

Workforce reduction: employer's duties 3/20/21



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With the Covid-19 pandemic leading to many redundancies, the courts are increasingly hearing disputes over mistakes employers make in laying off their workers. This suggests a lack of understanding of how a workforce reduction should be achieved lawfully. It is important in this context for the employer to offer the worker another job before issuing a redundancy notice.

Workers may be laid off if the employer needs to take some urgent business, organisational, technological or similar measures in the company. Assuming that a workforce reduction results in employment being terminated with up to five workers within 30 days, this process should comprise the steps set out below:

01

A board decision to take urgent measures

The board has to make a decision to take urgent measures in the company. The board decision or an authorised officer's order relating to organisational measures is recognised as a necessary precondition for termination due to workforce reduction (the Supreme Court's ruling No. SKC-2285/2016 of 21 December 2016).

02

An assessment of priorities

The employer has to assess the workers' priority to stay employed under section 108 of the Employment Act. Such priority goes to workers with better performance and higher qualifications. The priority assessment obligation involves comparing the job duties to be done and not the role titles (the Supreme Court's ruling No. SKC-1627/2016 of 29 November 2016).

03

Verification of prohibitions and restrictions

After assessing priorities, the employer is advised to check whether the workers with the lowest priority qualify for any of the restrictions laid down by section 109 of the Employment Act. A workforce reduction must not involve terminating employment with a pregnant woman, with a woman during a period of up to one year after the childbirth (if the woman is breastfeeding, then throughout the breastfeeding period but not to exceed two years of age), or with someone who has a disability. More factors to look out for are whether the worker has temporary incapacity for work and whether they are a trade union member.

04

Offering another job

Under section 101(4) of the Employment Act an employment contract may be terminated because of workforce reduction if the employer is unable to employ the worker with their consent in another job in the same or another company. Once the employer's assessment has identified the workers to be laid off, the employer has to offer them another job.

Failure to offer another job has been the reason for recognising the employer's redundancy notice as invalid in several cases. Case law finds that the employer has a duty to offer a job that matches the worker's qualifications and abilities. And a job must be offered not only in the business unit the person is working but also in another unit where the company employs workers. Yet the opportunity to offer the worker another job must exist at the time of the redundancy notice being issued, and there is no basis to offer a job for which an open competition has been announced.

Case law is silent as to what position or role should be offered to the worker. Yet the employer's failure to offer another job, to warn the worker of a lower pay, and to find the worker's refusal of another vacancy being offered, has been recognised as a mistake. Accordingly, to meet the statutory requirement that another job must be offered, the employer has to offer any job the worker can do according to their qualifications and professional ability. For example, even if it is a department manager who is being laid off, the employer has a duty to offer a lower paid or lower skilled role as well.

In practice such an offer and the worker's refusal should be recorded in an internal document where the employer lists the jobs being offered and states that he has offered them to the worker, while the worker confirms with their signature that they refuse those jobs or, conversely, accept one of the vacancies being offered.