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NEWS

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EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

AS ANOTHER SUCCESSFUL YEAR DRAWS TO A CLOSE we want to take this opportunity to share some more updates with you, but also to say thank you.

We have retained our Band 1 ranking with Chambers and Partners and we remain ranked as one of the leading employment law firms with Legal 500, the other leading international guide to law firm expertise. As part of the Legal 500 ranking, two of our Senior Associates Matthew McGoldrick and Timothy Oldfield have been recognised as "next generation" lawyers and Sarah Ongley is highly recommended. In addition, we have been selected as part of a limited and exclusive number of firms to provide legal services as part of the All of Government RFP for the supply of legal services to eligible agencies (broadly the public service, Crown and crown entities, SOEs and local Government agencies). This recognises the high regard in which the firm is held including not only the reputations of our established partners but our depth and variety of experience. We are all thrilled and justifiably proud of these results and we thank you for your contribution – we wouldn't be where we are without your work and the interesting legal issues you and/or your employees provide. We hope you will all get an opportunity over the festive season to spend time with loved ones, to relax and to look back on another successful year.

We look forward to catching up in 2018 but will be available over the break as required.

IN THIS ISSUE:

First sentences for breaches of new Health and Safety Law

The Health and Safety at Work Act 2015 has been in force since 1 April 2016, but it hasn't been until recently that cases have worked their way through the courts. However, it is clear that much higher penalties are going to be the norm from now on.

One case is *WorkSafe v Rangiora Carpets Limited* [2017] NZDC 22587. It involved an employee at work who fell from a mezzanine floor, which did not have a balustrade. She overbalanced and fell 2½ metres suffering many broken bones and a laceration to her hand.

The company was charged with "failing to comply with a duty that exposed a person to risk of death or serious injury". The maximum fine for a company for such a failure is $1.5 million. This is the middle level of offence; the highest being "reckless conduct exposing a person to risk of death or serious injury" (maximum fine $3 million); and the lowest being "failing to comply with a duty" (maximum fine $500,000).

Without any guidance on where exactly to set the fine, the Judge worked out the following levels of culpability:

CULPABILITY BAND	FINE
Low	$0 to $150,000
Low/Medium	$150,000 to $350,000
Medium	$350,000 to $600,000
Medium/High	$600,000 to $850,000
High	$850,000 to $1,100,000
Extremely High	$1,100,000 plus

The Judge said this conduct was on the cusp of the low/medium and medium bands, because it was easy to put in protection against falls from the mezzanine and any fall would obviously result in serious injury.

The starting point was set at $300,000 and ultimately after discounts for good conduct and a guilty plea the fine was set at $157,500. The Judge allowed this to be paid off over time.

Another case is *WorkSafe v Budget Plastics* [2017] NZDC 17935. The employee was loading waste plastic into a machine when one part caught in the machine and his hand was dragged into it. He lost most of the fingers on one hand.

The company was charged with the same offence as Rangiora Carpets. The machine wasn't properly guarded, didn't have emergency stop controls or any proper procedures for operation. The Judge said the failures were moderate and a starting point for the fine would be between $400,000 and $600,000. If it were not for the company's financial capacity, the fine would have been $275,000. As all the company could pay was $100,000 that is what it was fined.

These "culpability bands" have not yet been confirmed by the higher courts, but we suspect they are probably going to end up being the working model for fixing fines. That means substantial penalties for breaches of health and safety law can be expected.

Finally, at the time of this newsletter going to print, the District Court has sentenced a company director to 4½ months home detention for breaches of the old health and safety law. The sentence arises out of the death of a person who was welding at a waste oil storage facility and was killed in an enormous explosion. The breaches appear to be very serious, and that is likely why the director has been treated so severely. He was also fined $25,000 for breaching a prohibition on work on the site after the explosion. The company was fined $258,750 and ordered to pay reparation to the victim's family of $110,000.

Update on Government progress in making Employment Law changes

The new Government was sworn in on 26 October 2017 promising a number of changes to employment law.

