Restructuring and redundancy around the world

Angela Atkins takes a look restructuring and redundancy in the second article in her series on employment law around the world. She checks out legislation and case law and sets out some of the consequences of not following the correct procedure.

One of the key areas of HR is restructuring and redundancy. This is especially so during, or coming out of, a recession, when companies are still downsizing or rightsizing. But how different is it if you've dealt with this overseas but not in New Zealand? What about if you're based in Australia but have to look after New Zealand employees as well—what do you need to do differently?

This article sets out the key things you need to know to comply not just with legislation but also with case law to make sure you follow the right process when restructuring and redundancy are happening. It also sets out some of the consequences of not following the right process!

Restructuring legislation

Firstly, in terms of restructuring and redundancy, what are the different Acts that apply around the world?

In New Zealand we have the *Employment Relations Act 2000* which sets out that all parties must work together in good faith. It has some regulations around restructuring and employee protection, but mainly the process we have to follow has been set out by case law.

In the UK, the *Trade Union and Labour Relations (Consolidation) Act 1992* requires employers in certain circumstances to consult employees about collective (ie, mass) redundancies, either through elected representatives or recognised trade unions.

In Australia, under the *Fair Work Act 2009,* employers covered must issue a Fair Work Information Statement to employees. It is then lawful for an employer to dismiss an employee if it is a genuine redundancy or if the dismissal would not be considered harsh, unjust or unreasonable or is consistent with the Small Business Fair Dismissal Code.

In South Africa, under the *Labour Relations Amendment Act,* an employer can dismiss an employee based on the company's operational requirements. The Act has different processes depending whether it is an ordinary redundancy, or whether the company employs more than 50 employees and it is retrenching up to 10 percent of the workforce.

The United States has the *Worker Adjustment and Retraining Notification Act of 1988 (WARN Act)* which protects employees, their families, and communities by requiring most employers with 100 or more employees to provide 60 days advance notification of plant closings and mass layoffs of employees.

Restructuring process

New Zealand

- For the restructure to be genuine, employers must *consult* with employees on the changes that are being proposed. This must be set out in a document explaining what changes are being proposed and why. Employees must be given a chance to provide feedback on these changes before any final decision is made. For small restructures this may mean the consultation process takes a week or two, for large changes it might take weeks or months to work through, consider and reply to feedback then make a final decision.
- Once a new structure is decided on, if there are new or changed roles then employees must be provided with selection criteria for those roles. Under the *Massey v Wrigley* ruling, employees directly affected by the restructure must be provided with all information about all other candidates applying for roles, including what was in the interviewers' minds. This overrides the Privacy Act.

Australia

- Employers can make a decision to restructure *without* consulting! Yes, this is the biggest difference between Australian and New Zealand restructuring. An Australian company can decide on a new structure and put it into place *without* consulting. In New Zealand this would probably result in mass PGs and large awards made against the employer, but in Australia not consulting is legal.

United Kingdom

- An employer must consult on a collective basis if they are proposing to make *20 or more employees* in one establishment redundant within a period of 90 days or less. Consultation must begin in good time (for example, enough time to make consultation meaningful), but the minimum before any dismissal can happen is 30 days if 20 to 99 redundancies are proposed, or 90 days where 100 or more redundancies are proposed.
- Consultation must be with representatives or a committee of employees (if there are no representatives).
- As in New Zealand, the employer must provide information about the reason for the proposals, which roles are affected, proposed methods of selecting the employees who might be dismissed and how any non-statutory payments will be calculated.
- Redeployment can be offered but isn't legally required.

South Africa

- For ordinary redundancies employers must consult in accordance with their Collective Employment Agreement. They must also have a workplace forum and consult with registered trade unions or nominated employees' representatives.
- Like New Zealand consultation, employers must set out the reasons for the proposed dismissals, alternatives, employees affected, the proposed selection methods, timing, severance pay and any employee assistance. Unlike New Zealand, they must also state the number of employees in total and also the number they have dismissed for redundancy in the last year as this has an impact on which process applies.
- For large-scale redundancy, the employer must invite employees and representatives to consult in writing, and consult for a minimum of 60 days (which may be 30 days consultation followed by 30 days statutory conciliation at the Commission for Conciliation, Mediation and Arbitration). Or either party can ask statutory facilitation for the whole 60-day consulting period. Only after that can employer issue notice of termination of employment.
- Employees and unions can strike if premature notice is given.

