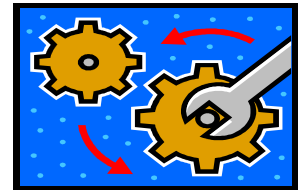


Employment Legislation Overhaul



The National government, in its quest to improve the long-term performance of the economy, has proposed some significant and ancillary changes to the Employment Relations Act 2000 and Holidays Act 2003 as part of a new employment package. It is envisaged that the changes will provide more choices for employers and employees and provide more certainty around the dismissal process. Early resolution of workplace disputes is also being promoted. There are many changes afoot, some have become more of a focal point in the media than others. The following is a brief overview of some of those changes:

1. 90 Day Trial Period

The Employment Relations Act 2000 was amended to include a 90 day trial period for employers with less than 20 employees, enabling the employer to dismiss within or at the end of the trial period without the employee having redress by way of a personal grievance with regard to the dismissal. The Government proposes extending this provision to cover all employers irrespective of size and the number of employees which they employ. It is anticipated that this will provide more employers with confidence to employ additional staff and will also give employees the chance to prove their worth to the employer. As under the existing provisions, a trial period will only apply where the parties agree to it in writing at the commencement of the employment relationship.

2. Personal Grievances

a) The test for justification for any action by an employer (including dismissal) is set out in s.103(A) of the Act. It is proposed that the word 'would' in the section will be changed to the word 'could' to better reflect the range of reasonable responses an employer may have in any given scenario. It is proposed that the new test for determining whether the employer's actions are justified is as follows:

"the question as to whether a dismissal or an action was justified must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred".

b)

This amendment would return the law to where it was prior to the Labour Government's amendment of the legislation to effectively overturn the impact of the Court of Appeal's determination in 'Oram' (refer to "The Advocate", Issue 76).

It is proposed that the Act will set out the minimum requirements of a fair and reasonable process required in a disciplinary setting. It is envisaged that this will provide more certainty for employers and employees. One proposed amendment of note is the removal of "pedantic scrutiny" of the employer's processes, so the focus will be more on the merits of the employer's decision rather than on a pedantic critique of the process followed by the employer. The process taken by the employer will however be considered as to whether, as a result of any procedural deficiencies, there was a probability the employee was unjustly treated. So, proper investigation, full communication, opportunity to respond, and to be represented will still be essential elements of any process.

3. Union Access to Workplaces

Rules on union access to workplaces are set to change, so that any access will require the consent of the employer. That consent cannot be unreasonably withheld. This recognises that employer's have the right for health, safety and productivity reasons to determine who comes into the workplace at any given time.

4. Holidays

a)

There are no planned changes to annual holiday and leave entitlements however it is proposed that employees will be able to trade one of their four weeks' annual leave for cash. This is only at the employee's request and cannot be raised in salary negotiations. It is envisaged that the employee will not have to cash up a complete week of leave, but may spread it out and make more than one request during an entitlement year.

While the employee will not have to give a reason for the request neither will the employer have to give a reason for declining the request. Employers will be able to apply the policy to all or part of their workplace, to suit their business needs.

- b) A change is proposed to the calculation of 'Relevant Daily Pay'. For those employees whose pay and hours are irregular, holiday pay for public holidays, sick and bereavement leave will be calculated on the basis of "average daily pay" The new calculation will be based on an average of their gross earnings over 52 weeks or whatever lesser period of employment they have had with that employer. It is unclear whether the definition of "gross earnings" under the Act will remain the same as the current definition in the existing legislation. There will be no change for salaried employees and those employees who work regular hours because the RDP does not change from a day to day basis.
- c) In recognition of New Zealand's cultural diversity the government is introducing the ability for employers and employees to agree to transfer the observance of public holidays to another identified working day. This will enable individuals to work on a public holiday in exchange for a different day off that has special significance to their culture or religion.
- d) It is proposed that employer's will be able to determine when an alternative holiday should be taken where agreement with the employee cannot be reached. Currently, employees can determine when to take alternative holidays during the first 12 months of entitlement arising and only after that 12month period can the employer decide when this alternative holiday is to be taken. The ability for the employee to determine the timing of taking alternative days has given rise to operational issues.

5. Proof of Sickness

The prospect of the ability for employers to request proof of sickness or injury after one day has received a lot of media interest. Under the current legislation an employer can ask an employee who has taken three consecutive sick days for proof of sickness or injury, which may include a doctor's certificate. An employer can also ask for this proof if there are "reasonable grounds to suspect" that the sickness is not genuine, even if it is only one day's sick leave. The intention is to remove "reasonable grounds" so a mere suspicion that the employee is 'pulling a sickie' will suffice. By and large it is envisaged that this provision will be rarely used, but it may act as a caution to those who do 'pull sickies'. The government counters arguments of possible employer abuse with the requirement for the employer to pay for the medical certificate as a disincentive for such abuse.

6. Snippets of other proposed changes to the Act

- Reinstatement will cease to be a primary remedy for unjustified dismissal;
- Promoting mediation by providing that the Employment Relations Authority (ERA) will give priority to mediated cases;
- Enabling mediators and members of the ERA to make recommendations to parties at their request to assist parties in deciding whether to proceed with their case;
- To allow ERA members to penalize parties who do not attend scheduled ERA investigation meetings or file late claims without good reason;
- Allowing the ERA to remove cases to the Employment Court, rather than only after application from one of the parties;
- Allow young people between 16 and 18 years to agree to terms of settlement that are full, final and binding;
- To require an employer to provide employees with a copy of a signed employment agreement or, where it has not been signed, an unsigned copy of that agreement;
- To increase penalties to a maximum of \$10,000.00 for individuals and \$20,000.00 for companies or other corporations.

A Bill amending the Holidays Act 2003 is being drafted for introduction later this year for intended implementation in July 2011. A Bill amending the Employment Relations Act 2000 is being drafted for introduction this year and will be introduced into Parliament shortly for referral to the Select Committee process which will then call for public submissions. An enactment date will be announced as the Bill progresses through Parliament.

We intend to make submissions on the proposed changes and so would appreciate any views you may have in this regard.

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact Neil McPhail, Raewyn Gibson or Peter Zwart.

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