Since then, the first change passed into law was the extension of paid parental leave from the current 18 weeks to 22 weeks from 1 July 2018 and 26 weeks from 1 July 2020.

In addition, there are a number of new policies that the Government has said it plans to implement within its first 100 days including increasing the minimum wage and specifying rest and meal break requirements.

Press releases from the Beehive have said that the minimum wage will increase from $15.75 to $16.50 on 1 April 2018. The Government has promised then to increase this to $20 an hour by 2020. In the election campaign, Labour said that it intended to keep increasing the minimum wage to two-thirds of the average wage "as economic conditions allow".

On 1 November 2017, further press releases said that the Government would withdraw the Employment (Pay Equity and Equal Pay) Bill that had been introduced by the National Government. It then said it would start working on new legislation that the Government considers adheres better to the principles set by the Joint Working Group on Pay Equity.

It isn't clear yet what the new legislation will look like, however, the purpose behind the changes is said to be to ensure that women in female dominated workforces have access to court processes to settle equal pay and pay equity claims, as well as having access to collective bargaining. In the meantime, we are aware of a number of pay equity claims that have stalled because of the uncertainty over what might happen with new legislation.

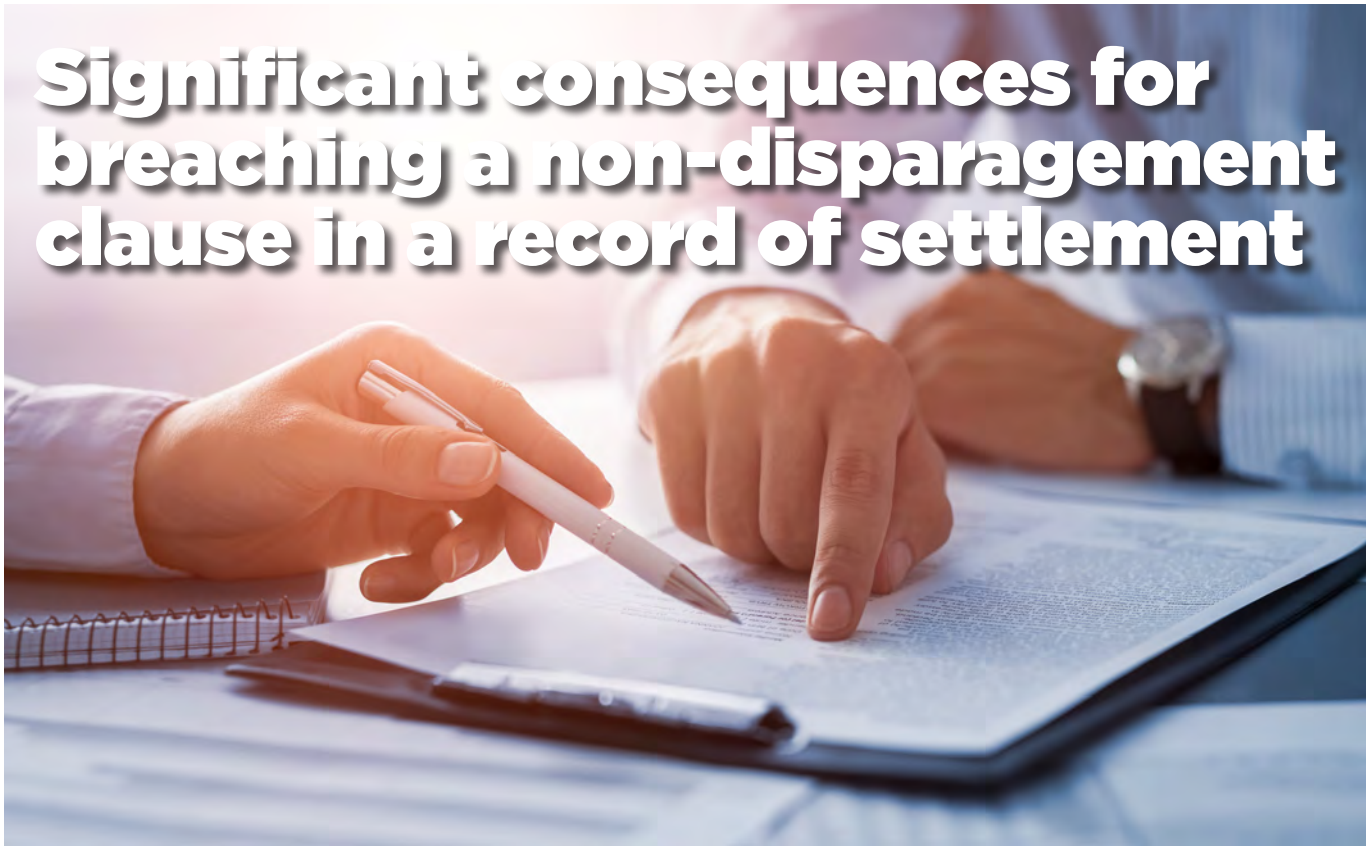
As a reminder on what might be coming, as part of the election campaign, as well as these items above Labour pledged to:

