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CBAFF Webinar

**Employment and
Immigration Law Update:
COVID-19 Issues**

29 May 2020

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Damn good advice



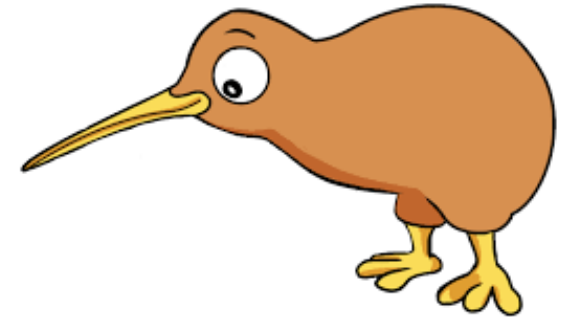
Today's Agenda

Employment Law

- Current alternative to redundancies
- Restructuring

Immigration

- Current state of play
- Impact of COVID-19 measures on migrants and employers
- Predictions on border reopening, etc.



Employment



Employer Obligations

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PCBU

Health & Safety
at Work Act
2015



**Good
employer**

S4 “good faith”
ERA 2000



Wage Subsidy

Purpose: To financially assist employers significantly impacted by COVID-19 and struggling to retain employees

- Suffered or projected to suffer *at least* 30% decline
- Employer must prove they have taken **active steps** to mitigate the losses of COVID-19
- Keep the employee connected to the employer



\$585.50 (F/T)
\$350.00 (P/T)

NOTE: Employee still accrues leave while on WS



Wage Subsidy (Pre 4.00pm, 27 March 2020)

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- Original declaration remains
 - The employer **can make an employee redundant** (subject to the usual good faith obligations and following a fair restructuring process)
- Employers declare that on their “*best endeavours*” they will continue to employ the affected employee at a **minimum of 80% of their income** for the duration of the subsidy period
- Wage subsidy and COVID-19 leave payments separate subsidies



Wage Subsidy

(From 4.00pm, 27 March 2020)

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- **An employer cannot make anyone redundant for the duration of the subsidy**
- Casual employees:
 - Yes, qualify for wage subsidy
 - Variable hours (paid on average hours worked)
- Re-hire employees (employed before 17 March 2020)
- Leave payment rolled into wage subsidy (except essential workers)
- Employers declare to use their “*best endeavours*” to pay at least 80% of each named employee’s ordinary wages or salary and pay at least the full amount of the subsidy to the employee
- Employee is only paid their usual wage and the remainder can be used to pay another employee



COVID-19 : FAQs

- Can an employer give 14 days' notice to take annual leave?
- Can we give an employee notice of redundancy within 12 weeks?
- What if the wage subsidy is not enough?
- Is it average hours worked and how is this calculated?
- If normal wage is less than the subsidy amount, what does the employer do with the difference?
- Is there any payment for essential workers who should not be working?

