MACKINNON & ASSOCIATES

Employment@Work

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A New Addition To The Team

We're delighted to announce that Richard Upton has recently joined our team as a Senior Associate.

Richard brings an added dimension to Mackinnon & Associates having worked both as a top employment lawyer and also as an Employee Relations Manager. Richard was a solicitor with a specialist Wellington based employment law firm for several years before joining Bank of New Zealand's Employee Relations team in 2002. Managing the Employee Relations' team of one of New Zealand's largest companies gave him exposure to a wide range of legal and human resources practices, including union strategies, collective negotiations, performance management and disciplinary disputes. This background also means Richard understands issues from a client's perspective, especially the need for prompt and pragmatic advice. Richard is especially skilled in bargaining and union related strategies.

Richard can be contacted directly on (09) 638 5823 or by email at richard@mackinnonassoc.co.nz

Walking the Line

A common question we're often asked, is how to deal with an employee who isn't working out, but where the employer doesn't want to commit to a drawn out performance management process.

This sometimes occurs where the employer can't point to clear areas of non-performance (it may be more an issue of style or fit), or the employee might be considered too senior or influential to be taken through formal warnings.

Most employers know that if they are going to raise performance concerns with an employee in an informal setting, there is a line they cannot cross, but many don't know how to *"walk that line"*.

In fact, because employers are aware they could face a constructive dismissal claim if they go too far, many actually avoid engaging in the very conversations which, if handled correctly, could quickly resolve their problem.

Let's take Johnny and June as an example. Johnny is a music salesman whose sales are poor, but not woefully so. June is Johnny's manager, and is about to put Johnny on a performance improvement plan. However, June doubts whether a career in the music industry really suits Johnny. It is quite lawful for June to approach Johnny and engage in a constructive conversation like this:

"It's not working out very well Johnny is it? Your sales are down, but more importantly, you don't seem to be enjoying your job, and you're not showing the passion we get

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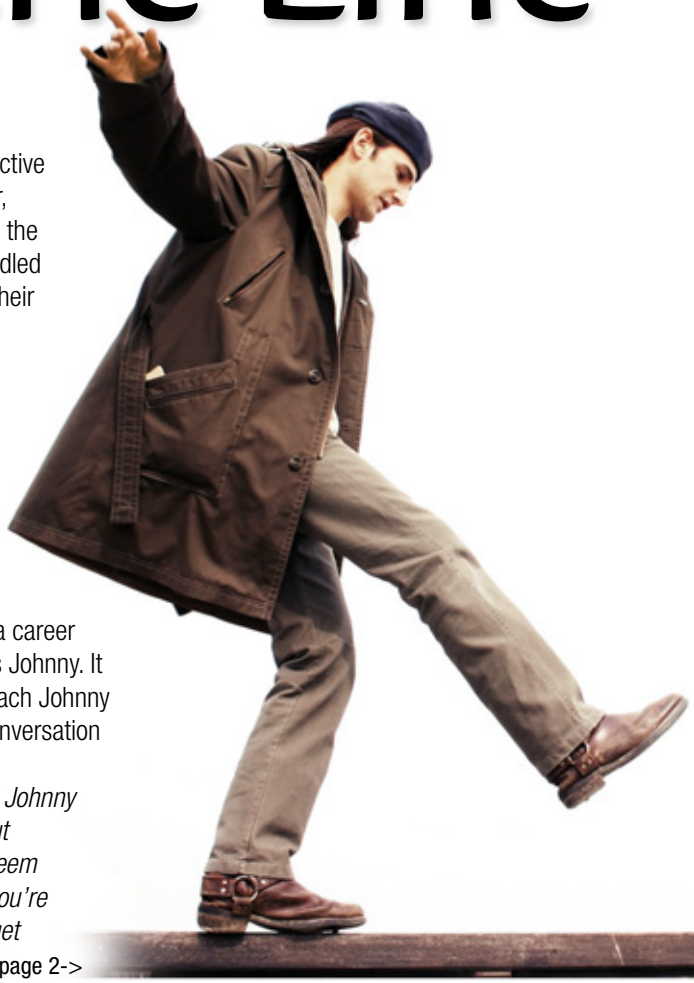

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from our other sales reps. In this industry, you need to love music and you need to be confident and enthusiastic. You've had a lot of training and support and I'm now looking at placing you on a performance improvement plan and potentially issuing a first warning. However, before I start that process, I want you to have a serious think about what it is you want from the job and whether this is the right industry for you … I have to tell you, I have my doubts as to whether this job really suits you."

This type of conversation does not cross the constructive dismissal line. However, what if June was to instead say:

"Johnny, it's simply not working out. You're not cutting it and you never will. We've done all we can. How about you take a months pay and call it quits. Happy to give you a reference if you need it, but I just don't think you're up to the job".

Such a conversation could easily lead to Johnny's resignation and a constructive dismissal claim. Alternatively, if Johnny chose not to resign, any future attempt by June to engage him in a performance management process may seem predetermined. This is a typical example of where the line has been crossed.

The key with these conversations is to avoid placing the employee in a position where they really have no choice but to leave. Ultimately, the decision must be one the employee reaches of his/her own accord, without coercion from the employer.

Of course, one response from Johnny might be:

"Sure, I'm finding the work difficult, and I am looking at a career in movies. If I was to leave, what would the Company offer me?"