- pay all "core" public service employees at least the living wage (currently $20.20);
- double the number of Labour Inspectors to 110;
- introduce a "speedy, lawyer-free referee service" to determine challenges to dismissals that arise during trial periods; and
- introduce Fair Pay Agreements (FPA's).

It isn't clear when the Government plans to introduce FPA's, but this may be one of the more significant changes to employment law. FPA's are intended to comprise a common set of terms and conditions of employment applying to a particular industry. It still isn't clear yet how an FPA would be established and how exactly it would operate. However, Labour has indicated that a year would be needed to discuss the proposal with businesses and unions, so we may not hear much more about FPA's for another year.

Given the promises made during the election, the Prime Minister's mention of "restoring workers' rights" in her first speech and the swift changes already made to paid parental leave, it does appear that the new Government is committed to making serious changes in employment law. Employers will need to be aware of any upcoming changes so that they can be implemented quickly and easily when required.

Significant consequences for breaching a non-disparagement clause in a record of settlement



Employment disputes happen. For some, litigation is required. For those that get resolved, parties can agree to a "full and final" record of settlement under the Employment Relations Act 2000. Once signed off by a mediator, that type of settlement is not only "full and final", it cannot be cancelled.

Often parties agree in a settlement to a mutual "non-disparagement" clause. This basically means neither of them can say bad things about the other in the future. That doesn't mean they can't **think** bad things about the other person; but they just can't tell others about those thoughts.

But what happens when a party does something to breach that sort of clause in a record of settlement? Does the other party have any recourse? In addition to enforcing the terms of a settlement agreement, a party can seek to have penalties imposed. These penalties can be significant; up to $20,000 against a company and up to $10,000 against an individual.

In *Vice-Chancellor of Victoria University of Wellington v Sawyer* [2017] NZERA Wellington 106 the Employment Relations Authority ordered a former employee of the University to pay a penalty of $8,500. This arose out of the employee sending emails containing disparaging comments.

Dr Sawyer and the University entered into a record of settlement which included a mutual non-disparagement clause which also covered two individuals associated with the University. Dr Sawyer was alleged to have sent five emails containing allegations of serious dishonesty, professional incapability, professional impropriety, falsifying records, fraud and blackmail against the two individuals mentioned in the settlement.

The University sought the maximum penalty for each of the five breaches, totalling $50,000.

The Authority said there was a "clear need for punishment" to signal the Authority's disapproval and "to act as a disincentive for others who may be inclined to breach their record of settlement obligations". Among the factors considered, the Authority said the breaches were intentional and Dr Sawyer expressed no remorse. However, it imposed one overall penalty of $8,500 rather than five separate ones (and ordered $3,750 each to be paid to the individuals who were the subject of the disparaging comments and $1,000 to the Crown).

