



Successfully planning and executing your restructure

BELL & CO

Restructures are often unavoidable when continuing to operate a successful business. In times of change and uncertainty, restructuring may be the only way to enable survival. Restructuring is not only a difficult decision for management, but the planning and execution can be complex, time consuming, and frustrating.

Bell and Co has created this guide to provide support for business owners, managers and HR professionals in the planning and execution of a restructure. We've also included tips on how to deal with the more difficult issues that can arise.

We've led extensive restructures for our clients and have acted on behalf of a number of disadvantaged employees impacted by government restructuring here in Wellington. These cases have given us useful insight that we use to assist our clients who are implementing their own restructures. We've helped employers avoid possible pitfalls and fallouts with their employees during the restructuring process.

This guide is intended to help you to begin the process of restructuring by creating a customized plan for your business. It will enable you to make better, more informed decisions from the beginning. It is not, however, intended to replace good advice. We recommend discussing your planning and its execution with a reputable employment lawyer.

Feel free to contact us with any questions regarding this guide. We are always available give advice from both a human resource and legal point of view.



Preparation

It's important to think critically about restructure from the start. Organise your thoughts and do most of the work before writing the proposal to employees. Shaky reasons for restructuring can cause headaches down the line, as redundancies without solid justification and explanation are vulnerable to grievances later in the process when employees lose roles.

1. The Rationale

The first step is to consider the rationale for your restructure carefully. The rationale is the reason for the restructure. Generally speaking, an employer is entitled to initiate the process for genuine commercial imperatives. It is within the employer's prerogative to make a business more efficient or cost-effective and to reduce the number of roles where it has roles surplus to its requirements.

One of New Zealand's oldest restructure cases, which has set a precedent for rationale, was *Grace Team Accounting Limited v Brake*¹. The case cemented the requirement that the rationale needs to be both reasonable and genuine.

Checklist

- Is the rationale for change a genuine commercial decision?
- Is it objective, reasonable, and supported by evidence?

Common Traps

Ensure your rational data is solid.

The Grace matter is somewhat of a cautionary tale, as it involved a firm of accountants that essentially got its forecasts wrong and, off the back of that, considered it necessary to reduce numbers. The redundancy was found not to be reasonable, and the employee's grievance was upheld. The take-away is that as the employer, you must make sure the information used to support your rationale is solid and will stand up under scrutiny. The optimal position is that issues are considered in conjunction with your accountants, and proper costings and forecasts are considered. Retain this information so you can use it to defend against personal grievances.

Conduct or performance issues aren't valid rationale.

There is often a temptation to use the redundancy processes to remove employees for conduct or performance reasons. This approach fails the test for genuineness and reasonableness and could leave you very exposed to a personal grievance. Once an employer starts down this track, it cannot then pivot to deal with real issues without appearing dishonest or disingenuous. It's better to address performance or conduct through an appropriate process.

Notes

We also encourage organisations to test their rationale with trusted advisors so there is an objective set of eyes. It's better that a professional tests your ideas rather than an employee's lawyer testing it with a grievance!

1 [2014] NZCA 541



2. The structure

Once the rationale has been established and verified, the next task is to consider the structure of the organisation. Map out the roles in a chart. Consider not only the titles and teams but every role description to establish whether they are meeting the business's needs. To ensure this is not scrutinized later, make sure descriptions are all up to date and accurate.

If you feel there is any lack of clarity about roles, make sure you understand what people are doing in their roles. You may find that descriptions are old, incomplete, or of low quality.

The next step is to work out the vision for the team structure. What would be ideal for achieving the business's goals? Should roles be merged, disestablished, or have their duties refined? Are the reporting lines optimal?

If creating new roles, begin drafting their role descriptions. Role descriptions will help give you clarity on their requirements. It will also help you avoid common grievances discussed in the traps section below.

Don't be afraid to ask for advice on the structure or role descriptions. The worst possible outcome is that a newly implemented structure isn't fit for its purpose, and you need to restructure again. No business needs that kind of disruption.

What is possible in a restructure?

The accepted definition of redundancy is as follows²:

[Where the] worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by the worker is, or will become, superfluous to the needs of the employer.

² *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA)

You can see that it is possible to make an employee redundant when they are superfluous to the business's needs. This reasoning isn't always a good fit since restructures usually aren't this simple. Typically, some elements of a role are needed while others are not. This is usually combined the need for a role to accomplish new tasks to meet the business's needs.

To accomplish restructures, you *are* entitled to create new roles to meet the business's needs. New roles may make existing roles superfluous if a new role would accomplish significant portions of an existing role. In that circumstance, the incumbent employee may be regarded as redundant.