USA

- If we're to believe US TV shows, when making someone redundant you just tell them you're laying them off and they can then sue the company for millions of dollars! But actually, under the WARN Act, employers with more than 100 employees must give notice of any closures or mass layoffs. Some states also have state legislation about this (for example, California requires advance notice for plant closings, layoffs, and relocations of 50 or more employees regardless of percentage of workforce).

Redundancy payments

New Zealand

- There is *no legal entitlement to redundancy compensation* unless it is provided for in the employment agreement. However, employees *must* be provided with notice when their role is redundant. If this isn't specified, it's as per their normal notice period.

United Kingdom

- Employees have the right to a *statutory redundancy payment* if they have worked continuously for you for at least two years and they are being made redundant. The payment they will get is:
  —0.5 week's pay for each full year of service where their age was under 22;
  —1 week's pay for each full year of service where their age was 22 or above, but under 41;
  —1.5 week's pay for each full year of service where your age was 41 or above.

Australia

- You are *entitled to redundancy or severance pay* if your award or agreement has redundancy pay, or if you work for an employer who employs more than 15 employees and you've worked for more than 12 months. There is a table that applies which sets out how much redundancy you get (for example, for three year's service you get seven weeks, or for eight year's service you get 14 weeks).

USA

- There is *no legal entitlement to severance pay.* Some companies do offer it though, usually based on length of service. They can also offer severance packages which include restraints of trades. Like New Zealand, employees may be eligible to receive an unemployment benefit if laid off.

Selling/contracting out

New Zealand

- In New Zealand employment agreements have to have an 'employee protection provision'. In situations where an employer's business is being sold, transferred, or contracted out, employers are required to follow a consultation process with employees in advance of the sale, transfer, or contracting out. In addition, employers must make arrangements with the purchaser of their business in relation to existing employees.
- For some 'specified groups of employees' there are special sets of rules for restructuring if the employer is either selling or transferring the business, contracting out work performed in-house or by another contractor, or moving a service in-house that they used to contract out.

United Kingdom

- The Transfer of Undertakings (Protection of Employment) Regulations or TUPE (and its parent European legislation, the Acquired Rights Directive) require among other things, the employer to consult representatives of employees wherever there is a transfer of an undertaking or business (or part) from one employer to another.

Grievances

New Zealand

- Where consultation doesn't take place or the process is flawed then an employee (or employees) can take a personal grievance for unjustified dismissal. In cases where employees have won, they can be awarded three months wages (or more) and anywhere from $2000 to $20,000 in hurt and humiliation (these figures come from reviewing a number of redundancy cases, but are only approximate).

United Kingdom

- You cannot take a claim for unfair dismissal if you are dismissed within your first year of employment.
- Where consultation doesn't take place, the redundancy can be considered unfair dismissal. The Employment Tribunal can make an award of up to 90 days pay.
- If an employer doesn't pay redundancy, then employees have three months less one day to bring a claim for the employer's failure to pay their contractual redundancy payment and six months less one day of the failure to pay their statutory redundancy payment.

South Africa

- A grievance must be taken within 30 days of the redundancy and is limited to challenging the justifiability of the redundancy.

Australia

- A redundancy may be considered *not genuine* if it was reasonable that the employee could have been redeployed and they weren't or if the employer still needs someone in that role. In that case an employee can apply to Fair Work Australia for a remedy.

So there you have it! Some key differences and some similarities. If you are in doubt about the process you're working through then get some legal advice or talk to another HR person to check that you're being fair and reasonable. et

Angela Atkins is GM of Elephant Training and HR and the author of Managment Bites and Employment Bites. Contact her on Angela@elephanthr.co.nz