sbop

ISSUE 25

NEWS

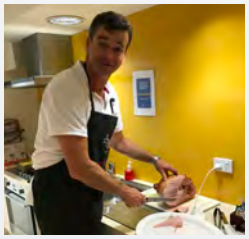
JULY 2017

EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

Hard to believe we're over halfway through the year already. The Lions are here to play the All Blacks, Emirates Team New Zealand have just won the America's Cup and there's a general election looming in September.

We have been involved in litigation regarding hours of work, medical incapacity, holiday pay, discrimination and the requirement to raise a personal grievance within 90 days. Less "legal" in focus, we have cooked dinner for 80 people twice at Ronald McDonald House and have also sponsored the award for most Sustainable Newmarket Business as part of the Newmarket Business Awards. The nominees for the award were Les Mills Newmarket, Lush Cosmetics and Wise Cicada and it was won by Wise Cicada.

The decision to support Ronald McDonald House through its weekly meal programme was an easy one, with the organisation already receiving support from a number of our clients: McDonalds, Farmers and ASB Bank. We were extremely grateful for the support of another client, Van Den Brink Poultry, who supplied not only enough chicken for one meal for 80, but in fact for two meals, which led us back a second time. Penny's experience feeding her two water polo playing boys and their respective teams came in useful, as did the ever reliable organisational skills of our infallible Office Manager Deborah Jensen (and temp receptionist Olivia Jensen before she left us bound for Germany). It was a great team building exercise setting the menus, cooking for 80 people in two hours and then serving. It was also a humbling experience as you appreciated just how difficult life must be for families with children in Starship, be it short or long term. If you are considering a team building event or a social contribution, we highly recommend it and are happy to answer any questions. Safe to say you won't be seeing any of us on Masterchef any time soon. I think we'll stick to the law! We also welcomed Hannah Keenan, our new receptionist, in May.



IN THIS ISSUE:

The Employment Relations (allowing higher earners to contract out of personal grievance provisions) Amendment Bill

A bill is being considered by Parliament which would allow higher income earners to contract out of the personal grievance provisions of the Employment Relations Act 2000 ("the Act").

If the Bill passes, it would mean that employees who earn a gross salary over $150,000 would be able to contract out of the personal grievance provisions. For employers, it would remove the risk of costly personal grievance claims. The ability to contract out, would need to be on terms agreed to by the employee.

For any contracting out arrangement to be enforceable, the Bill provides that:

- The agreement must be in writing;
- The employee must have had independent legal advice; and
- The lawyer who gave that advice must have certified that he/she explained the effect and implications of the term and witnessed the employee's signature.

The idea behind the Bill is that it well paid senior executives are not vulnerable workers that need the government's protection. Allowing for pre-agreed and negotiated exit arrangements for those employees who are skilled enough (as the National Government sees it) to command a high salary recognises that those employees should be capable of negotiating agreements themselves.

In our view, the Bill would likely create a situation where higher earners are better able to receive and negotiate large "golden handshakes", whereas other employees are effectively restricted in terms of the compensation they can receive under the Act.

As the Bill stands, it would not only prevent personal grievances for unjustified dismissal, but also claims for unjustified disadvantage including grievances for discrimination and harassment. Arguably, it allows an employer to contract out of basic human rights. This is different from the equivalent legislation in Australia which prevents higher earners from bringing claims for unfair dismissal but does not prevent claims for discrimination.

The Bill has now passed its first reading in Parliament.

EMPLOYMENT COURT CLARIFIES EMPLOYER OBLIGATIONS IN MEDICAL INCAPACITY CASES

IN A RECENT DECISION, THE EMPLOYMENT COURT PROVIDES CLEAR GUIDANCE ON THE STEPS AN EMPLOYER MUST TAKE WHEN TERMINATING EMPLOYMENT OF A LONG TERM SICK OR INJURED EMPLOYEE. SBM LEGAL ACTED FOR THE EMPLOYER IN THE CASE, THE WAREHOUSE LIMITED, AND WAS SUCCESSFUL IN SHOWING THAT THE COMPANY'S PROCESS AND DECISION TO DISMISS THE EMPLOYEE WERE JUSTIFIED.

It has long been that an employer can "fairly cry halt" to a person's employment where they can't attend work due to sickness or injury. But the questions are often when? And how? The Court has confirmed that an employer is not obliged to keep a job open indefinitely, no matter how long an employee has been employed or how large the employer's business is.

The Court has said that the following matters will need to be taken into account and considered as part of the obligation to act as a fair and reasonable employer:

- An employer must give the employee a reasonable opportunity to recover.
- An employer can't, at the first suggestion that an employee might be absent for a while, seek to terminate employment. But an employer is entitled to have regard to its business needs in deciding an appropriate response to the situation and any applicable timeframes.
- There isn't a fixed amount of time that has to be allowed and what is a "reasonable" amount of time will depend on a number of factors. This will include the terms of the employment agreement, any relevant policy, the nature of the position held by the employee and the length of time they have been employed. Paid sick leave entitlements under the Holidays Act, and whether those have been exhausted, will also be relevant.
- An employer must undertake a fair and reasonable inquiry into the "prognosis" for a return to work. This means trying to find out when an employee might return to work and in what capacity, and what sort of adjustments might need to be made.
- The Court says that this will likely involve seeking and considering relevant medical information. Having a provision in employment agreements requiring employees to be examined by a medical practitioner nominated by the company and allowing that information to be viewed by the employer will make this obligation easier to comply with.
- An employer will be expected to explain why it wants that information, and what might happen once it gets the information (i.e. the possibility of termination of employment). The employer will be expected to provide the employee with an opportunity for input and comment about this request for medical information and the process.
- As well as considering the medical information, the employer must fairly consider what the employee has to say before terminating their employment.
- Throughout such a process, an employee is required to be responsive and communicative. This means providing information when requested, attending meetings and engaging with attempts to return to work. This is part of the employee's duty of good faith.
- Ultimately, any contractual requirement (for example, notice requirements) will need to be complied with in terminating the employment as well.

