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EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

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AS THIS NEWSLETTER GOES TO PRINT, the nation is gripped with World Cup fever. By the time you read this the All Blacks will hopefully have retained the World Cup. Even the World Cup has several employment law features – from the short term staffing requirements for the cup hosts, the thousands of volunteers involved, to the public scrutiny of the performance of the players and coaching staff. Imagine if your performance in your role was publicly scrutinised world wide! Makes a humble desk job seem a little more attractive perhaps?

World Cup aside, there is new legislation to keep us busy. With an increased focus on health and safety it is imperative employers familiarise themselves with their obligations before the Health and Safety at Work Act takes effect on 4 April 2016.

IN THIS ISSUE:

What to be aware of when settling a personal grievance claim

So, you've settled the employee's personal grievance and avoided the threat of litigation. But before you pat yourself on the back, are you sure the settlement agreement is the end of the story?

Settlement agreements may sound like the answer to all your problems as an employer, but getting to settlement, and ensuring that you can rely on the settlement, may be trickier than you think. For example, it's easy when dealing with an employee who doesn't have a representative to press on with settlement without necessarily giving the employee a reasonable period of time to consider the terms and conditions being offered and/or to take advice. It is important to be aware that an employee may be able to challenge the validity of a settlement agreement if he/she hasn't had a reasonable opportunity to take advice before signing and therefore, if the employee wants to waive that right, that should be reflected in the terms of the agreement to protect you and your business moving forward.

Another issue that is more common than you might expect occurs when an employee signs a settlement agreement but changes his/her mind before the agreement is signed off by a mediator. In that situation, do you still have a binding agreement? The answer is no if the agreement requires sign off by a mediator. In that situation sign off by the mediator is a necessary precondition to settlement.

A recent Court of Appeal case has highlighted further difficulties in settlement; this time highlighting the important differences between private settlement agreements (signed only by the parties) and settlement agreements signed by a mediator employed by the Ministry of Business, Innovation and Employment ('MBIE'), which parties to employment disputes need to consider.

While settlement agreements signed only by the parties are still binding, a settlement agreement signed by a mediator has additional clout. This is because the Employment Relations Act 2000 provides for an optional additional process to be followed by the mediator, which makes breaches of a settlement agreement enforceable in the employment jurisdiction. The mediator contacts each of the parties to the agreement to ensure the parties are aware the settlement is final, binding and enforceable, then signs the settlement agreement. The effect of the mediator's signature is to make the settlement final, binding and enforceable. It means that no action may be commenced in respect of the terms of the settlement agreement, apart from enforcement. While there is scope for debate about what sorts of actions might be brought in respect of a settlement agreement, it is fair to say that settlement agreements signed by a mediator achieve greater finality. Settlement agreements signed by a mediator may be enforced via the Employment Relations Authority, and penalties are available for parties who breach such a settlement agreement. The most common breaches are breaches of confidentiality provisions.

The issue of the enforceability of settlement agreements was considered recently by the Court of Appeal, in a case involving JP Morgan Chase Bank NZ and its former employee, Mr Lewis. In that case, the parties had signed a settlement agreement, but did not get a mediator to sign it.

The employee alleged his former employer had breached the settlement, and attempted to bring proceedings in the Employment Relations Authority seeking damages for breach of the settlement. The Court of Appeal found the Employment Relations Authority had no jurisdiction to consider a claim for damages for a breach of a settlement agreement that was not signed by a mediator, as the settlement agreement was not a settlement agreement signed under section 149 of the Employment Relations Act 2000, nor was it an "employment agreement" or a variation to an employment agreement within the meaning of the Act. It said that any claim for damages would need to be commenced in the courts of ordinary jurisdiction. It also meant that the settlement agreement could not be enforced in the Employment Relations Authority.

By way of contrast, had the settlement agreement been signed by a mediator pursuant to section 149 of the Act, a claim for enforcement could be commenced in the Employment Relations Authority and penalties would be available for any breaches. However, the current law is that it is not possible to claim damages in the Employment Relations Authority for a breach of a settlement agreement signed by a mediator[1].

If you get a mediator to sign a settlement agreement, it will make it harder for parties to unravel that agreement, but could also make it harder for parties to claim damages for breach of a settlement agreement. Penalties are still available for a breach of a mediated settlement agreement, but these are restricted in quantum to up to $10,000 for individuals and $20,000 for corporations. On the other hand, if you don't get a mediator to sign a settlement agreement, the agreement could be easier to unravel, but damages will be available for a breach of that settlement agreement, although any claim would need to be brought in the courts of ordinary jurisdiction.

While settlement agreements may seem like a simple end to your issues, it is worth taking the time to get them right and ensure they provide the protection you seek.