However, from the accepted definition of redundancy, it isn't possible to simply change an existing role (unless you have an incumbent employee agreement).

If you create new roles, they must be substantially different from existing roles. If they are too similar, employees will claim that the creation of the new role is not genuine and reasonable. They may also claim that by right, they should be appointed to the new role. Minor changes or differences are then a matter that must be agreed on. The legal test used to consider whether an existing role is different from a new role asks:

*taking into account the nature and terms and conditions of each role (new and existing), and the characteristics of the employee, is the transition from the existing role to the new role sufficient to break the essential continuity of employment.*³

The legal test can be difficult to apply, which has led to some rules of thumb. The most common is that tasks in a role description need to be varied by 25–30% for the role to be considered a new role. Following this rule will usually mean that the legal test is passed.

³ *Carter Holt Harvey Ltd v Wallis* [1998] 3 ERNZ 984 and in the Court of Appeal matter of *Auckland Regional Council v Sanson* [1999] 2 ERNZ 597



Keep an analysis of the differences in roles on file to support your thinking behind the role if there is ever an argument that the new roles are not different roles.

Issues may arise, however, where the rule of thumb doesn't assist. Consider professional advice in the circumstances such as:

- varying hours and start and finish times
- varying location of work
- varying the manner in which work is to be performed

Checklist

- Is the documentation that informs on what each person does in the structure up to date?
- Are role descriptions drafted for new roles in the structure?
- Do the new roles pass the rule of thumb test of being 30% different to any existing role?
- If there was a transition from an existing role to a new role, is the continuity of employment broken?

Common Traps

Below are common grievance arguments made related to new structures:

“I don't understand why my role is affected in these circumstances.”

This grievance generally occurs when the rationale was too general or it was articulated to employees in an obtuse way. Rationales for change should be direct and practical and avoid cliché (i.e., avoid statements like “we need an agile team for a fast-paced and dynamic environment”). Clichés undermine the credibility of the professionals involved by feeding into a sense that the employer's considerations had been shallow.

“But I already do that role.”

It is a common mistake in a restructure to not clearly differentiate roles when creating a new role. This grievance commonly occurs because the manager or HR professional had not fully understood the existing team when planning the restructure. Alternatively, it arises when they haven't adequately thought about what is needed for the business.

Sometimes this argument arises because the new role description is poorly drafted and fails to demonstrate the difference between an existing role and the new proposed role.

“It's a full-time job you are getting rid of. Who's going to do it now?”

Another way we see employers caught out is when they don't appropriately cost or consider the implications of a change. A common mistake is disestablishing a role and assuming that others can absorb the tasks in the role description.

If you are reallocating aspects of a disestablished role, make sure the capacity exists to absorb it. Simply adding it to another role isn't enough. If you are adding to other roles, there are often hidden costs, overtime, pay rises for increased responsibility, etc.



If you are adding to an existing role, you may get arguments that you unilaterally varied the role by adding duties. **Remember, you can only create new, different roles** and disestablish existing roles. Generally speaking, distributing small elements of a role to others doesn't work.

The concept of redeployment

Once the old roles are understood and the new role descriptions drafted, you must consider the obligation to redeploy employees. Employees must be considered for redeployment if they are affected by the restructure, and the new role is within their capabilities with reasonable retraining.⁴ It pays to plan early for how this impacts your restructure.

If there are crucial aspects of new roles that sit outside the skills of the existing employees, emphasise them in the role descriptions. If there is a possibility of telling an employee that they can't do a role, then the role description should support this.

Redeployment-based grievances usually arise when the employer hadn't considered the obligation to redeploy at the planning stage. The failure to plan for redeployment could stall your progress through the restructure and create areas of conflict and disagreement with employees. Employees frequently argue that they should have been considered for roles that the employer didn't see them in. The employer is often caught short with an inadequate process to deal with this issue.

Affected employees have a right to be considered before seeking any external candidates. Candidates that are affected by the restructure should have preference over those who are not.

If you doubt whether an employee is suitable for a new role and they might argue that they are, we recommend an appraisal process to assess their ability to perform the tasks. The process needs to be robust enough to produce evidence that can be placed before the Employment Relations Authority if there is ever a challenge. We recommend a scored system with a minimum score required to do the new role. The minimum score should be reasonable, and the employee should be assessed in the same way.

If there are no affected employees capable of the new role, only then can you be justified in going to market or in drawing from employees that aren't affected by the restructure.

