Workplace Watch

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Workplace Watch is a periodical publication tracking legislative and regulatory reform in relation to workplace law.

Employment

Deal on Employment Relations Bill

Labour, New Zealand First and the Greens have reached a deal on the Employment Relations Amendment Bill that will ensure its passage through the House and – probably – improve its chances of surviving a change of government.

We reported on the key amendments proposed by the Bill in an early 2018 Brief Counsel.

Since then, there have been a number of modifications following negotiations between the coalition parties, including:

- reintroducing an ability for employers to opt out of bargaining for multi-employer collective agreements – employers will still be required to enter negotiations and to bargain in good faith, but will not be required to conclude an agreement if they have reasonable grounds not to, and
- reinstating the requirement that unions get employer consent before entering a workplace, but with an exception for when a collective agreement covering work done by employees is in force or being bargained for. This represents a middle ground between the consent requirement introduced by the National Government and the previous law, which did not require employer consent.

The 90-day trial period will be retained, but only for employers with fewer than 20 employees – as was the case when the Bill was introduced in January.

Press statement

Supplementary Order Paper

No more than two fair pay agreements this term

The Prime Minister used a major speech in August to allay employer concerns about the introduction of Fair Pay Agreements (*FPAs*), saying there would be "no more than one or two" concluded this term and that they would be in low paid industries in which workers were "vulnerable and regularly exploited".

Former National Prime Minister Jim Bolger is chairing the 10-person working group responsible for establishing the FPA framework for collective bargaining, which the Government hopes will lift wages and productivity.

The Terms of Reference (*TOR*) stipulate that industrial action will not be permitted in an FPA negotiation.

The recommendations are due by the end of this year.

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Equal Pay Amendment Bill

This Bill implements the recommendations of the working group appointed by the National Government to provide a simple and accessible process to pursue historic pay inequalities for women within the normal bargaining framework.

Key changes from the Bill introduced by the previous National Government are:

- providing that a pay equity claim must be "arguable" to be pursued (the National Bill required that claims must have "merit" to make the threshold), and
- removing the hierarchy of comparators which would have required claimants to look within their workplace, then similar workplaces and then a similar industry before going wider.

The Bill is now before select committee, which is due to report back on 16 April 2019.

Bill

Untangling the Holidays Act 2003

A tripartite taskforce has been asked to design a regime which is simpler and easier to apply than the current Holidays Act. The initiative follows widespread non-compliance due to calculation errors, particularly in industries which rely on shift, part-time and casual labour.

High-profile employers which have been caught out include the Ministry of Business, Innovation and Employment, the Department of Corrections and the New Zealand Police. The taskforce, which is chaired by law professor Gordon Anderson, is due to report mid-next year.

It released an issues paper for consultation in August on which submissions closed on 12 October. Chapman Tripp filed a submission in which we highlighted the:

- complexity of calculations required to determine the payment for employees' annual holidays and their bereavement, alternative holiday, public holiday and sick leave entitlements
- lack of definitions and clarity as to certain terms in the Act, including the meaning of "regular" and a "casual" employee
- confusion caused by the fact that most payroll systems calculate leave based on hours but the Act refers only to days and weeks
- problems with determining payment of annual leave on termination – the Act is based on entitled leave whereas termination payments require calculations based on both entitled and accrued leave
- difficulty in calculating a "genuine working week" where an employee's hours or work patterns change or there are variable rosters in place, and
- need to calculate leave on the basis of the employee's working pattern at the time that the leave is taken, in circumstances where an employee's working hours decrease during the course of the year.

Among the recommendations we made were that the legislation allow leave to be calculated in hours rather than days and weeks and on an accrual system.

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Issues Paper

No change on "Hobbit law"

The Film Industry Working Group, which had significant industry representation, has recommended that the central provision of the Employment Relations (Film Production Work) Amendment Act 2010 – the "Hobbit law" – remain. This provides that film workers are employees under the Employment Relations Act 2000 only if they have a written employment agreement.

But it has proposed dedicated legislation which would enable screen production workers to collectively bargain for minimum rights (including recognition of public holidays and minimum pay rates), introduce the principles of good faith and require contractors to be protected against bullying, discrimination and harassment.

