

# Slopp

EMPLOYMENT ■ HEALTH ■ EDUCATION ■ SPORTS

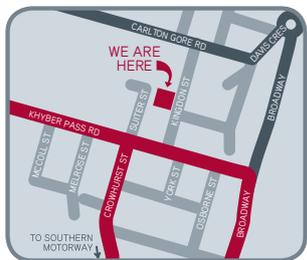
## A big year ahead 2014

2014 promises to be a big year for employment law. The Government is in the process of introducing sweeping changes to our health and safety system which directors and senior managers, in particular, need to be extremely conscious of. Paul Goldsmith's Private Members Bill could also deny high wage earners any access to personal grievance laws, while later this year we face an election.

Invariably employment law is one area where our political parties like to show their philosophical differences, so expect to see all the main parties proposing employment law reforms. Labour for example has already committed to lifting the minimum wage to \$15 while the Greens are targeting \$18.

In this newsletter, we look at some of the legislative changes that may come into law this year, we update you on some important cases involving Facebook and "work for free" trial periods, and we explain the increasingly complex world of redundancies and restructures.

We hope you enjoy our newsletter and best wishes for 2014!



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# Health & Safety law changes



The Reports from the Royal Commission into Pike River and a separate Health and Safety task force made it clear that New Zealand's health and safety laws were not fit for purpose. The government's response has been a complete overhaul of our health and safety framework.

On 29 October 2013, an "exposure draft bill" was released by the Ministry of Business, Innovation and Employment ("MBIE"). This bill has been out for consultation ever since, however, only half of the potential changes are known, because the "exposure draft bill" is being released in two tranches.

One of the most significant changes is the likely elevation of responsibilities imposed on directors and senior managers and an alteration of the focus towards risk-based assessments. Those in "governance roles" are going to be required to assume a positive "due diligence" duty.

This obligation is going to be on directors and "any other person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business (for example, the chief executive or a chief financial officer)".

"Due diligence" is going to require:

- Acquiring and keeping up to date knowledge of health and safety matters;
- Gaining an understanding of the risks and hazards associated with the conduct of the business;
- Ensuring the business has, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety;
- Ensuring the business has appropriate resources and

processes for responding to information regarding incidents, hazards and risks in a timely way; and

- Ensuring the business has, and implements, processes for complying with duties.

The governing principle of the changes is that workers should be given the "highest level of protection" against harm to their health, safety and welfare from hazards and risks arising from work as is "reasonably practicable".

At present the current law requires the taking of "all practicable steps" to ensure the safety of employees while at work, and the elimination, isolation or minimisation of "hazards". However whereas currently a director can only be liable for a HSE breach where the director has directed, authorised, acquiesced or participated in a breach, going forward a director will be required to be actively involved in ensuring HSE systems meet all requisite standards.

Allied to these changes is a five-fold increase in penalties. Penalties for the most serious of breaches could attract fines of up to \$600,000 and/or imprisonment for five years for an individual and up to \$3 million for a body corporate. Graduated levels of penalties for different types of offending is likely.

The new regulator, WorkSafe New Zealand, is up and running and is likely to be better resourced and staffed to monitor and prosecute. Rules for employee participation in their employer's health and safety policies are likely to prove challenging for employers.

## Other legislation

A private member's bill is a proposed law put forward by an individual MP.

These bills are not part of the Government's planned legislation. A ballot is held to select which bills get to be debated.

A recent example of a private member's bill which has made its way into employment law is Tau Henare's Employment Relations (Workers' Secret Ballot for Strikes) Amendment Bill, which now requires unions to hold secret ballots of all their members before going on strike.

Conversely, National MP Jami-Lee Ross' Employment Relations (Continuity of Labour) Amendment Bill failed late last year to make it past the first reading. This Bill would have allowed employers an unlimited ability to hire people to do the work of striking or locked out employees. Consequently, the various limits that exist on when striking or locked out employees can be replaced, remain in place.

