
EMPLOYMENT

CHANGE TO REDUNDANCY LAWS POSSIBLE

OCTOBER 2008



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If the Labour party is re-elected in November, its recently announced industrial relations policy could dramatically alter an aspect of redundancy law that has been well-established over the past two decades.

The law as we know it

In 1998 seven judges of the Court of Appeal issued one of the most important recent decisions in the law relating to redundancy.

The case was *Aoraki Corporation Limited v McGavin*. In contrast to previous decisions which had ordered employers to pay redundancy compensation, even where none had been provided for in their employment agreements, the court unanimously held that in the absence of a contractual right, the court has no jurisdiction to order any redundancy compensation.

The reasons given by the court were that there was no basis for reading into employment contracts such an implied obligation, nor that the mutual obligation of trust and fair dealing should be extended in that way. In its view, to do so would alter the substantive rights and obligations to which the parties had agreed and would change the economic value of their overall agreement. This would also erode the emphasis on the free negotiation of employment contracts. According to the court any remedies concerning the way the

redundancy process was carried out should therefore be limited to the consequences of that procedural failure, rather than imposing a substantive obligation which the parties did not agree to undertake.

This clear formulation has meant that this aspect of redundancy law has been well-established. However this could change following Labour Minister Trevor Mallard's announcement on Monday that, if re-elected, a Labour Government will introduce new statutory minimums for redundancy compensation and a statutory minimum notice period for redundancy. It will also encourage notification to government agencies of upcoming and potential redundancy situations – and refine how government agencies can respond quickly to raise awareness of the support available.

The announcements come on the back of the recently issued Report of the Public Advisory Group on Restructuring and Redundancy.

Public Advisory Group

This group was appointed by the Minister of Labour in 2007 to provide independent advice to the Ministers of Labour, Social Development and Employment, and Economic Development on the adequacy of redundancy law. The report was a

response to a concern that businesses are being exposed to greater and more frequent competitive pressures than ever before as well as there not having been a comprehensive review of the restructuring and redundancy framework in recent times.

The group was required to give its recommendations on whether there should be statutorily prescribed consultation requirements, whether notice must be provided to employees in the event of a redundancy, whether there should be mandatory notification to the Department of Labour of redundancies and whether there should be a statutory requirement for redundancy compensation. This analysis was in line with the Ministry of Social Development's "Security in Change Initiative" which aims to enhance support for employers and employees who are affected by restructures or downsizing.

The group's recommendations

Having finished taking submissions on these matters the group recently issued its report in which it makes three major recommendations for the Government to consider:

- a statutory requirement for redundancy compensation based on length of service and notice (including options for introducing a statutory "minimum" formula);
- extensions to the "Security in Change" initiative and the need for wider policies to help activate the labour market; and
- encouraging (but not requiring) the notification to government agencies of potential or upcoming redundancy situations (at present New Zealand is the only OECD country which does not require employers to notify government agencies of proposals for redundancies).

In order to implement these recommendations the report sets out a number of options to be considered by the

Government.

The first is that a "Code" be formulated which would act as a guide to employers in relation to notice, compensation and other matters in the event of redundancies. Compliance with this code would be voluntary but could form a basis of what constitutes a "good employer".

Secondly, that redundancy compensation be a legal right – without a statutory formula. All workers would have the right to redundancy compensation in a mechanism similar to that currently provided for "vulnerable" employees under employment legislation – with the amount of compensation to be subject to criteria which includes firm size, length of service, industry practice and other matters. Alternatively, only workers in a collective agreement could be given the right to redundancy compensation.

Thirdly, a statutory formula could be set for notice and compensation. Such an option could include for example, four weeks notice plus redundancy compensation based on four weeks for the first year of service and two weeks for each subsequent year – up to a maximum statutory requirement of 26 weeks pay. Alternatively, this formula is suggested but with exclusions for employees who earn a certain wage or employers who employ less than five employees.

Other options given in the report include an insurance scheme to provide for redundancy compensation or a redundancy support scheme which would entitle employers who register with the scheme and employ less than 20 workers to a rebate of the cost of redundancy compensation.

A number of other recommendations are included in the report which include ratifying the relevant International Labour Convention and providing for a one year



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delay following any law change to carry out a major education and awareness arising campaign.

The Government's response

In addition to the recent announcements, Trevor Mallard announced on 9 October 2008 that the Government's preference for some sort of statutory minimum would be subject to consultation via a discussion document process which is to be prepared by the Department of Labour for release next April. This would involve looking at options for introducing a statutory minimum for redundancy notice and compensation, extending the Security in Change initiative and possible mandatory notification arrangements. Obviously, in light of recent announcements it seems that this discussion process would be focused on how rather than if such minimums would be implemented.

In his executive summary of the report, Trevor Mallard specifies several policy issues to be considered with regards to minimum statutory entitlements for redundancy compensation and notice. These include how costs (and ongoing risks to employees in terms of future earnings) which result from redundancies are currently spread between employees, employers and the government, the possible impacts on businesses – particularly small and medium enterprises and whether employees and employers should be allowed to bargain and reach agreement on redundancy entitlements which suit their particular circumstances.

In Mr Mallard's view, introducing a statutory notice requirement would give employees more certainty over when their employment will end and provide them with time to look for alternative employment. He also notes that introducing a minimum floor for compensation and notice is

consistent with the evolution of minimum standards over time – in terms of recent initiatives relating to vulnerable workers, paid parental leave and meal and rest breaks.

What minimum statutory redundancy compensation and notice will mean for employers in practice cannot be said for certain until the particulars are detailed further in the Department of Labour's report to be released in April 2009. Of course, legislation on redundancy compensation may depend on which party forms the next government.

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