EMPLOYMENT, HEALTH,
EDUCATION & SPORTS LAW

# Employment at work

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## In this issue



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# Law changes still in progress

Most new governments find the lure of rewriting our employment laws impossible to resist. This election is no exception. Regardless of which parties emerge victorious after 8 November, more change is on the way.

However, the current administration clearly decided that some changes couldn't wait. In the last few months, a number of important employment law amendments have been passed while other Bills have been put before Parliament.

This article summarises the recent changes and outlines what the main parties have in store if they are able to lead the next government.

## Recent change

The Government recently passed the Employment Relations (Breaks and Infant Feeding) Amendment Act. Somewhat remarkably, an Amendment, which in its original drafting dealt exclusively with breastfeeding and rest breaks, was altered at the 11th hour to also amend the KiwiSaver Act.

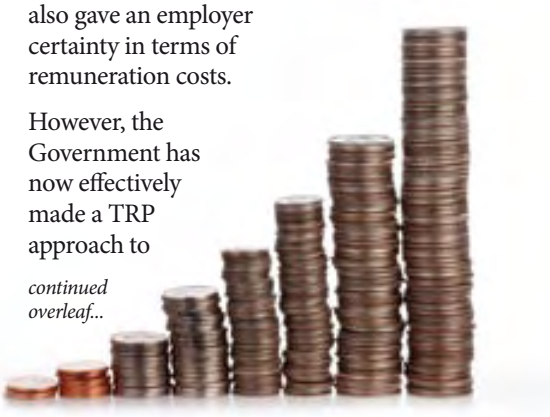
## KiwiSaver

Under the KiwiSaver Act, employers are required to make compulsory contributions to employees' KiwiSaver schemes, increasing from 1% of total salary up to 4% of total salary in 2011. Many employers sought to address the resulting increase in costs by introducing a "total remuneration package" (TRP) approach to remuneration. Under a TRP scheme, employees are given a number representing the total cost of their package and are allowed to select various components within that package.

In terms of KiwiSaver, the TRP approach allowed an employer to give staff the choice of joining the scheme and having the cost of the employer contribution deducted from the total package, or taking the cash equivalent as salary. TRP also gave an employer certainty in terms of remuneration costs.

However, the Government has now effectively made a TRP approach to

*continued overleaf...*



# Law changes still in progress continued...

Kiwisaver unlawful. Employers must now ensure that any employee in KiwiSaver does not receive less salary or wages than someone in a comparable role who is not in the scheme, if the reason for the difference is in any way based on the cost of the employer's contribution.

One obvious consequence of this change is that employees now have an added incentive to join the scheme. If two employees do the same job for the same pay, the one who joins KiwiSaver will effectively be receiving additional compensation from the employer, in a manner that should not impact at all on what he/she receives in terms of take home pay.

For those employers already using a TRP approach, the good news is that the law change doesn't apply to agreements entered into before 2 September 2008. However, some caution is needed because for any variation to an employment agreement after that date the new law applies and the TRP approach is unlawful. Employment agreements are often varied (arguably, even an annual change in salary constitutes a variation). Accordingly, over time, even existing TRP schemes are likely to become unlawful.

## Breaks

Although employees have always had a legal right to a safe and healthy working environment, New Zealanders have never had a statutory right to specific breaks from work. However, from 1 April 2009, employees working a 'normal' eight hour day will have a statutory right to receive two paid 10 minute breaks, together with a 30 minute unpaid meal break.

For those working shorter shifts, the number of breaks they are entitled to, depends upon the hours worked. For those on longer shifts, the pattern of entitlements begins again after 8 hours.

The Act specifies when these breaks are to occur *"so far as is reasonably practicable."* Employers can also provide enhanced entitlements.

## Breastfeeding

Employees who are breastfeeding must be provided with breaks and, *"where reasonable and practicable"* the facilities to do so. The breaks will be in addition to those mentioned above.

The extent of those facilities depend upon what is *"reasonable and practicable"* to that particular workplace. Considerations are likely to include the operational environment, the employer's resources and the number of staff in the workplace. The extent of employer's obligations for breastfeeding will be clarified further through a Code of Practice that the Department of Labour is developing.

# The **National** Party's Policy

Unsurprisingly, a number of Labour's initiatives are unlikely to survive if the National Party leads the next Government. National has made it clear it will not make sweeping changes to the Employment Relations Act. However, the changes it wishes to make are still significant.

## 90 Day Trial Period for New Employees

National intends to make it lawful to have a 90 day trial period for new employees. Employees would still have all the normal rights of employees during this period save that, the relationship could be terminated for performance without the employee having a right to bring a personal grievance. The trial period will only apply to businesses with fewer than 20 staff. It can also only be introduced by agreement.


## Unions and Collective Bargaining

National proposes introducing a right for workers to bargain collectively without having to belong to a union. This was a key element of the Employment Contracts Act, and like in the 1990s, could potentially have a negative impact on union membership.

## Dispute Resolution

National would retain the existing Mediation Service but would ensure that it was properly resourced with qualified mediators. The Employment Relations Authority would remain but would be required to act 'judicially' and in accordance with 'the principles of natural justice'. Finally, injunctions and important questions of law would be heard in the Employment Court in the first instance, rather than in the Employment Relations Authority.

## Annual Leave

The entitlement of four weeks of annual leave would remain. However, unlike the current law, employees could request to exchange their unused fourth week of leave for cash, if they wanted to. In those circumstances, no personal grievance rights would apply.

