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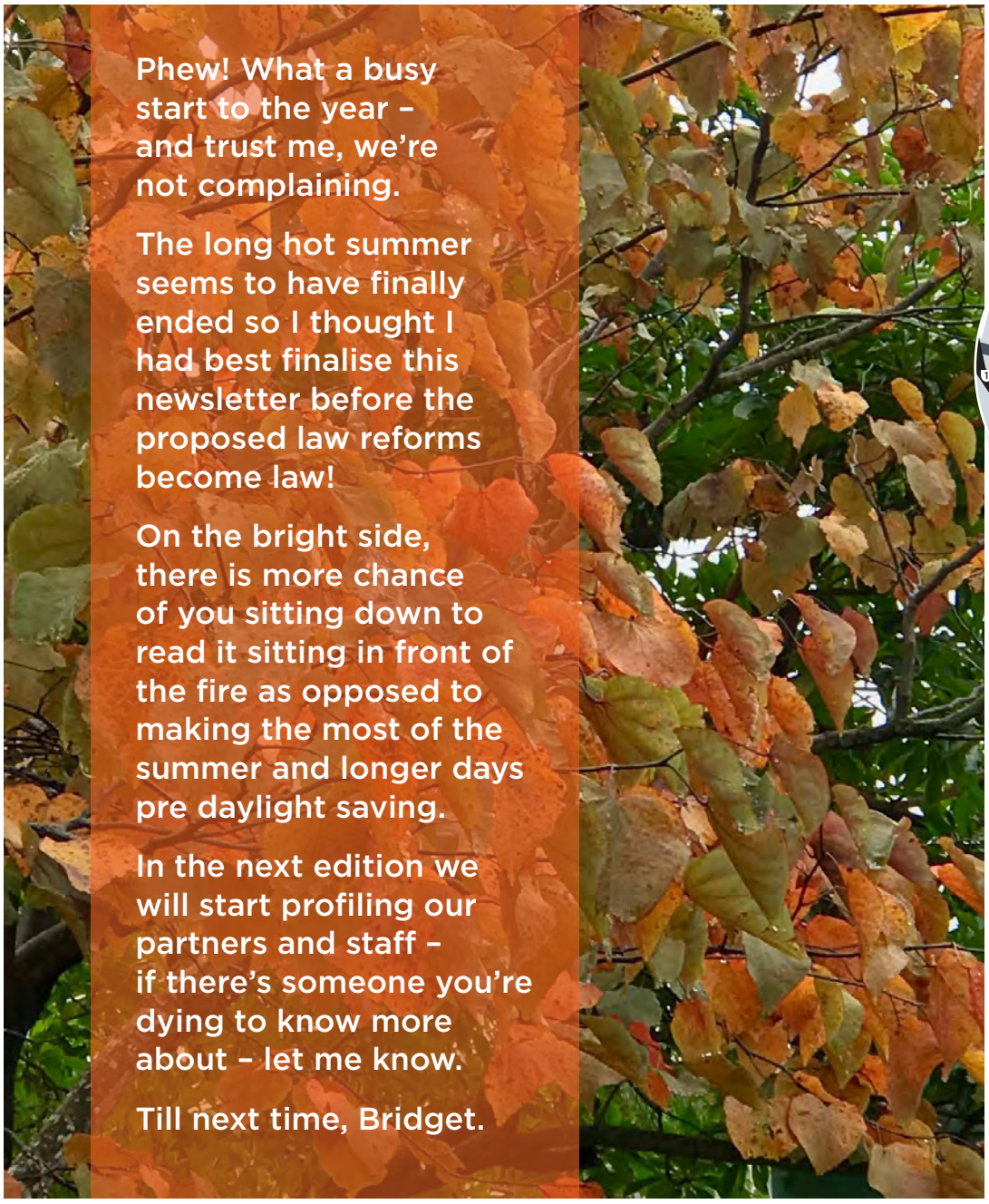
EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS



Phew! What a busy start to the year – and trust me, we're not complaining.

The long hot summer seems to have finally ended so I thought I had best finalise this newsletter before the proposed law reforms become law!

On the bright side, there is more chance of you sitting down to read it sitting in front of the fire as opposed to making the most of the summer and longer days pre daylight saving.