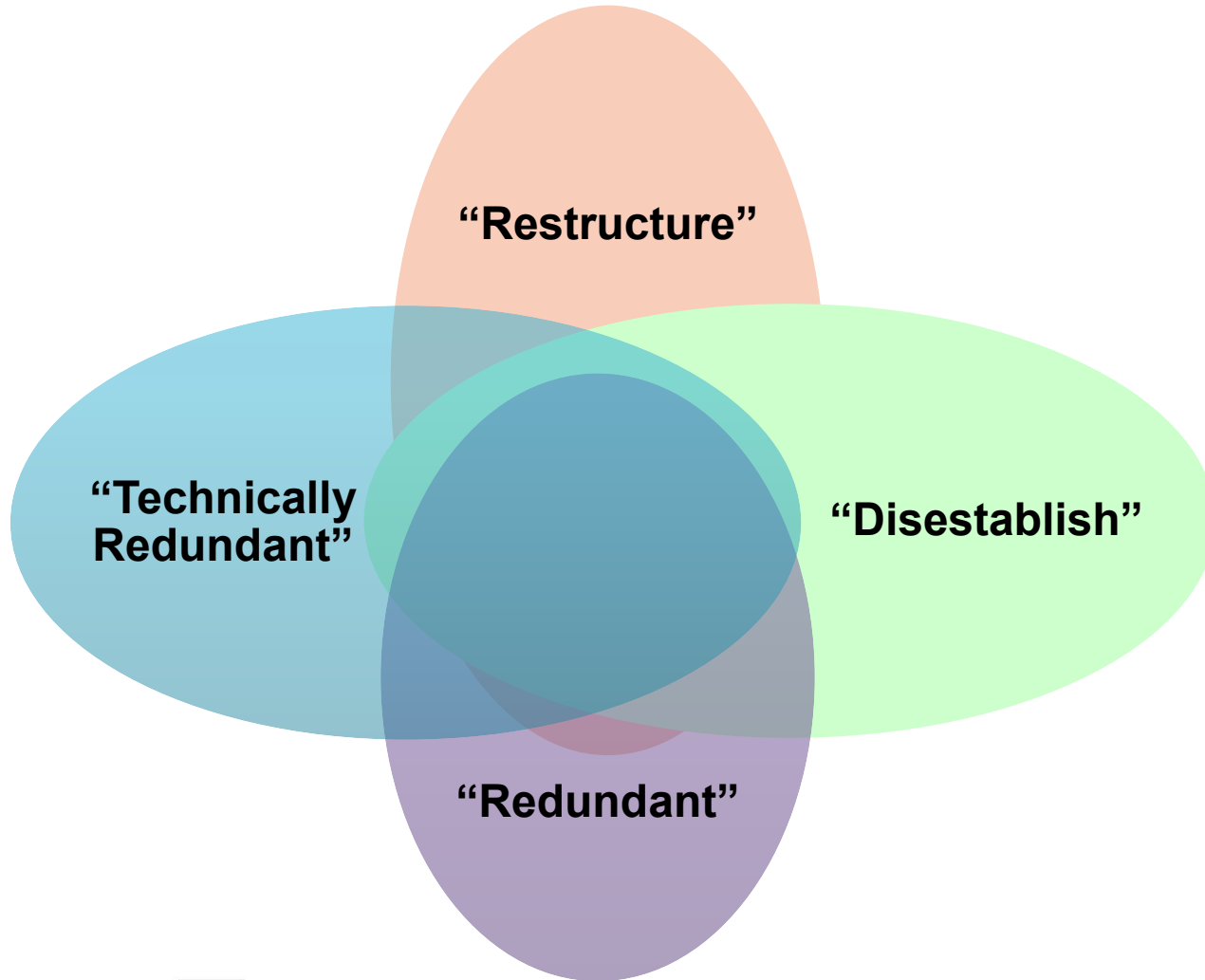


Restructuring



Overlapping Terminology – Do They Mean the Same Thing?

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Starting Point for a Restructuring

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As the employer, you need to:

1. Justify it – Genuine business reason

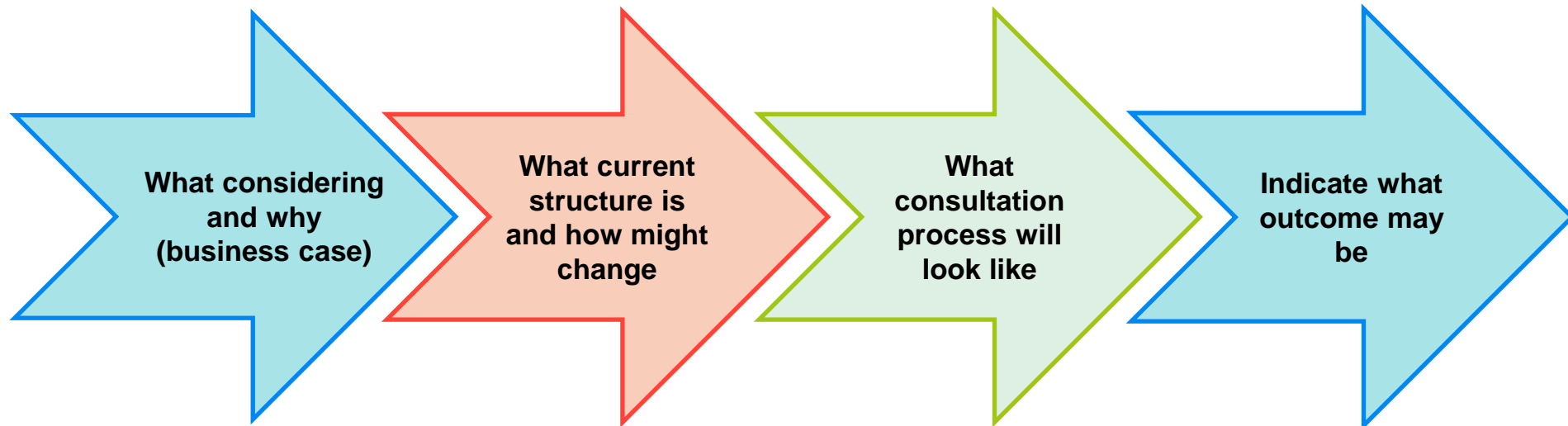
2. Get the process right – did you follow a “good faith” process

