EMPLOYMENT, HEALTH,
EDUCATION & SPORTS LAW

Employment at work

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In this issue

We wish you a very Merry Christmas

As 2010 draws to a close, the team at Swarbrick Beck Mackinnon would like to thank you for all your support this year.

We're very conscious that the last 12 months have been extremely difficult for many of our clients. However, if you have needed to call on our services, we hope that we've delivered practical, cost effective and solution focussed advice. Those are the standards we set for our firm.

Clearly others think we're doing things right. This year, we were honoured to once again be named as one of the top three employment law firms in New Zealand in the Lexis Nexis Law Awards. We have also again been ranked among the top employment law firms in the country in a variety of international publications, including Chambers Global and the Asia-Pacific Legal 500. And we have picked up a large number of new clients.

With most economic indicators suggesting slow but gradual growth in 2011, we wish you a wonderful Christmas and a strong and positive year ahead.

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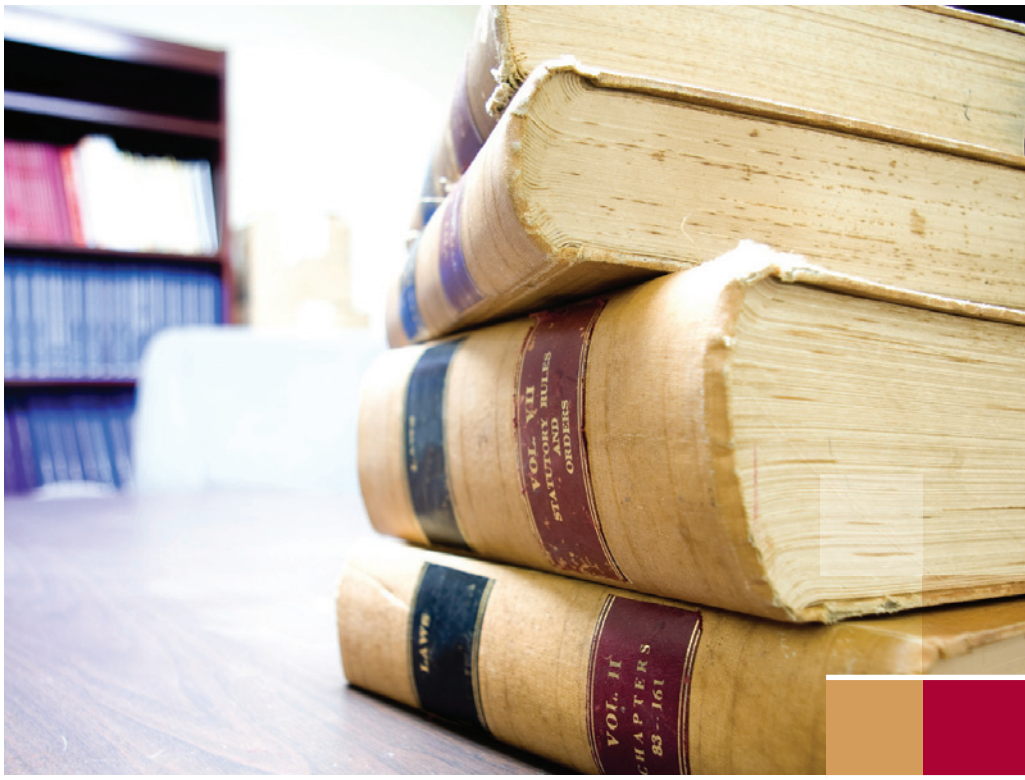
Employment Law - Ch

The Government has now passed its amendments to the Employment Relations Act 2000 (the ERA) and the Holidays Act 2003. The majority of these changes will come into effect from 1 April 2011.

Highlighted below are a number of key changes proposed under both Acts.



Union issues

Under the current law, unions have very broad access rights to workplaces. Although there are requirements for the union to be reasonable when accessing sites, employer consent is not currently required. However, from next April, that will change.

A union representative will need to make a request for access rights and, without the employer's consent, no right of access will exist.

Employers will not be able to unreasonably withhold their consent and, if they do decline a request, must provide reasons in writing no later than one day after the request was received. If an employer does not respond to the union's request within two working days, consent will be deemed to have been given.

The amendments also clarify when an employer can communicate with its staff during bargaining. The amendment makes it clear that employers do have the ability to communicate with their staff about bargaining matters (including their own proposals). However the employer will still need to recognise the union and will need to ensure that any communications do not constitute "negotiations" and do not undermine the union or the bargaining itself.

Dismissal

There will be a change to the legal test to justify a dismissal. Currently the law requires that the dismissal must be what a reasonable employer "would" have done in all the circumstances. The new test will require an employer to satisfy the courts that their decision was one that a reasonable employer "could" have reached.

The Government has justified this change on the basis that, where dismissal is within the range of options a reasonable employer could decide upon, the courts should not impose a different outcome.

In our view, this means employers should be able to make decisions in cases which are not quite so clear cut with greater confidence.

The amendment will also make it clear that "reinstatement" is no longer the primary remedy for unjustified dismissal.

