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THE ADVOCATE

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a regular newsletter for clients of
mcphail gibson & zwart ltd

Holiday Pay Bonus ?

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

In the continuing saga of confusion and lack of clarity of how to calculate payments under the Holidays Act 2003, a recent decision of the Court of Appeal overturned the Employment Court decision in *Metropolitan Glass & Glazing Ltd v Labour Inspector, Ministry of Business and Innovation and Employment* [2020] NZEmpC 39.

In 2020 the Employment Court examined if a Short Term Incentive scheme ("**STI**") provided by Metropolitan Glass to senior employees was a discretionary payment outside of the holiday pay framework, or productivity or incentive-based payments and had to be included in the calculation of holiday pay. You may be forgiven for not taking too much notice of this case given everything else that occurred in 2020. However, this was a significant decision given the impact on any number of businesses who excluded some bonus payments when calculating holiday pay on the basis they were discretionary, as Metropolitan Glass did.

However, Metropolitan Glass did not stop at the Employment Court, and challenged the outcome to the Court of Appeal.

The wording of the STI was extensive, but recorded in it at several points that the STI was discretionary, including terms as noted in the Employment Court:

"Any payments made under this Scheme are totally at the discretion of Metro's Board of Directors and there is no guarantee of any payment even if the … performance targets are achieved.

…

is completely discretionary and [Metropolitan] can at its sole discretion decide not [to] make any payment under this scheme, or amend, revoke or discontinue this Scheme at any time."

The Court of Appeal firstly examined if the STI was a contractual term of the employment agreement. Metropolitan Glass contended it was. However, the Court of Appeal disagreed and concluded:

"*[It is a] well-established principle that a contract of employment (service) between employer and employee may comprise terms arising from a number of different sources. Indeed, that is virtually always the case given the ongoing and dynamic nature of the employment relationship. To put it another way, the formal written employment agreement is never the entire contract of service. It is only one source (albeit often the main source) of contractually binding terms.*"

Based on the above, the Court of Appeal went on to agree with the Employment Court that the STI was part of the employment agreement even though recorded in a separate document.

Where the Court of Appeal differed from the Employment Court however, was in the application and discretionary aspect of the STI. In the Court of Appeal's view, the Employment Court did not "*consider whether the existence of a residual discretion under the STIB scheme not to make any payment even if all conditions were met took it outside the scope of gross earnings and into the territory of a discretionary payment.*".

The Court of Appeal examined this residual discretion and concluded that it did take the payment outside of the definition of gross earnings under section 14 of the Holidays Act. However, it was noted that Metropolitan Glass has a duty to exercise its residual discretion fairly and reasonably.

Suffice to say, this is a helpful decision in the context of managing discretionary payments and holiday payments for employees. However, with the ongoing review of the Holidays Act 2003 and the anticipated proposed changes to be put forward for consideration in 2022, and planned implementation of changes by 2024, we can safely say this is not the last we will hear on this issue.

Vexing Vax Issues

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 **Dean Kilpatrick or Jane Taylor.**

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We live in interesting times and over the past few weeks the Government has made significant announcements on vaccination requirements and the impact on workplaces.

The starting point is that there are any number of views, at either end of the spectrum on the need to vaccinate or not. We have often noted to clients, we understand there are a multitude of arguments for and against, but our role is to advise on the legal framework for workplaces.

It would be fair to say the Government has adopted an approach of strongly encouraging everyone eligible to get vaccinated for their own benefit and the benefit of the community. While stopping short of requiring vaccinations, other than in limited sectors, the message is clear – get vaccinated. The message is reinforced for workplaces with the planned introduction of the Vaccination Certificate Regime ("***VCR***"). Taking this a step further, as it is understood from announcements, law changes will be implemented to require vaccinations for workers at businesses operating under the VCR, such as hospitality and other close-contact businesses.

For those businesses that do not adopt the VCR, or cannot operate under it, a risk assessment will be available to determine if work should be carried out by vaccinated workers. Currently there is a risk assessment available at WorkSafe, and this has been utilised by employers to assess the current risk under the current legislation.

One of the significant changes that will occur is that where an employer operates under the VCR or has assessed that work must be carried out by a vaccinated employee, if an employee cannot or will not get vaccinated, an employer may be able to provide four weeks' paid notice of termination of employment. It is this aspect which has been a source of continuing enquiries. At this stage, without the details of the law, it is open to speculation of what will occur. However, what guidance there is makes it clear that while employers may be able to dismiss, the requirements of good faith and the like will still apply. The Employment New Zealand website provides:

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- *Employees and employers must continue to deal in good faith.*
- *Employers must still consider all reasonable alternatives, such as finding other work within the business that does not require vaccination.*
- *Employees will also be able to challenge any decisions they think are unfair, for example by raising a personal grievance.*"

In our view, the above list is not exhaustive and the list of considerations will likely be longer. As a starting point, a risk assessment should be undertaken. It is anticipated that employers undertaking the risk assessment and concluding workers must be vaccinated will have to establish this was reasonable. Given the significant negative outcome, we anticipate that this first step will likely require engaging with employees and allowing for a degree of employee input on the assessment and then on whether or not to require vaccination. Having completed this first step, referring to the second bullet point above, viable alternatives will need to be examined. It is only after ensuring all the steps are completed that termination can occur.

Finally, even if the procedural requirements are met, employees will still be able to raise a personal grievance.

As these changes progress, we will be updating clients. However, in the meantime, employers are not prevented from undertaking assessments now and we can advise on the current requirements in workplaces.