In the next edition we will start profiling our partners and staff – if there's someone you're dying to know more about – let me know.

Till next time, Bridget.

IN THIS ISSUE:

EMPLOYMENT LAW REFORMS ANNOUNCED – BACK TO THE FUTURE?

We now have details of proposed changes to employment law. In some respects it is *Back to the Future* as a number of changes simply reverse changes by the last government. However, there are some significant changes to collective bargaining that are proposed, and more complicated issues like industry-based Fair Pay Agreements are still some time away.

The Bill is now before Select Committee, and submissions closed on 30 March 2018. So what are the key changes?

90 day trial periods

Trial periods are here to stay, but limited to businesses which employ fewer than 20 employees. Probationary periods will continue to be available, but employees subject to probationary periods can still bring unjustified dismissal claims. We hope to see the Select Committee clarify details like how the 20 employee limit is calculated.

Collective bargaining

Most of the proposed changes are to collective bargaining and union rights. They include terms that have not been in the law before:

- A requirement to include pay rates in collective agreements. This may be by including pay ranges or methods of calculation.
- A requirement to provide reasonable paid time for union delegates to represent other workers (for example, in collective bargaining).
- A requirement for employers to provide additional information about unions along with a form for new employees to indicate whether they want to be a union member.
- Greater protections against discrimination for union members.

Changes that are to restore certain laws that previously applied are:

- Restoration of the duty to conclude bargaining unless there is a good reason not to.
- Restoration of the earlier initiation timeframes for unions in collective bargaining, so that a union can initiate bargaining first.
- Removal of the ability for employers simply to opt out of bargaining for a multi-employer collective agreement.
- Restoration of the "30 day rule" where for the first 30 days of employment new employees are employed on applicable collective agreement terms.
- Repeal of partial strike wage deductions which will prevent employers from making deductions from wages for low level industrial action.
- Restoration of union access without prior employer consent; union access will still be subject to requirements to access at reasonable times and places, having regarding to business continuity, health and safety.

Reinstatement

This will be restored as a "primary remedy" for employees who have been found by the Employment Relations Authority to have been unjustifiably dismissed.

Meal breaks

Statutory rest and meal breaks will also be restored. This will include exceptions for certain workplaces in "essential services", where it is not practical for workers to take breaks at certain times.

Finally, a Members Bill attempting to deal with "triangular employment" is on the Parliamentary Order Paper. It appears to be intended to allow, for example, labour hire workers working in a business to be covered by collective agreements that business has with its employees, and allow personal grievances against the business. It is unclear if this will have the numbers to progress, but as always, we will continue to update you with changes as they occur.

Equal pay reform continues

Hot on the heels of the government's first tranche of employment law changes was its plan to reconvene the Joint Working Group on Pay Equity Principles ("JWG"). The JWG has now reported back to ministers. They have made recommendations they say will clarify and simplify the process for initiating a pay equity claim. They have also recommended making no changes to the principles on determining how to "compare" individuals for the purpose of a claim, and suggesting amendments to the law to implement the principles.

The background to the JWG derives from a key 2014 case in which the Court of Appeal and prior to this the Employment Court interpreted how the Equal Pay Act 1972 ("the Act") should be applied. In that case a group of predominantly female care workers brought equal pay claims against their employer under the Act. They essentially alleged that they were being paid less on account of performing work that was systematically undervalued as a result of being historically performed by women.

An "equal pay claim" is essentially a claim for equal pay for work of equal value, and to rectify the undervaluation. The Court of Appeal said that it was not a complete defence that the employer in this particular case paid its four male caregivers the same rate as its 106 female caregivers, but did not give guidance on how to compare the work or how the undervaluation should be addressed.

In response, the previous government established the JWG to develop and recommend pay equity principles for workforces dominated by women, where the work may have been systematically undervalued. Since that time, the particular claim by care workers was settled, but law changes around equal pay have proved a hot potato.

In May 2016, the JWG made a number of recommendations to the Government, including the way in which equal pay claims could be brought, how the merit of such claims would be assessed (involving a consideration of whether the work was predominantly performed by women and whether it may have been historically undervalued) and how such claims could be resolved. The JWG did not however resolve the extent to which the pay equity principles provided guidance on identifying comparators.