Disciplinary processes

Employers are often frustrated by the importance the law places on following a fair process.

To assist employers, the ERA will include a list of factors the courts must consider in deciding if a process was fair. The aim is to provide greater clarity about what is required.

The courts will also be specifically directed not to find a dismissal unlawful if there were only minor defects in the employer's process.

Smaller employers will also be pleased to learn that when the courts have to assess if a dismissal was justified, one factor they must take into account are the resources available to the employer.

Extension to 90 day trial periods

Probably the most controversial amendment to the ERA is that 90 day trial periods will be available to all employers, regardless of size (currently only businesses employing less than 20 staff can use the ERA's trial period). From 1 April 2011, every employer will be able to dismiss a new employee within a trial period without cause so long as the decision is not discriminatory. That dismissed employee will have no ability to pursue an unjustified dismissal claim.

However the 90 day trial period may not represent quite as large a 'get out of jail free card' as many believe. As our article elsewhere in this newsletter discusses, there are a number of requirements that will need to be met before a 'safe' dismissal can occur in reliance on a trial period. Care will still be needed.

Cashing up the fourth week of annual leave

Currently, there is no ability to cash up the annual leave entitlements provided by the Holidays Act. However, from 1 April 2011,

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employees will be able to request to have a maximum of one week of their four weeks of annual leave paid out.

That fourth week must already have accrued and the request must be made by the employee – it can not be at the employer's request. Employers are not obliged to accept the request.

Relevant daily pay

Relevant daily pay (RDP) is the rate paid for public holidays, alternative holidays, sick leave and bereavement leave. RDP is based on what the employee would have been paid if they'd worked on that particular day.

This definition has caused some employers significant expense. Those employers who pay regular overtime, allowances and commission have faced a hefty increase in costs, as staff have often taken their alternative holidays (and sometimes sick leave) at times when their RDP is at its highest.

This formula will remove much of the incentive to take leave on the best paying days and should limit the windfalls some employees currently receive.

However, from 1 April, if it is not practical to determine an employee's RDP or their daily pay varies within each pay period, then the employer instead is to pay for these days using Average Daily Pay (ADP). This is, in essence, gross earnings over the previous year divided by days worked in that year. This formula will remove much of the incentive to take leave on the best paying days and should limit the windfalls some employees currently receive.

In addition, employees will no longer be able to determine when they will take alternative holidays. Except where agreement can be reached on when the day is to be taken, the alternative holiday will be taken on a day determined by the employer, acting reasonably.

Sick Leave

The Holidays Act will allow employers to request proof of an employee's sick leave at any time (so long as they are prepared to pay for it). This will mean that a medical certificate can be asked for by an employer whenever it sees fit.

"You're Fired!"

90 Day Trial Periods

Donald Trump has made an interesting contribution to global culture. There is his unique hair style, his garish buildings, his rumoured aspirations to become President and, of course, his 'reality' TV show, The Apprentice.

The final scene of each Apprentice episode sees Mr Trump thump the table, stare menacingly at some poor participant and bark "you're fired". No warnings are required, no notice is given and there is no scope for argument. The decision is final.

In New Zealand, a dismissal of this nature is normally totally unlawful. Employment law requires two fundamentals before a justified dismissal can occur. The first is 'good cause'. The second is a fair process.

However, in March 2009, the Government introduced statutory 'trial periods' of up to 90 days for employers with fewer than 20 employees. If a trial period was included in the employment agreement, the law seemingly allowed an employer to dismiss an employee within the trial period for any reason so long as it was not discriminatory, harassment or in breach of good faith. In those circumstances, the employee had no ability to pursue a personal grievance for unjustified dismissal.

Significantly, from 1 April 2011, amendments to the Employment Relations Act will extend the availability of trial periods to all employers in New Zealand, regardless of size.

However, the Employment Court has recently released its first judgment addressing 90 day trials. That judgment has made it clear that to rely on a 90 day trial requires far more than Mr Trump's "you're fired". Instead, there are a number of factors that will need to be considered before any dismissal can safely occur. The following check list sets these out. It is only when all of these can be answered affirmatively that a trial period will be able to be used safely:

1. Is the 90 day trial period included in the written employment agreement? whether collective or individual
2. Was the employment agreement actually physically signed before the employee started work?
3. Does the trial period state that:
   - The employee, for a particular period beginning on the first day of employment, is serving a trial period;
   - During this time, the employee may be dismissed; and
   - If this occurs, they will have no ability to pursue an unjustified dismissal claim.
4. Is the length of the trial 90 days or less from the commencement of the employment?
5. Has the employee been given the notice period required under the employment agreement?
6. Has this occurred within the duration of the trial period?
7. If the trial period contains a process that must be followed when it is being relied on, has this been followed?
8. Has good faith been followed?
9. If the employee has asked, has the employer provided a reason as to why they have been dismissed?
10. Did the reason for the dismissal have nothing to do with any prohibited grounds of discrimination or harassment?

In the case before the Employment Court, the employer did not meet a number of these requirements. That meant that the trial period could not be relied upon and the dismissal was unjustified.

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