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The times, they are a changing...

As 2010 drew to a close, we took the opportunity in our Christmas newsletter to update you on the proposed amendments to the Employment Relations Act 2000, which were set to take effect from 1 April 2011.

Those changes are now law, and because of their importance, set out is a quick summary of the amendments as they were finally passed:

Trial Periods

The change receiving the most media attention has been the extension of the 90 day trial period to all employers. Some key points to note are:

- The 90 day trial period must be included in the employee's employment agreement, from the commencement of employment. That means, from the employee's first day. Practically speaking, this means employers must ensure employees receive, read, sign and return a copy of their employment agreement **before** they commence work. Signing after day one probably renders the trial period unenforceable.
- The effect of a 90 day trial period is that, in the event the employee is dismissed during the trial period, the employee is not entitled to bring a personal grievance or other legal proceedings in relation to the dismissal (although the employee remains entitled to pursue a claim for disadvantage and/or discrimination).
- Quite specific wording must be used to ensure the trial period clause is lawful. If in doubt, you should obtain legal advice. >>

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Unions now need to request permission to access a workplace, whereas previously the employer's consent was usually unnecessary. However, while this is a very significant change, employers are not able to unreasonably withhold their consent and in the event that they do decline a request for access, they must provide reasons in writing within one day of the request.

Dismissal

The wording of the statutory test for a justified dismissal has changed from "would" to "could". That is, the test is now: is it a decision a fair and reasonable employer "could" have made, in all the circumstances rather than a decision that employer "would" have made. The rationale behind the change is that where dismissal is one of a range of reasonable options a reasonable employer "could" reach, then the dismissal should be lawful.

Holidays: cashing up annual leave, transferring public holidays and calculating relevant daily pay

Employees can now request up to one week of their annual leave be "cashed up". Employers are not required to agree to this request nor provide reasons for any decision to decline, but they must respond to applications in a reasonable time. Importantly, the requests must come from the employee and cannot be initiated in advance by the employer, including through the employee's employment agreement. The leave must also have already accrued which means that it must be leave that they became entitled to but have not used since their last anniversary date.

There is now a clear right to transfer the observance of a public holiday.



We're delighted to announce that we've recently welcomed Bridget Smith (Senior Associate) and David Dickinson (Solicitor) to our firm. Bridget and David are both highly talented and experienced employment lawyers and add further depth to our rapidly expanding practice.

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This might occur where an employee of a particular nationality or religion wishes to transfer say Christmas Day, to a day he/she considers more appropriate. As with the cashing up of annual leave, employees can apply to observe all or part of a public holiday on another working day, but there is no requirement that an employer agrees to such a request and it can even have a policy that it not transfer days.

The Act also introduces a new concept of "Average Daily Pay" that employers can rely on, when it is not possible to accurately determine "Relevant Daily Pay".

Finally, there is an increased ability for employers to require proof of illness or injury in respect of any absence. Previously, employers could only require proof for absences of more

than three consecutive calendar days, or less if there was "reasonable suspicion" the leave being taken wasn't genuine. Now, an employer can require proof of sickness or injury from the first day of absence. However, the limiting factor is that the employer must meet the reasonable costs associated with obtaining that proof.

While concern has been expressed in the media that employees will now be made to go and see a doctor even for relatively minor ailments, we are confident that common sense will prevail in most cases.

Now that these changes have taken effect, the time is probably right to review your policies and your employment agreements (particularly for new staff) to ensure they reflect these changes.

Show them the door; not the contents of your wallet...

A COMMON QUESTION FROM EMPLOYERS IS WHAT TO DO WHEN THEY BELIEVE THAT TERMINATION OF THE EMPLOYMENT RELATIONSHIP IS THE BEST OUTCOME, BUT THERE ISN'T THE TIME OR WILLINGNESS TO WORK THROUGH A TIME CONSUMING PERFORMANCE MANAGEMENT PROCESS?

A common misconception is that the employer can simply ask an employee if they are willing to have a "without prejudice" or "off the record" discussion. Some employers seem to believe if the employee agrees, they are then safe to say what they like in order to bring about the employee's departure. However, this is quite wrong.

Even if the employee agrees to a "without prejudice" conversation, such a discussion is not viewed by the law as being off the record. In order

to have a genuine without prejudice conversation (one that is legally off the record) there must first be a dispute between the parties. That doesn't mean legal proceedings have to be issued, but there must at least be a significant difference in views. As such, an employer should never launch straight into "without prejudice" negotiations – there needs to be a difference of views first.

Employers also can't use the "without prejudice" label to threaten or unfairly pressure an employee to resign.

The intention must be to genuinely settle a dispute.

And finally, it is crucial that both parties understand what "without prejudice" means. If the employee is not being legally represented, we always recommend that you make sure the employee acknowledges that they understand the conversation is confidential, off the record and unable to be referred to in any other forum, before you proceed any further.

So while a without prejudice discussion may allow the parties to talk more frankly and to achieve a swifter resolution than might otherwise be possible, to gain "off the record" protection, employers must act carefully. The risk is that if you don't get it right and don't get an agreed outcome, anything you say can be used later – proceed with caution!



Telling the truth and keeping secrets – where do employers draw the line?

The issue of what to say in a reference hit the headlines recently in a case involving a negotiated exit between a teacher and a pre-school.

The pre-school and one of its now former teachers had agreed to the teacher leaving the school and the terms of her departure. All of the terms were set out in a full, final and confidential settlement agreement, entered into during mediation and signed off by a mediator. So far, so good...

However, the problem arose when the Head Teacher of the pre-school subsequently decided she could not write a reference for the teacher in the positive terms agreed in the settlement agreement. She appeared to feel this would be dishonest. However, the Employment Relations Authority had no hesitation in ordering compliance with the terms of settlement, meaning the Head Teacher was ordered to provide the reference, as agreed, despite her personal misgivings about its contents.

The case is a timely reminder about what should or should not be agreed to in mediation, as well as the parameters around giving references (which are frequently negotiated as part of mediated settlements).

A mediated settlement, certified by a mediator, is final and binding and the Authority will require strict compliance with its terms. It can also impose a financial penalty if it wishes. It is therefore crucial to ensure the obligations you agree to can be met to the letter at a later date.

Just as importantly, there is no legal obligation on an employer to provide a reference. However, where a reference is provided, it must be honest and accurate. Therefore, employers should think carefully about agreeing to provide references in settlement agreements or in any other context, if the content could

be misleading. The Fair Trading Act 1986 contains a specific provision which prevents misleading conduct in relation to employment. This prevents any person from engaging in misleading or deceiving conduct in relation to employment, which includes employment offered by another person. As such, a misleading reference provided by a former employer, could quite easily result in a breach of the Fair Trading Act.

So when you're in mediation or negotiating a settlement, always bear in mind that the terms of settlement will be final and binding, and must be complied with. And, if references are involved, stick to the truth!