Recommendations

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Employment Relations (Triangular Employment) Amendment Bill

This is a private member's Bill sponsored by Labour list MP Kieran McAnulty.

The Bill addresses a situation 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 Bill seeks to have a tripartite approach by:

- providing employees who fall within the coverage clause of the secondary employer's collective agreement to coverage under that collective, and
- enabling an employee to apply to join the secondary employer to any personal grievance claim.

Bill

Time out for domestic violence victims

The Domestic Violence – Victims Protection Act 2018 will come into force on 1 April 2019. The Act introduces domestic violence leave which entitles victims of domestic violence (and those living with a child who is a victim) to take up to 10 days' leave in each 12 month period. An employer may request proof that the employee is a person affected by domestic violence.

Victims will also be able to request flexible working hours for a period of up to two months to enable them to deal with the effects of domestic violence in their lives. Employers must respond to requests within 10 working days and may refuse only when proof of the violence has been required but not produced, or where the request cannot be accommodated on certain grounds.

Act

Bereavement leave for miscarriage

A private member's Bill from National MP Virginia Anderson, would clarify that miscarriage is grounds for bereavement leave.

Bill

Higher awards of compensation in the Employment Relations Authority (*ERA*) and Employment Court

We continue to notice a trend toward higher compensation awards by the ERA and the Employment Court. In particular, "middle of the road" breaches of process by employers are now attracting awards in the $12,000 to $20,000 range.

In a recent Employment Court decision, *Richora Group Limited v Cheng*, Chief Judge Inglis set out three bands of compensation awards – up to $10,000 (Band One), between $10,000 and $40,000 (Band Two), and over $40,000 (Band Three).

The Court found that the employer's behaviour – failing to engage with the employee about allegations made against her, pushing her to resign and making a Facebook post that was obviously linked to her – would have been sufficient to place the case in Band Three, but the employee had only sought $20,000 in compensation.

This decision built on the approach in *Waikato District Health Board v Archibald* which introduced three bands to assess compensation:

- Band One, involving low-level loss/damage
- Band Two, involving mid-range loss/damage, and
- Band Three, involving high-level loss/damage.

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Employment Court decision on trial periods

In *Roach v Nazareth Care Charitable Trust Board*, the Employment Court rejected an argument that an employee was already employed at the time he signed a second employment agreement prior to starting work, such that a trial period would be invalid. The employee had already signed an agreement but was then offered a different role in a second employment agreement. Both agreements contained a 90-day trial period commencing on the same date.

The Court held that the intent of trial periods was to allow employees to be assessed while working. Accordingly, the Court was not persuaded by the employee's argument that he was strictly an employee under the broad definition in the Employment Relations Act because he had signed the first employment agreement and was a person "intending to work". However, the Court still found that the employee could pursue a personal grievance for unjustified dismissal, because the employee was issued with a written notice confirming he would be paid in lieu of his notice period but the trial period provision did not allow for payment in lieu of notice. The employee was awarded 12 months lost remuneration and $25,000 compensation.

This case illustrates the importance of ensuring trial period provisions are well-drafted and the need to closely review the provision before making a decision in reliance on it.

The Smiths City effect

An Employment Court ruling that Smiths City pay arrears to its workforce for unpaid time spent at daily 15 minute pre-work meetings has upset what had been a common industry practice and has had a ripple effect through the retail sector.

The Labour Inspectorate issued the company with an Improvement Notice in January 2016, as the failure to pay for meeting attendance took some employees' income below the minimum wage across all hours worked. Smiths City appealed to the ERA. The ERA ruled in Smith City's favour but the Employment Court overturned this decision.

Despite Smiths City's argument that the meetings were not compulsory, and that therefore remuneration was not payable for them, the Court found that there was significant evidence that Smiths City expected workers to attend the meetings. The Court determined that the meetings were "entirely about Smiths City business" and that neither their informality, nor the possible benefit they created for the employees by providing them with information which could enhance their ability to earn commission or incentive payments, was material.

Decision

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Health and safety

Useful guidance from pioneer case

Chapman Tripp acted for one of the defendants during the first defended hearing under the Health and Safety at Work Act 2015 (*HSWA*). The hearing involved a kiwifruit sampler who was fatally injured in a quad bike accident. Four parties were charged, including the orchard owner.

