



STANDARD INTERPRETATION GUIDELINE 2019 – 13

INCOME TAX ACT 2015 – REDUNDANCY PAYMENT

This draft Standard Interpretation Guideline (“SIG”) sets out Fiji Revenue and Customs Service’s (“FRCS”) policy and operational practice in relation to the administration of Redundancy Payment.

It is issued with the authority of the Chief Executive Officer (“CEO”) of FRCS.

All legislative references in this draft SIG are to the Income Tax Act 2015 (“the ITA”) and the Income Tax (Rates of Tax and Levies) Regulations 2016 (unless otherwise stated).

This SIG is in effect from May 2019 and may need to be reviewed in the event of any relevant legislative amendments.

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Executive Summary

1. 'Redundancy' refers to a state of being redundant, which is defined in *Oxford Dictionaries*¹ as:
 - a. Not or no longer needed or useful; superfluous
 - b. No longer in employment because there is no more work available
2. Redundancy payment is determined either by the terms of an employee's contract of employment (arm's length amount), or if it is silent in the contract, then by the statutory provisions.
3. The **key components** of a redundancy payment:
 - a. Payment is received in consequence of termination of employment;
 - b. Dismissal from employment must be caused by the redundancy of the employee's position; and
 - c. The redundancy payment must be genuine.
4. The following payments are **not included** in a genuine redundancy payment²:
 - a. a payment which is solely related to seasonal layoff
 - b. a payment made upon completion of either a fixed term contract or contract to complete specified work
 - c. a payment in lieu of a notice of termination of employment
 - d. a payment that, if it were not made on termination of employment, would constitute monetary remuneration of the employee
 - e. a payment made by a company to a director pursuant to its articles of association
 - f. a payment that is excessively large in relation to the earnings and length of service of the employee
5. A **non-genuine** redundancy occurs when the employee:
 - a. Is dismissed because they've reached normal retirement age;

¹ <https://en.oxforddictionaries.com/definition/redundancy> [Accessed on 25/02/2019]

² Section 2 of ITA 2015

- b. Leaves voluntarily;
- c. Has their contract terminated; or
- d. Is dismissed for disciplinary or competency reasons

Introduction

- 6. Redundancy generally occurs when there is a job loss due to circumstances such as the closure of the business or a reduction in the number of employees. The reason could vary from financial position of the business, lack of work, reorganization or the complete closure of the business.
- 7. Collective redundancy occurs where a number of employees are made redundant within 30-day period.
- 8. Voluntary redundancy situation occurs when employees volunteer for redundancy. This happens when an employer is in the process of reducing its workforce and requests for some employees to volunteer for redundancy.

Genuine Redundancy

- 9. A genuine redundancy payment occurs as a result of “loss of your job” because the job you were doing has been abolished or became superfluous to the needs of your employer.
- 10. Even though there is a tendency among many employees to claim payment received after the loss of their job as redundancy related, a genuine redundancy payment has to meet a substantial list of criteria, which is³;
 - a. A redundancy payment made to an employee due to the termination of the employment since the position that had been occupied by the employee has become superfluous to the needs of the employer.
 - b. A redundancy payment made to a seasonal worker whose seasonal employment becomes unavailable solely due to the seasonal worker’s position/ usual position becoming superfluous to the needs of the employer, e.g. XYZ Ltd’s locomotive drivers’ position becomes redundant due to XYZ Ltd outsourcing the supply of sugarcane to the mill to a private trucking company.

³ Section 2 of ITA 2015

11. The following payments, which will not be part of the genuine redundancy payment will be taxed at normal rates:
 - a. Salary, wages or allowances owing to the employee for work done or leave already taken for work completed
 - b. Payment of unused annual leave or unused long service leave paid on termination of employment
 - c. Payments made in lieu of superannuation benefits
12. There are various conditions under which an employee may be dismissed due to redundancy. These conditions may differ across a range of employees and plausible relationships between the employer and employee (in particular, whether the relationship between the employer and the employee is at arm's length).
13. A closer examination and assessment of the explicit situations of each employment relationship and how this influences on the dealings between the parties will result whether and to what extent a payment made on termination is a genuine redundancy payment.

Arm's Length Amount

14. The arm's length amount means that the redundancy payment made should not exceed what could reasonably be expected had the parties been dealing at arm's length, i.e. the redundancy payment paid is not excessively large compared to the earnings and the length. This condition will only apply if it is established that the employer and employee were dealing at non arm's length in relation to the layoff.
15. It is possible for an employer and employee to engage in a non-arm's length dealing without having any personal relationship. Nonetheless, the relationship between the parties is a significant factor in evaluating the nature of the dealing in relation to the layoff.
16. The years of service provided by the redundant employee and the value of the remuneration package are the most influential factors in determining an arm's length dealing.
17. If the redundancy payment is more than the arm's length amount, then consideration will be given to only that component of redundancy payment had the parties dealt at arm's length.

