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EMPLOYMENT ▪ HEALTH ▪ EDUCATION ▪ SPORTS

AS the first quarter of 2012 draws to a rapid close, it's time to issue our first client newsletter for the New Year.

OUR clients have certainly been keeping us busy since we returned in January – we've been fighting disputes in the Employment Court over holiday pay entitlements and redundancy pay, been involved in numerous Authority hearings and mediations, worked through some contentious industrial situations and picked up some excellent new work.

THERE have also been some important decisions emanating from the Courts over the last few months, particularly involving trial periods and dismissal law. In this newsletter, we outline those developments, as well as touching on some other important employment law issues.

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L&E GLOBAL

Escape the trials of trial periods...

ARE YOU LIKELY TO BE EMPLOYING NEW STAFF IN 2012 AND IF SO, ARE YOU CONSIDERING EMPLOYING STAFF ON 90 DAY TRIAL PERIODS? THE BIG ADVANTAGE WITH A TRIAL PERIOD CLAUSE IS THAT IT IS MEANT TO PREVENT EMPLOYEES FROM BEING ABLE TO BRING UNJUSTIFIED DISMISSAL CLAIMS IF THE EMPLOYMENT IS TERMINATED WITHIN THE FIRST 90 DAYS.

However employers need to be aware of two important decisions from the Employment Court which have made it clear that these "try before you buy" clauses may not provide as much flexibility as first thought.

The first case is **Blackmore v Honick Properties Ltd.** Honick Properties offered Mr Blackmore a job without providing him with a copy of the proposed employment agreement. Mr Blackmore accepted the job but wasn't given a copy of his employment agreement until an hour after he had started work on his first day. The agreement contained a 90 day trial period clause which confirmed, among other things, that he could not bring an unjustified dismissal claim if he was dismissed during the trial period. Mr Blackmore signed the agreement. Some weeks later, he was dismissed and (despite the existence of the trial period) filed a claim for unjustified dismissal. The company argued he could not proceed with that claim because of the trial period.

However the Employment Court held that the trial period was invalid because it hadn't been in place since the commencement of his employment. The Court noted that to be effective, a trial period had to comply with section 67A of the Employment Relations Act. That meant it had to be in place at the start of the employment. Anything after that made it entirely ineffective.

The Court was also critical of what it said was the unfair bargaining which had taken place. Bargaining is "unfair" under the Act where an employee is not given information and/or the opportunity to seek advice on a proposed employment agreement. The Court considered the lack of opportunity given to Mr Blackmore to read, understand and take advice on the agreement (including the trial period) meant the trial period could not be relied upon. As a consequence, Mr Blackmore was entitled to bring a claim of unjustified dismissal.

The case provides a timely reminder that a prospective employee who is offered employment must be:

- provided with their proposed employment agreement well in advance of starting;
- advised of their right to obtain independent advice on the proposed agreement; and
- provided with a reasonable opportunity to obtain the advice.

In practical terms this means giving the prospective employee a copy of the proposed agreement and a reasonable period to consider it and take advice before work is due to commence. It also means ensuring that the company receives back the signed agreement *before* the employee actually starts work.

The second case of importance is **Smith v Stokes Valley Pharmacy.** In this decision, the Employment Court once again ruled that an employee dismissed during a 90 day trial, was still able to bring a personal grievance for unjustified dismissal. Although the Court relied on a number of grounds to reach this view, perhaps the most significant was that the Court said that during a trial period, the duty on an employer to act in good faith continued to apply. This included a duty to be open and communicative.

That meant that if an employee wanted to know the reasons for their dismissal during the trial period these needed to be provided. And the Court seemed to leave open the possibility that, if the reasons relied on had not been fully discussed with the employee, the employee could potentially bring a personal grievance for unjustified disadvantage (rather than unjustified dismissal) based on the failure to be open and communicative.

The upshot is employers need to tread carefully when relying on a trial period. Firstly check carefully the trial period was part of an agreement entered into before the employee started work and which was bargained fairly. And if there are issues, openly and honestly discuss these with the employee during the trial, to minimise the risk of a disadvantage claim.

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As some of you may recall, from 1 April 2011 the test for a justified dismissal changed from what a fair and reasonable employer **would** have done in all the circumstances, to what a fair and reasonable employer **could** have done in all the circumstances.

THERE HAS BEEN SOME DOUBT AS TO WHETHER THIS CHANGE WOULD have any real impact on personal grievance claims. However the Employment Court has recently confirmed that the change is important and significant.

In **Angus v Ports of Auckland Limited,** two former employees filed separate applications alleging unjustified dismissal. A full bench of the Employment Court was then assembled to deal with the preliminary issue of what the new test of justification (set out in section 103A of the Employment Relations Act) meant in practice.

The Court rejected the argument that the change was of no significance or effect. It noted the previous test required the Court to decide what a fair and reasonable employer would have done. However under the new wording, the legislation contemplates that there may be more than one fair and reasonable decision that a reasonable employer could reach, and if the employer's actions fell within that range of reasonable responses, the employer's actions must be lawful.