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⁴ *Jinkinson v Oceana Gold (NZ) Ltd* (2009) 6 NZELR 813, *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC



Planning



Redeployment or a reduction in identical or similar roles results in having to decide who to retain. This needs to be done by a fair contestable process. Planning this process early and setting it out in the initial proposal will allow you to consult on the selection criteria.

A contestable process occurs when the restructure creates a situation where there is more than one candidate for an available role. One example is a reduction of roles due to downsizing, and five customer service roles become three. However, the process also applies when multiple candidates can be redeployed to a new role.

When deciding between employees, the process must be fair and transparent. It is common to utilise a panel interview as one of the key methods for selection. Other ways of selection can be fairly and legally employed if done well. They must rely on the availability of good, objective, and measurable data. Employees must always be aware of the way you're using their data. We focus on the panel interview in this guide because it is common and effective. We suggest obtaining advice if you are contemplating other methods, which may be useful if there are too many candidates to interview efficiently.

You must consult upon the criteria used in the process, so address the selection criteria in the initial consultation.

Checklist

- Have I considered whether there will likely be employees to redeploy?
- Have I created a process to determine whether a given employee can be considered eligible for redeployment?
- Does my redeployment process create robust evidence that can be used to rebut grievances?
- Have I planned for a contestable process that will be required and allowed for in the timeline?
- Have I considered what broad criteria will retain the best people for the roles and have I included the criteria to consult upon?



Common Traps

If you fail to consider redeployment and contestable processes, the following can occur:

- Your role descriptions may not emphasise the correct aspects of the role, and the arguments made by employees to be redeployed will be difficult to resist.
- If there are new roles in the structure, the proposal will leave employees wondering what roles they are eligible for.
- You might act on mistaken beliefs that you can seek external applicants if you haven't considered where redeployment may be required.
- Employees will inevitably view the process as disingenuous and predetermined if you don't appropriately consider employees for redeployment.
- If you fail to consult on selection criteria for contestable processes in the proposal, you may have to consult again.

We often see the mistake where the manager or HR professional assumes that, because the roles are different, they don't need to offer redeployment. This assumption misunderstands what the redeployment test is used for. You are not testing whether the role is different but rather whether an employee can do the new role.

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Consultation

Section 4 of The Employment Relations Act 2000 provides that employees should have access to information relevant to the continuance of their role. Employees also have the opportunity to comment before a decision is made.

Case law has set out more detailed requirements⁵ which is as follows:

- Consultation requires more than mere prior notification.
- If there is a proposal to make a change that must be preceded by consultation, the change must not be made until after the consultation.
- The requirement for consultation is never to be treated as a mere formality.
- A genuine effort must be made to accommodate the views of those being consulted.
- Consultation involves stating a proposal that is not yet decided on, listening to what others have to say, considering their responses, and deciding what will be done.
- The party obliged to consult, while entitled to have a working plan already in mind, must keep an open mind and be ready to change or even start afresh.

A well-constructed proposal is the foundation to getting consultation right.

⁵ *Communication and Energy Workers Union Inc v Telecom New Zealand Ltd* [1993] WEC20A/93

1. The proposal document – presenting the information

At this point, the bulk of the work should already be done. Consultation is then an exercise in communicating your well-thought-out restructure and asking employees to provide their views.

There is a balance in the first communication about the restructure. Yes, it should be readable and understandable, but it should also have sufficient detail to avoid a volley of requests for information. Such requests will throw off your timeline.

Avoid the cliché PowerPoint handout. More often than not, it leads to abbreviated and vague information.

The proposal should provide the rationale and outline the new structure. Provide role descriptions where they are relevant. There may need to be a general communication that is received by all affected staff and a tailored section, with relevant role descriptions, for people who are likely eligible to be considered for redeployment.

List how employees can give feedback on the proposal and give a timeline of events and steps in the process. It is better to seek feedback in writing from employees as it is easier to accommodate and less resource-intensive. We recommend an in-person option available on request because it avoids arguments that the process favoured strong written communication and did not give a balanced opportunity to those who are not strong in this. This grievance is usually an issue when a workforce did not need strong written communication to fulfil their role requirements.



If a contestable process is necessary, outline the criteria that will be applied with a broad overview of the process in the initial proposal. This avoids the need to consult again.

It is also a good practice to offer the provision of a counselling service. Most employees do not accept it, and it is relatively inexpensive. Therefore, it is worthwhile making the offer.

There should also be minimum compliance aspects that we address in the checklist below.

Timelines

The timelines given in the proposal must provide sufficient time to give feedback. You should also build flexibility into the process. Requests for information can cause difficulties, so be prepared to vary timelines. Remember, the tighter the timelines, the higher the risk of a grievance for an unfair process, and employees will more likely retain advocates to intervene. We recommend a timeline of five working days to give feedback to a proposal, but more time may be required if the proposal is complex.