Decrease likelihood of a personal grievance



Drafting the Proposal – The ‘Ideal’

What needs to be in it?



Consultation Process Timeline – The ‘Ideal’

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1. First letter inviting employee to meeting



2. First meeting - discuss proposal



3. Second letter inviting employee to feedback meeting



4. Second meeting - get feedback



5. Third letter inviting employee to outcome meeting



6. Third meeting - confirm proposal



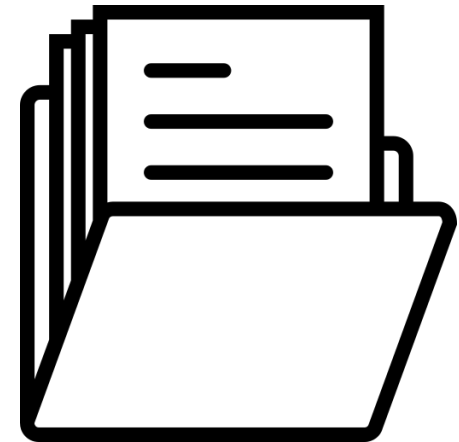
7. Selection criteria if necessary



**8. Confirm redundancy and any redundancy entitlements
(if redeployment is not an option)**

First meeting

- Purpose is to present proposal
- Give a copy to the employee
- Close meeting



Second meeting

- Purpose is for employee to give feedback
- Clarify any questions
- As a minimum keep a note of:
 - Date and time feedback given
 - Summary notes of nature of feedback



Third meeting

- Confirm proposal (or amended proposal)
- Inform them of process for selection criteria (if necessary)



Selection process (if necessary)

When one or more position is redundant, the employer must select employees for the redundancy using **a fair and reasonable** process



Selection criteria

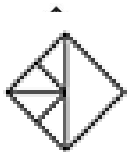
- Last on, first off?
- Criteria can be:
 - Length of service
 - Industry experience
 - Attendance
 - Performance
 - Attitude and work ethic
 - Demonstrated additional skills



Confirm redundancy(s)

- Confirm redundancy where role is disestablished and no redeployment opportunities
- Confirm compensation payments (if any)
- Notice period

FINAL



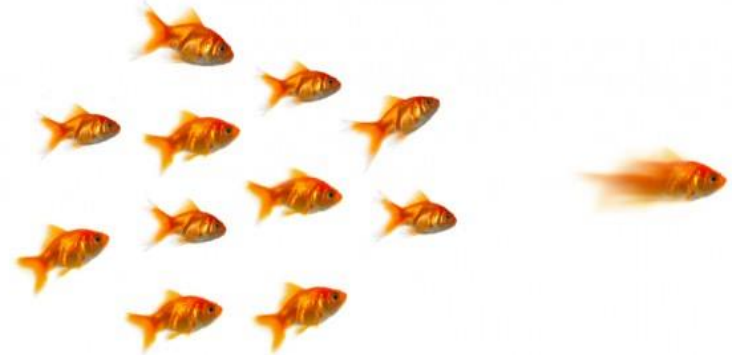
The 'quickest' process

Business Case – the proposal
(1-2 pages)

Consultation
(couple of days / 1 week)

Gather feedback
(within 24 hours)

Consider feedback and make a decision



Immigration



The Border – Who Can Still Get In?