Most recently, National MP Paul Goldsmith has put forward the Employment Relations (Freedom of Contract for Higher Earners)

Amendment Bill. This Bill would allow employers and employees to contract out of personal grievance law if the employee earns over \$150,000. Inevitably this would have the effect that all those employees would have clauses in their employment agreements removing this right.

Various political parties, including Labour, have expressed tentative support for the Bill. The Bill has been put in the ballot but has not been drawn. Simon Bridges, the Minister of Labour, said that National supported the Bill but that it wanted to get

advice on whether it should become a Government Bill.

The Bill has sparked some interesting debate. Some say the Bill will be useful and will prevent the sorts of golden handshakes often given to high paid employees. Others say we are all equal before the law and that there is no reason to treat higher-earners differently.

Australia has a law automatically exempting employees who earn over A\$129,000 from bringing a personal grievance.

It is an interesting issue, so watch this space.



# Facebook – when it doesn't pay to be “friends” with your employer

Remarkably, nearly half of our population, (around 2.3 million people) are Facebook users. Yet until recently, Facebook had not played a large part in employment law disputes. That is starting to change.



THE EMPLOYMENT COURT RECENTLY COMMENTED AT some length about Facebook in *Hook v Stream Group (NZ) Pty Limited* [2013] NZEmpC 188. Mr Hook was (somewhat ironically) an information technology administrator, who resigned after receiving a final written warning. Mr Hook claimed that he had been constructively dismissed. However, after the resignation, his employer had taken screenshots of Mr Hook's Facebook page (which was in the public domain). Mr Hook's posts included the following gems:

**Mr Hook:** “Going to quit my job tomorrow, while on annual leave. Probably should have timed that better.”

**Reply:** “is your boss on Facebook.”

**Mr Hook:** “Na. If he was, I'd tell him he is a dick head”.

Although the Facebook evidence was not determinative, the Court found that the posts were admissible evidence and indicated Mr Hook intended to resign of his own free will. He was unsuccessful in his constructive dismissal claim. The Court made the following comments about Facebook in the employment context.

- Conduct occurring outside the workplace may lead to disciplinary action.
- Facebook posts, even those protected by a privacy setting, may not be regarded as protected communications beyond the reach of employment processes.
- Facebook posts can easily be communicated outside of the circle of “friends” and “*have a permanence and potential audience that casual conversations round the water cooler at work or at an after-hours social gathering do not.*”
- Posts may substantiate a dismissal/disciplinary action or vitiate a claim of constructive dismissal.

A recent Employment Relations Authority case, *Kensington v*

*Air New Zealand Limited* [2013] NZERA Auckland 332; [2013] NZERA Auckland 384, is another example of the employee's Facebook posts assisting the employer's case.

Ms Kensington was dismissed by Air New Zealand for dishonestly taking sick leave to care for her sister who had recently given birth. After the dismissal, Air New Zealand sought copies of Ms Kensington's Facebook posts and bank records over the sick leave period because it did not accept she was caring for her sister. Ms Kensington objected to having to disclose these materials arguing Air New Zealand did not have any of these materials at the time of the dismissal so they could not be used to justify its actions. While accepting that argument, the Authority still required Ms Kensington to produce the relevant posts and then admitted them as evidence, as Ms Kensington's honesty was still relevant to the remedies she should receive.

The Authority held Air New Zealand could not, on the evidence it had, have fairly and reasonably dismissed Ms Kensington for being untruthful. However, it reduced her remedies substantially for contribution by Ms Kensington, relying on the fact that she had remained on the beach taking photos for her Facebook page as she tried to organise the domestic leave, while her sister was allegedly sick and alone.

The moral of these cases is that, although it is tempting to treat Facebook posts as a private chat with your close mates, in reality posts have a wide audience. They can easily get back to an employer and, if they do, privacy arguments are unlikely to justify inappropriate posts or prevent admission of your posts as evidence against you in your employment case.

For employers, consider requesting copies of Facebook posts during an employment investigation, if the employee uses Facebook and there could be posts relevant to the matters under investigation.

