EMPLOYMENT, HEALTH, EDUCATION & SPORTS LAW

Employment at work

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Our first birthday

Welcome to the first newsletter of Swarbrick Beck Mackinnon for 2009.

We've just completed our first year together as a merged firm, and we're delighted with how the first 12 months have gone.

We've got an excellent team and a wonderful group of clients to work with.

We are delighted with the feedback we have received from you, our clients. We have also received independent recognition by being named among the recommended employment law firms by AsiaPacific Legal 500. We have also received separate recognition through the Chambers Global survey.

So, thank you all for choosing to work with us, and we hope to be able to continue to add value to your business.

A "try before you buy" period?

Most employers have traditionally viewed trial periods as having minimal value.

One of the reasons for this is that trial periods have been subject to all of the usual disciplinary rules involving the need for cause and a fair process.

Any employee dismissed under a trial period also has had full access to our personal grievance laws.

However, for some employers, the rules have changed. That is because on 1 March 2009, the Government's controversial "trial period" legislation became law.

Businesses which employ fewer than 20 employees are now able to introduce a trial period of up to 90 days for new employees. During this trial period, the employer may legally dismiss the employee, without giving any reason, simply by giving notice of termination. A disciplinary process will not be required, and the employee will not be able to bring a personal grievance for unjustified dismissal.

There are several key requirements that employers must be aware of before deciding whether to use a trial period:

- It can only apply to new employees hired after 1 March 2009.
- It must be agreed with the employee and should be recorded in the written employment agreement.
- The maximum duration of the trial period is 90 days. Shorter periods can be agreed to, but nothing longer.
- Any employees (including casuals) working on the first day of employment, count toward the "fewer than 20" limit.
- An employee still has the right to raise a personal grievance on grounds other than unjustified dismissal, such as disadvantage, discrimination and/or harassment. The requirements of good faith also still apply. In other words, the trial period is not a "get out of jail free card" for employers, and fair treatment of staff is still essential.

The ABCs of redundancy

As the global economy toughens, many employers are having to consider ways to reduce their overheads. Inevitably redundancies are often part of this consideration. With this in mind, we thought it timely to revisit the main obligations on employers when making staff redundant.

The two key elements for a lawful redundancy are that;

- The role must be being restructured or disestablished for genuine business reasons: and
- The process the employer follows must be fair and just.

If the employer can point to genuine commercial reasons for making the role redundant and show that they were the real reason for the redundancy, then the Courts cannot interfere with that decision. What the Courts will examine, however, is whether the redundancy was not genuine but was used to mask some ulterior motive for removing the employee, such as poor performance or misconduct. Employers who blur redundancy and performance/misconduct issues often get into considerable difficulty.

In practice, however, it is the process followed that more often creates a problem for employers following a proper process will likely avoid the bringing of personal grievance claims. That process will vary depending on the circumstances but consultation is usually the key. There should be consultation over the decision to restructure before it is finalized. Ideally, the employee should be informed as to the employer's proposal. That proposal should contain enough information for the employee to understand the changes being considered and why. The employee should be provided with an opportunity to provide feedback on that proposal. Any feedback should then be considered by the employer in good faith before a final decision is made on whether the restructure is required. The employee should also be invited to obtain independent advice throughout the process.

While this process may seem relatively straightforward, in practice complications often arise. The employee may, for example, refuse to participate in the consultation, demand more information or request that the process is slowed down. Deciding who, amongst a group of employees, should be redundant can also be a complex issue. Similarly, redeployment issues can complicate things – can the employer make the employee take on another role, or can the employee insist he/she is offered a vacancy?

If you're facing those sorts of issues, our advice is simple - get good advice… particularly as your employee probably already is!

What about my **EPP?**

A recent case from the Employment Relations Authority ("Authority") has also raised a new potential hurdle when restructuring – the implications of having no employee protection provision ("EPP") in the employment agreement.

In 2004, it became compulsory by statute for all employment agreements to contain an EPP for employees (the exception being for "vulnerable" employees, being predominantly those in the cleaning and food catering industries). The intention of the legislation was that an EPP would give greater protection to employees in certain business transfer situations by requiring the employment agreement to set out a process the employer must follow when discussing employment issues with the other party which is acquiring the business or the outsourced work.

Until recently, the consequences of there being no EPP in agreements have been unknown. However, a recent decision of the Employment Relations Authority makes it clear that not having an EPP can have major consequences, including preventing restructuring.

In this case, the Pulp and Paper Workers' Union and a large employer had not agreed on an EPP, despite many attempts to negotiate one into their collective agreement. The employer proposed to contract out part of its services to a third party. The union argued the employer couldn't properly consult with the third party in the absence of an EPP and therefore the outsourcing could not go ahead. It reasoned that an EPP was meant to deal with the process the employer would follow when dealing with the new potential employer, and, without such a process, consultation could not properly occur.

The Authority agreed with the union and found that an EPP is a fundamental first step in any restructuring process. Without it, an employer is unable to know what its obligations are, let alone comply with them. The Authority held that if it did not come to that conclusion, the effect would be that the employees would have been denied the right to protection which the Act expressly conferred on them.

That meant the employer was prevented from implementing its contracting out plan, until an EPP was successfully negotiated in a new collective agreement.

This case is on appeal but in the meantime all employers (especially those contemplating a restructure) need to ensure their employment agreements contain an EPP. As the law currently stands, it may only take one employee who lacks an EPP, to stop the sale of a business from proceeding.

a recent decision of the Employment Relations Authority makes it clear that not having an EPP can have major consequences, including preventing restructuring.

