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NEWS

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EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

Spring has sprung (finally!), the election is just around the corner and we have set the date for our client seminar (01 November – mark it in your calendars, invitations will follow).

We've been busy as you will see from the case law update, arguing cases and developing the law. Kathryn has been particularly busy chairing the NZRU's Respect and Responsibility Panel, which issued its Report this month.

Like you, we are waiting in anticipation for the election which is likely to result in some changes and developments in employment law.

If you have questions or concerns, don't hesitate to get in touch.

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What the election could mean...

It's election year and changes of government often bring changes to employment relations law. While employment relations law has been relatively stable in New Zealand in the 21st century, there is traditionally a stark divide between the employment law philosophies of our two main political parties.

However, the current National Government has largely kept the Employment Relations Act 2000 intact, and has uncharacteristically enacted a more rigid system for the enforcement of minimum entitlements, passed new health and safety laws and enacted stricter controls around working hours. It has also increased the minimum wage regularly.

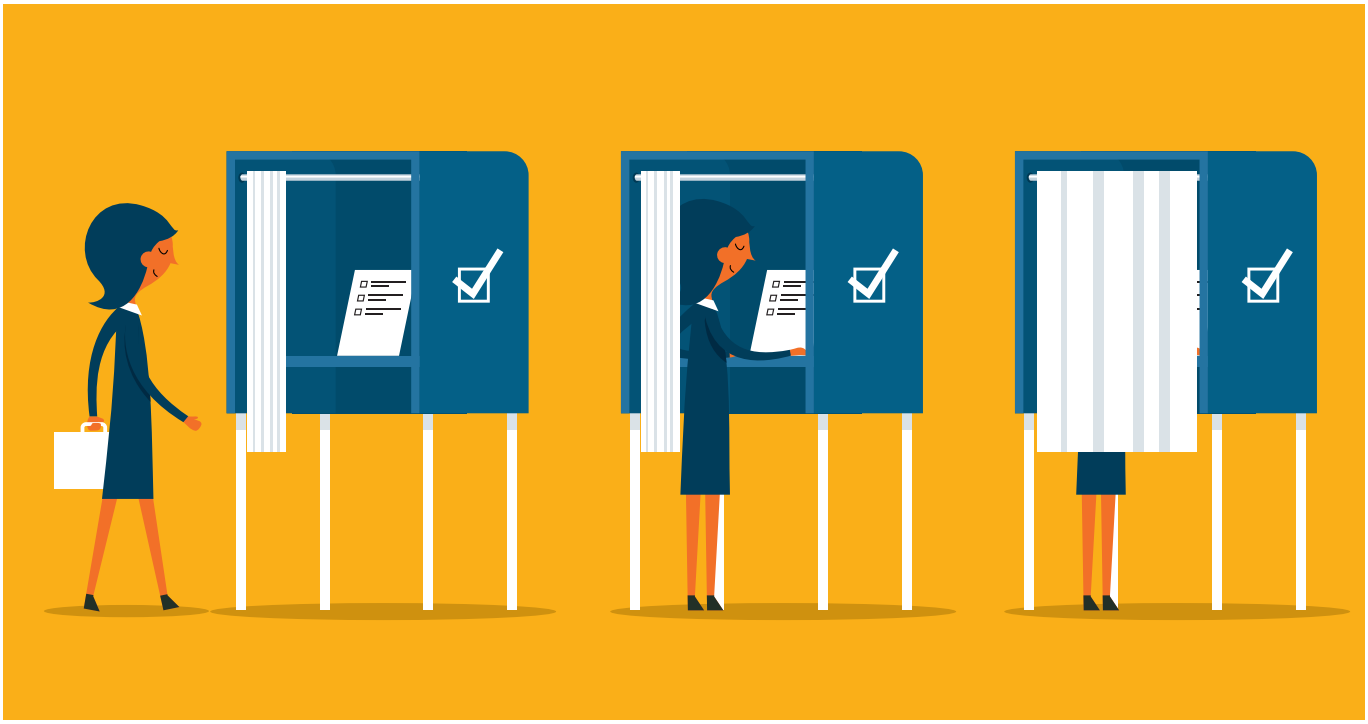
So, what are the various political parties saying they'll do if elected? Would a Labour-led Government really create that much of a change? What if the evergreen Winston Peters becomes king-maker? What if ACT sweeps to power buoyed by the good people of Epsom? What if Colin Craig rises zombie-like from political oblivion?