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Checklist

- Proposal contains rationale.
- Proposal provides sufficient information on how employees can give feedback.
- Proposal avoids language that indicates conclusions have been made.
- Proposal provides a timeline for feedback and an overview of the steps and times at which they will occur.
- Proposal advises of an opportunity to seek legal advice.
- Proposal recognises the impact on staff and makes a counselling service available where appropriate.

Common Traps

- Inadequate detail in the proposal will cause requests for information.
- Failures over minimum compliance matters may lead to procedural grievances.
- Unions and employment lawyers often seize on a proposal's inadequacies to slow down the employer's timeline.
- If you put financial data at issue, be prepared to disclose it.



2. Consultation – receiving and responding to feedback

The obligation in respect of feedback is to consider it in good faith.

For well-planned restructures, there is usually a limited amount of true feedback. Most employees move on to advocate for their retention in the new structure and fail to critique the proposal genuinely. However, there will be some individuals who use the opportunity effectively.

Genuine feedback should be considered. In some circumstances, feedback may necessitate changes to the proposal if it identifies a problem you haven't considered and where it would be unreasonable not to act. In rare circumstances, the feedback may mean you need to consult again. However, this reserved for occasions where significant revisions of the proposal are reasonably required.

Take the time to gather any facts necessary to respond to employee feedback, as this will show your fair consideration.

3. Issuing a decision on the proposal

After the consultation period closes, send the decision letter or memorandum out to employees. The decision should inform employees whether the proposal will be adopted, varied, or abandoned.

Well planned restructures are usually adopted with only minor amendments given that most issues are identified in the planning stage.

Where feedback was not accepted, you should still be able to show it had been considered appropriately. Record an outline of any feedback received as well as your response in the decision document.

The decision should inform employees of the next steps. In simple redundancies and proposals (i.e., where there is no contestable process or redeployment), this is the point where affected employees are issued a notice of redundancy in a separate document.

If there is a contestable process or redeployment to consider, a timeline should be given.

Checklist

- All feedback is considered.
- Where necessary, issues arising from feedback are checked and relevant information and evidence is gathered.
- The decision addresses the feedback.
- The decision advises next steps where necessary.

Common Traps

Failure to properly address feedback will create the perception of predetermination and lead to grievances.

Failure to carefully check points raised in feedback and retain information and evidence weakens your ability to rebut a grievance.



Implementation

Implementing contestable processes is equally applicable to the process that determines someone's suitability for redeployment. In the redeployment process, you are testing whether an employee achieves the minimum standard of suitability for a role. If you know an employee is suitable for a role and there isn't a need to contest the role with others, you can place them in the role without process.

This part of the process isn't one size fits all and should be considered carefully. You may want to ask for advice regarding the design of your contestable process. Several aspects or metrics may need to be taken into account to retain the right people in the right roles. Factors should feed into a weighted score that can evidence the reasons for a given candidate's success. Objective measures, such as sales performance, are essential. However, subjective matters, such as attitude and drive, are equally important. In our experience, employers often value subjective matters more in determining who to retain or redeploy.

For subjective matters, we prefer the scored panel interview method in a contestable process. Consider a behavioural interview for a contested role and conduct it against the role descriptions. It often pays to have this put together for you by an HR consultant. If you do run the process yourself, prepare all questions in advance. Remember, there is a chance the Employment Relations Authority will scrutinise the interview if a grievance arises.

Because of this, you may want to place an independent professional on the panel who can give evidence of independence if there is a grievance. HR consultants are relatively inexpensive, and some money spent here can avoid a costly grievance. An independent person on the panel can be a significant deterrence against grievance. If an employee argues that the panel interview was unfair, pointing to the independence of the professional on the panel will likely stop the grievance in its tracks.

Include detailed records to evidence your process. Be prepared to hand over to employees everything you have considered when deciding on the continuance of their employment.

Note that case law suggests that obvious objective measures should be favoured and past performance should be considered. Consider relevant factors and deal with the hierarchy of importance by weight. An example of a weighted score is:

- 70% based on the behavioural interview
- 15% based on sales figures
- 15% based on technical proficiencies.

The choice of what informs selection sits with you, provided it is not unreasonable or unrelated to the role. The choice must reflect the broad selection criteria that was consulted upon.

If certain performance tools were used during the ordinary course of employment, evidence that you referred to them. If you don't view them as a factor, make sure the weighting of scores reflects this. It helps to avoid the argument that relevant measures were ignored.