The change in focus in the HSWA from hazard identification to risk management was an important aspect of the case. A key question for the Court was determining which party was actually in a position to control the risk of quad bike roll-over.

Chapman Tripp commentary

The Opus International Consultants (*Opus*) enforceable undertaking and overlapping PCBU duties

WorkSafe has accepted an enforceable undertaking from Opus relating to the collapse of scaffolding during the completion of maintenance work to the underside of a steel bridge. Opus was not a party to the relevant contract and had no contractual role related to the scaffolding.

The undertaking focused on the interrelationship of the respective duties of each of the PCBUs involved. Opus accepted that the other PCBUs may have assumed Opus had a larger role than it actually had, and that it could have communicated and collaborated more with them in relation to the delineation of health and safety duties.

Opus has committed to spending at least $100,000 towards providing guidance on how the NZS 3910:2013 construction contract works, and the respective obligations of each PCBU engaged in a construction project.

The undertaking illustrates the approach that WorkSafe is taking towards overlapping duties and highlights the need to ensure there is good cooperation and communication between the parties which are engaged in a project.

Interestingly, the operation of the duty to consult and coordinate with other PCBUs was a key theme in the public response to Safe Work Australia's review of the Model Work Health and Safety laws. Although the feedback was broadly positive about the regime as a whole, there was a consistent message that the duty to consult with other PCBUs who had an overlapping duty was not working well and was not well understood.

Our experience is that this is also the case in New Zealand and so it will be interesting to see what recommendations come out of Australia.

Opus undertaking

A steer from the bench on fine-fixing in the new regime

The High Court has provided guidance on the appropriate sentencing approach in prosecutions under the HWSA. Chapman Tripp represented two of the appellants in an appeal from three employers against fines awarded in the District Court.

In the *Stumpmaster, Tasman Tanning and Niagara Sawmilling* decision (reported as Stumpmaster v WorkSafe New Zealand) the High Court considered how the new $1.5m maximum penalty should be divided into culpability bands. WorkSafe wanted the maximum penalty for medium level offending to be $800,000 while the appellants argued that it should be set at $400,000.

The Court went down the middle. It set four bands (compared to three under the old legislation):

- low up to $250,000
- medium $250,000 to $600,000
- high $600,000 to $1m, and
- very high $1m to $1.5m.

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The Court also considered what allowances should be made for mitigating factors. It determined that discounts should be no more than 30% and should be reserved to cases where all mitigating factors were moderately present and one or more factors were present to a high degree.

Tasman Tanning's appeal succeeded, resulting in a $17,000 reduction to the fine initially ordered by the District Court. The other two appeals were rejected by the High Court.

Enforceable undertakings

WorkSafe is making solid use of its new enforceable undertaking (*EU*) process, having approved 21 undertakings (including the Opus undertaking outlined above).

A wide range of initiatives have been developed as a result of EUs, including a machine guarding forum in Southland and the development of training courses and guidance material on health and safety or other areas. More experience will be needed with the EU mechanism before industries can get a reliable gauge on what will satisfy WorkSafe.

We have agreed an EU for one of our clients and can advise that it should not be seen as an easy option. It requires a large financial commitment (commensurate with the business' overall financial position), support for any victims, creative solutions and initiatives for improving health and safety across communities or industries. It also demands significant management time to assure WorkSafe that the EU will be successful.

WorkSafe guidance

Health hazards more deadly than accidents

Work-related illnesses cause 10 times more deaths than accidents, according to information collated by WorkSafe. Particular hazards are: exposure to asbestos and fertilisers, silicosis and the physical effects of shift work or long hours, both of which are highly correlated with cancer and heart disease.

In *WorkSafe NZ v Precision Animal Supplements* the company was sentenced for breaches related to a worker's exposure to harmful substances – including wheat dust and lime dust, which are associated to silicosis or baker's lung. The Court considered a start point of $400,000 appropriate but reduced it to $70,000 due to financial circumstances. We consider that it is likely there will be more of these cases in the future.

Article

Online Health and Safety tool for small businesses

An online tool is now available to assist small businesses to design health and safety policies appropriate to their workplace.

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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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