

CONSULTING WITH EMPLOYEES IN AN ASSET/ BUSINESS SALE TRANSACTION

BACKGROUND

1. In an asset sale, where a business is being sold as a going concern, an employee's employment will be terminated by the vendor upon completion of the sale due to redundancy. This is because an employee's role will be surplus to the vendor's requirements after the sale completes. Accordingly, the ordinary rules that govern justified dismissals apply.
2. In broad terms, this requires employers and their employees to deal with each other in good faith. In the context of an asset sale, this requires the vendor to:
 - a. consult with its employees about the proposal to sell its business (since that decision may have an adverse effect on its employees' continuing employment);
 - b. provide affected employees with access to relevant information about the proposed decision;
 - c. allow employees to comment on the information provided, before any decision is made.
3. The steps below outline the general approach and minimum considerations for a vendor when dealing with the sale of its business. Matters such as negotiations with the purchaser, time constraints, confidentiality obligations, other commercial issues and the nature of your employees will affect the approach you take, including the number of meetings you hold and the amount of information you are able to provide your employees.
4. This resource only applies to employment relationships that are governed by individual employment agreements and employees that are not considered "vulnerable employees" (as set out at Schedule 1A of the Employment Relations Act 2000).

MATTERS TO CONSIDER

- **Review your employment agreements to determine your obligations.**
 - Your employment contracts should contain an "employment protection provision" which sets out the procedure you will follow when negotiating with the purchaser about the sale of your business.

- You should ensure that you follow the provisions of the "employment protection provision" clause and, if no such clause exists, you should, at the very least, comply with the following steps below.
- **Meet with your employees and advise them of your intentions.**
 When should consultation begin?
 - Strictly speaking, a vendor should consult with its employees about the proposal to sell its business before taking any concrete steps (including, for example, signing a sale and purchase agreement (SPA)). Arguably, any consultation that commences after a vendor has signed a SPA may be considered to have commenced too late by the Employment Relations Authority.
 - However, in practice, it is not uncommon for consultation to commence in the latter stages of a sale. This can be due to a number of reasons including preserving confidentiality or a lack of knowledge of the purchaser's intentions. In addition, if employees will be offered employment by the purchaser then that can sometimes cause a vendor to lean towards consulting at a later stage of the sale process (since the practical risk of employees bringing claims may be lower).

How do you consult?

- Consultation may initially take the form of a general meeting with your employees (at which you inform them in general terms of the sale and the potential impact that may have on their employment) or at individual meetings. You should not tell your employees that you have already made your decision.
- If you choose a group meeting you should also discuss your intentions with each employee individually (since employees might not raise their concerns in a public forum). It is particularly important to meet each employee individually if employees will be treated differently (i.e. only some employees are to be offered employment by the purchaser) or if matters are sensitive.

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DATE: JUNE 2015

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- The early stages of your consultation may simply involve advising your employees that you are considering an offer to sell your business. Note the more informed the employees are, and the earlier you begin consultation with them, the more time you have to address any issues that may arise. You would need to tell your employees as early as possible that the sale of the business may result in the termination of their employment with you.
- In deciding when to commence consultation, you need to consider your commercial interests and including any confidentiality or other obligations you have to other persons including the purchaser.
- **Ensure the employee has access to all relevant information about your intentions.**
 - Such information may include (depending on your situation) the date the sale of your business is to take place, whether the purchaser is considering employing all or some of the employees (and the terms of such offer), information about the purchaser, how much notice each employee will receive of any termination, any redundancy entitlements, and, if such entitlements are available, the process to be followed to determine those entitlements.
- **Give the employees an opportunity to consider all information you provide.**
 - Your employees should be given a reasonable amount of time to consider the information. This could be anything from 1 day to a week (or longer!) after each meeting depending on your situation and the complexities that may have arisen.
- **Meet the employees regularly to discuss any developments and/or any comments or questions they may have.**
 - Consider each employee's views and advise them you will get back to them. Don't make any decisions during any meeting. You will need to ensure that you have taken all relevant matters into account before delivering a reasoned and well-thought through response to employees.
- Give your employees an opportunity to comment during any meetings.
- **Liaise with the purchaser throughout the process to determine its intentions.**
 - You may need to instigate meetings with the purchaser on regular occasions to keep up to date with the purchaser's intentions so you can keep your employees well informed. The purchaser may want you to provide information about certain employees. You should obtain each employee's consent to disclose such information before doing so.
 - You should negotiate and discuss possibilities of redeployment of your employees with the purchaser (having specific regard to the employee protection provisions in employees' employment contracts).
 - If applicable, you should ensure that you insert appropriate provisions in the SPA that deal with how employees may be transferred to the purchaser. In particular, will you insist that the purchaser makes written offers of employment to employees under the SPA, will you require some control on the content of the purchaser's offer of employment, will the purchaser recognise transferring employees' annual leave (and other statutory) entitlements, etc.?
- **Consider each employee's views and then meet with them to advise them of your decision.**
 - Make sure you give your employees the requisite notice and pay any redundancy or accrued (but untaken) annual leave entitlements due to them.

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