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EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

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NEWS

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The festive season is upon us once again. It is traditionally a busy time of year for employment lawyers as many employer clients try to resolve employment issues in the hope of a fresh start in the New Year. Not to mention, unforeseen issues arising from Christmas parties, dealing with holiday pay questions and everything in between!

While we will inevitably be working hard up until the last minute, the truth be told, we wouldn't have it any other way. We love working with our loyal clients, developing a real understanding of your businesses and issues, and helping you prosper.

However you chose to spend the festive season we wish you a relaxing break and look forward to working with you again in 2017 *(and if that isn't soon enough, we will have staff on call to meet any urgent needs over the break).*

IN THIS ISSUE:

Shift work, and the unintended consequences of the hours of work legislation changes...

THE GOVERNMENT ATTEMPTED TO DEAL WITH THE "ZERO HOURS" CONTRACTS ISSUE BY PASSING LEGISLATION WHICH CAME INTO FORCE ON 1 APRIL 2016.

The legislative change does not make casual employment unlawful, as an employee in casual employment is entitled to accept or decline any work offered. However, the new legislation is intended to address employment agreements which say an employer is not required to offer any hours of work, but say the employee must accept them if they are offered. This sort of employment agreement is what is colloquially known as a "zero hours" contract, although there is no legal definition of a "zero hours" contract.

The new legislation applies to all employment agreements entered into after 1 April 2016. The new rules apply to existing employment agreements from 1 April 2017 and to existing collective agreements once they are renegotiated.

The legislation essentially does away with "zero hours" contracts. It still permits an employer to require employees to accept work the employer makes available, but employers wishing to do this must have an availability provision.

An availability provision basically means a provision requiring an employee to accept hours of work offered by an employer where the employer is not required to offer those hours of work. If the employee may decline the hours of work offered, no availability provision is needed.

An availability provision may only be included where there are genuine reasons, based on reasonable grounds, for including such a clause in an employment agreement.

Further, an availability provision may only be included in an employment agreement that sets out minimum, guaranteed hours of work and should only apply to hours of work over and above those minimum, guaranteed hours of work. The availability provision must also provide for reasonable compensation for the employee being available.

There is a list of factors to take into account in determining whether there are genuine reasons, based on reasonable grounds, for including an availability provision and to determine what reasonable compensation is. There is no definition of reasonable compensation.

If an employee's employment agreement does not contain an availability provision, an employee may refuse work over and above the minimum, guaranteed hours of work and an employer can't discipline the employee or take other action.

There are also new rules in respect of cancelling shifts. If an employee undertakes shift work, an employer may not cancel a shift without giving the employee reasonable notice of the cancellation, or without paying reasonable compensation if notice is not given. What constitutes reasonable notice and reasonable compensation depends on the circumstances, but must be set out in the employee's employment agreement.

There is a definition of *"shift work"* provided. A *"shift"* means a period of work performed in a system of work in which periods of work are continuous or effectively continuous; and may occur at different times on different days of the week.

Unfortunately, the new legislation is quite unclear in parts, so the courts will no doubt be kept busy trying to interpret what the legislators meant. If you need advice about interpretation in the meantime, please let us know.

COURT OF APPEAL CLARIFIES EMPLOYER OBLIGATIONS IN DISCIPLINARY PROCESS

In a recent decision of *A Limited v H* the Court of Appeal has clarified what is expected of an employer when conducting a disciplinary process.

This case involved a pilot who was dismissed for serious misconduct. His dismissal followed a complaint by a junior flight attendant that the pilot had touched her in a sexual manner while the crew were staying over at a foreign destination. The pilot had said that the touching was inadvertent, but the company rejected that response and determined on the basis of credibility that the alleged touching had occurred.

The Employment Court found a number of flaws in the process followed. The Court appeared to suggest that transcripts of all interviews with relevant witnesses were required, that all individuals needed to be interviewed in person, and each aspect of the complainant's contradictory account (not simply the "gist") needed to be specifically put to the employee for comment.

In granting leave for the matter to be heard, the Court of Appeal suggested that the Employment Court had appeared to require from the employer something akin to a "judicial inquiry".

Helpfully, the Court of Appeal has rejected that "judicial inquiry" type of approach. The Court confirmed that each witness is not required to be questioned in the same way or to the same level of detail. The Court emphasised that there can be a variety of ways of an employer achieving a fair and reasonable process and outcome.