The Employment Court's recent decision in *Lumsden v Sky City Management* [2017] NZEmpC 30 is also noteworthy. In that case, a mutual non-disparagement clause was agreed to in a record of settlement. However, another clause was that, while Mr Lumsden's employment would end as a result of the record of settlement, he could apply for future jobs within Sky City.

The Court found that Sky City had breached the record of settlement by recording in its HR system "NO" to a question "Would it rehire" Mr Lumsden. And the comments in the HR system went on to say that his employment had been terminated due to "performance issues, complaints and attitude problems". This not only effectively prevented him from obtaining another job within Sky City, the comments were found to be disparaging.

Careful attention to the wording of non-disparagement clauses in records of settlement is needed, particularly as electronic communications and social media communications are the norm. And venting on social media, or failing to keep bad thoughts to yourself about someone you've agreed not to say bad things about can leave you in hot water.

Important decision on determining alternative holidays using "3 out of 4" rule

MEATLOAF SAID 2 OUT OF 3 AIN'T BAD. BUT WHEN IT COMES TO DETERMINING ALTERNATIVE HOLIDAYS, 3 OUT OF 4 COULD BE BAD.

That is the possible outcome of an Employment Relations Authority determination which directly affects when an employee becomes entitled to an alternative holiday for working on a public holiday (sometimes known as a day in lieu).

The case is *Wendco (NZ) Ltd v Labour Inspector* [2017] NZERA Christchurch 199. It involved the interpretation of the Holidays Act 2003 and dealt with the question of whether a particular public holiday would "otherwise be a working day" for employees.

The employer operates the Wendy's hamburger restaurants. Due to the nature of its business, it has a large number of employees whose working patterns are variable, so it is not always easy to determine whether the particular day of the week on which a public holiday falls would have been an employee's usual working day. A further factor was that employees would often request to swap shifts after the roster had been posted, so change of days was commonplace.

Wendy's therefore adopted a "3 out of 4" rule, which works like this: if the public holiday falls on a Monday and the employee worked 3 out of the last 4 Mondays, then the day would "otherwise be a working day" for the employee. It's an important rule because the consequence of working on a public holiday that would otherwise be a working day for the employee is that, in addition to receiving payment at the rate of time and a half for any hours worked on that day, the employee also accrues an entitlement to an alternative holiday. An alternative holiday is a whole paid day off (regardless of the number of hours worked) to be taken at a later date.

In this case, the employment agreement contained the "3 out of 4 rule", and Wendy's payroll system automatically applied the "3 out of 4 rule" to public holidays.

The Authority found the blanket application of the "3 out of 4 rule" wasn't good enough and could result in situations where employees received less than their minimum entitlements (including missing out on an alternative holiday).

Instead of applying the "3 out of 4 rule" automatically, the Authority said Wendy's needed to consider, on a case by case basis, all of the factors set out in section 12(3) of the Holidays Act before determining whether a particular public holiday would otherwise be a working day for a particular employee. The factors are:

- the employee's employment agreement;
- the employee's work patterns;
- any other relevant factors, including:
  - whether the employee works for the employer only when work is available;
  - the employer's rosters or other similar systems;
  - the reasonable expectations of the employer and the employee that the employee would work on the day concerned; and
- whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave, the employee would have worked on the day concerned.

The Authority's determination comes at a time when there has been significant scrutiny by MBIE's Labour Inspectors of Holidays Act compliance. Audits have been conducted of a large number of businesses throughout New Zealand. While this particular decision only affects Wendy's at the moment, it is likely the Labour Inspectorate and unions will try to extend its application to other employers who use the "3 out of 4 rule", or a similar rule of thumb to determine what is "otherwise a working day". Each case needs to be decided on its own merits, but the Authority's determination sets something of a precedent.