While an employer can explain what it would provide if the employee decides to resign, it must exercise care to avoid looking like it's determined to make the employee leave. Indeed, the employer may need to have further discussions on a "without prejudice" basis. If this is to occur, then specific legal advice should be obtained.

The key message however, is that conversations about "fit" and "suitability", can and should occur. Yes, there are risks, but plan in advance and you should be able to walk the line safely.

More Legislative Change Ahead!

There are currently five significant employment related Bills before Parliament. Employers need to be aware of the potential consequences of each of these and even consider making submissions on them. If passed into law, these Bills will impact on most workplaces. Set out below is a summary of what the various Bills aim to achieve. Please contact us if you need more information.

Employment Relations Amendment Bill

The Employment Relations Amendment Bill (the "Bill") seeks to provide greater protection for cleaners, food caterers, and employees doing caretaking, orderly and laundry type work in certain specified industries. The focus of the Bill is on ensuring these employees (commonly referred to as "vulnerable employees") will have their rights protected in contracting out situations, including "subsequent contracting". This is where a contract is lost and issued to another supplier. The Bill is complicated and seems to have some bizarre consequences, as the following example shows:

XYZ Marketers has an agreement with a cleaning company, Flash Cleaners, who employ "vulnerable employees". XYZ decides that Flash Cleaners are not living up to their name and decides to have its cleaning done by a new company, Reflection Cleaners. Under the Bill, the employees of Flash Cleaners will have an automatic right to transfer to Reflection whether or not Reflection wants or needs them. And, if the Flash employees clean various sites, including XYZ, they will transfer to Reflection only for that particular work, while staying employed by Flash for the rest of their work.

Not only will this make such transactions very complex, it also will produce quite extraordinary outcomes. In this example, XYZ have changed cleaning companies to get better service. However, if the employees transfer to Reflection, XYZ will be forced by law to continue to have the cleaning done by the very staff they were actually trying to avoid!

Minimum Wage (Abolition of Age Discrimination) Amendment Bill

Currently employees aged 16 or 17 can be paid a lower statutory minimum

wage than those aged 18 or over. The Minimum Wages Amendment Bill (the "Bill") will require those aged 16 or 17 to receive the same minimum wage as adult workers, which is currently $10.25 an hour. Importantly, at the same time this Bill is being advanced, there is also a push to raise the statutory minimum wage to $12 an hour for all workers.

The Bill continues to allow employers to pay a lower minimum wage to apprentices and trainees.

Employment Relations (Probationary Employment) Amendment Bill

This Bill proposes to introduce a 90 day probationary period for all new employees. This will mean that an employee will have no ability to raise a personal grievance against an employer if they are dismissed within 90 days of their employment commencing.

The Bill would not prevent an employee from exercising rights under the Human Rights Act 1993, (such as for discrimination or sexual harassment) nor for taking action for a breach of contract (such as wage arrears).

Flexible Working Hours Bill

The Flexible Working Hours Bill (the "Bill") seeks to allow employees who are parents or primary care givers to request flexible working hours where they have full time care of a child under 5; or a disabled child up to 18.

Under the Bill, an employer could refuse the application, essentially only on the basis of genuine business or operational considerations. The employer would have to be able to justify their actions. If they are not able to do so, then the refusal could be challenged in the Employment Relations Authority.

KiwiSaver Bill

The KiwiSaver Bill proposes to introduce a work-based savings scheme, which will be Government sponsored. This is essentially intended to be used for retirement purposes. In most instances, the funds will be locked in trust until the employee reaches the age of eligibility for superannuation.

Although participation in the scheme will be voluntary, eligible employees (aged between 18 and 65) will be automatically enrolled, with a six week ability to then withdraw. Those remaining in the scheme will have contributions deducted from their gross salary at a rate of 4% (but higher rates are permissible).

The Future?

It seems likely that all of these Bills (with the possible exception of the Bill on probationary employment) are likely to be passed in their current or a revised form. We will keep you updated and if you would like assistance in making submissions on any of the Bills, we would be delighted to help.

No April Fool's Joke

From 1 April 2007 onwards, every employee in the country will qualify for a minimum of four weeks annual leave. Obviously, this will be celebrated by most employees. Unfortunately, the situation is not so rosy for employers, who are again faced with further compliance issues to keep pace with legislative change.

Good planning will result in fewer impacts. It is important to prepare for this change in advance by taking the following steps in 2006:

- It is only on the next anniversary of each employees commencement date after 1 April 2007 that each employee qualifies for the extra week. In other words, a fourth week of leave is not granted to every employee automatically on 1 April 2007! It is worth communicating this to your employees now so as to avoid confusion.
- You should commence the necessary financial provisioning for the extra week of annual leave 12 months prior to qualification.
- Your payroll system will need to be updated to ensure that from twelve months prior to the date each employee qualifies for the fourth week, leave accrues at 8%, rather than the current 6%, of the appropriate wage rates.
- Employment agreements entered into or updated this year should reflect the introduction of a fourth week of leave next year. It makes sense to incorporate this change throughout 2006, rather than having to alter agreements again early next year.
- You should evaluate your resourcing and determine whether you have enough staff members as an extra week of leave will logically result in increased absences!
- If you already provide four weeks of annual leave to your employees, then rest assured that when their employment agreements are next negotiated, it is probable that employees will ask for further annual leave. The rationale will be that the company has always provided a week more than the statutory minimum. Now is the time to implement strategies to deal with this demand.

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