

REDUNDANCY: A REVIEW

Jennifer Haworth – February 2010

The difficult economic times we are in call on employers to reconsider, among other things, their personnel needs. Organisations are taking various steps to reduce their expenses, and in the last several months, there have been numerous redundancy announcements from various organisations around Bermuda. It therefore seems to be an appropriate time to review the redundancy process.

The Legislation

The Employment Act 2000 (the “Act”), allows employers to terminate employees whose positions are redundant. An employee is considered redundant for the purposes of the Act where the termination of his or her employment is part of a reduction of the employer’s work force as a direct result of certain conditions of redundancy. These conditions are the modernisation, mechanisation or automation of all or part of the employer’s business; the discontinuance of all or part of the business; the sale or other disposal of the business; the reorganisation of the business; the reduction in the employer’s business which has been necessitated by economic conditions; contraction in the volume of work or sales; reduced demand or surplus inventory; and the impossibility or impracticality of carrying on the business at the usual rate or at all due to shortage of materials, mechanical breakdown, act of God or other circumstances beyond the control of the employer.

The Act imposes an obligation on employers, prior to terminating an employee for redundancy, to notify the employee’s trade union or other representative, if any, of the existence of the relevant condition of redundancy, the reasons for termination contemplated, the number and categories of employees likely to be affected and the period over which such termination is likely to be carried out. The employer must also consult the employee’s trade union or other representative, if any, prior to terminating an employee for redundancy, regarding the possible measures that could be taken to avert or minimize the adverse effects of such redundancy on employment and the possible measures that could be taken to mitigate the adverse effects of any termination on the employees concerned. If, however, there is no trade union or employee representative, these obligations will not apply and an employer need not facilitate the creation of employee representatives.

Redundancy Procedure

Once the employer has reached the decision that redundancies are necessary within its organisation, the first step will be to select those employees to be affected. The Act does not set out a procedure for how to select which employees to retain in redundancy. However, the selection process is an important step in redundancy and if not done carefully, employers may leave themselves open to a claim of unfair dismissal.

In the past, organisations would often apply the “Lifo”, or last-in-first-out, principle in redundancy situations. However, redundancy practices have evolved over the years leading to perhaps more sophisticated selection processes. For example, it would be more common now for an organisation to take the following steps when a redundancy situation arises: choose a pool of employees to select from (if the company needs to retain employees from a specific department then that department could be the pool); decide on a set of criteria to use for selection which should be as objective as possible, such as basing it on previous annual performance reviews; apply the criteria by keeping records of the process; inform the employees in the pool of the results and give the employees an opportunity to discuss the results before a final decision is made. Once a decision is made, the employer should notify the employees affected as soon as possible and provide them with notice of termination in accordance with their contracts of employment or, if none were provided, in accordance the provisions of the Act.

Statutory Severance Pay

Employees who have completed at least one year of continuous employment are entitled to severance allowances under the Act if terminated for redundancy. The allowance is two weeks' wages for every year the employee has completed up to the first ten years, and three weeks' wages for each completed year thereafter up to a maximum of 26 weeks. A severance allowance is not payable if an employee unreasonably refuses to accept an offer of re-employment by the employer at the same place of work under no less favourable terms.

Contractual Severance Pay

Any payment of severance to an employee is subject to any contractual provisions which may provide for more generous provision in the event of redundancy. The Act simply sets out the minimum requirements. Therefore, the employee's contract should be carefully reviewed prior to termination. Severance packages are often used to retain staff for a period longer than their minimum notice period, for greater compensation, sometimes referred to as a 'bonus'. The giving of any such packages should be contingent on the employee remaining until the termination date and the signing of a compromise agreement or release.

Potential Pitfalls

It is important to follow the other guidelines set out above to avoid potentially litigious and costly results. As has been alluded to above, if redundancies are not handled properly, employers may leave themselves open to unfair dismissal claims being made by their employees. Unfair dismissal claims can provide higher damages awards and may also damage the employer's reputation should the findings be publicised. An employee may argue that his or her so-called redundancy has been a sham. The term 'sham redundancy' is used when the reason given by the employer to the employee for the redundancy is untrue, for example, if an employer tells the employee that the business' amount of work has decreased, but the employer has recently hired new employees. This is why the conditions for redundancy given and the reason for selection of a particular employee are particularly important. Employers should take care when making redundancies and should document the process.

Several cases that have gone before the Employment Tribunal have involved an employee being terminated under a so-called redundancy move by his or her employer successfully claiming unfair dismissal. In these cases, the Employment Tribunal has awarded damages in favour of the employee.

The provisions referred to in this article relate to employers who employ individuals in Bermuda and to individuals employed solely or predominantly in Bermuda. This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

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Notes to Editors

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