Of course, the decision might not be as significant as it may seem for all employers who use the "3 out of 4 rule". Whether or not the application of the factors set out in the Holidays Act will create a different result than the "3 out of 4 rule" will depend on all the circumstances applying to the employer and employee at the time the public holiday is worked. It could be that the result is no different in most circumstances or the liability is not as great as might be thought.

Nonetheless, employers who use a rule such as the "3 out of 4 rule" should consider and review their employment agreements, payroll systems and practices in light of this development. An assessment of whether a different result arises and what the potential liability might be could also be undertaken.

Labour hire workers and Uber drivers – are they employees and who employs them?

The question of whether or not a person is an employee is a fundamental one.

It has come into sharp focus with a decision of the Full Employment Court in *Prasad v LSG Sky Chefs NZ Ltd* [2017] NZEmpC 150 regarding contractors of a labour hire agency who worked at LSG Sky Chefs. Despite having contracts with the labour hire agency describing them as "contractors", those individuals were found to be employees of LSG.

The Employment Relations Act 2000 defines who is an employee. That is "any person of any age employed by an employer to do any work for hire or reward under a contract of service". The test for determining whether a person is an employee is "what is the real nature of the relationship between them"? In applying that test, all relevant matters must be considered, including any statement of the parties' intention, but must not "treat as a determining matter any statement by the persons that describes the nature of their relationship".

In *Prasad*, the labour hire agency (Solutions) initially engaged the workers as "independent contractors" and recruited them to work for the end user (LSG). The agency paid the workers after being funded by LSG for that purpose and after taking a margin for their services. The workers did not receive holiday pay or other employment rights, although they were paid the minimum wage. The workers were also paid less than the rates in the LSG collective agreement for their work.

After their initial recruitment, Solutions played no real part in the working relationship, other than paying the workers according to timesheets the workers filled out at LSG. LSG rostered the workers and had complete control over their hours of work. LSG could dismiss the workers and did dismiss one of them. Arrangements for leave were made with LSG. LSG controlled almost all aspects of their work and the workers were integrated into LSG's business.

Each worker worked exclusively for LSG for several years and the workers weren't placed on other assignments by the labour hire agency. Later on, when a Labour Inspector became involved, Solutions created a new company called Blue Collar and began paying the workers holiday entitlements. However, the Employment Court found this made no real difference to the real working relationship.

Based on these facts, the Employment Court found the real nature of the relationship between LSG and the workers was one of employment. It didn't matter that the workers were described as labour hire agency workers nor that they had signed contracts to that effect, because they were "in reality" employees of LSG.

There is every chance LSG may appeal this decision. In our view though, the decision in no way puts an end to the use of labour hire agency workers. It simply reinforces the need for employers to have in place rigorous systems and practices that minimise the risk the workers will be deemed to be their employees, as opposed to employees of the labour hire agency.

Another recent case from the United Kingdom involved Uber drivers. In *Aslam v Uber BV* [2017] IRLR 4 ET the Employment Tribunal held Uber drivers were really employees not contractors and were entitled to the minimum wage, holidays and so on, notwithstanding a comprehensive written agreement governing their relationship. That case is being appealed to the Employment Appeal Tribunal, which is at a similar level as our Employment Court.

Why is all of this important? If a person is an employee, a suite of protective laws applies to that person, including the minimum wage, annual and public holidays, sick leave (all of which the employer has to provide) and the right to bring a personal grievance. However, employees also have duties to their employer that are not automatically present in normal contracting situations, such as the duty of fidelity, the duty of personal service and the duty of obedience.

A person who is not an employee has none of these protections, but may also have some advantages. These may include advantages in terms of taxation, and the ability to have more control over his or her work. The Employment Court has said that any "deficit in bargaining power" is going to be relevant to whether a person in fact has any such advantage.

In some respects, the United Kingdom is aligning with the test for employment in New Zealand legislation, which has existed since 2000. The written agreement is only part of the bargain, and the courts may peek behind that agreement and look at all relevant matters to determine the real nature of the relationship.

As the gig economy develops, questions about who is an employee and who is not remain as important as ever.

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