligations on a collective dismissal?

There are no specific penalties for collective dismissals (as no such concept exists).
Please see the answer to **6.5** regarding penalties for non-compliance with individual dismissals.

5.6. Do obligations to inform and consult employee representatives and/or competent authorities arise in the context of multiple dismissals, which do not qualify as a collective dismissal, as defined by law?

There is no concept of collective dismissals. Please see the answer to **6.2** in relation to consultation obligations on individual redundancies.

If multiple dismissals are likely to arise for employees under a collective agreement, the duty of good faith requires that the employer first consult with the union. The parties should follow any redundancy processes that are outlined in the collective agreement. This is in addition to the general process requirements in respect of each individual employee, outlined in **section 6 – Process on individual dismissals**.

5.7. Does an employer have options/alternatives when it has been unable to reach agreement with employee representatives during the negotiation period?

If multiple dismissals are likely to arise for employees under a collective agreement, then provided that there has been proper consultation with the respective union and its affected employees (including providing all relevant information and considering any feedback), an employer does not have to reach agreement about a proposal relating to multiple dismissals. An employer maintains ultimate management prerogative to make changes to its business.

6. Process on individual dismissals

6.1. Are employees entitled to a minimum period of notice on dismissal on redundancy or economic grounds?

There are no statutory minimum notice periods. An employee's notice period will usually be specified in their employment agreement but, if not, an employee will be entitled to "reasonable" notice – the length of which will depend upon seniority, length of service, company practice and other factors.

6.2. Does any special procedure apply when proposing to implement an individual dismissal on redundancy or economic grounds?

A dismissal must be both substantively justifiable by reason of redundancy (ie the employee's role is, or will be, surplus to the company's requirements) and carried out in a procedurally fair manner.

Based on case law and the statutory duty of good faith, fair procedure includes, as a minimum:

– provision of information about the proposal to restructure, including information about the restructuring process proposed, before decisions are made

– where applicable, consultation about the selection criteria used to decide who will be made redundant

– provision of information about potential redundancies, including notification to employees on an individual basis of how the restructuring could affect their positions, so that affected employees have sufficient information to give informed feedback on the proposal

– an opportunity for employees to comment on the restructuring proposal

– an open-minded consideration of employees' responses before a decision is made, and

– consideration of alternatives to redundancy, including potential alternative positions within the company or group.

An employer must also comply with the terms of each employee's employment agreement and with any relevant policies or procedures. Such documents may provide additional or enhanced procedural requirements.

6.3. Does special dismissal protection apply where dismissals are to be implemented following or in connection with a business transfer?

Special statutory protections apply to protected employees (who are employees who provide cleaning or food catering services in any place of work, and employees providing cleaning, food catering, orderly, laundry, and caretaking services in specified industries). Such employees have a statutory right to elect to transfer to a buyer as of right on their existing terms and conditions of employment in certain "restructuring" situations.

If they do so, and the protected employee's work is to be made redundant by the new employer for reasons relating to the transfer, the protected employee has a right to bargain for redundancy payments with the new employer (if their employment agreement does not provide for redundancy compensation) or to have those entitlements determined by the Employment Relations Authority. Alternatively, the new employer may face an unjustified dismissal claim if the redundancy cannot be justified on genuine commercial grounds.

If the protected employee does not elect to transfer to the new employer, they may be made redundant by the seller if their role is superfluous to the needs of the seller.

In all cases, the seller or new employer must have genuine commercial reasons for making a protected employee redundant and follow a fair process before dismissing an employee for redundancy.

6.4. Are employees entitled to a minimum severance payment on dismissal for redundancy or economic grounds?

There is no statutory entitlement to severance/redundancy compensation. It is only if an employment agreement (or policy document) provides for a severance payment, that one becomes payable.

A "technical redundancy" situation arises where an employee's employment with a particular employer is terminated as a result of the sale or transfer of the business to another owner, but the employee is offered a substantially similar position with the new owner on the same terms and conditions of employment, including recognition of service with the previous employer. It is common for employment agreements to contain a "technical redundancy" provision providing that if, for example, the employer sells, transfers or contracts-out all or part of its business, the employee will not be entitled to redundancy compensation where they are offered substantially similar ongoing employment (or other similar wording).

