

## Navigating redeployment in a restructure process

**As businesses continue to grapple with the current economic uncertainty, we are consistently being asked to advise on a range of restructures and their resulting employment terminations. Amidst a threat of lower profits and rising costs, we are seeing many businesses responding by re-evaluating the size and structures of their workforces.**

Workforce restructures, whether large or small, run the risk of personal grievances and legal liabilities.

To minimise those risks, it is imperative businesses have a genuine and justifiable business reason for the changes they make, and run a fair process. This means presenting a proposal, providing all relevant information, consulting with employees, genuinely considering their feedback, considering any alternatives to redundancy, and making a final decision.

When it comes to alternatives to redundancy, one of the main considerations is redeployment. Can the employee who has had their position disestablished be redeployed elsewhere in the business?

When an employer turns its mind to redeployment, its obligations are many and varied. It is those obligations that are the focus of this article.

### Redeployment

If an employer pays mere lip-service to redeployment obligations, it can become a significant issue. The recent Employment Court case, *New Zealand Steel Limited v Haddad* [2023] NZEmpC 57, has underlined the risks if employers fail to adequately comply with their redeployment obligations. It has also clarified what those obligations are.

### Facts of the case

In the case, Mr Haddad was a Process Computing Manager whose position was disestablished and three new managerial roles created. Mr Haddad applied for all three positions, but declined to be interviewed as he considered NZ Steel should simply offer him one of the roles. He was also concerned that being interviewed would be futile and humiliating.

NZ Steel did not appoint Mr Haddad to any of the roles and said that in the absence of an interview, it was not able to determine his suitability. NZ Steel said further it was entitled to appoint the best person(s) for the job(s). Mr Haddad was terminated for redundancy.

### Redeployment takeaways

The Employment Court confirmed that even where there is no contractual requirement to consider redeployment, an employer has a number of specific redeployment obligations. In particular, an employer must:

- Consider whether to redeploy the employee;
- Consult with the employee about redeployment options; and
- In deciding whether to redeploy the employee, be active and constructive in maintaining the employment relationship in accordance with its good faith obligations.

This last requirement to be active and constructive in maintaining the employment relationship means that an employer cannot comply with its obligations simply by showing that it assessed the possibility of redeployment, it must be able to demonstrate the merits of its decision. In other words, a decision not to offer redeployment must be objectively reasonable. The Employment Relations Authority and Court are entitled to look at why the employee was not redeployed and determine that such a decision was not substantively justified or did not follow a fair process.

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## Navigating redeployment in a restructure process (Continued)

In Mr Haddad's case, his choice not to be interviewed for the three management positions was not fatal to his case. Mr Haddad had understandably perceived a dismissive attitude towards him and NZ Steel had enough information about him to properly assess whether he could take on any of those roles. Nevertheless, the Employment Court did consider that it would be wise for an employee to attend an interview in those circumstances, and put the employer to the test.

### Offering a role vs the opportunity to apply

One difficult redeployment issue is whether an employee whose position has been disestablished should be offered a vacant role or given the opportunity to apply for it.

The position that has developed through case law is that where the employee has the necessary skills and experience to perform the role, they should be offered the job. This is also the case where the employee will be able to perform the role after undertaking some additional training.

The opportunity to apply should only be used where it is unclear whether the employee has the necessary skills to perform the duties of the role. This will generally only arise where the vacancy is for a completely different role or one that is considerably more senior.

Where an employee is only provided with the opportunity to apply for a vacant role, the risk of a personal grievance is high. This is particularly so if the vacant role has some crossover with the role that is being disestablished, or the employee clearly has the skills to undertake some of the role's duties. Whether the employee applies and is unsuccessful, or chooses not to apply, there is likely to be significant risk involved in not offering them the position.

An employer's redeployment obligation also extends to roles that are considerably more junior and not as well remunerated. This is a well-established principle ever since *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39 in which a disestablished Farm Manager successfully pursued a personal grievance for the failure to offer him a Junior Shephard role, despite

him having turned down the opportunity to apply for that position.

### Redeployment obligations and unjustified dismissal

Failing to comply with redeployment obligations is a significant issue because it can completely undermine what may have started out as a genuine and substantively justified restructure. *NZ Steel v Haddad* has again confirmed that regardless of the rationale for the restructure, if the decision to not redeploy an employee was unjustified, or the redeployment process was not fair and reasonable, this will give rise to an unjustified dismissal claim. A decision not to offer redeployment is an inherent aspect of an employee's dismissal and can also indicate that the restructure itself was predetermined.

It is imperative that businesses don't just see redeployment as a tick box exercise tacked on the end of a restructure process. The Employment Court reaffirmed the position in *Gafiatullina v Propellerhead Limited* [2021] NZEmpC 146 that "*an employer's assessment of suitability for redeployment is not to be conducted unilaterally outside of the restructure consultation*". Rather, the proper consideration of redeployment is as an intrinsic part of any restructure process.

If redeployment is properly considered, consulted on and assessed, there will still be a number of situations where it is justifiable to not offer redeployment. However, in ensuring that a robust process has been undertaken around redeployment obligations, this will help provide comfort that a fair and reasonable decision has been made.

### Want to know more?

If you have any questions about this process, please contact our specialist Employment Team.