

## **REDUNDANCY AND SEVERANCE PAYMENTS IN THE BRITISH VIRGIN ISLANDS**

### **1. INTRODUCTION**

The British Virgin Islands' (the “**BVI**”) has recently enacted the Labour Code, 2010 (the “**New Labour Code**”). When the New Labour Code comes into effect by proclamation of the Governor it will replace the Labour Code (Cap. 293) (the “**Old Labour Code**”) except that businesses who have planned and budgeted their severance payments for time served by existing employees over the years will not have those existing plans affected, but will have to consider the new severance structure for time served by employees going forward.

Under BVI law, “redundancy” includes various situations where the work for which the employee was hired under the contract of employment is changed, modified, discontinued, relocated, diminished or similarly affected.<sup>1</sup> Employees who have been made redundant are entitled to severance payment if they have been in continuous employment for at least 12 months,<sup>2</sup> or if they are periodic employees<sup>3</sup> who have worked for the same employer, which includes any predecessor to that employer, for at least 4 consecutive years.<sup>4</sup>

Although redundancy is the most well-known factor for which severance payment is normally made, it is not the only factor. Other facts include:

- (a) mental or physical incapacity which has lasted for at least 6 months and certified by 2 medical practitioners;<sup>5</sup>
- (b) a rule of law that requires the employee to cease working;<sup>6</sup>
- (c) one-month after the winding-up or appointment of a receiver,<sup>7</sup> unless the liquidator or receiver continues the business, or the business otherwise continues or is transformed;<sup>8</sup> or

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<sup>1</sup> Section 89(3) of the New Labour Code. Unless otherwise indicated, references to sections in this Guide are to sections of the New Labour Code.

<sup>2</sup> Section 104(1).

<sup>3</sup> See Section 3 which defines “periodic employee” as “an employee who has worked for at least four months but less than twelve months per year”.

<sup>4</sup> Section 104(2).

<sup>5</sup> Section 89(2)(a).

<sup>6</sup> Section 89(2)(b).

(d) the death of the employer.<sup>9</sup>

For the purpose of this bulletin, however, only redundancy will be explored, although the principles of severance payment which follow can apply to any of the other factors outlined above.

## 2. REDUNDANCY

Although redundancy is generally an appropriate mechanism for dismissing an employee, it may be unfair where none of the circumstances qualifying as a redundancy are present and it is for the employer to show that the reason for the dismissal was due to a redundancy.<sup>10</sup> Therefore, it is advisable that an employer be completely fair and reasonable during any redundancy by first giving adequate written warning to the employees (or holding a general staff meeting) giving the reasons why employees may have to be made redundant and that those employees are at risk of redundancy. It is open to the business to consider the redeployment within the company or group based on the appropriate drafting of the contract of employment. Unless the business has outlined an agreed redundancy policy which should then to be followed, the method of selecting employees for redundancy should be transparent so that there is a means of identifying the pool of employees from which redundancies will be made. The pool of employees may be selected based on disciplinary record, length of service or some other objective criteria. Failure to do this may render the redundancies to be unfair dismissals.

After the written warning has been issued, or a general staff meeting held, and the selection criteria determined, it is advisable that a consultation be provided with the employees in the given pool before any final selection is made. It is never advisable to have a consultation meeting with an employee about redundancy before the written warning is issued, or the general staff meeting is held, notifying them of the risk of redundancy. It is important to immediately notify the Commissioner of Labour once a selection is made, or at least 1 month before the termination date, where there will be 3 or more employees made redundant,<sup>11</sup> and it is for the Commissioner of Labour to inform the Minister of the redundancy.<sup>12</sup> Also unlike under United Kingdom law, there is no obligation on an employer to provide reasonable time off for an employee who is being made redundant to seek alternative employment, and employees are required to work as usual until their termination becomes effective in accordance with the appropriate notice periods. As a practical measure, an employer should ensure that no public announcement is made until after the written notice of termination is given to the affected employees. If within 6 months following the termination of employees due to a redundancy and it becomes necessary for the employer to hire persons to perform those same tasks for which the employee was

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<sup>7</sup> Section 93(1).

<sup>8</sup> Section 93(2).

<sup>9</sup> Section 94.

<sup>10</sup> Section 85(1).

<sup>11</sup> Section 99(1).

<sup>12</sup> Section 99(3).

made redundant, the employer is under an obligation to give preference to that employee if anyone is to be hired.<sup>13</sup>

### 3. TEMPORARY LAY-OFF

Redundancy should not be confused with a temporary lay-off, which normally occurs in industries which experience cyclical or seasonal work reductions like the hospitality industry. To constitute a temporary lay-off, the employer must indicate in writing prior to the temporary lay-off the date of re-engagement<sup>14</sup> and a temporary lay-off is not a break in the period of employment, so that notwithstanding a temporary lay-off an employee can be deemed to be in continuous employment.<sup>15</sup> However, a temporary lay-off should not exceed 3 months.<sup>16</sup>

### 4. SEVERANCE PAYMENT

The amount of severance payment is based on whether the employee is (a) a periodic employee; (b) a part-time employee or an employee paid on a piece-work basis; or (c) all other employees. This, however, does not apply to severance payment for time served prior to the commencement of the New Labour Code, and the severance payment under the Old Labour Code of 6 days per year will remain in effect. The new severance regime applies to all time served after the commencement of the new Labour Code using the following formulas:

#### (a) Periodic Employees

1 day's pay = 12 months basic wage ÷ number of days worked

$\frac{3}{4}$  day's pay x 29 days

or

9 days' pay x number of years employed

#### (b) Part-Time Employees

1 day's pay = 13 weeks total earnings immediately preceding termination ÷ number of days worked

$\frac{3}{4}$  day's pay x number of months (including major fractions) employed

or

9 days' pay x number of years employed

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<sup>13</sup> Section 99(4).

<sup>14</sup> Section 104(3).

<sup>15</sup> Section 96(h).

<sup>16</sup> Section 107(2).

(c) **All Other Employees**

*¾ day's pay x number of months (including major fractions) employed*

or

*9 days' pay x number of years employed*

Therefore, based on the minimum wage of \$4.00 an hour in effect since 1 September 1999,<sup>17</sup> the severance package for all employees other than periodic or part-time employees or employees paid on a piece-work basis, where that employee worked 5 years from January 1 after the commencement of the New Labour Code, and is being terminated on December 31 five years later and working based on an 8 hour day, would be:

$$\$288.00 \times 5 \text{ years} = \$1,440.00$$

The calculation would be different for any years worked prior to the commencement of the New Labour Code.

## **5. CONCLUSION**

An employer that is faced with making employees redundant has two basic options:

- (a) provide an ad hoc system for each time a redundancy situation arises; or
- (b) create a formal redundancy policy to deal with all cases of redundancies wherever they arise.

While either situation would be acceptable, the latter option would be advisable as an added measure against an action for unfair dismissal. Harneys would be willing to assist in advising further on creating a formal redundancy policy in accordance with the New Labour Code.

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<sup>17</sup> Section 2, National Minimum Wage Order, 1999 (S.I. No. 44 of 1999). This, however, does not apply to persons enrolled as a student in any secondary school in which case the minimum wage is \$3.00 an hour. By virtue of section 187(2)(a), the National Minimum Wage Order, 1999 continues in force until revoked.

# HARNEYS

## FURTHER INFORMATION

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