Dispatch

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Genuine Consultation a MUST for redundancies

Good faith obligations have been part of our employment law for almost 25 years, and include the requirement to consult when an employer is considering changes to its business that could have an adverse impact on employees. The recent economic environment has led to some employers seeking to push through redundancies without the usual regard for meaningful consultation with employees, and in a manner that could indicate a *fait accompli*.

Two recent determinations provide a good reminder of both the significant obligations placed on employers who are undertaking redundancies, and the need to apply them rigorously.

- **In a recent determination relating to TVNZ newsroom employees, the Employment Relations Authority ordered the employer to start its process again (unless mediation resolves matters). The Authority found that TVNZ did not comply with their collective agreement which required a period of 'co-design' before TVNZ could move on to redundancies if agreement had not been reached through that collaborative co-design process. Although TVNZ had been open with staff about the commercial realities of the future of broadcasting and had run an extensive 'ideas' gathering exercise with staff to identify ways in which the organisation could move forward in the environment, the Authority found that this did not excuse TVNZ from the contractual commitments it had made, under which it needed to engage more fully with a view to reaching agreement on recommendations to be made to management.**

- **The Court of Appeal recently declined leave to appeal in a case involving the transfer of employment of a group of Midwives from a Trust, to the then DHB. The employer commenced consultation with employees only after it had entered into an agreement for the transfer, because it had signed a confidentiality agreement with the DHB. At that point the transfer of employees was a *fait accompli*, and to add insult to injury, the Trust refused to pay the transferring employees in lieu of notice (as required by their employment agreement). The Employment Relations Authority and the Employment Court both found in favour of the employees. The employer had failed in its obligations by not taking steps to consult at an earlier stage, and then by not actually giving notice of termination. It is common for employers to misunderstand their obligations when employment is transferring, and to overlook the fact that they are ending the employment of the employee, even if a new employer will employ those same employees. This**

can lead to a failure to undertake basic steps, including consulting in good faith, and giving notice of the termination of employment.

Ultimately, in both these cases the employer failed to comply with the terms of the employees' employment agreements – something that is fatal to any employment process. The Authority noted in respect of the TVNZ process that employers bear the risk of non-compliance: "*TVNZ have assumed the risk of making workplace changes without the relevant clause in mind and if having to redo things again comes at significant cost, that is a natural consequence of its breach.*"

These cases show that consultation cannot be a box ticking exercise –employers must ensure that they are genuinely engaging with employees in good faith, and in accordance with their employment agreements. A slick slideshow will not save an employer from challenge if it has not properly and genuinely engaged in good faith consultation with its affected employees.

The team at Dundas Street

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