Likely with Labour...

Labour has pledged to increase the minimum wage to $16.50, and to keep increasing it to two-thirds of the minimum wage *"as economic conditions allow"*. That allows it a lot of wriggle room in its policy. In essence, Labour's policy is not too different to what is currently occurring. The National Government usually increases the minimum wage by 50c each year and it sits at roughly 50% of the average wage at the moment.

More significantly, Labour's policy is to pay all "core" public service employees at least the living wage. The living wage in New Zealand is currently $20.20 per hour. It is not clear when this would take effect from. It is also unclear what a "core" public sector employee is, nor how many core public sector employees are currently paid below the living wage. Labour has said its policy would cost $15m, and this is presumably a per annum figure. We assume the policy applies to both central and local government, as both are part of the public sector.

Such a policy could have the effect of increasing wages across the board, as private sector employers may need



to match public sector rates in order to attract staff. Also, public sector workers on higher pay may see a pay boost to maintain relativity.

Labour says it will double the number of labour inspectors to 110 at a cost of $9m per annum.

Labour will not do away with trial periods, but it will introduce a speedy, lawyer-free referee service to determine challenges to dismissals that arise under trial periods. In our view, it would be simpler to say that either trial periods exist or they do not. Under the referee system, remedies will be capped, but reinstatement will be available. While no detail has yet been released, this could restrict access to the courts and undermine the right to justice. A tribunal forced to make speedy decisions without lawyer involvement may get the wrong answer, and any restriction on appeal rights from the tribunal could saddle an employer with a reinstatement order that cannot be challenged. If the referee's powers were restricted to modest monetary remedies alone with restricted appeal rights, this could be more palatable, but it still undermines the whole concept of a trial period. It is also not clear how evidence will be heard and whether it will be under oath. Labour says this service will cost $4m per annum.

Labour has also pledged to introduce Fair Pay Agreements, which will comprise a common set of terms and conditions of employment applying to a particular industry. Labour says wages and conditions will be set by *"pay and experience"*, so wage increases based on length of service alone may be a feature of FPAs. Labour says, *"Negotiations on FPAs will begin once a sufficient percentage of employers or employees within an industry call for one. This threshold and the precise implementation of FPAs will be developed in government in consultation with all stakeholders."*

The devil is in the detail, and it is not clear how negotiations will be conducted, whether industrial action could occur in FPA negotiations, nor whether there will be an arbitration court that could make a final determination on an FPA. Also, it is not clear whether employer and employee agreement would be required to enter into FPA negotiations or whether FPA negotiations could be commenced unilaterally by employees. Finally, it is not clear whether employees who are not members of a union would have representation in FPA negotiations.

Without that detail, it is difficult to assess the impact FPAs will have, but the concept of an FPA is a reasonably significant departure from our current law, which provides for individual employment agreements or collective agreements. The concept of an FPA is certainly an interesting one worthy of debate.

Going Green...

The Green Party's industrial relations policy is quite comprehensive, and generally similar to the Labour Party's. Like Labour, it supports an increase to the minimum wage to 66% of the average wage, but without Labour's proviso of *"as economic conditions allow"*. It would also require all employees to be paid the minimum wage and abolish the starting out wage.

The Green Party appears to be the only party to directly address the issue of labour hire workers. It would create laws requiring labour hire workers to be employed on the same terms and conditions as directly employed employees and give them the right to transfer to the contracting employer if they work for it for 6 months. This is an emerging area of law, and the UK, the EU, Ireland, South Africa and the province of Ontario in Canada have recently enacted legislation dealing with this phenomenon in the gig economy.

The Green Party has a policy of industry standardisation of terms and conditions of employment, although it is not quite the same as Labour's FPA policy and refers to multi-employer collective agreements instead.

Oddly, the Green's policy says "Require employers to consider, in good faith, requests for flexible working arrangements from the parents of young children". A law

allowing this has been in place since 2008. In fact, the National Government even extended the ability to request flexible working hours to all employees.

Equal pay is another focus of the Green Party. The Green Party's website says one of its policies is to support an Equal Pay Amendment Bill. This is a private member's bill by Green MP Jan Logie. The bill failed on its first reading in May 2017 but presumably the party seeks to revive it if it's in the Government. The party says, *"This bill would require all employers to collect information about how much men and women are paid, to make it easier to find out where there is discrimination. Ensuring transparency around pay is an easy way to ensure women get paid fairly – this bill will make that a reality."* The Bill would require an employer to provide data about the pay and gender of employees doing the same type of work to any employee's representative on demand.

