Workplace Watch

CHAPMAN TRIPP

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Workplace Watch is an occasional publication tracking legislative and regulatory reform in relation to workplace law.

Employment

Full Court ruling on availability for work provisions

The Employment Court has clarified the statutory requirements for availability provisions that were introduced in 2016. Employers must comply with the availability requirements in the Employment Relations Act, which include providing for reasonable compensation for employees making themselves available, where employees are required to perform work outside of their ordinary hours.

The Employment Court agreed with the Postal Workers Union that New Zealand Post workers were entitled to refuse to perform work in addition to their guaranteed hours because the collective agreement did not provide for reasonable compensation for posties making themselves available. The Court held that there was a distinction between payment for additional hours worked as compared with a contract that provided for compensation for employees making themselves available. The latter requirement is needed for an enforceable availability provision. The Court confirmed that this requirement applies equally to salaried workers as well as hourly waged workers.

Many salaried contracts will state that an employee's salary is compensation for all hours worked. Based on the Employment Court decision, this wording will not be sufficient to have an enforceable availability clause covering any additional hours which may be required. However, there are no pay implications simply as a result of such a clause being unenforceable. The only implication is that the employer cannot insist on an employee performing work outside of ordinary hours.

In practice, this decision means that employers who require their staff to work additional hours should ensure that their contracts specifically provide for reasonable compensation for workers making themselves available. For waged workers this will be an extra monetary amount, but for salaried workers it can be built into employees' salaries.

What exactly constitutes "reasonable compensation" for availability to work has not been defined and will depend on the circumstances surrounding the employee's employment, the amount of remuneration, the agreed hours of work, and the hours of availability.

Alternatively, your employment agreements can make clear that additional hours are voluntary. Please get in touch if you have an availability provision in your employment agreements that may need to be reviewed.

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Watch out for reinstatement

The Employment Court has recently ordered the reinstatement of an investigator employed by the Ministry of Health after 14 months out of the role and into a different position than the one which she was performing at the time of her dismissal.

In *Rayner v Director-General of Health*, Ms Rayner was dismissed after an anonymous complaint was received and investigated regarding her qualifications to be an investigator. Despite the Ministry receiving information that clearly exonerated Ms Rayner, she was dismissed because the Ministry considered that her approach during the investigation eroded the trust and confidence the Ministry had in her to perform her role.

The Employment Court accepted that there was a significant risk of dysfunctional relationships were she to be reinstated to her investigator role but reinstated her to her previous position as auditor, required that she be paid an investigator's salary, and increased her damages awards to six months' lost wages and $45,000 in compensation. This was despite the fact that she was on Accident Compensation Corporation (*ACC*) with no clear prognosis for a likely return to work. The decision to order reinstatement was made under the prior regime where it was not the primary remedy.

This was the second Employment Court decision in May 2019 to order reinstatement. Earlier in May, the Employment Court also ordered Mr Hong's reinstatement to his former role as a parking warden at Auckland Transport despite health and safety (*H&S*) concerns being raised against reinstatement (see *Hong v Auckland Transport*). That decision was also made under the prior regime.

These Employment Court cases show that parties can expect to have their arguments against reinstatement tested closely by the Employment Relations Authority (*ERA*) and the Court.

As an aside, the Employment Court's award of $45,000 in compensation to Ms Rayner is a clear demonstration of the increasing compensation awards under s123(1)(c)(i) of the Act. It is also shows the Court applying the band regime which the Chief Judge promoted in *Waikato DHB* that was featured in our previous edition of Workplace Watch.

Fixing the terms of a collective agreement

Jacks Hardware and Timber Ltd has been ordered by the ERA to pay a base rate of $19 an hour at its Mosgiel and Dunedin Mitre 10 MEGA stores – a rate that is $1.30 an hour above the statutory minimum wage and has been described by Retail NZ CEO Greg Harford as "out of kilter" with market rates for similar businesses in the region.

This ERA order follows a ruling from the Employment Court in February that the ERA had the right to fix the provisions of a collective agreement between Jacks Hardware and First Union Inc. under section 50J of the Employment Relations Act. This is the first time the power has been exercised.

The Court was asked to decide whether: Jacks Hardware had breached the duty of good faith; that breach was sufficiently serious and sustained to significantly undermine the bargaining; all reasonable avenues for reaching agreement had been explored, and whether fixing the provisions of an agreement was now the only effective remedy.

It ruled in the union's favour on all four questions. In particular, it found that:

- Jacks Hardware had breached its duty of good faith in that it persistently engaged in delaying tactics by not accepting or rejecting the Authority's recommendations during facilitation from March 2017 until May 2018, and
- the words "sufficiently serious" in s50J, rather than suggesting an especially high threshold, meant that the ERA had to be satisfied that the breach was more than "trivial, negligible or transient" and that it had carried on for enough time to undermine the bargaining.

The takeaway for businesses is to proceed cautiously if you may have breached your good faith duty in bargaining as the breach could expose you to forced intervention by the ERA where other settlement options (mediation and/or facilitation) failed.