Common Law Position

18. There is a clear distinction between a position being made redundant and an employee being dismissed due to redundancy. In *Adcock v Blackmores Limited & Ors [2016] FCCA 265* an employee (Mr. Adcock) whose position became redundant refused redeployment to other positions and sued his employer in the Federal Circuit Court alleging that the company had breached its

employment contract by refusing to pay him redundancy benefits. The Federal Circuit Court made a decision and stated that -

“The redundancy of a job or position does not necessarily amount to a termination of employment as contended. The authorities cited in support of that contention did not support it and in fact demonstrated that redundancy of a position does not necessarily mean that an employee’s employment is terminated.”

19. In *Fiji Development Bank v Fiji Bank and Finance Sector Employees Union [2011] FJHC 7; ERCA02.2009* (an appeals case from the verdict of the Employment Relations Tribunal (ERT)) the initial decision of the Chief Tribunal (CT) was ruled in favor of the respondent (Fiji Bank and Finance Sector Employees Union) which was overturned by The Hon. Justice Anjala Wati in the High Court of Fiji.

The Hon. Justice Anjala Wati made the following orders in her ruling: -

- a. *That Nawaia Touakin and Sant Prasad did not qualify for any kind of redundancy because the appellant did not breach the Memorandum of Agreement dated 4th June 2008 when it offered comparable positions and no loss of benefits to them pursuant to section 1.6 of the Memorandum of Agreement.*
 - b. *Neel Suresh does not qualify for any redundancy payment under the Memorandum of Agreement as there was no evidence that the offer of redeployment was not an offer of comparable position albeit there was a change in the job position and place.*
 - c. *That Viliame Tagi was not wrongfully downgraded and should continue to be paid at Grade 2.*
20. The foremost emphasis of Hale in *G N Hale & Son Ltd v Wellington Caretakers IUW [1991] 1 NZLR 151 (CA)* was on what constituted redundancy. The Labour Court had found that loss of job due to redundancy was justifiable only if the employer could prove that it had been commercially necessary in the interests of the viability of the employer. Viability was used as a synonym for capacity to survive.

This Court was clear that the Labour Court’s restrictive interpretation was wrong: what was required was that the employee’s position was superfluous to the needs of the business. This could arise where the employer sought to make the business more efficient⁴.

Legislative Analysis

21. Income Tax Act 2015

Part 1 – Preliminary

Section 2 of ITA 2015 defines “redundancy payment” as a bona fide lump sum payment, other than a retiring allowance which is⁵-

- a. made to an employee on termination of the employment where the termination is wholly or mainly due to the fact that the position occupied by the employee will become superfluous to the needs of the employer.

⁴ *G N Hale & Son Ltd v Wellington Caretakers IUW [1991] 1 NZLR 151 (CA)*

⁵ Section 2 of ITA 2015

- b. made to a seasonal worker when the seasonal employment becomes unavailable wholly or mainly due to the fact that the individual's position/ usual position will become superfluous to the needs of the employer.

22. Schedule (Regulation 3) Rates of Tax and Levies⁶

The rates of Income Tax for a redundancy payment derived by an individual are –

Amount of Redundancy Payment (FJD)	Tax Payable
0 – 15,000	Nil
>15,001	15% of excess over \$15,000

23. Employment Relations Act 2007

Part 12 – Redundancy For Economic, Technological or Structural Reasons

Under section 108 (1), (2) and (3) of the ERA 2007 employer has to pay an employee not less than one week's wages as redundancy pay for each complete year of service in addition to the worker's other entitlements provided the employee has completed one year of service with the employer. This Act does not limit the employer from paying an employee a redundancy payment which is in excess of the amount as stipulated in section 108 (2) of ERA 2007.⁷

Examples

24. Example 1 – Dismissal from Employment Due to Underperformance

Tom is the CEO of company ABC Ltd. The company's profits have been in decline for some time, therefore the Board hires a strategic management consultant, who advises them to reorganize the corporate structure. The Board decides to follow the advice of the consultant and terminates Tom's employment as CEO. An acting CEO is appointed to manage the organizational change in lieu of the appointment of a new permanent CEO. Tom is given a generous payment on his termination, which ABC Ltd's HR department states as a redundancy payment.

The payment made to Tom doesn't qualify as a genuine redundancy since the position of CEO is not redundant. The reason for Tom's termination was due to underperformance.