There is a risk the bill would create unnecessary compliance costs, as such information could already be obtained via the Employment Relations Authority or Employment Court to support any claim for discrimination before those judicial bodies. The Authority or Court would be better placed to ensure the confidentiality of such information. The bill may not really advance equal pay claims, particularly seeing as the recent equal pay case and settlement were not about gender discrimination by the same employer, but gender discrimination between industries.

New Zealand First...

New Zealand First says it will lift the minimum wage to $20 per hour over three years starting in 2018 with tax assistance for employers and abolish the starting out wage.

It also says it will "change laws that allow individuals to be employed on a permanent 'casual' basis". Given the recent legislative banning of "zero hours" employment agreements and the existing common law safeguards preventing employers from mischaracterising permanent employees as casual employees, this may not be that big of a change and such a law change seems unnecessary.

New Zealand First also says it will make hiring New Zealanders a priority and invest in training for them.

What actions will Act take?

ACT does not appear to have an industrial relations policy on its website, but it tends to take a very free market view of employment relations, including by calling for the abolition of the minimum wage and Employment Court. Any such policies are unlikely to be implemented, particularly given its minor role in Parliament. Such policies would also bring New Zealand out of step with international labour law norms.

Māori Party

The Māori Party says it will introduce a living wage and double the existing Māori and Pacific trade training and cadetships.

No change from National

The National Party does not appear to have a specific employment relations policy on its website, but presumably it would continue with the moderate approach of the past few years. We are unlikely to see a return to the days of the Employment Contracts Act 1991.

In summary, a Labour/Greens/New Zealand First coalition, should such a hydra occur, would probably increase the minimum wage and abolish the starting out wage, consider some method of industry standardisation of terms and conditions of employment, pass laws restricting irregular employment, and perhaps increase the pay of the lowest paid public sector employees.

The Conservative Party does not appear to have an employment relations policy either, but it would do well to consider strengthening sexual harassment laws given its former leader Colin Craig's behaviour. No matter what law changes occur, there is a consensus that writing bad love poetry to your employees is never a good idea...

Employment (Pay Equity and Equal Pay) Bill

IN APRIL 2017, THE DRAFT EMPLOYMENT (PAY EQUITY AND EQUAL PAY) BILL WAS RELEASED FOR CONSULTATION. THE AIM OF THE BILL IS TO ENSURE THAT FEMALE DOMINATED WORKFORCES ARE PAID CORRECTLY AND TO ADDRESS ANY IMBALANCE CREATED BY HISTORIC AND SYSTEMIC GENDER BASED UNDERVALUATION.

If implemented, the Bill would amend aspects of the Employment Relations Act 2000 and would repeal the Equal Pay Act 1972 to provide a set of guiding processes and principles to help employers and employees in making, assessing and resolving equal pay and pay equity claims in bargaining.

The Bill was proposed in response to the recommendations made by the Joint Working Group on pay equity principles. The Joint Working Group had been set up by the Government in response to the TerraNova pay equity case where female care workers claimed that their pay was undervalued compared to male workers with the same skill set in different occupations, and as a result of historical undervaluation and gender discrimination.

Essentially, the Bill would allow employees to make three types of claims; pay equity, equal pay and unlawful discrimination based on gender. The Bill then sets out the processes for resolving each type of claim.

In an equal pay claim, the claim will be made in the Employment Relations Authority and the employee can seek lost wages and other benefits.

Pay equity claims are more complex. The Bill provides that a pay equity claim has merit if the work is predominantly performed by females and there are reasonable grounds to believe the work has been historically undervalued and continues to be undervalued.

In terms of the process, the key features of a pay equity claim are:

- An employee may raise a pay equity claim with their employer;
- Upon receiving the claim, the employer must assess and determine the claim on its merits;
- The employer must acknowledge the claim within 7 days and notify other affected employees within 30 days;
- The employer's decision to refuse a claim can be challenged in the Employment Relations Authority and a penalty can be imposed;
- Where the employer accepts a claim, the parties must begin bargaining;
- The new Act will outline how to assess the work performed as compared to the work of comparable occupations. Such comparable work may include work performed by predominantly male workforces that is the same or substantially similar (or involves similar skills, experience, responsibilities etc);
- Where bargaining reaches an impasse, the parties can access the Employment Relations Authority's mediation services (including a determination on fixing the terms and conditions of employment).

