

Managing workforce change in adverse economic conditions

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Business conditions

It has been said that current business conditions are the most adverse since the Great Depression. Certainly, at least, most businesses will not have been more challenged to align their costs, labour and operational processes to a declining, or an uncertain, revenue base.

Critically, and more so than ever, the size and composition of the workforce will be the subject of intense scrutiny for most businesses. Some of the key questions for employers are:

- Is the overall size of the workforce correct?
- Do we have the people with the right skills and experience?
- Is our remuneration structure sufficiently flexible, but still attractive to motivate employees?
- Do we need temporary workers, and how do we achieve that?
- How do we develop a flexible workforce to meet challenges in uncertain markets?

In taking action on these issues, the legal consequences need to be considered – inevitably, change will often be required and an employer will want to avoid additional costs arising from expensive claims.

Reducing workforce size

An ongoing consideration over this period will be whether workforce size needs to be reduced.

In reducing workforce size the key issues will be:

- provision of the correct notice period, whether under statute or contract;
- is there a legal liability for redundancy payments?
- managing entitlements to bonuses and other incentive payments;

- selecting employees on lawful criteria to avoid discrimination claims;
- dismissing employees in a fair manner to avoid unfair dismissal claims;
- application of policies and procedures;
- managing protection of intellectual property and confidential information;
- use of outplacement consultants;
- availability of employee assistance programs;
- securing finality through settlement agreements; and
- managing expectations of the remaining employees.

Unfair Dismissal from 1 July 2009

More employees will be eligible to bring an unfair dismissal case after 30 June 2009 because of expected legislative changes. Critically, from that date, employers in the national industrial relations system will no longer be protected from an unfair dismissal case if:

- they have 100 or fewer employees; or
- the dismissal is for "operational reasons", although there will still be protection in the event of a "genuine redundancy".

Employers should take into account these changes in managing the timing of any downsizing initiatives over 2009.

Alternatives to dismissal

There are a number of alternatives to dismissal including:

- taking of leave;
- changes to remuneration, including incentive payments;

- changes to working hours;
- conversion from ongoing to casual employment;
- alteration to positions; and
- variation of duties.

There may not be any automatic right of the employer to unilaterally make these changes. In all likelihood, it will be necessary to have the agreement of the employee, failing which, there may be a breach of a contract, an award or a statutory agreement which would entitle the employee to damages and possibly subject the employer to penalties.

In introducing a more flexible workforce on a temporary or permanent basis, it will be important to document the change in variations to contractual conditions or statutory agreements. In the absence of proper documentation, the existence and extent of any changes may be uncertain, and the employer will then be exposed to claims.

Transition HR Policy

During these current economic difficulties, it will be important, as part of a broader communication and consultation strategy, to outline the employer's approach to human resources in what may be called a Transition HR Policy – the objective would be to reduce uncertainty, motivate employees and, critically, retain employees, particularly high performing employees.

The Policy would assist employers to compete in difficult times and create a platform of committed, capable employees who can take the business forward in more favorable economic circumstances. The Policy would also outline to other stakeholders the business' approach on employee issues to the current conditions.

The Policy could cover interim HR measures including:

- changes to working conditions and how any changes will be processed;
- principles guiding changes to workforce size;
- what is a redundancy and the benefits, if any, to the employee on a redundancy;
- consultation processes over workplace change;

- changes to remuneration policy;
- variation to recruitment policy;
- availability of employee assistance programs;
- occupational health and safety issues; and
- acknowledgement and understanding of economic pressures.

The Policy should be expressed to be non-binding, aspirational in its aims, of limited duration and subject to withdrawal or amendment at any time by the employer.

Managing Claims

Even with the very best of planning there will be claims by employees, whether arising from a dismissal or because of workplace change. Most employers would desire to manage these claims efficiently, confidentially and with least cost.

Effective management of claims includes:

- an early assessment of the legal risks, including potential costs;
- assessing potential damage to business reputation; and
- development of strategies to manage legal risk and obtain early resolution, if at all possible.

For further information, or for assistance with developing appropriate policies and training contact:

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