1 South Tranz Ltd & Ors v Strait Freight Ltd

Costs Awards in Employment Court

THE EMPLOYMENT COURT IS PROPOSING TO CHANGE THE WAY IT GIVES DECISIONS ABOUT THE COSTS OF LEGAL REPRESENTATION FOLLOWING THE CONCLUSION OF A SUBSTANTIVE COURT HEARING.

At present, a party that is successful in a claim in the Employment Court is entitled to be reimbursed by the losing party. The general rule is that two-thirds of the winning party's actual and reasonable costs incurred in the Court will be reimbursed by the losing party.

The Court has discretion to modify the application of that general rule in appropriate cases. For example, this could be by awarding "indemnity" or full costs if there has been some egregious behaviour by the losing party, or increased costs if a party has unreasonably refused an offer which was made 'without prejudice save as to costs' which they should have accepted.

The Court's proposal is to adopt a "scale" which relates to costs. This would see the Court allocate a particular amount of time that each step in the proceeding should take and an associated rate relating to that step. The party would then recover costs accordingly to all steps that they have actually taken in the proceeding. It is also proposed that the Court would maintain an overarching discretion for cases where the application of costs on a "scale" basis is not appropriate. This approach is generally how the High Court deals with costs.

The intention behind the Employment Court's proposed changes is to give parties to litigation a greater degree of certainty in their likely costs as at present, there is a high variability in the level of costs awarded.

The Court is currently working on the concept, framework and details of a scale and it is likely to involve the Court having a lead in period to the formal adoption of a scale. Until that time the general two-thirds rule will continue to apply. We will keep you updated.

NEW EMPLOYMENT STANDARDS BILL

The Government has introduced an Employment Standards Bill into Parliament which includes proposals to amend the Employment Relations Act, Holidays Act, Minimum Wage Act, Wages Protection Act and the Parental Leave and Employment Protection Act.

Among the various technical changes are provisions which are intended to address "zero hours contracts".

The Bill defines these types of employment agreements as involving provisions where an employee's performance of work is conditional on the employer making work available, but where there is no obligation on the employer to actually make work available, and where an employee is required to be available to accept any work made available by the employer.

The Bill proposes that these types of agreements be unlawful unless "compensation" is paid to an employee. Further, there are provisions for payments being due to an employee if an employer cancels any shift without appropriate notice (and employees being required to be paid for the duration of the shift in those circumstances).

The Bill also proposes to introduce a number of weapons in the Court's arsenal to deal with breaches by employers of minimum entitlements. This comes on the back of a number of serious and significant breaches of minimum standards that have been reported in the media.

Those 'weapons' include the Court making a declaration of breach of minimum entitlements, imposing pecuniary penalties on an employer of up to $100,000 (or three times the amount of the financial gain made by the employer by breaching minimum entitlements), and "banning" orders where a person could be banned from entering into an employment agreement as an employer for a period of up to 10 years.

The Bill has been referred to Select Committee and its report will be due in the new year.

New Health and Safety legislation – finally!

After significant debate and considerable delay, the new Health and Safety legislation has been passed into law. The new law will be called the Health and Safety at Work Act and comes into force on 4 April 2016. It intends to bring about major change to the current health and safety regime and the health and safety culture of New Zealand businesses.

The Act contains a range of new terms and concepts that we are busy upskilling clients on so that you are all ready come April 2016.

The legislation establishes different duty holders: Person Conducting a Business or Undertaking (PCBU); Directors and Officers; Workers; Other persons. It further introduces a positive obligation on the different duty holders to work together to manage risks in the workplace. A person may fit into more than one category (for example, be both a Director and a worker) and therefore, will have multiple duties. Where there are overlapping obligations, each duty holder retains his/her responsibility and a duty holder cannot contract out of his/her responsibilities.

The new law replaces the current duty to take "all practicable steps" to ensure health and safety with the concept of what is "reasonably practicable". This means what "is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters". What a business needs to do with regards to health and safety will therefore depend on the business' risk, control and size.

A duty of "due diligence" is also introduced in the new law and places a positive duty for "Officers" to actively engage in health and safety matters and ensure compliance. "Officers" will include people in senior governance roles, who exercise significant influence over a PCBU's management (e.g. a Chief Executive, director, board member or partner). There is no corporate manslaughter provision despite this having been proposed some months ago.

The need for employee engagement and participation in work health and safety matters is strengthened in the new law, emphasising that everyone in the workplace is responsible for health and safety. Engagement simply means talking and listening and may include topics like identifying hazards and risks and making changes to work practices that affect health and safety.

Health and safety representatives will be required in "high risk" industries such as forestry and mining. What is considered "high risk" is yet to be confirmed by Government Regulations but as you may be aware from recent media reports, most types of farming will be able to claim an exemption.

The new law will replace the existing Health and Safety in Employment Act 1992 and the Machinery Act 1950. There are also related amendments to employment, ACC and hazardous substances legislation.

Until April 2016, all existing health and safety laws remain applicable. We are currently working with clients to ensure that their policies and practices are up to speed in preparation for April 2016.

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