This also means that no one standard approach was required in terms of the interviewing or recording techniques adopted by the employer. More particularly, the Court emphasised that every aspect of the complainant's account which was inconsistent with the employee's account did not need to be put to each witness for comment. The Court determined that it was sufficient for the essence of the accounts to be put to the witnesses, particularly in circumstances where each were clear about the general nature of the conduct involved.

Ultimately, the Court stated that the overall fairness and reasonableness of the process was to be considered, rather than subjecting it to "minute and pedantic scrutiny".

This meant that the employee's reinstatement was set aside and the Employment Court must now determine the proper remedies for the dismissed employee (if any).

Making sure you're paying Christmas Holidays correctly

WHATEVER YOUR COMPANY, THERE ARE ALWAYS DIFFERENT STAFFING AND PAY CONSIDERATIONS OVER THE HOLIDAY BREAK WHERE FORWARD PLANNING IS REQUIRED.

Holiday workers

For employers that need extra staff over the holiday season to deal with high demand, it is important that those employees have the correct type of employment agreement in place so that minimum employment requirements are covered off.

If an employee is only needed for the holiday period (and will be employed consistently during that time), a fixed term employment agreement is likely to be the most suitable. The agreement will need to specify the term of the agreement and the reasons why the employment is just for a fixed term (e.g. to cover

increased demand over the Christmas season). If there is no expectation of ongoing employment and the employee is only to be employed on an as and when required basis, then a casual employment agreement is likely to be the most suitable type of agreement.

In both cases, you will need to consider whether the employee should be paid annual holiday entitlements (8% of gross weekly earnings) on a paid as you earn basis (recommended for casual workers) or at the end of their employment term (if less than 12 months). This will need to be agreed and specified in their employment agreement.

Public holidays

This holiday season, both Christmas Day and New Year's Day fall on a Sunday. Over Christmas and New Year, where a public holiday falls on a Sunday and the day would not otherwise be a working day for an employee, the public holiday must be treated as falling on the following Tuesday. If the Sunday would otherwise be a working day for the employee, the public holiday must be treated as falling on that day.

If you need your employees to work on a public holiday, they must be paid the greater of:

- The portion of that employee's relevant daily or average pay that relates to the time actually worked on the day, less any penal rates, plus half that amount again; or
- The portion of that employee's relevant daily pay that relates to the time actually worked on the day, including penal rates.

In addition to the above, where the public holiday falls on a day that would usually be a working day for the employee, they are also entitled to a day in lieu.

The trials of trial periods

The decision of the Employment Relations Authority in a series of cases involving Lighthouse ECE Limited attracted significant attention as it involved a dismissal during a trial period being held to be unjustified. This was because the ERA Member held that the wording of the trial period was deficient and therefore that the employer could not rely on the trial period.

In that case, the trial period clause simply stated *"A trial period will apply for a period of ninety (90) days..."* While it was stated elsewhere when the employment commenced, the two were not linked and the Authority Member found that the wording of the trial period did not meet the statutory test provided in section 67A(2) of the Employment Relations Act 2000, that a trial period means a written provision in an employment agreement that states or is to the effect that for a specified period not exceeding 90 days, starting at the beginning of the employee's employment, the employee is to serve a trial period.

The employer argued that the clause was "to the effect that" the trial period applied for 90 days starting at the beginning of the employee's employment but the Authority disagreed. It found that the wording used did not reasonably imply that the 90 days started on the first day the employee started work for the company.

Some advisers are suggesting that a trial period provision must contain an actual start date. The risk of that approach arises if the employee doesn't commence (for whatever reason) on the specified start date; does that invalidate the trial period? In our view, a trial period which provides that it commences on the day the employee commences work is sufficient to comply with the legislation and is practical enough to leave open the possibility of an employee's start date changing at short notice.

This case is a useful reminder that special care must be taken with trial periods and their wording. Their use has serious consequences for employees and the Authority and Court have demonstrated that they will be interpreted narrowly and in favour of the employee where there is any ambiguity.

We're more than happy to advise if you aren't sure if the trial period wording your business is using complies, or if you want to make sure you can rely on a trial period.

sbm

SBM Legal Barristers & Solicitors

52 Broadway, Newmarket, Auckland 1023
PO Box 7120, Wellesley St, Auckland 1141
New Zealand | **www.sbmlegal.co.nz**

P: 09 520 8700
F: 09 520 8701

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