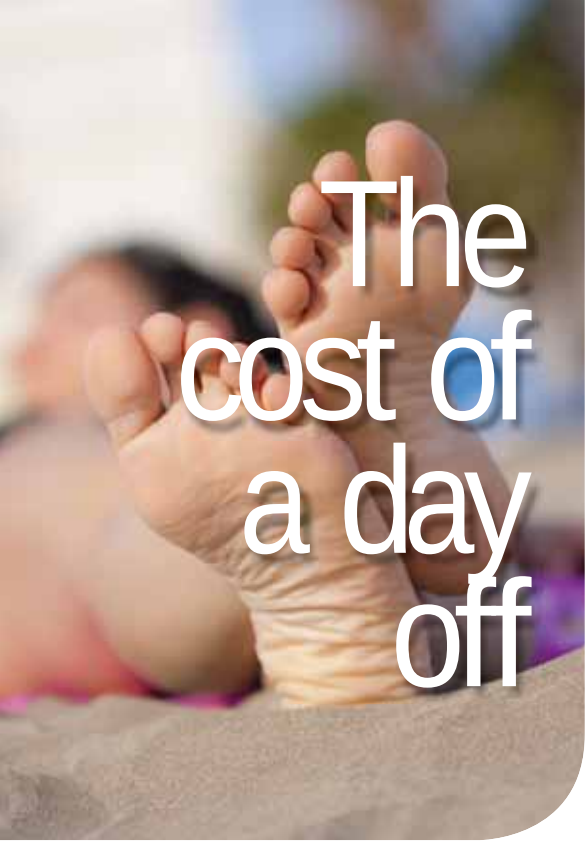
The Court was very clear that if a dismissal (or any other formal action such as a warning) was a decision that a fair employer could reasonably have come to, then the Authority or Court could not substitute its view for that of the employer. Instead, it is incumbent on the Authority or the Court to objectively assess both what the employer did and how the employer did it, and then decide whether it falls within the scope of what a fair and reasonable employer could have done in those circumstances.

From a practical perspective, we believe this decision should give employers more confidence to make decisions which they believe are right and fair, even though the issue might be more grey or borderline than is ideal. That is because if the decision reached is within the scope of what a reasonable employer could have concluded, then the test in section 103A will have been satisfied.

It's important to note too, that the need to follow a fair process remains just as important under section 103A. In fact, in section 103A (3) (a)-(d) there is a list of procedural considerations that the Authority or Court must consider when assessing whether or not the actions of the employer were those that a fair and reasonable employer could take.

These include whether the employer sufficiently investigated the allegations; whether the employer raised its concerns with the employee before dismissing; whether the employer gave the employee a reasonable opportunity to respond; and whether the employer genuinely considered the employee's explanation before taking action.

Ultimately though, employers will be pleased with this decision as it suggests the courts may be slower to overturn decisions if the employer can show it was within the range of sanctions open to a fair and reasonable employer.



The cost of a day off

The Government has called for submissions on a proposal to Monday-ise Anzac Day and Waitangi Day. At present those public holidays are observed on the day on which they fall. This means that where either or both of these public holidays fall on a weekend, the majority of employees (those who work Monday–Friday), are not entitled to the public holiday or payment for it.

Labour's new MP for Dunedin North, David Clark, is promoting the Holidays (Full Recognition of Waitangi Day and Anzac Day) Amendment Bill but interestingly, the Department of Labour has advised the Government against the proposal, citing a potential cost of up to $400 million.

There is no rush to make the changes as the next time either holiday falls on a weekend is not until 2015 and the next time they both fall on a weekend is not until 2021. However, given the potential extra costs, there is growing opposition from some employers. If you would like assistance in making a submission, please let us know.

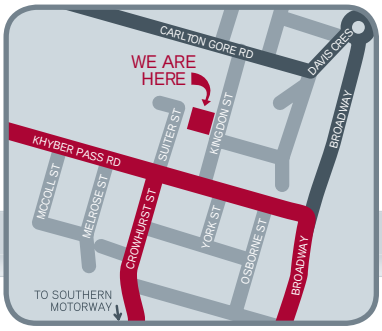
SPORTS NUT

Finally, many of you will know that SBM partner Don Mackinnon is a bit of a sports nut. Aside from representing some of the country's biggest sporting organisations, Don has, for the last few years, been a director of SPARC (recently renamed Sport New Zealand). Now he's taken on two other major appointments.

We're delighted to announce Don has been appointed to the Board of Cricket New Zealand. Now, when Don disappears to the Boardroom with a file under his arm and we find the cricket on the TV, he can actually claim he is working.

Don has also been appointed to the Government's new high performance sport unit, High Performance Sport NZ. This company provides funding to all our high performance sports and oversees their planning and campaigns.

We're sure Don will be a real asset to both organisations.



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