## Holidays Act

National would appoint a working group to review the Holidays Act 2003. The focus would be to reduce compliance cost for employers, with a particular focus on the issue of relevant daily pay.

# Future Legislation under **Labour**

The current Government has a number of other Bills and proposals that are currently in the pipeline or working their way through the Parliamentary system. Many of these have already been mentioned in our last newsletter (available at www.sbmlegal.co.nz). However, some of the newer initiatives recently introduced are also of real significance.

## Triangular Employment Relationships

This Bill proposes three main changes to the current law.

The first relates to 'triangular employment relationships'. This is where a party which is contractually the employer, contracts the services of the employee to a third party which is, in reality, the controlling party. This most typically occurs with temping agencies. The proposed changes would allow the employee (or the employer) to apply to the Employment Relations Authority to join the controlling party to any personal grievance action. This would enable an employee to bring a dual personal grievance against both the employer and the controlling party. Ultimately, the extent of each party's liability would be determined by the Authority on the basis of the contribution that party had made to the personal grievance.

The second change is that, when a triangular employment relationship exists, an employee working for a controlling party, must be employed on the terms and conditions of employment consistent with any collective agreement to which that controlling party is bound, if the worker joins the relevant union.

Finally, the legislation aims to simplify the process for determining who is a casual and a fixed term employee. If the status of these employees is uncertain, their status can currently only be definitively clarified by the Employment Relations Authority.

Under the Bill, the employee will be able to have a Labour Inspector determine the status of that employee's employment. This proposed change will provide a lower cost alternative for employees to challenge the status of their employment, if they wish to. If passed, it is likely that this Bill will see an increase in claims brought by "casual" or "fixed term" employees.

## The Employment Relations (Protection of Young Workers) Amendment Bill

This Bill aims to provide better protection to the rights of working children by having them covered by the requirements of the Employment Relations Act. This would mean that all children aged 15 and under would need to be employed under a written employment agreement. These young workers would have to receive the minimum wage, holiday pay (including days in lieu if they work on public holidays), sick leave and all other employment entitlements. They will also have a right to progress a personal grievance if they believe they have been dismissed unjustifiably.

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## Restructuring and Redundancy Issues Public Advisory Group

Finally, a Government appointed Public Advisory Group has been considering whether changes are needed in relation to how New Zealand workplaces deal with redundancies. It has recently released its report, which recommends that the Government considers a statutory requirement to pay redundancy compensation and notice. It also recommends a range of other initiatives including different tax rates for redundancy compensation.

## Conclusion

As can be seen, whatever the make up of Government, further change is afoot. We will keep you updated as the political process unfolds!

## Please pay me to vote!

It's also worth remembering that the Electoral Act provides some employees with paid time off to vote. Those working on Election Day (Saturday 8 November) who have not had a reasonable opportunity to vote before they started work are entitled to leave work at 3pm for the remainder of the day for the purposes of voting. In those circumstances, it is unlawful for the employer to make any deduction from the emloyee's remuneration.

The only exception is where the employer provides 'essential work or service' (such as emergency response). In that case, the employee is entitled to leave work for a reasonable time (up to two hours!) to cast his or her vote. During that time, the employee again remains on pay.

Because of this, those employers operating on 8 November need to be prepared. Careful rostering should be arranged to ensure everyone gets the opportunity to vote.

# Keep your friends close and your enemies closer!

There is an old adage that good leaders should keep their friends close and their enemies even closer. This is well illustrated in an important Court of Appeal decision involving a Mr Salt, who was based on a tiny but rather notorious rock in the Pacific Ocean, Pitcairn Island.

Mr Salt was employed by the Governor of Pitcairn, Mr Fell, who was resident in New Zealand. Ultimately, because of breakdowns in communications between the parties, Mr Fell dismissed Mr Salt on the basis of a general lack of trust and confidence. Mr Salt challenged his dismissal, claiming that it was unjustified.

Some months later, in the course of investigating other matters on the island, Police undertook a forensic examination of Mr Salt's computer. They uncovered many emails that Mr Salt had sent to associates on Pitcairn Island, while he was still an employee. The emails contained comments that the Court held were, overall, "of a highly disparaging nature pertaining to [Mr Fell] and other government officials". The emails also indicated that Mr Salt was acting against his employer's best interests.

While Mr Salt's dismissal on the basis of a lack of trust and confidence was held to be unjustified, the Court of Appeal was asked to determine the relevance of the emails to Mr Salt's right to remedies. The Court had little hesitation in concluding that, had they been known about earlier, the emails in question would have justified Mr Salt's dismissal. However, because they were found nine months later, the issue for the Court was whether they were relevant to his dismissal and, if so, how?

**As this case demonstrates, there may sometimes be merit in employers continuing an investigation into an employee's misconduct, even after a dismissal.**

The Court held that the emails were relevant. It said that when determining what remedies to award, the courts were permitted to take into account information which the employer did not know about at the date of dismissal if that information was directly relevant to what, in fairness, the employee genuinely deserved. In this case, in spite of his dismissal not being justified, Mr Salt's actions were such that his remedies were reduced by 50%.

As this case demonstrates, there may sometimes be merit in employers continuing an investigation into an employee's misconduct, even after a dismissal. If that employee brings a personal grievance, information found after the dismissal may be relevant if it undermines the merits of an employee's claim. On a cautionary note, however, the court was quick to say that it was not encouraging witch-hunts and only misconduct of a significant nature would be relevant.

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