sbm

ISSUE 29

NEWS

JULY 2018

EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

This year is racing by at what feels at times like almost breakneck speed. Balancing children and work has been a topic of conversation within many workplaces with the Prime Minister giving birth to her daughter (referred to by many as the Prime-miniature). Of course that topic continues as by the time you read this, the school holidays will be upon us leaving many parents questioning the logic of a system that provides 12 weeks school holidays, but only 4 weeks annual leave.

In the spirit of embracing children and work, we've managed to retain the skills of Senior Solicitor Hana Schofield, varying her hours to take into account school drop offs and pick ups. Hana will still be available to clients but it is important to us to accommodate our staff at the various stages of their lives and careers, where we can.

We've also welcomed to the team experienced lawyer, Anthony Russell. Anthony joins us from another firm, in the role of Principal, having brought an impressive and loyal client base with him.

In the last issue of the newsletter, I promised a profile of one of the staff. First up to the crease...

MATTHEW MCGOLDRICK

WHAT I LOVE ABOUT THE LAW: *A former boss of mine said the work of an employment lawyer is either saving the world or making people miserable. While I'm definitely not saving the world or making anyone miserable (I very much hope), I'd like to think what the law involves is much closer to the former than the latter for clients who need my help.*

NICKNAME: *At work they call me teen dad, in relation to my youthful looks.*

MY DAY STARTS WITH: *Getting one of my two young boys up or one of them getting me up. Then coffee. Always coffee.*

IF I WASN'T A LAWYER: *I would have liked to have been an international cricketer. It's a pity that my talents didn't reach higher than the very lower echelons of grade cricket. But I have managed to get one of my boys to say "Gone, yes he's got 'em!" at the fall of a wicket, so at least I'm passing on my love of the game.*

Finally, on the subject of communication, anti money laundering legislation now requires us to hold increased information to verify the identity of clients. So don't be surprised if we ask for identification information for our files. If you have any questions or concerns, please let us know.

IN THIS ISSUE:

The RIGHT TO BE PAID FOR ALL HOURS WORKED...

A recent case from the Employment Court confirmed that employees should be paid for pre or post-work meetings if those meetings are an integral part of the employee's work.

The case was brought by the Labour Inspectorate, which is tasked with enforcing minimum entitlements such as the minimum wage. The employer that was the target of the Labour Inspectorate was Smith's City, a retailer. The New Zealand Council of Trade Unions provided submissions in support of the Labour Inspectorate as an intervener. The Employment Court sometimes allows the NZCTU or Business New Zealand to make submissions in important labour law cases, even if they're not a party to the case.

The case concerned pre-work meetings. Employees were expected to attend the meetings, but they were not paid for them.

While Smith's City said the meetings were not compulsory, the evidence established employees were expected to attend. Managers would follow up with employees if they were late to the meetings and tended to regard employees who regularly failed to attend the meetings as poor performers.

The purpose of the pre-shift meetings was to convey important sales information. The Employment Court found this was an integral part of employees' work as sales staff and that the meetings were therefore work that needed to be paid for.

The Employment Court referred to some American cases dealing with factory workers who had to change into work clothes before a shift started and meat workers who had to sharpen knives before their shifts. In those cases, the United States Supreme Court found the employees should be paid for the time because the pre-shift work was integral to their jobs. The Employment Court recognised the law in the United States is different, but found the cases to be useful by way of example.

The Employment Court also analysed the constraints on employees during the meetings, the responsibilities of employees during the meetings and the benefit to the employer of these pre-work meetings. It found an analysis of these factors also showed the meetings were work.

The Employment Court found the employees needed to be paid the minimum wage for this work.

Smith's City then argued that even if employees had to be paid the minimum wage for this work, if you averaged out the total amounts they were paid, including commission and incentive payments, over the total number of hours worked, employees were paid above the minimum wage.

The Employment Court rejected this approach, finding that because the employees were waged employees who were paid by the hour, the Minimum Wage Act 1983 applied to each hour worked. Therefore, the employer wasn't allowed to take an averaging approach to payment of the minimum wage.

This case is of some interest and we may see unions attempting to extend the precedent. There are a number of cases from overseas jurisdictions known as "portal to portal" cases. They involve issues such as payment for the time spent at work preparing for work before officially clocking in, or time spent travelling within an employer's workplace before starting work. Each case will be fact-dependent.

Government announces long awaited Holidays Act review

A perpetual holiday for the Holidays Act 2003? That could be the outcome of a just announced review.

The review will involve representatives from both the business community and the union movement, and be chaired by Gordon Anderson, who is a well-respected professor of employment law.

The myriad number of problems that have arisen under the Act are largely due to the varying types of work patterns worked by employees. Many industries do not operate in a standard "9 to 5" environment which is the basis of the Act. This has meant the Act has not really kept pace with how work is actually performed. Employers have also found that their payroll systems were just not equipped to deal with their particular complex workforces.

