

Employment Law Update - Views from the Beech



Changes to Employment Relations Act and Holidays Act

The Government has announced substantial proposed changes to the Employment Relations Act 2000 (ERA) and Holidays Act 2003 to take effect later this year. We are pleased to see that a number of the matters highlighted in our submissions to select committee in March appear in the proposed changes. We set out the key provisions below.

90-Day Trial Periods

- The ERA is to be amended to allow all employers to dismiss an employee within the first 90 days. The employee will have no right to challenge the dismissal by way of an unjustified dismissal personal grievance.

Employers will still need to be careful to exercise this right within 90 days – a dismissal on day 91 can still be challenged, as can a dismissal on discriminatory grounds.

Changes to Personal Grievance Scheme

- The test of whether a dismissal is justified is to be modified, lowering the threshold for employers in justifying a dismissal.

As long as the employer's response is reasonable, the Authority will not substitute its opinion as to what the employer should have done.

- New minimum requirements will specify what a fair and reasonable process is, and a Code of Employment Practice around discipline and dismissals developed.

The Government has acknowledged criticism that current law focuses too much on "pedantic scrutiny" of the process and not enough on whether the correct outcome was reached. The new code and minimum requirements are intended to create more certainty.

Changes to Employment Relations Authority Proceedings

- The Government intends to promote mediation and reduce the number of cases going to hearing by requiring that the Employment Relations Authority gives priority to mediated cases.
- The Authority will be enabled to throw out frivolous or vexatious cases at an early stage.
- Authority Members will be permitted to award penalties against parties who fail to attend investigation meetings without good cause.
- New code of professional conduct for employment representatives.

These changes are made in response to criticisms of the behaviour of "no-win-no-fee" advocates and representatives, and the perception that many employees "have a go" knowing it is cheaper for an employer to settle a case than defend it.

- Remove reinstatement as the primary remedy.

At present, the Authority must consider this before other remedies, such as damages for lost wages. This change recognises that often the employment relationship has deteriorated to a point where reinstatement is no longer practical. It will also reduce employers' costs in defending a claim for reinstatement, which requires substantially more evidence to be heard.

Union Access

- Unions will require the employer's consent before accessing a work place.

This recognises employers' concerns about access affecting productivity, and to maintain health and safety compliance. A blanket refusal will not be permitted.

Collective Bargaining

- The law regarding direct communications between employers and employees during collective bargaining is to be clarified. Any communications must still be consistent with the employer's duty of good faith under the ERA.

Labour Inspectors

- The role of labour inspectors will be defined for the first time as being to investigate complaints and support businesses to achieve compliant practices and systems.
- Inspectors will have greater powers such as issuing improvement notices, similar to those under the Health and Safety in Employment Act.
- Labour inspectors will be able to seek penalties for non-production of employment agreements, emphasising the requirement to give every employee a written agreement.

Holidays Act

- Employees will be able to exchange up to one week's annual holidays for cash.

This can only be at the written request of the employee to the employer. Employers are not required to agree to such a request. The exchange of holidays for cash may not be discussed in salary negotiations or as a condition of employment. If the Employment Relations Authority or a labour inspector finds that an employer has pressured an employee to cash-up annual holidays, those holidays are to be restored.

- Employees may request the transfer of public holidays to another identified working day, being a day that has special significance to the employee's culture or religion.
- Employers may request proof of sickness or injury within the first three consecutive days of sick leave. The employer must pay for such proof to be obtained. Employers will no longer require reasonable grounds to question whether sick leave is genuine before asking for a medical certificate.

While this may deter some employees from taking a "mental health day", given that any medical certificate will be issued solely on the employee's report to the doctor that he or she was too unwell to attend work, this change is likely to be of little practical effect.

- The calculation of "relevant daily pay" for sick leave, bereavement leave and holidays is to be simplified. It will be calculated by averaging gross earnings for the preceding 52 weeks or whatever lesser period the employee has been employed.

This is to simplify the position for employees whose hours of work and pay are irregular.

- The maximum penalties for non-compliance with the Holidays Act will double from \$5,000 to \$10,000 if the employer is an individual and from \$10,000 to \$20,000 if the employer is a company or body corporate.

A Bill amending the ERA and the Holidays Act is being drafted for introduction later this year and will be given priority. Public submissions may be made at the select committee stage. We will advise you once further detail of the proposed changes is available, so you can advise if you have any views you would like incorporated in our further submissions.

This newsletter is necessarily of a general nature, and should not be relied upon as a substitute for specific legal advice. Should you wish to discuss anything further, please contact our team:

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