# Restructuring

ONE OF THE MOST WELL ESTABLISHED PRINCIPLES OF REDUNDANCY law is that the courts cannot substitute their own decision for an employer's about whether a role should have been made redundant. In essence, the courts have long accepted that if an employer made a role redundant for genuine business reasons, that part of its decision cannot be challenged.

However, in a series of recent cases, the Employment Court has indicated that under s103A of the Act it is statutorily required to investigate whether what the employer has done (and how it was done) were what a fair and reasonable employer could have done in all the circumstances.

This means that if an employee challenges a redundancy decision, the courts must take a close look at the reasoning of the employer and the data relied on, and decide if the employer's actions were reasonable and fair.

In *Rittson-Thomas t/a Totara Hill Farms Ltd v Davidson* [2013] NZEmpC 39 ("Totara") Totara entered into a restructure which merged two roles into one. One employee was made redundant as a result.

The Employment Court found that the decision to make the employee redundant was not one which a fair and reasonable employer could have made and the dismissal was held to be unjustified. The Court considered the employer had failed to justify the redundancy by the "standard that he had set himself" for the restructure. Totara stated in its proposal that the cost saving to be achieved by the restructure was \$10,000, however post dismissal, the cost savings were found to actually be only \$6,000. The Court said it was insufficient for an employer to simply assert that it had made a "genuine business decision". In this case, it had relied on erroneous information, and therefore could not show its decision was one which a fair and reasonable employer could have reached in all the relevant circumstances.

A similar approach was taken in *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 163 Ms Brake was made redundant with two other employees, six months after commencing employment. She successfully challenged that decision. The Employment Court found her employer had relied on erroneous information and could not establish that its financial position had deteriorated substantially in the six months since Ms Brake had been hired. It also found there was a lack of evidence as to why Ms Brake had been selected for redundancy amongst its various staff. The Court was unimpressed by evidence the company had been underperforming for five years, noting it had that information when it hired Ms Brake, it must have needed her at the time, and there was no evidence the position had materially changed over the next six months.

The Court awarded the employee \$65,000 in lost wages, \$20,000 for humiliation and costs.

We understand the employer is appealing this decision. In the meantime though, these two cases illustrate that an employer's decision to make a role redundant is likely to be examined far more closely than in the past. Employers should ensure that any business reasons put forward for a restructure are carefully researched, accurate and can survive close scrutiny.

## Trial periods & work trials

LATE LAST YEAR, THE EMPLOYMENT COURT delivered a decision which all employers who take staff on for unpaid work trials or unpaid/poorly paid internships need to note.

In *Salad Bowl Limited v Howe-Thornley* [2013] NZEmpC 152 Ms Howe-Thornley applied for a job working in a mobile salad cart. At her interview she was told there was no reason why she wouldn't be hired if she satisfactorily completed a three hour work trial. The employer also intended to pay her for the time she had worked on trial. She worked her three hours satisfactorily but the employer later came across a discrepancy in the till takings, suspected Ms Howe-Thornley was responsible, and sent her a text telling her not to come back. She brought a personal grievance.

An employee is defined in the Employment Relations Act as anyone doing work for hire or reward under a contract of service. The Court held that Ms Howe-Thornley had been performing "work" in that she was doing tasks of economic benefit for the company, and that this work came with an expectation of some reward. Therefore she was an employee and was entitled to bring a personal grievance.

The Court noted that the employer could have placed the employee on a 90 day trial period in a formal employment agreement but it had elected not to do so.

While the decision is particular to its facts, the Court sent a clear message in its judgement that it is aware that there are several industries where unpaid work or internships are prevalent. It noted where "work" is performed which provides a benefit to the employer, there is likely to also be a payment obligation (usually at least to the level specified in the Minimum Wage Act).

The bottom line here is that if an employer wants to provide work experience to somebody or genuinely wants to assess suitability for work, and in doing so, has that person performing tasks that provide a benefit to the employer, that person should probably be paid. The exception might be very brief engagements (for example asking a prospective barista to make a coffee) or a genuine volunteer with no expectation of any reward.