As always we recommend seeking advice on the particular factual situation your organisation is dealing with. But in the meantime, an employer following this guidance is going to be well placed to make good decisions about whether a person's employment should or should not be terminated, and also well placed to defend personal grievance claims by employees following termination on the basis of medical incapacity or frequent or long term absence.

Unable to reach an agreement?

A recent news article reported a union and an employer were still bargaining for a collective agreement 3½ years after bargaining commenced. FIRST Union and a Dunedin Mitre 10 store are still unable to agree on a collective agreement, even though collective bargaining was initiated on 18 October 2013.

Momentous events have occurred in the time since bargaining commenced. The Irish beat the All Blacks, there was an Ebola epidemic, a robotic spacecraft landed on a comet, Malaysian Airlines flight 370 went missing and then there was Brexit and Donald Trump became President of the United States of America. Viewed in that context, 3½ years is an incredibly long time to bargain without settling a collective agreement.

Which raises the question: what can parties do to bring bargaining to an end? There are legal avenues available to unions and employers to bring bargaining to an end one way or the other, and the example of FIRST Union and the Dunedin Mitre 10 provides a useful case study.

The first and most obvious way to end collective bargaining is by signing a collective agreement. This usually involves a process of compromise and good faith bargaining. This is how most collective bargaining is resolved.

Sometimes, a bit of a push is needed in the form of industrial action. This can either be industrial action by the union, known as a strike, or industrial action by the employer, known as a lockout.

Mediation is also a good way to break deadlocks in collective bargaining. However, MBIE mediations dealing with collective bargaining are not confidential and without prejudice, unless the parties expressly agree they should be.

If mediation fails, parties having serious difficulties in concluding a collective agreement may seek a reference to facilitation from the Employment Relations Authority ('the Authority'). Facilitated bargaining is bargaining supervised by the Authority itself. There are some threshold tests before a reference to facilitation may be accepted. One of these is that bargaining has become unduly protracted, and extensive efforts, including mediation, have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement.

If a reference to facilitation is accepted, the parties meet in private with a different member of the Authority (to the member that made the referral decision) to try to conclude a collective agreement. The parties must participate in the facilitation process in good faith.

Having said that, to some extent the Authority is a bit of a toothless watchdog in this process, as while it may make recommendations to the parties about the provisions of the collective agreement the parties should conclude, those recommendations are non-binding; the parties are not obliged to adopt or follow them.

FIRST Union and the Dunedin Mitre 10 have been to mediation and facilitated bargaining. While the Authority has made recommendations about how the parties should settle the collective agreement, the parties are still unable to agree.

Generally speaking, a party to collective bargaining may not unilaterally declare that it is at an end. An Employment Court case in late 2015 between FIRST Union and the Dunedin Mitre 10 reaffirmed this principle.

However, in March 2015 the Employment Relations Act 2000 was amended to provide a statutory process by which a party to collective bargaining may seek a declaration from the Employment Relations Authority that bargaining is at an end. If the Authority determines bargaining is at an end, no further collective bargaining between the parties may be initiated for a period of 60 days.

This law was enacted after the protracted dispute between the Ports of Auckland and the Maritime Union, which ran from 2012 to 2015.

In reality, the party seeking a declaration bargaining is at an end will be the employer. If bargaining is at an end, industrial action is unlawful except on the grounds of safety or health. A declaration that bargaining is at an end would allow an employer to stave off a strike.

This process is not available if the party seeking a declaration bargaining is at an end has breached the duty of good faith during the collective bargaining. Accordingly, when employers seek declarations that bargaining is at an end unions will likely use allegations of breaches of good faith against the employer as a shield to continue bargaining.

There have not yet been any cases where a party has successfully sought a declaration bargaining was at an end.

Finally, if a party to collective bargaining commits a serious and sustained breach of good faith in collective bargaining, the Authority has the power to fix the terms of the collective agreement. This law has been on the statute books since December 2004 but it has never successfully been used. It is a significant departure from the general rule that the role of the Authority and Employment Court is not to fix terms and conditions of employment. This rule has existed since the enactment of the Employment Contracts Act 1991 and the abolition of arbitration.

In reality, the best way to conclude collective bargaining is for the parties to sit down and nut out a deal that suits both of them. The parties are better off focussing on the substantive issues rather than legal arguments. The longer bargaining drags on, the more difficult it is to get a deal.

While it is important for employers and unions to be mindful of their legal obligations and to comply with the technical, legal requirements of the bargaining process, unnecessary legalisation of the bargaining itself can increase costs for the parties and distract them from the real issue, which is terms and conditions of employment rather than legal rights and obligations.

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

L&E GLOBAL