- The border is closed to all travellers
- Some can still enter: NZ citizens and residents, Australian citizens who live here, family members
- Entry with approval (exceptions):
 - Essential health workers
 - Other essential workers - critical to delivering the response to COVID-19 and/or maintaining critical infrastructure
 - Samoan and Tongan citizens
 - NZ-based partners/dependent children of Work, Student or Visitor visa holder who is in NZ
 - Humanitarian exceptions
- High decline rate (80%)



Current Situation and Processing Capacity

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- No non-COVID-19 related visa processing during lockdown
- All offshore branches and VACs closed
- 70% onshore processing
- Significant backlog
- Additional info requests (Labour Market Test) will extend backlog
- Bottleneck coming in September
- Visa programme postponements
- Processing priorities



Variations to Conditions

- Variations to T&C of employment: Reduced hours, reduced pay, redeployment, change of job duties, a combination
- All variations must comply with employment law
- ‘Open’ and ‘closed’ Work visas:
- Closed Work visas: Talent visa and Essential Skills Work visa
 - Minimum income thresholds and/or ANZSCO requirements



Variation to Conditions

- Open Work visa: Can vary conditions
- Closed Work visa: Any changes to T&C of closed Work visa must first get INZ approval (Variation of Conditions or new Work visa)
- Online process for Level 4 Essential Services businesses:
 - Change of occupation: Same employer
 - Change of employer: Same occupation
 - Student visa: Same employer – increase above 20 hours p/w
- Valid during: Alert Levels 3 and 4 + six weeks after
- For everyone else: Lodge application with INZ



Variation to Conditions

- Reality check – these variations already happened
- Significant INZ backlogs – nothing happening any time soon
- Majority of cases – variation will lead to working outside of conditions of visa (technical breach):
 - Employee: Potentially liable for deportation
 - Employer: Potential breach of Immigration Act, non-compliant



The Million Dollar Question



What can we/our employees do about this?

What is INZ going to do about this?

- New visa: Unlikely to be processed any time soon
- Relying on INZ to overlook non-compliance
- Our view: Any discretion is likely to be limited and very short duration



Redundancy

- Restructure process should be based on objective criteria
- No obligation to notify INZ of termination of employment, but it is best practice
- Timing of notification important
- Migrant workers – need a new visa before they can take up a new role
- Keep an eye out for possible lifeline – leave without pay
- Minister has indicated migrant workers won't be disadvantaged
- Special treatment unlikely – priority will be to give Kiwis the first shot at roles



Immigration (COVID-19 Response) Amendment Act 2020

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- Radical, discretionary powers for whole classes of visas
- Resident and temporary visas
- Though the powers are there, some/all may not necessarily be exercised



What Lies Ahead – Work Visas

- Labour Market Tested Work visas:
 - New guidance just released: Tougher Labour Market Test
 - Pending applications: Repeat test?
 - Higher level of declines and “PPI” letters
 - All skill levels, especially ANZSCO Levels 4 and 5
 - Ongoing and sustainable employment
 - Increased focus on other policy grounds
- Talent visa also a target here
- Accredited Employer applications



What Lies Ahead – General Policy

- Uncertainty and more uncertainty – there is no playbook to rely on
- We are already seeing a ‘wait and see’ assumption-based approach from the Minister
- Delays: Government departments will have to formulate the immigration and labour market strategy
- Reactionary policy decision-making
- One eye on the labour market and the other on the election



Predictions on the Border Reopening

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- Minister – no conclusive ideas
- Difficult balance: Public health vs economic recovery
- Two main determining factors announced by Minister:
 - COVID-19 statistics
 - Infrastructure – capacity to have an effective quarantine system (hotel capacity and ability to police 14-day quarantine)
- Mounting pressure to re-open
- Subject to strict quarantine requirements



Predictions on the Border Reopening

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Traveller type	Possible timeframe
Returning Kiwis, Australians and their families	Ongoing
Others essential to fight COVID-19/other critical humanitarian needs	Ongoing
New Resident visa holders	6 months?
International Student visa holders	6 months?
Other “non-essential” Work visa holders (staged depending on skill level and risk to labour market)	6-12 months?
Tourists (staged and controlled, e.g. country of origin, antibodies for COVID-19)	12-24 months?



Preparation

- Understand the impact for your business – know your migrant workforce
- Be aware of likely backlogs at INZ – manage the timing of lodging applications
- Tougher Labour Market Test – very well drafted documents that address key policy requirements
- Get the best advice and get it right first time
- Tell the story – visas as exception to policy
- Set realistic expectations



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