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EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

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NEWS

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We'll keep this introduction brief as there is a lot to talk about in terms of developments in employment law, in the accompanying articles, and it is better that your attention is focussed on those.

We continue to be kept busy by some of the most interesting current cases in the jurisdiction and have recently welcomed to our staff, Sarah Ongley. Sarah comes to us from a civil litigation firm, with a strong background in civil litigation, medico legal and health and safety. She has a particular interest in employment law and we're delighted she has come to work with us, and our clients.

All going according to plan, we will squeeze in one more newsletter before Christmas!

IN THIS ISSUE:

Court of Appeal significantly extends obligations of good faith for employees

*

Working Group on Pay Equity Principles

*

Employment Relations Authority increases daily tariff for costs recovery

*

Payroll compliance

Court of Appeal significantly extends obligations of good faith for employees

In a recent decision of ASG v Hayne the Court of Appeal stated that the failure of an employee to tell his employer that he was facing criminal charges which involved behaviour which was relevant to his employment duties was a breach of his obligation of good faith.

This was the case even though he was discharged without conviction and his name and the details of his offending were suppressed. We see this case as being a significant expansion of the duty of good faith for employees, particularly in situations of alleged criminal conduct.

ASG was employed by Otago University as a Security Officer. As a result of a domestic incident, he was charged with wilful damage and assault. When he appeared in the District Court he pleaded guilty to the offences, but was granted a discharge without conviction, and a non-publication order was made. This occurred because the District Court Judge agreed that there was a strong possibility that ASG could lose his job.

However, a representative of the University was in Court that day and noted down what he heard. He then took legal advice which said he could communicate the information he heard to the University because it had a legitimate interest in knowing about the details which could be relevant to ASG's job. The University subsequently commenced a disciplinary process which led to ASG being suspended and later receiving a final written warning.

After earlier hearings in the Employment Relations Authority and the Employment Court, the Court of Appeal held that it had "no doubt" that ASG should have disclosed his pending criminal charges to the University. The Court also said that even though ASG did not disclose these facts, the University was entitled to act as it did and the representative disclosing the information to the University was not a breach of the non-publication order. The Court said it was not a "publication" because "publication" meant dissemination to the world at large not provision of information to people who had a "genuine interest" in knowing the information.

The Court said that the University had a "genuine interest" in knowing about the information so that it could consider whether ASG was able to continue to perform his role, and in doing so would not undermine the University's trust and confidence in him.

We understand ASG has filed an application for leave to appeal to the Supreme Court, so it may be that this is not the last word on the issue.

However, the case does show that employees may well be required to inform their employers about pending criminal matters if the criminal matters involve behaviour which could genuinely impact upon their ability to do their job or undermine their employer's trust and confidence.

What it also shows is that if an employer has any doubt about the scope of a non-publication order it is essential to get legal advice to ensure that it isn't breached.

WORKING GROUP ON PAY EQUITY PRINCIPLES

IN OCTOBER 2015, THE GOVERNMENT SET UP THE JOINT WORKING GROUP ON PAY EQUITY PRINCIPLES ("THE WORKING GROUP") TO RECOMMEND TO THE GOVERNMENT, PRINCIPLES THAT PROVIDE PRACTICAL GUIDANCE TO EMPLOYERS AND EMPLOYEES IN IMPLEMENTING PAY EQUITY FOR FEMALE DOMINATED WORKFORCES WHERE THE WORK MAY HAVE BEEN SYSTEMATICALLY UNDERVALUED (SUCH AS NURSING AND CHILDCARE).

This was sparked by the Court of Appeal decision in Terranova v Service and Food Workers Union (SFWU) and Bartlett (the Terranova Case), that we reported on in our April 2015 newsletter, which confirmed that "equal pay for women, for work predominantly or exclusively performed by women, is to be determined by reference to what men who would be paid to do the same work, by removing the skills, responsibilities, conditions and degrees of effort as well as any systematic undervaluation of the work from gender discrimination.".