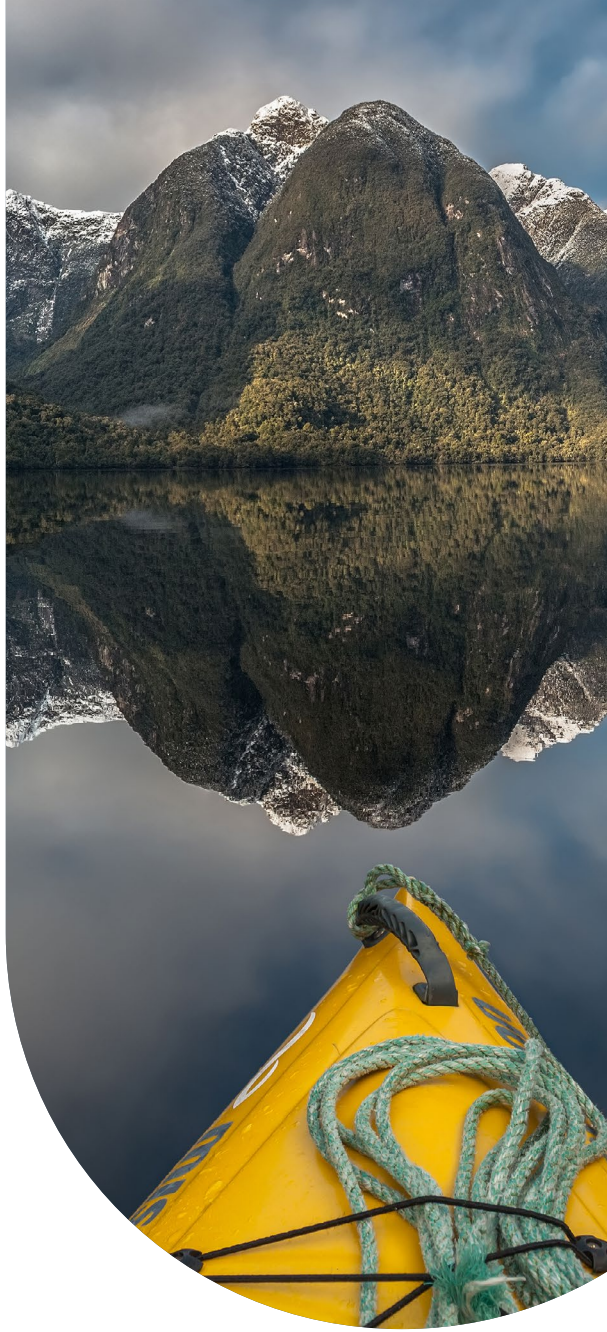
6.5. What are the penalties for non-compliance with individual dismissal procedure?

An employee who considers that they have been unjustifiably dismissed may commence a personal grievance claim, the possible remedies for which include reinstatement, an award of lost wages and/or lost benefits (whether or not of a monetary kind), and compensation for humiliation, loss of dignity and injury to the feelings of the employee.

6.6. Is there any special legal protection or does any special treatment apply for particular groups of workers?

In relation to restructuring, special protections apply to employees who provide cleaning or food catering services in any place of work, and employees providing cleaning, food catering, orderly, laundry, and caretaking services in specified industries. These protected employees have a statutory right to elect to transfer to a buyer on their existing terms and conditions of employment in certain restructuring situations. If those employees are subsequently made redundant by the new employer following such a transfer, the employees may bargain for redundancy entitlements with that new employer or have those entitlements determined by the Employment Relations Authority.

In relation to dismissals generally, certain categories of employee benefit from enhanced legal protection, for example, whistleblowers in the context of protected disclosures, and those who are pregnant or on parental leave in the context of redundancy. However, ultimately employers are not prevented from dismissing any category of employee (regardless of the risk of doing so). To be lawful, the reasons should be genuine, unrelated to any protected characteristics, and a fair process must be followed.



7. Process when implementing alternatives to redundancy

7.1. Can changes to employment terms be made with or without express employee consent?

As a general rule, contractual terms and conditions cannot be varied without the consent of both parties and the ERA contains certain provisions that must be abided by if an employer wishes to vary an employment agreement. However, in many cases the employment agreement may provide that the employer is entitled to make minor reasonable changes without obtaining employee consent. In those instances it is recommended that an employer still consult with the employee in good faith before implementing the change.

The employer's actions would be subject to the statutory test of justification which requires an assessment of whether the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all of the circumstances at the time.

7.2. Must an employer consult individually or collectively with affected employees or their representatives (if any) before making changes to employment terms?

The statutory duty of good faith requires parties to the employment relationship to deal with each other in good faith, which includes being active, constructive, open and communicative with one another. Where the employer proposes a change to an employee's terms and conditions of employment, it should consult with affected employees individually before implementing those changes. This should involve providing the employee with a copy of the intended variation, advising the employee that they are entitled to seek independent legal advice (and giving the employee a reasonable opportunity to seek that advice), considering any issues that the employee raises and responding to them.

If employees are represented by a union pursuant to a collective employment agreement, the employer should consult with the union on behalf of its constituents. While an employer is not prevented from communicating with its represented employees, any failure to notify or include a union may expose the employer to a risk of a breach of good faith claim being brought against it.

