

## Governance Forum

2 July 2009

### Employer responsibility regarding restructuring

#### Likely Steps:

- Analyse the situation you face (senior management and the Board, utilise resources in the community & professional advice)
- Make grounded predictions
- Make a Proposed Plan
- Consult with employees about the proposal (stress what is driving the decision making process as much as the proposed plan)
- Amend Plan and re-consult if necessary
- Advise employees

#### The Law:

A decision to dismiss for redundancy can be attacked in two main ways:

- Lack of Substance (are reasons/drivers genuine)
- Lack of Procedure (genuine consultation in good faith)
- The two are interlinked – a failure to consult may cast doubt on genuineness of decision

*Aoraki Corporation Ltd v McGavin [1998] 1 ERNZ 601*

#### Procedure is governed by the circumstances

"There can be no dispute that the parties to an employment relationship must deal with each other openly and fairly. They must communicate and, where appropriate, consult in the sense of imparting and receiving information and argument with an open mind when they still realistically can influence outcomes. To adopt an approach calling for mandatory consultation at specified times risks inflexibility. What is practicable in the exigencies of particular business operations and workplaces must be kept in mind."

*Auckland CC v NZ Public Service Assn Inc [2003] 2 ERNZ 386; [2004] 2 NZLR 10 (CA) (at para 24)*

#### The Legal test

"...the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred."

*Employment Relations Act 2000 s103A (passed December 2004)*

#### Employee Protection provisions (EPP)

- Vulnerable workers: All Cleaners, all food caterers, caretakers laundry and orderly services in education, hospital and aged related residential care sectors
  - Right to transfer if selling, contracting in or out or subsequently
  - New employer liable for all accrued sick leave, holiday pay
- Other employees
  - Required to have an employee protection provision
  - If no epp then can be required to negotiate until one agreed before restructuring.

## Example of a draft restructuring proposal

---day, day Month 200-

### Proposed Action in light of current & likely funding

#### **Background**

- Funding reduced.
- On-going uncertainty in the sector.
- Need to match service levels with funding available
- Need to remain efficient and viable.

#### **Existing Structure**

0.8 Manager  
0.4 Administrator  
1 Social worker  
4 Case workers working in two areas (more detail)  
1 Education/Newsletter editor

#### **Proposed Structure**

1.0 Manager with a 20% case load  
0 Administrator  
0.5 Social worker  
3 Case workers working in one main area (more detail)  
1 Education/Newsletter editor.

We want to hear alternatives, other suggestions, ideas and feedback on this proposal, before making a decision.

#### **Effect Of Proposal If Implemented**

- If implemented the administrator's position and one case work position would be made redundant.
- All other positions would be required to be undertake more administration (to completion of filing and composition or reports as required)
- Selection of the surplus positions would be on the basis of our assessment of work performance based on skills acquired and applied including timeliness, quality of work and ability to undertake a variety of casework, the ability to be able to undertake all aspects of our work, current and likely future needs of the CSI, attitude, teamwork and willingness to learn.
- Preliminary assessment based on these criteria has been made and the affected workers have been informed. It is possible that a different selection could be made after feedback.

#### **Time line for Consultation**

We wish to meet with you within the next week and you are welcome to bring a support person to that meeting. If you have suggestions or just want to talk to the Manager please feel free to do so.

At this stage we intend to consult over the coming week (until bccday dd mm 200-) on the best way forward and to hear alternative suggestions and ideas.

We propose advising you of our decision on bccday dd mm 200-