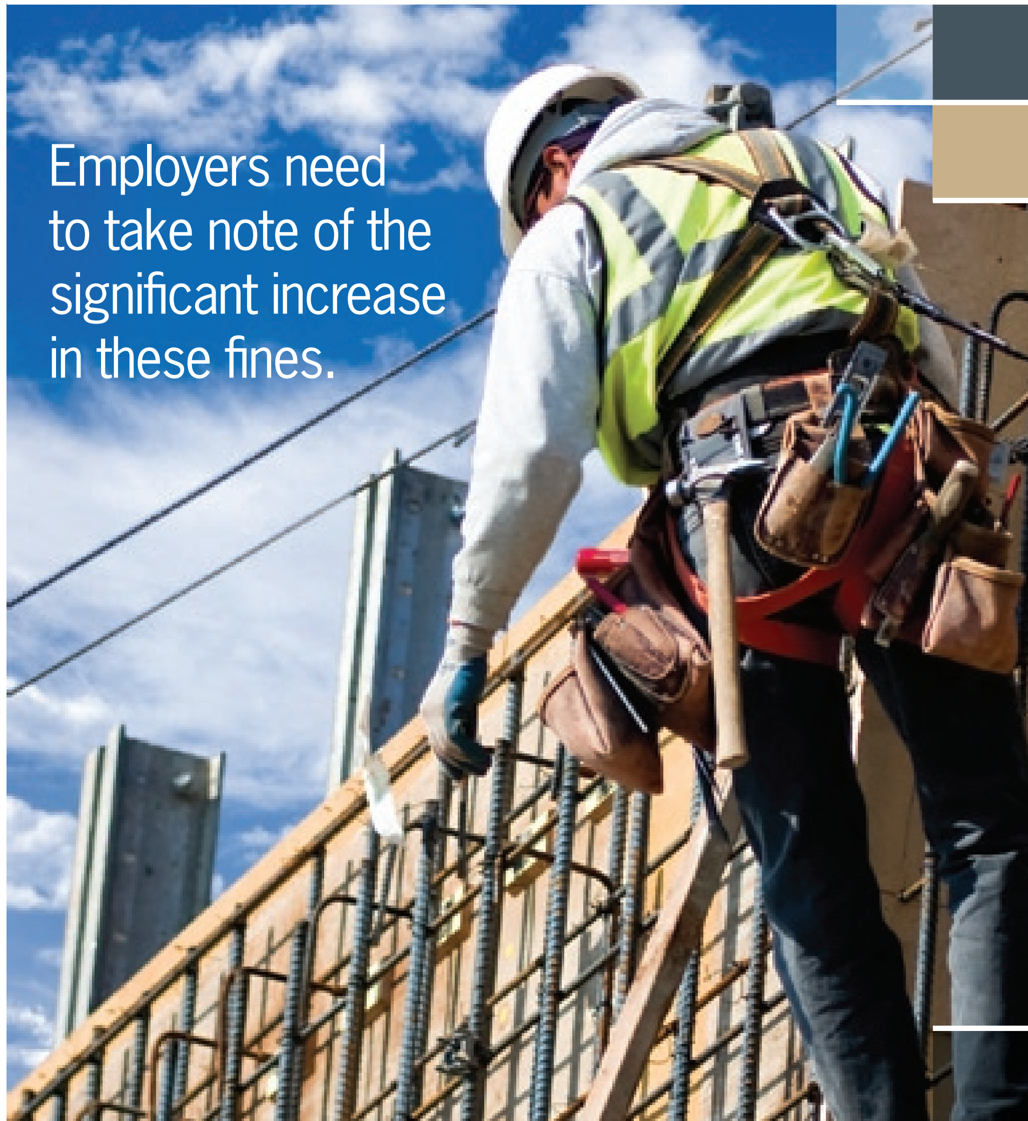
A harder line on safety

Most employers are well aware of their obligations to keep their employees safe when at work. However, a recent decision of the High Court demonstrates that the Courts are taking an increasingly hard line over workplace accidents.

The case involved an employer who carried out an apparently controlled explosion in a West Coast mine in 2007. The explosion led to the mine being flooded, which trapped two employees working nearby. One was lucky to escape alive, the other drowned.

The Department of Labour prosecuted the employer, Black Reef Mine Ltd, for failing to take all practicable steps to ensure the safety of the employees. The employer was initially fined $10,000 and also ordered to pay reparation of $20,000 to the deceased's widow.

The Department of Labour appealed those fines, saying they were inadequate. The High Court dealt with this case as well as two other appeals involving workplace injuries in the same hearing. In all three cases, the Department argued that the sentences imposed were inadequate in light of changes made to the Health & Safety in Employment Act 1992 in 2003, which resulted in a substantial increase in maximum penalties.



The High Court decided that a "substantial uplift" in existing levels of fines was needed to reflect the seriousness of workplace accidents, the ongoing costs of accidents to society, and the general increase in the maximum fines introduced in 2003.

The High Court said the starting points for fines under the H&S Act should be fixed at:

- Low culpability – a fine of up to $50,000;
- Medium culpability – a fine of between $50,000 and $100,000;
- High culpability – a fine of between $100,000 and $175,000.

Applying these fines to the facts before it, the High Court increased the fine on Black Reef to $20,000 and ordered reparation of $75,000. In the other two cases, it imposed:

- A fine on a commercial construction company of $50,000 following an accident in which a contractor was injured by falling off wooden scaffolding (the District Court had originally set a fine of $5,000);
- A fine of $40,000 on a food manufacturer whose employee's arm became caught in a conveyor belt ($15,000 had been imposed by the District Court).

Employers need to take note of the significant increase in these fines. It reflects a tougher attitude from the Department and the Courts.

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