⁶ [Legal Notice No. 5] ITA 2015: Income Tax (Rates of Tax and Levies) Regulations 2016

⁷ <http://www.employment.gov.fj/images/640/erlaws/Employment%20Relations%20ACT%202007.pdf> [Accessed on 26/02/2019]

25. Example 2 - Business Acquisition, Acceptance of Demotion

Jone works as a Sales Manager for Marine Adventures Fiji Ltd (MAFL). MAFL acquires Scuba Fiji Ltd (SFL). Chris who is the Sales Manager of SFL assumes the role of Sales Manager for MAFL as a result of the expanded operations. Jone is offered the role of Sales Representative in the now expanded MAFL in Coral Coast. Jone accepts the position of the Sales Representative. He is also paid a generous compensation which the HR team terms as redundancy package for the loss of his Sales Manager position which he had held at MAFL prior to the acquisition.

The compensation which the HR had termed as redundancy package cannot be characterized as a genuine redundancy payment since in this circumstance, Jone's employment with MAFL is not terminated.

26. Example 3 – Seasonal Employment Becomes Unavailable

Paula has been working as a seasonal (during the sugarcane harvesting period) locomotive driver for Sugar Corporation Ltd (SCL) for 15 years. SCL is restructuring and streamlining some of its processes and has decided to outsource the cartage (from the farms to SCL's processing mills) of the sugarcane to a private company. As a result of this restructure SCL has decided to terminate the locomotive drivers' contracts since these positions will no longer exist. Therefore, the affected employees will be offered with a redundancy package.

The redundancy package offered to Paula and other locomotive drivers will be treated as a genuine redundancy since these seasonal workers' employment has become unavailable wholly and mainly due to their position becoming superfluous to the needs of their employer. Their termination is not a result of seasonal layoff.

27. Example 4 – Negotiation of Termination Date Due to Redundancy

Jim is employed by PQ Plastics Ltd as a Regional Sales Manager. Due to the decline in the sale of plastic bags, PQ Plastics Ltd issues Jim with a notice of redundancy in six months' time so as to assist him in securing alternative employment. Jim's position is superfluous to PQ Plastics Ltd and the position will not be occupied by anyone else.

Jim negotiates with PQ Plastics Ltd to end his employment in two months rather than six months. PQ Plastics Ltd agrees with Jim and brings forward the timing of his termination. At the end of Jim's employment, PQ Plastics pays him a redundancy payment as per section 108 of ERA 2007.

The new negotiated date of lay-off is not a relevant factor in determining whether Jim's dismissal is due to redundancy. Therefore, in this situation, the redundancy payment Jim receives from PQ Plastics Ltd qualifies as a genuine redundancy payment. The character of Jim's termination is established when PQ Plastics Ltd notified Jim of his impending dismissal.

Therefore, in these circumstances, the Jim's termination pay qualifies as a genuine redundancy payment provided all other conditions are satisfied. However, if Jim had voluntarily resigned or retired than any payout that had been received by him would not have been classified as being a genuine redundancy payment.

28. Example 5 – Calculation of Redundancy Package (Year 2018)

Ann has been an employee of XYZ Ltd for 20 years. The Board of XYZ Ltd decides that due to competitive pressure they will reduce the staff numbers by 30%. Subsequently Ann is laid off from her employment.

A lump sum payment of \$150,000 is paid to Ann as her redundancy package. Of this amount \$20,000 represents unused annual leave entitlement, \$20,000 represents unused long service leave payments and \$5,000 as balance of salary.

The first step in calculating the tax treatment of the \$150,000 is to apply the rules for unused leave payments and salary. The value of \$45,000 (annual leave, long service leaves and salary) will be treated as an ordinary employment income, and will be computed according to the 2017/2018 Tax Rates Table (Resident)⁸.

The balance of \$105,000 is a genuine redundancy payment. Therefore, Income Tax on the \$105,000 will be calculated as follows;

\$15,000 will be exempted from tax (redundancy exemption). The remaining balance of \$90,000 will be computed for redundancy tax component, which is \$13,500 [\$90,000 x 15%].

