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NEWS

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EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

A GREAT START TO THE NEW YEAR

What a great start to the new year! Great weather, new legislation, lots of exciting work and the Black Caps making the cricket world cup final.

If you haven't been to see our new premises, please feel free to come and visit. We would love to see you. We're enjoying our new location and having more space. And of course, the great weather has helped too; which you will really understand when you see the offices.

In addition, we are delighted to advise you that in the latest rankings published by Chambers and Partners, three of our partners (Penny, Kathryn and Don) have retained their status as "leading lawyers" and for the first time, the firm has been elevated to Band One. This is further confirmation, on a global scale, of our status as one of the leading employment law firms in the country. To put this in context for you, we have the highest proportion of partners ranked as "leading lawyers" and we are the only boutique firm in Band 1.

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Changes to the ERA from 6 March

CHANGES TO THE EMPLOYMENT RELATIONS ACT CAME INTO FORCE ON 6 MARCH 2015. WE HAVE SET OUT A SUMMARY BELOW:

Rest and Meal Breaks

Employers and employees are now able to negotiate the timing and duration of rest and meal breaks. Where there is no agreement, the final decision will be the employer's, subject to reasonableness and good faith. It is also possible, in certain circumstances, to not provide breaks provided there is reasonable compensation. However, always check what your employment agreement says as the number and timing of breaks can always be agreed in that contract.

Good faith

An employer does not have to give an employee confidential information about another identifiable employee/job applicant. Employers are now also able to withhold evaluative or opinion material including the identity of the person who supplied it, if provided in confidence. This is particularly important in a downsizing situation.

Unions and Bargaining

The "30 day rule" no longer applies (unless it is still a term of your CA) and employers with a CA can offer new employees terms and conditions of their choice, including the employer's own standard individual employment agreement. There is no longer a duty to agree and conclude a CA, but the parties must still bargain in good faith and try to reach agreement. Employers are able to opt out of multi-employer bargaining if they didn't wish to be involved and for the first time, proportionate pay reductions are possible where there has been a partial strike. Advance notice is required for all strikes or lockouts – not just in essential services, as was previously the case.

Employment Relations Authority

The Authority is now required to provide an oral determination at the conclusion of the investigation, "wherever practicable" (and a written record of that determination within one month), or an oral indication of its preliminary findings (and a written determination within 3 months). There will be extensions allowed in exceptional circumstances.

"Vulnerable Employees" and Continuity of Employment

Companies employing less than 20 people who are involved in a sale or contracting out of work are now exempted from the requirement to offer to transfer particular types of employees on the same terms and conditions as they currently hold.

Flexible Working Arrangements

The right to request flexible working arrangements has been extended to all employees (not just those caring for other people). Employers will need to respond within one month and employees will be able to make multiple requests in a 12 month period.

UPDATE ON EQUAL PAY LITIGATION

Equal pay is defined in the Equal Pay Act 1972 as "a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees".

The Court of Appeal in T*erranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516 has confirmed that "equal pay for women, for work predominantly or exclusively performed by women, is to be determined by reference to what men would be paid to do the same work, by removing the skills, responsibilities, conditions and degrees of effort as well as any systemic undervaluation of the work from gender discrimination."

This means that the Authority or Court is required to have regard to what is paid to males in other industries, not just in the industry or workplace that the female employee challenging her rate of pay, works in (in this case, in the aged care industry). In the present case, what this may mean is that it is not enough for Ms Bartlett's employer to say that it is complying with the Act by paying its male employees the same as its female employees.

The next stage in this case is for the Employment Court to set principles on how to compare male and female employees in other industries, so that the Court can then assess whether Ms Bartlett and her colleagues have received equal pay.

There is a long way to go in this case, but the outcome of it could effect many industries which have predominately female or male employees. We will continue to keep you updated as this case progresses.

TRIPARTITE EMPLOYMENT RELATIONSHIPS

The growing use of labour hire companies, and companies outsourcing work to contractors, means more and more employees are at the mercy of third party contracting.

We're referring here to a situation where an employer has a commercial contract with a third party, who effectively tells the employer what it wants it to do with its own employees. So the question is, what does this mean for the employees?

