
EMPLOYMENT

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EXITING SENIOR STAFF: REDUNDANCY AND RISKS



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The economic downturn has brought with it casualties at all levels of the workforce. However, exiting a senior member of staff can present tricky issues for employers, and the more senior the employee, the higher the stakes. The Employment Relations Authority recently awarded a former senior executive almost \$350,000 for her unjustified constructive dismissal following a deficient restructuring process (*Whitten v Ogilvy New Zealand Limited*).

The decision is an important reminder for employers that in a possible redundancy situation (as in any termination) senior employees are entitled to a full and fair process just like their junior counterparts.

In practice, when the employment of a senior executive ends, it is often abrupt following perhaps a change in corporate control, desire for new leadership or perception of incompatibility or loss of trust and confidence. Given the high levels of responsibility and corresponding profile held by some senior employees, the parties often prefer for the parting of ways to be handled promptly and discretely, without the more formal and thus public process required by the Employment Relations Act 2000.

However, the legal reality remains that every dismissal must be procedurally fair as

well as substantively justified whatever the well as substantively justified employee's level of seniority – even if that gives rise to a tension with usual business practice.

How to avoid the pitfalls of restructuring

When considering a business restructure that involves possible disestablishment of one or more senior roles:

- Review the employment agreements of affected individuals and all applicable policies for consultation and other procedural obligations and compensation entitlements if any.
- Consult promptly and to the full extent, providing all relevant information and an opportunity for affected individuals to take legal advice and give informed feedback before any decision about the proposed restructuring is taken. If an executive requests it, allow further time for them to consider options. If there are time constraints, advise the executive and request their feedback within a set timeframe.
- Where redundancy is confirmed, consult on the timing of its implementation. Avoid terminating abruptly.

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- Beware of issuing any internal or external statements or announcements prior to completion of a restructuring process or otherwise prematurely. The prudent approach is to discuss such statements with those affected before publication.
- Where appropriate, consider using an external consultant to undertake a restructure, for example, where there are insufficient resources at the appropriate level in-house, or for sensitivity reasons, an external consultant would be preferable.

One practical (but as yet untested) approach is to include in the employment agreement a “no fault” termination provision.

Essentially, such a provision provides for termination of employment on a no fault basis in return for payment of a specified amount of compensation. No fault termination clauses should generally be reserved for the highest ranking employees, as they seek to mitigate some of the practical difficulties highlighted above. Careful drafting is required to minimise risks associated with enforcing a no fault termination, and the executive concerned should be encouraged to seek legal advice before agreement on the clause is reached.

The Ogilvy case

The company advised Margaret Whitten, then deputy MD, that it had appointed a replacement for her. It was proposed that Ms Whitten relinquish her title in exchange for a directorship on the Ogilvy board. She was advised that if she did not accept the change, her current role would be reduced from a national to regional position.

Three days later, notwithstanding a request by Ms Whitten for time to consider the proposal, the company advised its staff and the media that a new deputy MD had been appointed.

When Ms Whitten expressed upset at the announcement for being premature, the company withdrew the offer of directorship and raised general performance concerns. Ms Whitten resigned and claimed constructive dismissal and entitlement to redundancy compensation on the basis that her position had substantially changed.

Ogilvy’s breach of duty caused resignation

The Authority found that the company was in serious breach of the contractual duty not to damage the relationship of trust and confidence:

- In withdrawing the offer of directorship without notice, the company unilaterally and unreasonably terminated the consultation process;
- In asserting that Ms Whitten had not discharged the duties of deputy MD when in fact she had performed the role for over three years; and
- In raising unspecified performance allegations notwithstanding the earlier offer of directorship.

Ogilvy compounded these breaches by denying any obligation to consult with Ms Whitten about the new structure, having earlier invited her to consider the proposal and request further information.

In the circumstances, Ms Whitten’s resignation was readily foreseeable and amounted to unjustifiable constructive dismissal. Further, her position as deputy MD no longer existed in the new structure, and therefore had been made redundant.

Ogilvy was ordered to pay Ms Whitten just under \$200,000 for lost remuneration and benefits; \$130,000 redundancy compensation and \$15,000 compensation for hurt and humiliation.

Ogilvy has appealed against the Authority’s determination. Watch this space for any further developments.