Total tax payable from:

(i) Employment Income

45,000 – 30,000 = 15,000

15,000 x 18% = \$2,700

(ii) Redundancy Payment

105,000 – 15,000 = 90,000

90,000 x 15% = \$13,500

(iii) Total Tax Payable

2,700 + 13,500 = \$16,200

29. For further clarifications on this SIG, please email us at tipu@frcs.org.fj

⁸ [Legal Notice No. 59] ITA 2015: Income Tax (Rates of Tax and Levies) (Amendment Regulations 2017)

Appendix 1: Legislations

Income Tax Act 2015 (Revised 31st August 2017)

Part 1 – Preliminary

Interpretation

2. In this Act, unless the context otherwise requires—

“redundancy payment” means a bona fide lump sum payment, other than a retiring allowance—

(a) made to an employee on termination of the employment of the employee when the termination is wholly or mainly due to the fact that the position filled by the employee is, or will become, superfluous to the needs of the employer; or

(b) made to an individual who is a seasonal worker when the individual’s usual seasonal employment is unavailable wholly or mainly due to the fact that the individual’s position or usual position is, or will become, superfluous to the needs of the employer, but does not include the following—

(i) a payment relating solely to a seasonal layoff;

(ii) a payment contingent on the completion of either a fixed term contract or a contract to complete specified work;

(iii) a payment in lieu of a notice of termination of employment;

(iv) a payment that, if it were not made on termination of employment, would constitute monetary remuneration of the employee;

(v) a payment made by a company to a director pursuant to its articles of association;

(vi) a payment that is excessively large in relation to the earnings and length of service of the employee;

Part 2 – Income Tax

Division 3 – Gross Income

Employment income

15. (1) The following are employment income—

- (f) an amount derived by an employee on termination of employment, whether paid voluntarily or under an agreement, including a redundancy payment or other compensation for loss of employment, and golden handshake payments;

Income Tax Act 2015: Income Tax Regulations

[Legal Notice No. 5] Income Tax (Exempt Income) Regulations 2016

Schedule (Regulation 3) - Rates of Tax and Levies

(2) The rates of Income Tax for a redundancy payment derived by an individual are:

Amount of Redundancy Payment (FJD)	Tax Payable
0 – 15,000	Nil
15,001 +	15% of excess over \$15,000

[Legal Notice No. 59] Income Tax (Rates of Tax and Levies) (Amendment) Regulations 2017

Schedule amended

“Resident Individuals”

<i>Chargeable Income \$</i>	<i>Income Tax \$</i>	<i>Social responsibility Tax (Inclusive of the Environment and Climate Adaptation Levy) \$</i>
0 – 30,000	Nil	Nil
30,001 – 50,000	18% of excess over \$30,000	Nil
50,001 – 270,000	\$3,600 + 20% of excess over \$50,000	Nil
270,001 – 300,000	\$47,600 + 20% of excess over \$270,000	23% of excess over \$270,000
300,001 – 350,000	\$53,600 + 20% of excess over \$300,000	\$6,900 + 24% of excess over \$300,000
350,001 – 400,000	\$63,600 + 20% of excess over \$350,000	\$18,900 + 25% of excess over \$350,000
400,001 – 450,000	\$73,600 + 20% of excess over \$400,000	\$31,400 + 26% of excess over \$400,000
450,001 – 500,000	\$83,600 + 20% of excess over \$450,000	\$44,400 + 27% of excess over \$450,000
500,001 – 1,000,000	\$93,600 + 20% of excess over \$500,000	\$57,900 + 28% of excess over \$500,000
1,000,001 +	\$193,600 + 20% of excess over \$1,000,000	\$197,900 + 29% of excess over \$1,000,000

Employment Relations Act 2007

Part 1 - Preliminary

Interpretation

4. In this Promulgation, unless the context otherwise requires –

“redundancy” means no longer being needed at work for reasons external to a worker’s performance or conduct pursuant to the reasons and processes set out in Part 12;

Part 12 — Redundancy For Economic, Technological Or Structural Reasons

Object of this Part

106. The object of this Part is to provide workers facing redundancy with some degree of certainty about the problems faced by the employer and the assurance of compensation.

Provision of information

107. (1) If an employer contemplates termination of the employment by redundancy of workers for reasons of an economic, technological, structural or similar nature, the employer must –

- (a) provide the workers, their representatives and the Permanent Secretary no less than 30 days before carrying out the terminations, with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; and
- (b) give the workers or their representatives, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize the terminations and on measures to mitigate the adverse effects of any terminations on the workers concerned, such as action to attempt to find alternative employment or retiring.

(2) In this Part—

“economic” means maintained for profit;

“structural” means in relation to a company, corporation, business enterprise or workplace the manner in which such entity is organised, managed or administered;

“technological” means a matter concerning, or use of, technology or information technology.

Redundancy pay

108. (1) Subject to subsection (2), if an employer terminates a worker's employment for reasons of an economic, technological, structural or similar nature, the employer must pay to the worker not less than one week's wages as redundancy pay for each complete year of service in addition to the worker's other entitlements.
- (2) A worker is not entitled to the payment specified in subsection (1) unless the worker has completed one year of service with the employer.
- (3) Nothing in this Promulgation prevents an employer giving to a worker a redundancy payment in excess of that required to be given by this Act.