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THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart

ISSUE 275

February 2018

Proposed Changes to Employment Laws: Back to . . . a few years ago

Introduction

The changes to the Employment Relations Act 2000 set out in the Employment Relations Amendment Bill are likely to be no real surprise. It reflects the Government's post-election commitments "*to restore key minimum standards and protections for employees, and … to promote and strengthen collective bargaining and union rights in the workplace*" (see the Explanatory Note – Introduction in the Bill). Whether it achieves these goals and/or is necessary will of course be the subject of much debate (politically and philosophically).

However, from a practical perspective, it is highly likely the Bill will pass with little or no changes. So, putting aside the merits or otherwise, we examine what the changes will mean for businesses, workers and unions.

New Provisions

The Bill introduces a number of new provisions mostly around unions, collective negotiations and agreements.

The Bill inserts a new section 18A into the Act. This section allows any employee who is a union delegate to undertake union activities during work time and on pay. There is a restriction in that the employee can only do so reasonably and the activities must not unreasonably disrupt the employer's business or the employee's performance of their duties.

We expect to see some testing of the boundaries of this new right from unions, employees and employers. However, while there will be some uncertainty, guidance can be found in the context of the union access provisions of the Act including ensuring operations and scheduled work are uninterrupted. It is likely this entitlement will come into play during collective negotiations and in cases where delegates assist members during disciplinary investigations etc.

Section 54 of the Act is amended by the insertion of section 54(3)(a)(ii). This new section requires collective agreements to contain the wages rates and/or salary payable to employees. The flow on effect of this is that pay rates will need to be bargained. This is unlike some current collective agreements which provide that pay rates are addressed on an individual basis (along with such other matters as hours of work, benefits etc). Of concern is that section 54(4)(b)(ii), as currently drafted, provides that any term giving employer's "*sole discretion*" to determine pay rates does not meet this requirement. It appears the intent is to avoid terms that provide that an employer may set rates "*from time to time*". However, it may be that even in cases where rates are sufficiently specified, an argument could be made that a union and/or employees must be involved in determining pay rates (in addition to bargaining them). Any such power obviously has the potential to impact upon a business. Therefore, it will be necessary to clarify this proposed section to avoid essentially ousting a business's ability to set pay rates as required (subject to minimum pay rates, good faith etc).

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Disclaimer:

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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Another new provision, section 59AA, requires that if a union requests that an employer provide information about the union to new employees, the employer must comply with this request. The only exceptions are the information cannot be defamatory (within the meaning of the Defamation Act 1992) or confidential. This new section is intended to compliment section 63(3)(b) of the Act which covers an employer's obligation to new employees whose duties may be covered by a collective agreement.

Finally, new sections have been added to broaden the definition of discrimination and timeframes in respect of any discrimination claims. Discrimination and the presumption of discrimination occurring will include an employee's union membership status and/or any union activities the employee may undertake (see sections 104(1) and 119(1)(b)). Section 107(1) will be amended to extend the timeframe for any claim of discrimination from 12 months to 18 months from the time the conduct complained of occurred.

Roll Back

The Bill also rolls back the law in number of areas.

The Bill repeals section 20A of the Act introduced which was introduced in 2011. Once passed, union representatives will no longer be required to obtain consent from an employer before entering a workplace. No doubt this will become a contentious issue as the only controls imposed are contained in sections 21 and 22, which impose obligations in respect of entry and include that entry can be denied where it would cause disruption or where there are health and safety and/or security considerations, and 23 (where entry can be denied on religious grounds.

The collective bargaining provisions of the Act will be amended to essentially reflect the 2015 position. Therefore, unions will be able to initiate bargaining 20 days before an employer can. Good faith obligations mean the parties will be required to enter into a collective agreement and employers will not be able to opt out of multi-party collective bargaining.

Likewise, the sections of the Act relating to the management of new employees who are not union members have also been rolled back and added to. Once passed, employers will be required to:

(a) For the first 30 days of their employment, employ new employees on the same terms and conditions as the applicable collective agreement relating to their work;
(b) Provide a copy of the applicable collective agreement, union contact details and the option to join the union at the same time as they provide the intended individual employment agreement to an employee;
(c) Provide information about the union (see above); and
(d) Provide information about the employee to the applicable union, unless the employee objects to any information being provided.

In addition to the above, the law is rolled back to:

(a) Remove the exemptions under the employee protection provisions of the Act for small employers in respect of the transfer rights/obligations, extending the time frames for employees to accept an offer to transfer and altering the requirements on employers about providing employees' personal information provided (Under Part 6A of the Act);
(b) Bringing back the rights to prescribed meal and rest breaks;
(c) Re-establish reinstatement as the primary remedy in claims of unjustified dismissal; and

Perhaps the most significant roll back is that trial periods may only be utilised by employers with less than 20 employees. Very little commentary has been provided on this decision. However, it has been noted that this is a softening of the original position that trial periods will be abolished.

Conclusion

It has not been made clear when the Bill is expected to pass. However, the Report from the Select Committee is not due until 1 August 2018. Additionally, there is a four-month lead in time provided for in the Bill. We will be monitoring the progress of the Bill and providing updates. We can also assist clients who wish make submissions on Bill.