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New Code of Good Faith in Collective Bargaining

The Code of Good Faith in Collective Bargaining has been updated to reflect the changes introduced through the Employment Relations Amendment Act 2018, which came into force on 6 May 2019.

The Act reinstated prescribed meal and rest breaks, strengthened collective bargaining and union rights, restored protections for vulnerable workers and limited the 90 day rule to businesses with fewer than 20 employees.

The Code provides guidance to wage negotiators, the ERA and the Employment Court.

The Code

Boundaries of duty of good faith explored in PAK'nSAVE decision

The duty to bargain in good faith does not preclude rudeness or bluntness. So found the Employment Court in a case taken by Kaikorai Service Centre Limited (Kaikorai), trading as PAK'nSAVE in Invercargill.

The Court upheld the union's right to stage a protest outside the store in which it used an inflatable rat to represent the employer and displayed a banner reading "PAK'nSLAVE", stating:

"[T]he Act does not attempt to regulate, restrict, or confine how the parties to an employment relationship communicate with or about each other. …It does not require using polite language, or to resist robust position-taking, or avoiding a combative style".

Decision

Equal Pay Amendment Bill in final straight

The amendments proposed by the select committee to the Equal Pay Amendment Bill, reported back in May, will make it easier for employees to make a claim. Key among them are that claimants can choose one of three legal avenues – the Equal Pay Act, the Human Rights Act and the ERA.

Under the Bill as first drafted, if a claimant raised a personal grievance with their employer, they would be barred from pursuing any other avenue.

The Government has also provided $1m funding to assist the pursuit of claims. This includes money for the Ministry of Business, Innovation and Employment (*MBIE*) to develop online tools and resources to improve bargaining processes so that court action becomes a last resort.

Bill

Statement

Family violence leave

The introduction of the Family Violence Act 2018, in force from 1 July 2019, has changed the definitions in the Holidays Act and Employment Relations Act from "domestic" violence to "family" violence. The meanings of the definitions have not changed.

By way of a reminder, employees affected by family violence are now entitled to up to 10 days leave a year to deal with the effects on their lives. The leave must be paid, unless the employer has asked the employee for proof to support the claim and that has not been provided.

Employees can also request a short-term (up to two months) variation to their work arrangements. This may include changes to hours and location of work as well as the employee's duties. Employers must respond to such requests as soon as possible, and within 10 working days.

Fact sheet, Employment New Zealand

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New power for labour inspectors

The Regulatory Systems (Workforce) Amendment Bill, now going through Parliament, will give the Labour Inspectorate authority to determine whether any place is a workplace, whether any worker is an employee and whether any person is an employer. The Bill also expands the scope of Labour Inspectors' powers to assist them with making these determinations.

Bill

Triangular Employment amendment

This amendment has now passed their final hurdle in Parliament and are awaiting Royal Assent. The change covers arrangements (typically labour hire arrangements) where an employee is employed by one employer but is working under the control and direction of another business or organisation (the secondary employer).

The amendment establishes a tripartite approach by enabling an employee to apply to join the secondary employer to any personal grievance claim.

The amendment previously included the right for an employee in a triangular employment relationship who falls within the coverage clause of the secondary employer's collective agreement to have coverage under that clause. However, this provision was removed prior to the legislation receiving Royal Assent.

The new regime will come into force after 12 months (most likely in July 2020). It will most commonly apply to employers who use labour hire or temp agencies but could also apply to secondments. The transition period provides an opportunity to consider how it might affect you, and whether there is any action you should take.

Bill

Minimum wage increase

The minimum wage rose to $17.70 an hour at 1 April 2019 – an increase of $1.20 and another step in the Government's $20 by 2021 commitment.

New Hobbit law

As proposed by the Film Working Group, screen workers (including TV, film and video games) will maintain their "contractor" status but have the right to bargain collectively.

The collective agreements would set minimum pay rates, agreed breaks, whether public holidays are recognised (and if so, how), hours of work and availability, dispute resolution and termination processes. There is no ability to strike.

Individual contracts will continue to be possible, but must meet the minimum terms in the collective agreement.

Legislation is expected to be introduced shortly and passed by mid-next year.

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Health and safety

Reparation payments – some clarification

A decision by the High Court concerning two appeals on reparation has wider implications – one relating to how consequential loss of earnings should be calculated, and the other appeal to how much the reparation payment should be reduced to take account of the victim's responsibility for the harm caused.

Calculating consequential loss

The Court considered two approaches to the calculation in the context of a deceased victim – one based on the victim's previous earnings and limited to the victim's ACC entitlement period, and the other which requires actuarial reports to calculate lost earnings, including projected pay increases, until the deceased would have reached retirement age.

ACC, by contrast, pays dependents a fixed percentage of the deceased's earnings for a period of five years, or until the youngest dependent attains the age of 18. ACC payments are based on 80% of the pre-accident income, so there is a shortfall between ACC payments and actual loss – this shortfall was considered to be the consequential loss under this approach.