Submissions on the Bill closed in May 2017. If the Bill passes, it is likely to generate some interesting cases assessing "comparable work" and could have a significant impact on female dominated industries.

CASE LAW UPDATE

The first Employment Court decision involving "availability" provisions has been released, in which McDonald's Restaurants was successful in showing that its individual employment agreements complied with the law. The case is *Fraser v McDonald's Restaurants NZ Limited* [2017] NZEmpC 95. Kathryn Beck and Tim Oldfield acted for McDonald's.

The case involved two McDonald's crew employees during a short period when they were employed on individual employment agreements. They argued that their employment agreements breached the law. Their claim was that McDonald's, in setting their rosters, had effectively required them to work additional hours beyond their guaranteed hours, without paying reasonable compensation. This was because the employment agreements said that McDonald's could "reissue your schedule at our discretion".

One difficulty with the employee's claims is that they could not point to any practice where McDonald's had required them, or anyone else, to work beyond their guaranteed hours. The Court found the operating practice was that employees would nominate periods when they were available to work, and then McDonald's would produce employee rosters (with no less than their guaranteed hours within those periods of availability). If McDonald's had additional hours which were available they would offer them to employees who had specified that they were available, but would not require them to do those hours. If an employee agreed to do those additional hours, then the roster schedule would be "reissued".

As a result, the Court concluded both that the employment agreements and McDonald's practice complied with the law regarding "availability" provisions.

The decision does not provide as much clarity as employers had hoped. However, it is useful for employers who are operating roster systems in a similar way to McDonald's, because it demonstrates that if an employer is not "requiring" work to be undertaken in addition to guaranteed hours then this will not amount to an "availability" provision.

Another recent decision of note is a decision of the Employment Relations Authority involving an attempt by a union to access a workplace not controlled by the employer. The case is *E Tu v Evergreen International LLC t/a Armourguard Security* [2017] NZERA Wellington 68. Don Mackinnon acted for Armourguard.

Following the tragic events at the WINZ office in Ashburton, the Ministry of Social Development increased security personnel at its WINZ branches. MSD contracted with Armourguard to have security guards present at these branches.

E Tu tried to access certain WINZ branches to speak to security guards, and sought consent from Armourguard to access the premises. Armourguard informed E Tu that it was unable to consent because it didn't have any control over who accessed those premises (because MSD did). MSD subsequently did not allow access. Armourguard offered E Tu alternative Armourguard offices where E Tu could speak to security guards. E Tu was not satisfied with those alternatives and brought a claim in the Authority alleging Armourguard had breached the access rules and sought penalties. It also alleged that MSD had aided Armourguard to breach the access rules.

The Authority accepted Armourguard's arguments that it could not grant access to premises which it did not control and as a result determined that Armourguard had not breached the access rules. This is an interesting case which has the potential to affect a number of workplaces where there are third party contractors present, and it is possible that the decision will be challenged to the Employment Court.

Finally, the Employment Court has provided clarity about notice requirements when employment is terminated during a trial period. The case is *Farmer Motor Group Limited v McKenzie* [2017] NZEmpC 98.

The employee had a valid 90 day trial period in his written employment agreement. The agreement said that the notice required during the trial period was 4 weeks, and the employer was entitled to pay the employee in lieu of all or part of the notice period.

Before the end of the trial period, his employer told him that his employment his employment was being terminated under the trial period, the dismissal was effective "immediately", and that he would be paid 4 weeks' salary in his final pay in lieu of him working those 4 weeks.

He alleged that his employer had not complied with the notice requirements of his trial period because by being told the dismissal was effective "immediately" he had been given "no" notice. The Court agreed. It confirmed that in order for a dismissal to comply with a trial period clause, any notice given must be in accordance with the agreement.

This is a subtle but very important point. You can still have a person's employment end on the basis of a trial period on the day notice is given, but:

- the amount of notice must be given to the employee (i.e. one week's notice if that is what is in the employment agreement); and
- the notice can then be paid in lieu of requiring it to be worked out (if the employment agreement allows that).

Alternatively, you can give the notice of termination and require the employee to work it out, it that is going to work practically by having the employee remain at work for that time.

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