7.3. Do additional restrictions apply if changes are proposed in connection with or following a business transfer?

Employees' terms and conditions of employment post-transfer will depend on the terms offered by the new employer, which may reflect the offer required to be made under the terms of any sale and purchase agreement. The existing employer should also be aware of the terms of the EPP that applies in connection with a business transfer (which specifies the process to be followed in a restructuring).

Protected employees (who are afforded enhanced statutory protection under the ERA) have a statutory right to elect to transfer and may do so on the same terms and conditions of employment and with continuity of service (including for the purpose of all leave-related entitlements). However, protected employees can be employed by the new employer on different terms and conditions if they so agree.

7.4. What are the penalties for non-compliance with these procedures?

Although rare, a penalty can be awarded if an employer fails to comply with its duty of good faith by breaching consultation requirements and that failure is deliberate, serious and sustained or was for the purpose of undermining an employment agreement or the employment relationship. The penalty for a breach of the duty of good faith is NZ$10,000 for an individual and NZ$20,000 for a company, per breach.

An employer would also be at risk of a claim of unjustified disadvantage (a type of personal grievance under the ERA) or constructive dismissal (a type of unjustified dismissal).

7.5. Do national laws promote or permit any alternatives to redundancy (eg layoff or short-time working)?

The Government adopted emergency measures for wage support, job retention and leave payments in response to the Covid-19 pandemic. These measures include the Wage Subsidy Scheme, Resurgence Support Payments, Leave Support Scheme, and Short-Term Absence Payments. The availability of these payments depends on the applicable Government Alert Level status at any one time (which ranges from Alert Level 1 to Alert Level 4) and associated timeframes for application. Further, each of these payments has eligibility criteria. In other contexts alternatives to redundancy can be agreed.

8. Process on insolvency

8.1. Do obligations to inform and consult employee representatives arise on the sale of an insolvent business (whether share sale or business sale)?

In New Zealand the phrase "insolvent business" is capable of describing:

– a business which cannot meet its debts as they become due in the normal course of business ("cash-flow insolvent")

– a business whose assets are less than the value of its liabilities ("balance sheet insolvent"), and

– different forms of external administration (including receivership, voluntary administration or liquidation).

The same requirements in relation to the provision of information and consultation with employees (and their representative/a union if relevant) apply in the case of solvent or insolvent businesses, except in a liquidation (please see **section 2 – Process on business sales** for further information). However, the additional protections usually afforded to "vulnerable employees" do not apply to contracts, arrangements, sales or transfers entered into, made or concluded while the employer is adjudged bankrupt or in receivership or liquidation.

8.2. Does the buyer of an insolvent business inherit employees and/or employee liabilities by operation of law?

The position will depend on the type of insolvency.

In a receivership situation, the receivership does not automatically terminate an employment agreement. A receiver has a threshold decision as to whether it is in the best interests of the creditors to trade on, or to realise the secured assets. A receiver may terminate, dismiss and re-employ, or adopt the existing agreements. A buyer would buy the assets of the business and therefore the employees would be in a redundancy (or technical redundancy) situation (ie the buyer can choose to make offers of employment and if they do, the employees' past service is usually recognised). Whether employee liabilities are transferred in a receivership is subject to negotiation between the parties.

The purpose of a voluntary administration is to maximise the chances of the company continuing its business or to obtain a better return for creditors and shareholders than would result in a liquidation. The administrator may carry on the business of the company to the extent necessary for the administration of the company, including disposal of all or part of the business. In that event, a buyer would buy the assets of the business and therefore the employees would be in a redundancy (or technical redundancy) situation (ie the buyer can choose to make offers of employment, and if they do the employees' past service is usually recognised). Whether employee liabilities are transferred in a voluntary administration is subject to negotiation between the parties.

In a liquidation, the employees' employment is terminated automatically by operation of law upon the making of the liquidation order, and there is no obligation to consult in this event. The liquidators' duties are to realise assets – they have very limited power to trade on the business, and therefore it is highly unusual for liquidators to employ anyone. A buyer of assets can choose to make offers of employment, but unlike a receivership/voluntary administration, a technical redundancy situation will not arise as the employees' past service will not be recognised. There will not be any employee liabilities to transfer in a liquidation situation.

8.3. Do obligations to inform and consult employee representatives arise where collective dismissals are to be implemented in an insolvent business?

There is no concept of collective dismissals, nor any specific regulations regarding collective dismissals. Whether individual dismissal rules apply will depend on the type of insolvency proceedings.

9. Contacts

Tim Clarke
Partner
Tel +64 9 916 8347
tim.clarke@bellgully.com

Sarah McFetridge
Senior Associate
Tel +64 9 916 8865
sarah.mcfetridge@bellgully.com

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