The Court went for the ACC entitlement period approach. This is a welcomed decision, which will inject significant certainty into the sentencing process.

The victim's contribution

The ruling also decided another case in which the employer argued a reduction in reparations to reflect the fact that the victim had contributed to his own misfortune. The Court rejected this argument, saying it would undermine the foundational primary duty of the Health and Safety at Work (*HSW*) Act 2015.

In making this finding, the Court cited the 2013 *Eziform Roofing Products* decision which concluded that "guarding against workplace accidents that result from the foolish carelessness of employees is part of the role of the [H&S legislation]".

Alternative sentences of uncertain utility

The HSW Act 2015 introduced a range of new sentencing options such as adverse publicity orders, training orders, project orders and court ordered enforceable undertakings. There have now been a number of decisions making these types of orders. The circumstances in which they have been made indicates that defendants will be unlikely to apply for these in future as there has been no benefit from them. WorkSafe also continues to focus on the financial penalty alone.

It was possible that these orders could have provided a basis for a shift from a model of purely financial penalties. These orders can result in direct H&S benefits for a company workforce, for example, through better trained workers. The incentive for this was expected to be a reduction in the fine to recognise this additional imposition. However, where orders have been made by the Courts they have simply been in addition to the fine and without any reduction to recognise the additional burden on the company. This approach makes them unattractive for defendant companies and it is hoped that a more refined approach will develop. In the meantime they need to be approached with caution.

Turning to Court ordered enforceable undertakings the first applications have been heard. In one case the Court indicated that, while not always the case, these applications will be more likely to be granted for first time offenders and where an offence is low culpability. The application to the Court (rather than WorkSafe) had been made because the offending did not meet those exact parts of WorkSafe's policy. The result means that if you cannot get through WorkSafe's process successfully then it is unlikely an application to the Court provides a genuine alternative.

In our view these outcomes are unfortunate as there was the potential for these orders to provide real benefits to worker H&S as part of the sentencing process. Instead it appears sentences will remain restricted to purely financial penalties.

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Australian review of model H&S law finds it's working well

The first review of the Australian Model Health and Safety Laws, on which the New Zealand HSW Act 2015 is based, has found that they are "largely working as intended" but are "still settling". The review has produced 34 recommendations, many of which are technical.

Notable recommendations include:

- a new industrial manslaughter offence for "gross deviation from a reasonable standard of care" (Justice Minister Andrew Little is proposing a similar change here)
- banning access to insurance cover for the payment of fines
- an increase in penalty levels to catch up with inflation, and
- regulations to deal with psychological health.

Implementation areas identified as requiring improvement are:

- where more than one person has Person Conducting a Business or Undertaking (*PCBU*) duties, and where there are multiple duty holders on a site, and
- the operation of, and consultation with, worker H&S committees.

In both cases, the report recommends the development of practical guidance.

Report

HSW Strategy for 2018-2028

Workplace Relations and Safety Minister Iain Lees-Galloway emphasised the need for continuing improvement at the launch of the Government's new HSW Strategy, saying that New Zealand still has 50 to 60 deaths from work injuries each year and as many as 600 to 900 from work associated health risks.

Strategy

Marlborough construction firm cops almost $533,000 for workplace death

Crafar Crouch Construction (Picton) Ltd has been ordered to pay $532,798 after a young, unlicensed worker died after running off the road while driving a heavily laden dump truck. This included a fine of $351,563 (which was at the bottom end of the high culpability range, after mitigating factors and a guilty plea).

The employee had not been wearing a seatbelt but the Court did not consider this an "appropriate" consideration. He had been able to drive heavy vehicles before, despite not having a licence, the company had failed to communicate, monitor and enforce its H&S policies and a supervisor who had been present at the time had failed to intervene.

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Volunteers Bill abandoned

A Private Member's Bill by National MP Harete Hipango which would have allowed volunteer associations to employ people for up to 100 hours each week without incurring PCBU duties has been canned by a majority on the select committee.

But New Zealand First only withdrew its support after being given an assurance that the idea will be addressed within a wider review that the Minister is apparently intending of the HSW Act. No timeline has been given.

Bill

Two big decisions from Australia

Australia has recorded two firsts in its H&S law:

- its first conviction for reckless conduct, and
- the first jail sentence for an H&S breach in the state of Victoria.

A roofing company was fined AU$1m and its director sentenced to a year in prison (to be suspended after four months) for a 2014 incident in which a roofer died after falling from a shed. The accident might have been prevented had edge protection been installed but this was not done because it was considered too expensive.

And the owner of a scrap metal business was jailed for six months and fined AU$10,000 after a male worker fell through the bottom of a corroded bin at a height of three metres. The owner was operating the forklift at the time despite not holding a forklift licence, the forklift was on uneven ground, and the bin was not secured.

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Our services

We can assist you in all areas of employment law, including health and safety, personal grievances, litigation, collective bargaining, disputes and mediations, redundancies, restructuring, senior executive employment, exit negotiations and post-employment arrangements.

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