The JWG has now reported back on:

- How to determine the merit of a claim as a pay equity claim – basically by saying that to start a claim the work must predominately be performed by women; and that it must be "arguable" that the work has been undervalued historically. These would seem to be relatively low and easy bars to cross to get a claim off the ground; and
- How to deal with the claim – basically by requiring the parties to bargain about the resolution of the claim before they progress the claim through the processes of the Employment Relations Authority, including mediation and facilitation.

We understand that once the government considers the report it will introduce new pay equity legislation in the middle of this year. It remains to be seen how wide the net can be cast in relation to identifying appropriate male comparators required for pay equity claims, so watch this space.

In the meantime, the Act continues to apply as it is, and we understand a very large number of cases are stalled in the Employment Relations Authority and are unlikely to be pursued until the legal position on pay equity is clarified.

Rap over knuckles for employer not dealing with employee representatives

THE INLAND REVENUE DEPARTMENT IS IN THE MIDST OF AN ENORMOUS RESTRUCTURING TO THE WAY THAT IT RECORDS TAX MATTERS, AND THAT IS RESULTING IN CHANGE PROCESSES HAPPENING FOR POTENTIALLY THOUSANDS OF EMPLOYEES WHO WORK AT IRD – AS WELL AS LITIGATION.

A recent decision of the Employment Court shows that, no matter what the circumstances, an employer has to deal with an employee's representative when the employee has chosen to be represented in something to do with their employment.

Many employees in IRD's workforce are members of the Public Service Association, and they are employed under a collective agreement. IRD has been consulting over a long period with employees who are potentially affected by these changes. This has involved consultation with the PSA over what appears to be a large number of matters, and about what is to happen during a lengthy transition process when the technology supporting the tax system is upgraded.

Matters reached a head late last year when IRD made offers of redeployment to employees to work during that transition. The PSA had a number of concerns about these offers, and recommended to its member employees that the PSA represent them in discussions with IRD. This is something that the Employment Relations Act provides for: any person can chose a representative to deal with matters relating to their employment on their behalf; and an employer has to respect that choice.

Some 1,300 employees agreed with that recommendation, and the PSA notified IRD that it represented these employees. Despite that, IRD declined to send the offers to the PSA, saying that it needed to ensure every affected employee (whether or not they were represented) had to get the offer of redeployment at the same time. It was said that this meant they had the fullest opportunity to consider them. The offers were therefore sent directly to the employees who were represented. Pressure was then put on employees to accept the offers by a particular time, despite the PSA challenging aspects of the offers (as well as employees being dealt with directly) in the Employment Relations Authority and Employment Court.

The Court did not accept that this was a valid reason for IRD not dealing directly with the PSA. The Court was also critical of the pressure applied to employees by the IRD doing so, and the effective bypassing of their representatives. The Court made a declaration of a breach of the Act, and has reserved remedies. What those might be is hard to say, and could involve penalties, but it is clear that the Courts will be very unhappy to see parties fail to recognise representatives that have been chosen to act on a person's behalf.

This is likely to be only one issue in a range of many that will be dealt with in this restructuring. A Full Court of the Employment Court in May 2018 will hear an argument between these parties about whether it is fair to use psychometric testing in selecting employees for some new roles in the restructuring. That case is likely to be a fascinating one which will have an impact for employers in the use of such testing – both during restructurings and at the time of hiring. We will update you when that case comes to hearing.

Costs and fees in the authority and “fast tracks” – getting bang for your buck

Many personal grievances in the Employment Relations Authority or Employment Court aren’t worth that much money. That is especially when compared to the amounts involved in commercial litigation in the District Court or High Court. While the Authority and Court can hear very significant claims worth many millions of dollars, most of their work is concerned with personal grievances.

If a person wins an unjustified dismissal claim, the Employment Relations Act 2000 says the Authority should ordinarily award the lesser of 3 months’ ordinary time remuneration or actual lost wages in personal grievances where employees have lost wages. While the Authority has a discretion to award more, this is a typical award. And in addition to this, the other most common remedy, is compensation for humiliation, loss of dignity and injury to feelings. The most recent compensation tables from the Authority show most awards for are still between $5,000 and $5,999. Having said that, there are recent decisions from the Employment Court indicating such awards should increase, so it may be that awards of $10,000 or more are becoming more common.