This situation arose in the Employment Court case of *Workforce Development v Hill* [2014] NZEmpC 174. Ms Hill was employed as a tutor by Workforce Development, a private provider of adult literacy training. Workforce Development had a contract with the Department of Corrections to provide tuition to prisoners. So while Ms Hill worked for Workforce Development, the work she was doing for them was at a Department of Corrections prison site. It is also relevant to note that the commercial contract between Workforce Development and Corrections provided that Corrections could withdraw a tutor's access to a prison on an interim or permanent basis, in its sole discretion.

Ms Hill took an overseas holiday and while away sent a postcard to a prisoner. She said that it was to encourage the prisoner to develop his learning, but Corrections took the view that the postcard breached appropriate boundaries between Ms Hill and the prisoner. She was suspended from the prison and subsequently her access was cut off completely. She was dismissed by Workforce Developments as she could no longer do work at the prison site and it had no other job she could do. Ms Hill alleged that she had been unjustifiably dismissed.

The Court did not accept the claim and held that Ms Hill's dismissal was justified. The following points are relevant for employers dealing with tripartite employment relationships:

- An employer still has an obligation to ensure that any dismissal or disciplinary action it takes is what a fair and reasonable employer could take in the circumstances, and in doing so it must follow a fair and reasonable process;
- An employer will have an obligation as a matter of good faith to try to retrieve the situation, however, it was not part of a good employer's obligations to "strongly advocate" for Ms Hill's renewed access to the prison, even though it would have been possible for the employer to have done so;
- The employer did not have to persuade Corrections to consider Ms Hill as its own employee in assessing whether she should be allowed to access the prison; and
- The employer was under no obligation to seek some form of "review" or "appeal" of Corrections' decision to refuse access to the prison.

The Court also confirmed that the employer had to turn its mind to whether there were any redeployment possibilities for the employee (once the employee couldn't go back to the worksite) and to take active steps to investigate any possibilities. On the basis that there were no such options, the Court said that the employer was entitled to terminate the employment relationship.

What this case also demonstrates is that in a tripartite employment situation it is important that the employment agreement and the contract with the third party deal with scenarios which may prevent an employee accessing the workplace. Usefully for the employer in this case, the employment agreement referred to an obligation to observe Corrections' policies, and had set out the process it would follow in the event of loss of access to the prison.

REDUNDANCY

Clarification from Appeal Court

For at least the last 20 years it has been a well established part of employment law that the Courts could not substitute their own decision for an employer's about whether a role should be made redundant. The approach was that if an employer made a role redundant for genuine business reasons, and not because of any other concerns with the employee, then that part of its decision could not be challenged. The rationale behind that approach was that the employer knew its business best and was better placed than an independent third party to decide whether a decision was for "genuine business reasons".

However, in *Grace Team Accounting v Brake* [2014] NZCA 541, the Court of Appeal confirmed that it is not just whether an employer is "genuine" in making employees redundant, but whether the employer acts as a "fair and reasonable employer" pursuant to the Employment Relations Act 2000, that is reviewable. This confirms that the Employment Relations Authority and/or Employment Court is statutorily required to investigate whether what the employer has done (and how it was done) was what a fair and reasonable employer could have done in all the circumstances, and that means looking not just at the process but also the fairness and reasonableness of the business decision.

We reported on the Employment Court decision involving these parties approximately a year ago. To briefly recap, Ms Brake was made redundant along with two other employees, six months after commencing employment. The Employment Court found that 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 (its financial position had been relied on as part of its genuine business reason to justify the redundancy). It also found there was a lack of evidence as to why Ms Brake had been selected for redundancy amongst its various staff. Ms Brake was awarded $65,000 in lost wages and $20,000 for hurt and humiliation.

The Court of Appeal has confirmed that the Employment Court's decision was correct. In particular, it confirmed that key aspects of whether the employer will have acted as a fair and reasonable employer in a redundancy situation are whether it has complied with its obligations under s4(1A)(c) and:

- provided information to the employee which is relevant to the employer's proposed decision to make position(s) redundant; and
- provided an opportunity to comment on the information prior to the decision being made.

In practice this means that an employer must have a robust business case for proposing and making any role redundant. That business case must be carefully reasoned and any information on which it is based must be accurate and able to withstand later scrutiny. Further, an employer must be active in disclosing that information and engaging openly in consultation with affected employees. This also means that the employer will need to consider and respond to any issues raised by employees during consultation. If an employer does not do all of these things then it will be at risk of unjustifiably dismissing an employee.

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