sbm
EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

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NEWS

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The new coalition government has just completed its first 100 days and has already made several changes to employment law

Changes already made

Trial periods are once again available to employers of any size. A trial period clause in a written employment agreement enables an employer to dismiss an employee within the first 90 days of employment. If notice under the trial period clause is given, that employee is unable to bring a personal grievance or other legal claim regarding their dismissal. Previously, trial periods were only available to employers who had fewer than 20 employees.

The second change is the repeal of Fair Pay Agreements legislation. FPAs had allowed for bargaining for conditions to apply across a whole industry, or to large groups of workers. While some bargaining had been initiated, no FPA had ever been finalised. FPAs will now no longer be able to be negotiated.

If you would like to know more about trial periods and how to use them correctly, please get in touch. We are happy to discuss them with you, and also review your employment agreements.

Changes to come

Workplace Relations Minister Brooke van Velden has announced the government's intentions in relation to other employment related matters, to be put in place in this term of government. No details have yet been released, but the indications are as follows:

As announced, a top priority is to make changes to the **Holidays Act** to simplify it. The government will be seeking feedback from stakeholders before taking any steps in relation to a Bill. We will keep you updated about this. This will be welcome news for the many employers who have been found to have been in breach of the Act, often through no fault of their own but because their payroll systems have not been compliant with the Act's requirements.

There are some indications in the two coalition agreements about further changes to come, but most of these give a "trend" rather than clear upcoming changes.

The **Employment Relations Act** will also be reviewed, with a focus on contracted or gig economy workers and their status, and also on simplification of personal grievance procedures. We anticipate, from the ACT/National coalition agreement, that there will be provisions to create certainty for parties who enter into a contract for services (a contractor arrangement) that their intent will be upheld. There may also be changes in the personal grievance arena such as removing an employee's eligibility for remedies where they are "at fault"; and introducing an "income threshold" where an employee earning beyond a certain amount could not raise a personal grievance.

Health and Safety in the workplace will also be a focus. The government intends to set performance targets for the health and safety system so that "frontline services are focusing their energy and resources on areas where they can have the most significant impact". No details are available as to how that might be achieved.

In other likely changes, the NZ First/National agreement indicates "moderate" increases in the **minimum wage** each year are likely. From 1 April 2024, the minimum wage will increase by 2 per cent to $23.15 an hour. Otherwise, this agreement appears largely to focus on changing overall **immigration** and welfare settings.

We'll provide more specific updates affecting employment law when more detail emerges.

Social media & interim reinstatement

A recent Employment Relations Authority decision brings into sharp focus the role of social media in out-of-work misconduct where it significantly impacts work colleagues.

Vinod Chand's employment was terminated by Te Whatu Ora Waitemata District after he referred to a colleague as a "Maori c***" in WhatsApp messages. His application for interim reinstatement was rejected.

Mr Chand was employed as a psychiatric nurse in the Mason Clinic. His comment was made in a WhatsApp chat group with colleagues after 11pm and after "a few beers".

In the disciplinary process, and before the ERA, Mr Chand argued that his comment was an unintended typo, but also that it was not appropriate for his employer to be disciplining him for his private activities.

Following a lengthy disciplinary process Te Whatu Ora found Mr Chand actually meant to write the comment, which was about a particular colleague. It had been made to colleagues and had a significant impact on his working relationships. He was dismissed due to breaches of numerous policies, but also due to the disrespect shown to his colleague.

In considering Mr Chand's claim for interim reinstatement, the ERA found that Mr Chand had raised sufficient questions regarding the dismissal and whether it might be unjustified. The bar here is particularly low and "arguable" means simply that his claim was not "merely frivolous or vexatious".

However, the ERA was also required to consider the "balance of convenience" of temporary reinstatement, which requires weighing the potential detriment to both sides. The ERA noted that Mr Chand was out of a job which counted in his favour but had provided very little information about the financial impact of his dismissal, and no information he had been trying to find new employment. There was no suggestion his skills would decline if he was out of work. As such, any detriment to him was only financial and could be remedied following the full hearing.

In contrast, the ERA considered the potential detriment to some of his colleagues, and to Te Whatu Ora, was significant. His argument that this was an unintended typo was weak, as was his suggestion this was private activity that could not be considered by his employer. His reinstatement was also not in the best interests of health service users and raised health and safety concerns. As such, the overall justice of the case weighed against Mr Chand's interim reinstatement.

This case raises interesting questions as to what distinction remains, if any, between an employee's private and work lives, in a situation where there is a social media posting about a work colleague shared with other work colleagues. The substantive hearing will take place later this year.

SBM Legal is acting for Te Whatu Ora.

Recent case has implications for collective bargaining

In the recent highly publicised ERA decision, the Athletes' Co-operative has been allowed to bargain collectively with High Performance Sport New Zealand, even though HPSNZ does not actually employ those athletes. This finding has potentially major implications for collective bargaining because it would mean that even if a union does not have any members in a particular workplace, it can still initiate bargaining for a collective agreement.

TAC is as an athletes' representative body and registered union which had recently been formed to represent the interests of athlete wellbeing and funding issues. TAC had its genesis in some high profile and tragic incidents involving high performance athletes representing NZ.

The athletes are largely contractors to various national sports organisations and did not have any employment relationships with those bodies or with HPSNZ. While HPSNZ was an "employer" because it had various other employees, none of those employees were the athletes concerned.

TAC attempted to initiate collective bargaining with HPSNZ. While HPSNZ said it was open to discussing matters of concerns directly with the athletes, it resisted bargaining collectively. This was due to not having any employment relationships with the athletes.

The upshot of the ERA's determination decision was that HPSNZ had to bargain collectively with TAC. The ERA stated that there are no requirements under employment law for a union to have current employees of the employer it has initiated bargaining with. It determined that TAC was a single union that had initiated bargaining with a single employer, HSPNZ – and so HPSNZ must engage in collective bargaining.

HPSNZ has come out strongly against the decision – and is challenging it in the Employment Court.

This is a novel issue and one which the ERA had not really considered before. We look forward to the Employment Court giving guidance about this position. However, as noted, what the ERA's decision means is that an employer who does not employ certain individuals will still need to engage in collective bargaining with them if it gets a compliant bargaining initiation notice.

CHANGE IS IN THE AIR:

There are a couple of changes at SBM Legal to update you on, but nothing that will affect our ongoing service to you. First, we are sorry to advise that after 13 years with SBM Legal, Bridget Smith has decided to leave us. She will be finishing up at the end of April, and we wish her all the very best. And second, Anthony Russell will be stepping back from the partnership from next month, but still playing a crucial role as a senior lawyer in the firm. His title as from next month will be Consultant and it will be business as usual for him and the rest of the team, under the leadership of Penny Swarbrick and Matt McGoldrick. Feel free to give us a call if you have any questions.

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