

## CHANGES TO EMPLOYMENT LEGISLATION

The Employment Relations Amendment Bill (No.2) and Holidays Amendment Bill received royal assent on 26 November and have been enacted as the Employment Relations Act 2010 and Holidays Amendment Act 2010, respectively. The majority of the changes in these bills take effect from 1 April 2010.

### ***Employment Relations Amendment Act 2010: Justification - would becomes could***

One of the more subtle but controversial changes is the change to the test for justification. The s103A test has been amended to what a fair and reasonable employer could have done, rather than would have done in all the circumstances.

Further, when deciding whether a dismissal (or another action) is justified, four things must be considered, namely, whether:

- Having regard to the employer's resources, there has been sufficient investigation
- The employer's concerns were raised with the employee
- The employee had a reasonable opportunity to respond
- The employer genuinely considered the employee's explanation.

All four are undoubtedly elements of a fair process, but it is not clear what weight will then be given to other fair process factors, such as the right to representation and access to relevant documents (although good faith obligations still apply). They will not be just 'nice to have' factors, but how important will they be?



The government's employment law package had flagged that the employer's resources would be taken into account. The Act incorporates this requirement into only one consideration - whether a sufficient investigation has been undertaken.

The new s103A also states that a process will not be unjustified if the process failures were minor and did not result in the employee being treated unfairly.

Apart from the change from 'would' to 'could' the changes reflect current case law. Because of this, and because the 'would' to 'could' change is more technical than practical, we doubt the changes will have a widespread impact, but in close cases we consider they will make a difference. They will also help inform both employers and employees about their rights and obligations.

### ***Union access***

Currently, unions have extensive rights to access workplaces to discuss union business or recruit new members. While unions have obligations to act reasonably and in good faith, they do not need the employer's permission. From 1 April 2011 the current situation will be reversed - a union must seek permission to

access a workplace, and it is the employer who must not unreasonably refuse access.

Employers must respond as soon as reasonably practicable, but no later than the working day after the date on which the request is received. If consent is declined, the employer must provide reasons in writing by the next working day after the date of the decision. If the employer does not respond, consent is treated as having been given.

### ***Communications during bargaining***

The extent to which employers can communicate directly with employees during bargaining has been a contentious issue. At present, employers may communicate with employees about the bargaining, so long as the communication is factual, 'recognises' the union, does not amount to negotiation and does not undermine the union or the bargaining.

The changes in the Act confirm that employers may communicate with employees about bargaining, including communicating the employer's proposals. However, the existing statutory restrictions apply. So, while this change on its face expands employers' rights, they should not take false confidence from it. Employers who wish to communicate their proposals directly will still need to ensure that they do so in a way that recognises the union, does not constitute negotiation, and does not undermine the union or the bargaining. The relationship between the changes and these existing limitations is not clear and is likely to be the subject of litigation. Employers should be wary of being the test case.

## ***Employers must retain IEAs***

Employers should be aware of the current requirement to have written employment agreements for all employees. This has been extended to requiring employers to retain a copy of every individual employment agreement or the current terms and conditions of employment, even where an employee has not signed the agreement or agreed to its terms and conditions. As the government says, an employment agreement is the "foundation of an employment relationship", which, if in writing and easily accessible, reduces the likelihood of non-compliant behaviour and litigation. This requirement comes into force on 1 July 2011.

The requirement to retain an unsigned agreement is interesting. Sometimes an unsigned employment agreement takes on legal effect because, in practice, the parties act in accordance with its terms. But, if an employee clearly informs the employer that the terms are not agreed, it would cut across basic principles of contract law to treat the document as the parties' employment agreement. We would hope that the new provision is not used in this way, and would like to see this issue clarified by the Courts.

The intended scope of what must be documented is also unclear. Many 'conditions' of employment exist outside of the written employment agreement and are contained in policies or unwritten rules. The provision could arguably require an employer to ensure that all of these (often less important) conditions are documented, thereby increasing compliance costs and risk.

Labour Inspectors are charged with enforcing these new requirements. They must first give an employer seven working days to remedy any breach, failing which, the employer is liable to a penalty of up to \$20,000. Given this prescribed enforcement mechanism, it would appear that employees will not be able to bring actions against employers for breach, but this is unclear.

## ***Extension of trial periods***

The most publicised change is the extension to all employers of the current 90-day trial period for employers with fewer than 20 employees. This will enable all employers to dismiss employees within the first 90 days (or such shorter period as is agreed) without the employee being able to bring a personal grievance challenging the dismissal.

The government says the change will improve labour market flexibility and help job seekers gain employment where it might not otherwise be offered. The extension has been retained despite strong opposition from unions that were fundamentally opposed to the change, and public campaigns to have it scrapped.

Trial periods will not always sit well with an employer's culture and recruitment strategy, especially in a competitive labour market. Therefore, not all employers will use trial periods, and some may use them for parts of the work force only or on a case-by-case basis. Where a trial period is used, a legally effective clause will have to be included in the employment agreement.

We recommend also that employers still follow a fair process and provide reasons during a trial period - unjustified disadvantage claims are still available, as are claims for discrimination or breach of good faith.

