

Tough Times, Tough Decisions

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Nicole Bucher, March 2009

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Given the growing trend of reduced consumer spending amongst visitors and residents of the Cayman Islands, we must prepare for what could be a prolonged global recession which will likely impact local employers. If indeed businesses need to reduce staff in order to survive the downturn, it is in the best interest of both the employer and employee that terminations be conducted fairly and with the utmost professionalism, keeping in mind that the cornerstone of any business is its operating staff.

As business owners and managers having to make difficult decisions about staffing needs during this downturn, it is important to consider terminations with sensitivity in order to maintain your reputation in the community as a good corporate citizen. It is equally important that you comply with the Labour Law of the Cayman Islands to avoid being brought before the Labour Tribunal in response to allegations of unfair termination. If the Tribunal were to make a finding of an unfair termination, a payment in the amount of one week's wages for each continuous year of service and severance pay may be ordered-in addition to any contractual notice pay.

The Labour Law reflects an understanding that businesses have different staffing needs at different

times and it provides that a termination is fair if it is because of redundancy. Redundancy is a situation in which, by virtue of either a lack of customers or orders, retrenchment, the installation of labour-saving machinery, an employer going out of business, force majeure, or any other reason that reduces or eliminates the tasks that a person was employed to perform. In essence this means that if your customer base is dwindling, your business is scaling back or becomes unprofitable, your business is restructured, or you've implemented new systems that make the business more efficient resulting in too many employees to carry out the work, it is fair to terminate those who are redundant provided that you pay the required notice and severance payments.

If more than one employee performs the same kind of redundant work and you must decide between them, differences in immigration status must guide you in choosing who to terminate. For example, an employee with a work permit must be made redundant and terminated before a Permanent Resident or Caymanian. Likewise, a Permanent Resident must be made redundant and terminated before a Caymanian. As between employees of equal immigration status, it is

recommended that the employee with the least seniority be made redundant and terminated first.

As with all provisions of the Labour Law, employers are duty bound to act in good faith when dealing with employees and this is particularly true with respect to terminations. Redundancies must be genuine and employers cannot use redundancy provisions as an excuse to terminate employees that they would otherwise not be able to terminate fairly. The Department of Employment Relations is naturally sympathetic to business realities, and particularly so in this economic climate; however, they will likely uncover abuses of the redundancy provisions and corresponding unfair terminations. Attempts to circumvent unfair termination provisions by later hiring another person for the same position where no change in the business has occurred or by hiring for the same work under a different job title will likely not be deemed to be fair in the event of a complaint to the Department of Employment Relations.

Another mechanism provided for in the Labour Law allowing employers greater flexibility when under financial constraint is temporary termination of employees. If business has slowed down to the point where terminations are necessary but you can anticipate an up turn because of, for example seasonal changes or the possibility of future contracts being finalised, you can terminate employees temporarily.

The advantages to you, as an employer, are that once you have provided the requisite notice, you have a pool of staff on Island ready to respond to

changes in the marketplace without them being on your payroll. This may help your business stay afloat through lean times and ensure continued employment for all in the future. Provided that employees are recalled within 30 days of termination, you do not have to pay severance at the time of temporary termination. Since severance payments are one week's wages for each continuous year of service, this provision is particularly important for businesses needing to temporarily terminate a large number of long term workers. This 30 day recall deadline is extended to six months for agriculture and construction workers since these industries are particularly vulnerable to short term seasonal and market trends. Using this mechanism, employers and employees can work together to ensure that businesses survive and prosper in the Cayman Islands. Care should be taken not to infringe upon the requirements of the Immigration Law and Regulations in the event that this option is exercised in respect of a non-Caymanian employee.

Terminations and redundancies can be fraught with technical difficulties and accordingly, it is encouraged that legal advice be sought to ensure that what amounts to a cost saving exercise for businesses does not inadvertently create an additional financial burden on all concerned.

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