The Working Group has now made several recommendations to the Government on the processes and principles which should be used when resolving pay equity issues. The recommendations are currently being considered by Ministers but in summary, the main elements are:

1. Determining the merit of a pay equity claim involves consideration of whether the work is predominantly performed by women and subject to systemic undervaluation;
2. Employers receiving claims will be required to notify other employees who may also be affected;
3. Once accepted as a pay equity claim, the parties will bargain to resolve the claim using the existing good faith bargaining arrangements under the Employment Relations Act 2000;
4. Good faith bargaining will be guided by pay equity principles including an assessment of the skills, responsibilities and conditions of the work;
5. An examination of the work and remuneration of appropriate comparators may include male comparators performing work, all or aspects of which, involve skills, responsibilities and conditions which are the same or similar to the work being examined;
6. If parties reach an impasse in any aspect, either in assessing whether the claim is a pay equity claim or during the bargaining itself, they will be able to use the existing dispute resolution processes including mediation and determinations in the Employment Relations Authority;
7. The Employment Relations Authority will be able to make determinations to fix provisions in employment agreements, including pay.

If the Government implements the Working Group's recommendations, industries such as nursing and early childhood care will be affected. Pay equity claims are likely to be complex and expensive to resolve, possibly making the resolution of such claims, prohibitive. The Working Group has recognised this and has suggested that the Government consider training support agencies involved in the process to ensure there is support in resolving pay equity claims.

EMPLOYMENT RELATIONS AUTHORITY INCREASES DAILY TARIFF FOR COSTS RECOVERY

The Employment Relations Authority has recently issued a Practice Note which increases the "daily tariff" for recovery of legal costs for a successful party to $4,500 for the first day of an investigation meeting. Any subsequent days are set at $3,500.

In the normal course of events, where a party has been successful in their case in the Authority they are entitled to receive from the unsuccessful party a contribution to the legal costs that they have incurred.

The Authority's long standing practice has been to impose costs with reference to the "daily tariff", and then adjust the amount up or down depending on a range of factors like a person's ability to pay. For a number of years this has been set at $3,500.

However, for matters lodged in the Authority from 1 August 2016 onwards, the daily tariff is now $4,500 for the first day of an investigation meeting and $3,500 for any subsequent days. The Authority will still consider applications to increase or decrease the amount depending on the circumstances of the case.

As it is a "contribution" to legal costs, rarely does the daily tariff fully recompense the successful party for what they have actually spent, except in the most simple of matters. However, we are pleased to see that the Authority has recognised that litigation can be expensive, and provided for higher awards for successful parties.

Payroll Compliance

The Ministry of Business, Innovation Employment (MBIE) is continuing to take a tougher approach to non-compliance with employees' pay. Despite MBIE's own payroll compliance issues (errors that affect more than 700,000 government employees, at an estimated cost of around $2 billion NZD), it has made a high number of prosecutions against employers in 2016.

The cases being reported generally relate to the underpayment of wages and holiday pay entitlements for more vulnerable employees (e.g. those remunerated on the minimum wage, young and migrant employees). However, Labour Inspectors can (and do) carry out industry and geographically specific audits. Now is therefore an opportune time to ensure that your employees' pay is compliant.

The greatest non-compliance risk for employers is generally where employees have fluctuations in the hours they work, or receive additional pay on top of their normal wages, such as for shift work or commission payments. It is easy to miss out additional hours or a special payment and for this reason alone, it is critical to maintain accurate time and wage records. (Note also that maintaining time and wage records is a legal requirement for employers anyway).

Where there is an error in an employee's ordinary pay, leave payments (such as annual leave and sick leave) will also be affected. Calculating leave is not straightforward, and although the Holidays Act was introduced in 2003 with the objective of simplifying the law, many people (including many employment lawyers), find the current law complex and confusing. Ensuring that your payroll system is correctly set up is therefore critical.

If an employee complains that they have been incorrectly paid, it is worthwhile investigating the matter sooner rather than later. We also suggest that you seek specialist advice if you are uncertain about your response. Unremedied errors can cumulate into significant sums of money over time.

If you are faced with a visit from a Labour Inspectorate, as a result of a complaint or one of MBIE's targeted audits, it is important to know that the powers vested in Labour Inspectorates are wide-ranging. Their job is to ensure employer compliance with minimum employment standards and they can enter the workplace and interview employees, and request information such as pay records. Where a breach is identified, a Labour Inspectorate has tools to enforce remedies such as payment of arrears of wages owing. For more serious breaches (where rights or entitlements have been breached repeatedly or blatantly), a Labour Inspectorate can issue penalties, publicise the case and even take steps to ban employers from the labour market. Recently MBIE also released the names of the companies that its Labour Inspectorate has investigated for breaches.

Employee pay can be complicated but it is critical to get it right. The MBIE website has a host of resources to assist employers. If you are still in any doubt whether you or your employees' pay is correct, we suggest that you seek specialist advice.

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