For the last couple of years, the Labour Inspectorate has been undertaking a comprehensive programme of audits of holiday entitlements of some of NZ's largest companies. The Labour Inspectorate has been attempting through its audits to recover arrears where payments have been less than legally required. Even government departments have not been able to get calculations right – so it is no surprise that smaller businesses have struggled with the Act.

But irrespective of some employers getting it wrong both on a small and large scale, it is clear that the Act is no longer fit for purpose, and it will need to change to address the complex working arrangements that now exist in practice. We welcome the review.

The review primarily is going to look at more logical ways to calculate payments for all forms of holiday and leave entitlements. The aim of the review is to simplify the calculations, but at the same time preserve entitlements that employees have (4 weeks' paid annual holidays, 11 public holidays, five days' paid sick leave and three or one day of paid bereavement leave).

We are told the endpoint of the review is that these simplified calculations can be "readily implemented" in a payroll system. We hope that is the case.

The review report will be out within 12 months with recommendations for "clearer and transparent rules" for payments, but the government has said that a "new regime" is likely to be two to three years away. It is highly likely this will mean a new piece of legislation will be put in place sometime within that two to three year period.

But in the meantime it is business as usual. The review is not going to look at fixing historical underpayments. Employers still have an obligation to pay employees based on the entitlements still in place now under the Act. If employers have not been paying correctly over the years, this liability is not going to go away.

It also means employers do not have to overhaul their payroll systems – at least not just yet. At some point in the near future employers are going to have to look at their payroll systems to see whether they are compatible with any new regime.

Finally, it also does not affect the ongoing Labour Inspectorate audits. These audits seem like they still have a long while to run yet, and inevitably some cases will end up in the courts.

We will provide you with updates through the review process, and any subsequent legislation process that follows. If you want to provide a submission to the review we are able to assist. And if you find you are the subject of one of these Labour Inspectorate audits we are able to assist you as well.

Fair pay agreements moving forward

Background

In the run up to the General Election in September 2017, the Labour party set out its proposed workplace relations policies, some of which it intended to implement within the first 100 days of being elected into office and some within 12 months of being in office. One of Labour's policies was to introduce *"fair pay agreements" (FPAs) that would "set fair, basic employment conditions across an industry."*

Labour proposed that unions and employers, with the assistance of the Employment Relations Authority, would be able to create FPAs which would set minimum terms and conditions such as wages, allowances, weekend and night rates, hours of work and leave arrangements for all workers in an entire industry or occupation. Further, it would be mandatory for all employers in a particular industry to comply with such minimum terms and conditions, whether or not they had taken part in the negotiations. It was unclear whether the Employment Relations Authority would be able to fix the terms of an FPA in the absence of an agreement.

In our newsletter of December 2017, we noted that it wasn't clear when the new Government planned to introduce FPAs, or how an FPA would be established and how exactly it would operate, but that this may be one of the more significant changes to employment law.

Why introduce FPAs?

The Government has said that it thinks a framework for lifting wages and productivity is needed, particularly for 'middle 'New Zealanders', due to a lack of wage rises for this group when compared with higher and lower earners. The aim is to prevent a 'race to the bottom', where some employers are undercut by others who reduce costs through low wages and poor conditions of employment. The Government also aims to further its *"vision for a highly skilled and innovative economy that delivers good jobs decent work conditions and fair wages, while supporting economic growth and productivity."*

Latest position

On 5 June 2018, the Government announced the establishment of its working group on Fair Pay Agreements, signalling that work on this will begin. The Right Honourable Jim Bolger will lead the 'Fair Pay Agreement' working group, which comprises a mixture of people from business, employers, unions and industry representatives. The working group will now get to work on recommendations to design the system for the FPA framework and they are due to report back to the Government with their recommendations by the end of this year.

It is understood that the group will look at:

- the criteria and process to initiate bargaining on a Fair Pay Agreement;
- how bargaining participants will be identified and selected;
- what Fair Pay Agreements should cover in terms of scope;
- bargaining rules and dispute resolution processes, and ratification and enforcement of Fair Pay Agreements.

We understand that industrial action (strikes and lockouts) will not be permitted in negotiations for Fair Pay Agreements.

Impact

Depending on the parties to FPAs and the legal scope of them, they might look like a return of the 'national awards' system in place almost 30 years ago. National awards were legally binding documents that set the minimum legal conditions of employment throughout the relevant industry or occupation and applied whether or not the employer was a party to the award.

If FPAs are introduced as indicated, it will be essential that employers make themselves aware of any applicable minimum terms of employment for their employees and job applicants.

We will keep you updated on the progress of FPAs, which, if implemented as currently proposed will be a major employment law change to be aware of going forward.

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