



Workplace Change

▶ How to lawfully make changes

Workplace change, for the purposes of this pamphlet, involves changing the structure of a business – often referred to as a ‘restructure’.

A change in structure could include: removing roles that are no longer required; re-jigging current roles e.g. combining one or two or more roles; and/or creating new roles. There are two overriding aspects of a restructure:

- ▶ A business must be able to illustrate that it has genuine business reasons; and
- ▶ A business must follow a fair and reasonable consultation process with the potentially affected employee(s).



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Genuine business reasons - what are they?

A genuine business reason is a legitimate commercial reason that underpins the decision to make changes to the structure of the business.

Genuine business reasons can include, without limitation: adapting and/or moving the business in a different direction; outsourcing or other cost reduction measures; loss of business and/or revenue; identification of operational efficiencies e.g. the removal of layers of management; and/or changes in supply and/or distribution channels.

The business reason (which of course must be genuine - i.e. not a cloak for dismissing an employee that isn't up to par!) is the foundation of any restructure. It is therefore critical that this is carefully considered before commencing a restructure process. Such considerations should include the collection and provision of documentation that supports any asserted business reason.

CONSULTATION PROCESS - WHAT DOES THIS LOOK LIKE?

Before commencing a consultation process, the relevant employment agreement(s) and policies must be checked for any prescribed process. If such a process is expressly set out, it must be followed - provided it is not inconsistent with the two key aspects of restructuring referred to (on page 1). If in doubt, obtain independent legal advice. Set out here is a summary of the consultation process that we suggest you follow when undertaking workplace change (or a restructure).

1. Document and communicate the proposal

We suggest that this is done by way of letter to the potentially affected employee(s). This letter should: set out what the proposal is; the reasons for the proposal;

what the ultimate outcome could be; and advise the potentially affected employee(s) that you want to meet with him or her or them to further discuss the proposal.

2. Meet with the potentially affected employees

The purpose of this meeting is to further discuss the proposal. The Employee(s) may have questions about the proposal - engage with them. However, this is not the time for the employee(s) to provide feedback on the proposal. Advise the employee(s) that you will meet with them again, and that during this meeting they will be given the opportunity to provide such feedback. You will also need to tell them that they are entitled to bring a support person or representative to this next meeting if they want to.

3. Meet with the potentially affected employees for a second time

The purpose of this second meeting is to obtain feedback from the employee(s) about the proposal. Remind them that this is their opportunity to provide feedback, and that it could include alternatives to what has been proposed.

4. Consider (genuinely) the feedback the employee has given

For many businesses, their staff are their most important and valuable asset. Feedback from employees may identify options, opportunities and/or solutions to the challenges facing the business. If, based on this feedback, it is decided to change the proposal, then do so, and recommence the process from the beginning. If not, then consider whether there are any appropriate redeployment opportunities available. If there are none, then move on to the next step.

Remember, you are required to offer an employee redeployment to an alternative position if the position is within the employee's capabilities with some upskilling.

5. Document and communicate the outcome

We suggest that this is done by way of letter. This letter should: briefly summarise the process that was followed, and feedback the employee has given and your responses to that i.e. why you have chosen not to proceed with the alternative proposal put forward by the employee; and confirm the outcome i.e. that you have chosen to proceed with the original proposal, and the impact this has on the employee i.e. their position has been disestablished.

It is at this point that you need to consider whether a competitive process needs to be undertaken. This will likely be necessary where one or more employees want to be deployed to an available role. If a competitive process needs to be undertaken, consultation on and the development and application of selection criteria (including the weight placed on each criteria) needs to be considered. If such a process is required, then the letter should advise the employee of the intended next steps regarding the competitive process. If not, then the letter would confirm: that, if applicable, their employment will end due to redundancy; and any ongoing contractual obligations, and other termination matters such as final pay, Employee Assistance Programmes, etc.

A WORD TO THE WISE

Workplace change can be fraught with difficulty. Errors in the legitimacy of the business reason, or consultation process can occur even with an experienced or well-intentioned manager at the helm. We therefore recommend that you obtain independent legal advice from an experienced employment law specialist before undertaking any workplace change.