## ***Changes to promote mediation***

The changes provide for mediation 'at an early stage', and will expressly enable mediators to engage with the parties without representatives being present.

The scope of this 'new' service is unclear - technically it is available now, but the mediation service is seldom used in this way. The changes may therefore be more promotional than substantive, encouraging parties to attempt to resolve a problem by telephone, fax, email or over the internet. These methods are seldom used at present, but, in urgent or otherwise appropriate cases, we may see mediators in future calling up the

parties to attempt resolution when they are waiting for a mediation date.

Mediating without the parties' representatives being present, either for the whole mediation or in break-out sessions during mediation, can sometimes be an effective method of resolving a problem (as can speaking with the representatives without the parties being present). However, mediators will need to continue to ensure that a party is not railroaded into this situation when they would rather have their lawyer, advocate or union involved.

The Employment Relations Authority is now empowered to give priority to investigating disputes that have been mediated. This is a positive move and will help limit the practice of filing a claim with the Authority, thereby incurring substantial (and unhelpful) costs, without having attempted mediation.

## ***New power to give recommendations***

Both mediators and Authority Members are now empowered to make recommendations for the resolution of a dispute, where requested to do so by the parties. Once the recommendation is made, each party will have an agreed timeframe (e.g. seven days) within which to advise that they do not accept the recommendation.

If neither party objects within the agreed timeframe, then the recommendation becomes final and binding on the parties. It cannot be appealed or reviewed (although it can be enforced). As there is no requirement to positively accept a recommendation, it will be deemed to be accepted by silence. Parties will therefore need to act if they are unhappy with a recommendation.

If the recommendation is rejected, then further mediation may occur or, if an Authority Member has made the recommendation, the Member is obliged to continue to investigate and determine the dispute. Either party may request that a different mediator or Authority Member (as the case may be) mediate or

determine the matter instead. This is obviously designed to ensure fairness, particularly where an Authority Member makes a recommendation which is rejected. However, it appears that a party's request for a new Member may be declined. If the Member does step aside, this will add to the time and cost of resolving the dispute, which is what the new power is designed to avoid.

### ***Holidays Amendment Act 2010: Cashing up annual holidays***

Employees may now request that up to one week each year of annual holidays be cashed up. Multiple requests can be made in a year (e.g. one day here, two days there), as long as the total amount does not exceed one week in any one 'entitlement year'. To be effective, any request must be made in writing.

Employers may accept or decline requests, and need not give reasons. They can have a blanket policy that they will not cash up. Otherwise, every request must be considered on its merits.

Employers cannot of course require employees to make a request. Neither can they propose cashing up in negotiations for terms and conditions of employment, or agree in an employment agreement that holidays will be cashed up. That is not to say, however, that employers cannot encourage or facilitate cashing up (e.g. by introducing a policy supporting the practice).

### ***Transferring public holidays***

The Act restores the ability to agree to transfer the observance of public holidays to another working day. This will give employers greater control over their operational needs, and will give both employers and employees more flexibility. For example, an Australian employee may ask to transfer Waitangi Day to Australia Day.

In order to transfer the public holiday, a number of criteria must be met, including clear identification of the relevant public holiday and the day to which it is to be transferred (both

days must otherwise be working days for the employee).

Public holidays cannot be transferred for the purpose of avoiding the employer's obligations to pay time-and-a-half and grant an alternative holiday. Employers can have a blanket policy that they will not transfer public holidays.

No material changes have been made to the current provisions that allow part of a public holiday to be transferred for shift employees whose shift overlaps with a public holiday.

### ***Public holidays during closedown periods***

In a recent Employment Court decision, the Court found that the employees in that case need not be paid for the public holidays during the Christmas/New Year closedown. The changes to the Act will mean that employees are entitled to be paid for public holidays, alternative holidays, sick leave or bereavement leave if any of them fall during a closedown, and if the day would otherwise have been a working day 'but for' the closedown.

These provisions are in now in force, having taken effect from 27 November 2010.

### ***Alternative to relevant daily pay***

Changes have been made to try and simplify the calculation of pay for public holidays, alternative holidays, sick leave and bereavement leave. 'Relevant Daily Pay' still applies, but the change allows a different calculation where it is not possible or practicable to determine what the employee would have earned, or where the employee's daily pay varies within the pay period in which the holiday or leave falls. The new calculation, 'Average Daily Pay', is based on average earnings over the last 52 weeks, rather than the current 4 week formula, and should make calculation easier for employees with variable hours or pay.

### ***Medical certificates for sick leave***

The Act allows employers to request proof of an employee's or dependant's sickness or injury within three days, and without the need to question genuineness. Previously, employers had to wait until the fourth consecutive day of injury or illness, or have reasonable grounds to suspect the sick leave is not genuine.

Under the new rules, employers must inform employees as soon as possible that proof is required, and must also pay for that. Given the cost of a doctor's visit, it is likely employers will only require proof if they have a specific reason.

For sick leave entitlements above the statutory five days, a better strategy (which can be applied currently) is to include a provision in the employment agreement requiring medical certificates to be provided on request and at the employee's cost.

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