To determine whether someone should be redeployed, you can use the contestable process. Here, if employees achieve a minimum score, then the role is considered within their capability. If no one reaches that score, you can argue the need to recruit externally.



Checklist

- Check there are no unnecessary barriers to participation in the contestable process and that everyone who should be participating is. Make sure that direct managers are not discouraging participation. Let the process do its job. There's no need to weed people out.
- Obvious relevant objective measures are addressed by the methodology used.
- If a panel interview is preferred, it is prepared in advance and is of sufficient rigour.
- The process is sufficiently linked to the selection criteria consulted upon.
- Weighting is correctly applied to all measures.
- Good records and evidence of the process is generated.

Make sure that direct managers are not discouraging participation. Let the process do its job. There's no need to weed people out.

Common Traps

Common grievance summaries are as follows:

“I can do the role, and I was discouraged from applying.”

Employees should not be discouraged from participating in any process that vets them for redeployment. Let a good process do the work. Discouraging an employee's application will be argued as unreasonable. They will also argue that you had predetermined who you wanted in the role.

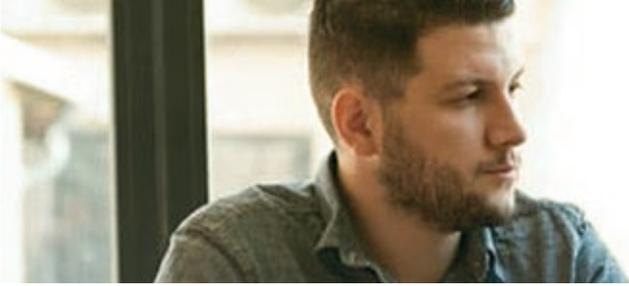
“I can do the role. Look at my performance history.”

As discussed above, there is support in past cases that past performance should have been considered. These arguments usually arise when there was no reference to existing measures, such as performance reviews. Th grievance can be compounded when the panel has formed a view that contradicts annual reviews. The perfect storm arises where the interview isn't rigorous and is seen by employees as a poor test of their skills and aptitudes.

Some managers like employees to experience performance reviews positively, so records of performance may not equate to the panel's impression. It pays to check performance reviews.

“They tested things that don't matter for the role and favour other people.”

This argument points to a failure to use relevant measures and transparency. Your process should be linked to the role description for the new role. For example, if you use a panel interview, they should consider behaviours relevant to the new role. It should not stray from the broad criteria that was consulted upon.



“They didn’t include me because the role was a lower-responsibility role.”

The obligation to consider redeployment includes redeploying to a lesser role or a lower-level role. Make sure that the opportunity to apply for lesser roles exists.

“They didn’t include me because the role was a higher-responsibility role.”

If a higher role may be within a person’s capability, then they should be allowed to apply. It is better to trust a well-designed process than to deprive an employee of the opportunity to participate. The sense of unfairness that accompanies being denied an opportunity often drives grievances.

“They had already decided.”

Badly designed processes will create this perception. Employees in the process should feel it is fair to them. This is why a technique like an independent panellist is key. An independent panellist will prevent employees and existing managers from bringing up the past as the source of unfairness. An opportunity to comment on scoring also helps eliminate perceptions of predetermination.

Notice of termination

When redeployment options are exhausted, and contestable processes concluded, it is time to give the notice of termination. It should indicate the last day of service or make an offer to pay in lieu of notice. Where the employment agreement expressly allows the employer to pay in lieu of notice, the employer can decide to or not. There is a right to work out a notice period where the agreement is silent on the issue, but employees rarely exercise this.

It goes without saying that the letter providing notice should be sensitive to the circumstances.

Again, it is good practice to offer the provision of counselling if it is required.

A final pay should be paid on the final day of work as opposed to in an ordinary pay run.

Checklist

- Notice has the appropriate tone.
- Notice sets out the last working day or provides for notice to be paid in lieu.
- Final pay is paid on termination and properly calculated.

Common Traps

Failure to do basics well here creates a perception issue with employees. A poorly handled notice can polarise employees who may be considering challenge.

There is a lot to think about when it comes to a restructure.

Restructures are often complex, and the guide is only an overview. At Bell & Co, we are experienced in helping employers defend personal grievances, and we are one of the most successful firms of advocates at employment mediations. Visit our website to learn how we can help you.

About Us

Bell & Co is a boutique dispute resolution firm. We've led extensive restructures for clients and acted on behalf of disadvantaged employees.

This guide is not a replacement for good advice. We recommend discussing your restructure with a reputable employment lawyer. At Bell & Co, we can offer advice from both a human resource and legal point of view.

Feel free to contact us with any questions.



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