Costs and fees in the authority and "fast tracks" – getting bang for your buck *continued*

What this means is that for a worker on the New Zealand average (not median) salary of $49,000 per annum, a successful personal grievance might result in an award of around $17,750. Once you've been to mediation and the Authority, however, much of that award might be eaten up in legal fees. Similarly, employers may find themselves spending a lot in legal fees defending claims that aren't worth that much money.

One approach that we understand it going to happen in the Authority are "fast track" hearings. This is where the Authority will just get the employee and the relevant managers into a hearing room and – without requiring any written evidence, and with limited documentation – just getting on and asking questions and making determinations. This is what the Authority was originally intended to do; and we support this new practice. It is likely to mean lower costs, but easier access to justice.

In terms of costs, the Authority awards costs on a daily tariff system. This means that the successful party in the Authority is entitled to an award of $4,500 per hearing day in normal circumstances.

There are pros and cons to this approach. A simple and relatively low tariff means employers are often put to the expense of defending unmeritorious claims without the ability to recover their legal costs if they succeed. Similarly, employees may find that much of their award is eaten up in legal fees, and they do not get much in return.

On the other hand, the tariff approach brings certainty and predictably, and the knowledge that you won't be able to recover all of your legal costs. This encourages settlement at an early stage. Most personal grievances don't need to be ventilated in a courtroom, and can be sorted out without litigation.

However, sometimes parties can't be reasonable, reinstatement might be genuinely sought, or there may be a genuinely complex legal issue involved, so it is inevitable some personal grievances will head to the Authority to a full-on hearing. While parties can represent themselves in the Authority, they are often very reluctant to do so in what can be an alien environment. The involvement of lawyers also assists parties to put their best foot forward, as well as focusing the Authority's mind on relevant points and assisting it to reach the right decision.

But in terms of costs, for those that don't follow this type of "fast track", why not just increase the legal costs that parties can recover in the Authority? Policy-makers and judges are concerned that this might act as a barrier to justice to ordinary employees. Employees might be put off bringing claims for fear of an adverse costs award. This is particularly the case for unjustified dismissals, as it is very hard for a person who has lost their job and is out of work to afford legal fees and court fees.

In other jurisdictions, hearing fees alone may act as a barrier to justice. A recent judgment of the Supreme Court of the United Kingdom has highlighted these issues. In *R (on the application of UNISON) v Lord-Chancellor* [2017] UKSC 51, a large trade union challenged the legality of the fees individuals had to pay to bring a claim in the Employment Tribunal, a judicial body roughly equivalent to New Zealand's Employment Relations Authority. The fees were either £390 or £1200 depending on the type of claim, and had to be paid unless the claimant was impoverished. The Court heard evidence that since the introduction of the fees, the number of claims in the Employment Tribunal had dropped dramatically. By way of comparison, the filing fee for the Authority in New Zealand is $71.56, and in the Employment Court the filing fee for challenging a decision of the Authority is $204.44.

The Supreme Court of the United Kingdom unanimously held the filing fees imposed by the Employment Tribunal were unlawful, as they were unaffordable for most people and acted as a barrier to access to justice. The fees were also disproportionate to the value of most claims brought before the Employment Tribunal and needed to be affordable in a real sense, as opposed to a theoretical sense. The Court found the constitutional right of access to the courts is inherent in the rule of law: it is needed to ensure that the laws created by Parliament and the courts are applied and enforced.

A similar principle operates in New Zealand, and costs awards in the Authority are modest to reflect its informal procedures, and to avoid oppressive costs orders that may prevent parties (whether employers or employees) from accessing the courts.

Parties can give themselves something of a costs insurance policy by making offers of settlement "without prejudice save as to costs". An offer without prejudice save as to costs is "off the record" unless the Authority has to make a costs decision. Parties who turn down offers without prejudice save as to costs and who don't do any better in the wash up run the risk that they'll have to pay costs or increased costs to the other party. These sorts of offers encourage parties to settle matters without the need for court intervention, although whether these offers are effective and can be taken into account depends on the circumstances.

So, while costs in the Authority are modest, there are tactics parties can employ and new processes on the way to get the best bang for their buck.

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