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THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart

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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
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Trials and Tribulations of Change

This Advocate covers a number of topics regarding the upcoming changes to Minimum Wage rates, the Holidays Act 2003 and the Employment Relations Act 2000.

1 April 2019 – Minimum Wage Increase and Domestic Violence Entitlements

From 1 April 2019, the Minimum Wage will increase to $17.70 per hour for adult workers. The increase affects the weekly minimum rate which will be $708.00 for a 40-hour week.

The starting-out and training minimum wage rates will increase to $14.16 per hour, consistent with the practice of maintaining these rates at 80 percent of the adult minimum wage.

In addition to the above, the Government has indicated that the minimum adult rates will increase to $18.90 from 1 April 2020 and to $20.00 from 1 April 2021. The rates are indicative only and will be subject to an annual review each year. However, the indicative rates are consistent with the intention to lift the minimum wage to $20.00 by 2021.

As noted in Issue 282 of the Advocate, the Domestic Violence - Victims Protection Act was passed last year and provides for entitlements under the Holidays Act 2003 and Employment Relations Act 2000. In summary the changes provide that employees are entitled to:

- Up to 10 days of paid domestic violence leave per year, in order to deal with the effects of domestic violence; and
- Request a short-term variation to their working arrangements (up to two months or shorter) for the purpose of assisting an employee to deal with the effects of domestic violence.

Trials of Trial Periods and the Return of Probationary Periods

One of the most significant and publicised changes to the law is the limitation on the use of Trial Periods in employment. From 6 May 2019, employers with 20 or more employees will no longer be able to employ new employees on a Trial Period. As a result, we see the impact will be potentially two-fold.

Firstly, we anticipate employers with 20 or more employees will start returning to the use of Probationary Periods which are provided for under section 67 of the Employment Relations Act 2000.

A Probationary Period provides more flexibility in how it is managed than a trial period. For example, it Is not limited to 90 days and can be used when an employee starts a new job, irrespective of whether the employee is currently employed or worked for the employer before. In the latter case, it can be a useful tool for assessing the suitability of an employee being promoted.

Like a Trial Period a Probationary Period must be recorded in writing in the applicable employment agreement. Failure to do so entitles the employee to treat the provision as ineffective.

Also like a Trial Period, the object of a Probationary Period is to assess an employee's suitability for a role.

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 **Raewyn Gibson**, **Peter Zwart** or **Dean Kilpatrick.**

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Unlike a Trial Period however, an employer must comply with the requirements of good faith and procedural fairness when dismissing an employee during or at the conclusion of a probationary period. In short, a probationary period is akin to performance management. The Employment Court has noted that an employee is effectively commencing work (or starting a new role) on a warning. The employee is on notice that if they do not perform to the expectations of the employer, their continued employment is at risk.

As with other performance management processes, there are requirements to ensure compliance with the good faith and procedural fairness requirements provided for in the Act. In summary, an employer should:

- Meet with the employee regularly to inform them whether their performance is meeting the required standards;
- Where the performance is not meeting the required standards, clearly communicate the shortcomings along with what is required to meet the expectations going forward;
- Ensure the employee is provided with supervision and, where required, appropriate training;
- Provide the employee with the opportunity to improve; and
- Clearly communicate the outcome if the employee does not meet the required standards, this can include termination of employment, or a lessor sanction such as extending the Probationary Period.

At the end of the probation period there are several potential outcomes. The simplest is confirming the Probationary Period was completed satisfactorily and the employment continues. Where expectations have not been met and dismissal is a potential outcome, along with informing the employee throughout the Probationary Period, at the conclusion, an employer is required to meet the good faith and procedural requirements provide for in the Act.

Unlike a Trial Period, employees cannot just be dismissed. Having properly assessed the performance consistent with the above, an employer is required to provide the employee an opportunity to respond to the shortcomings and the potential dismissal. Only after considering any response can an employer decide to terminate an employee's employment by providing the notice consistent with the applicable employment agreement.

Likewise, unlike a Trial Period, where an employee is dismissed, they are entitled to raise a personal grievance on the grounds of unjustified dismissal and pursue other claims under the Act. We can assist with drafting clauses and managing Probationary Periods.

Another area we may see further activity is the use of a Work Trial.

We discussed the effective prohibition of Work Trials in Issue 223 of the Advocate. In *Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152 the Court stated that the appropriate way to assess the suitability of an employee is to use a Trial Period. After exploring all avenues that the person could have been engaged, i.e. as a volunteer or on a fixed term employment agreement, and determining there were not applicable, the Court stated that:

> *"[106] The enactment by Parliament of ss 67A and 67B of the Act, together with the prohibition on suitability for employment being a valid ground for a fixed term agreement under s 66, may mean that if a potential employer wants to "try out" a potential employee, that person may have to be engaged as an employee on a trial period of appropriate duration under s 67A. Although this would require greater compliance costs on the part of both parties, such an arrangement would offer some protections to the employee during the trial period but would also enable the employer to conclude that the employee is unsuitable for the position and to terminate the arrangement without the risk of an unjustified dismissal personal grievance."*

With the limitation being placed on the use of Trial Periods, employers with 20 or more employees may look to assess the suitability of an applicant by having them undertake Work Trial. With the decision in the *Salad Bowl* case still in place, even with the changes in the Act, we would advise caution. For example, it must be clearly communicated that a Work Trial is part of the application process and the applicant is not being engaged as an employee. This is only one of many requirements to consider to ensure an applicant is not found to be an employee and employers should seek advice from us prior to offering a Work Trial.

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