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NEWS

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EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

Changes at SBM Legal but business as usual

At SBM Legal we have taken the next big step in our development as one of Australasia's leading employment law specialists.

Co-founding partner Don Mackinnon is stepping away from day-to-day involvement in the firm, to practise as a Barrister. The move reflects Don's changing priorities, including a higher level of commitment to sports governance and a desire to focus more on project work such as investigations and bargaining. The firm will continue to retain a strong association with Don.

Further, SBM Legal has appointed two new partners of the firm, Matthew McGoldrick and Anthony Russell.

Matthew has worked at SBM Legal since 2013, including working closely with Don for many years as Senior Associate. Anthony joined SBM Legal in May of 2018 as a Principal.

The move marks a new phase of growth for SBM Legal with the appointment of Matthew and Anthony, and at SBM Legal we are excited about this new phase for the firm.

Everything at SBM Legal will carry on business as usual, with a continued commitment to providing clients with the best possible service. All of the highly experienced lawyers at SBM Legal are here to help with any employment law needs, and we look forward to working with you in 2020.

And finally, how is it really almost Christmas and holiday time? Where has the year gone?!

It has been a pleasure assisting our clients during 2019 during what has been a very busy time indeed.

We know 2020 will bring many more developments in employment law – the remainder of our newsletter brings you up to speed on a number of those changes – as well as an election where yet again the shape of employment law policy will be a key battleground.

We wish you all a happy festive season and a safe and restful holiday time with family and friends.

IN THIS ISSUE:

TRIANGULAR EMPLOYMENT RELATIONSHIPS

A "triangular employment relationship" occurs when an employee of one employer works under the control of another person. When this happens, the identity of the real employer can become a little hazy.

Some good examples of potential "triangular employment relationships" are labour hire workers and temp workers. If a triangular employment relationship is established, the labour hire worker or temp worker could bring a personal grievance against their employer as well as the person they actually do the work for.

Now, from 27 June 2020, the Employment Relations Act 2000 will allow employees in a "triangular employment relationship" to bring personal grievances against the person who controls their work, as well as their employer.

However, there needs to be a more than the appearance of a triangular employment relationship for such a personal grievance to succeed. In order to be able to bring a personal grievance against the person who controls their work (known as the "controlling third party"), the employee must show:

- The controlling third party gets the benefit of their work;
- The controlling third party exercises control and direction over the employee that is similar or substantially similar to the control and direction an employer exercises; and
- The controlling third party caused or contributed to the personal grievance while the employee was working under their direction.

There isn't much guidance in the legislation about what all of this means. But we think that if the alleged controlling third party does things like telling the employee how to work or when to turn up, has control over the employee's pay rates, and control over hiring and firing, then it's likely they could be joined to any personal grievance as a controlling third party.

The controlling third party also needs to "cause or contribute" to the personal grievance while the employee is working under their direction to be liable for a personal grievance. Once again, there isn't much guidance in the legislation about what this means but an example might be where a controlling third party says they don't want a particular labour hire worker on their site anymore and tells the employer to get rid of them.

The employee must still notify the employer of the personal grievance within 90 days. However, if either the employee or the employer think the personal grievance arises out of an action by a controlling third party, then they can ask the Employment Relations Authority or Employment Court to join the controlling third party to the personal grievance. The controlling third party still needs to be notified of the claim by either the employee or the employer within 90 days.

It is quite interesting that the employer has the power to apply to join the controlling third party to the personal grievance. While it might help the employer avoid liability for any personal grievance, it might also create commercial friction between the employer and the controlling third party.

If all of this happens and the Authority or Court decides the employee has a personal grievance, then they can apportion remedies against either or both of the employer and the controlling third party, except reinstatement against the controlling third party.

The legislation is very much open to interpretation in a number of areas. However, that's to be expected with employment legislation that tries to regulate new types of employment arrangements, like those arising in the "gig economy", and "zero hours contracts".

It's worth nothing that this new law doesn't stop employees from arguing that they're really employees of someone else, like in *Prasad & Tulai v LSG Sky Chefs New Zealand Ltd*. There, labour hire workers were in fact employed by the flight catering company where they worked, even though they had contracts saying they were employees of another entity.

In the meantime, organisations who have labour hire workers or temp workers on their sites, or who control the work done by another employer's employees could take the following steps:

- Review their relationship with the employee's employer to be clear about who controls which aspects of the employee's work;
- Ensure there are clear and well written contracts governing the parties' relationships;
- If there is the risk of a personal grievance and it's commercially viable to reduce that risk, to consider how that might be reduced; and
- Discuss liability and the apportionment of any liability with the employee's employer in the event of a personal grievance.

Update on Fair Pay Agreements and Holidays Act Review

Earlier this year we told you that the Government was progressing work on Fair Pay Agreements ("FPA's") and also on the Holidays Act 2003 review.

We also told you that we would update you when there were further developments. There has been progress...of sorts...so here is our update as promised.

Fair Pay Agreements

The FPA working group led by former Prime Minister Jim Bolger provided its report to the Government on 31 January 2019. This working group set out its recommendations on the design of an FPA framework.

Since then it is fair to say that if there has been progress within Government, it has not been particularly visible to the public. And while the Government has said its response to the working group's report would follow this year, instead FPAs have now had another round of consultation.

On 17 October 2019, the Ministry of Business, Innovation and Employment produced a discussion paper seeking further consultation from individuals and organisations on the "possible design of an FPA system". MBIE collected further submissions in order to "gather a range of views on how the options might work in practice, how it could be improved and how the policy could impact different groups." Submissions closed on 27 November 2019.

So, while we cannot report a great deal of progress in this space, it is difficult to see how anything further might happen prior to this side of the New Year.

Holidays Act 2003 Review

The long awaited review of the Holidays Act 2003 into the myriad number of problems that have arisen under the Act has also been delayed.

The taskforce issued an interim report in December 2018. That interim report advised that the taskforce received almost 90 submissions on issues with the Act, considered a number of options for change, identified two main alternative options for determining and paying leave entitlements and said it intended to test these options with an independent payroll advisor.

At that stage, it was expect that the final report would be received around July 2019. That date came and went, as did an extension to the end of September 2019. To our knowledge, the taskforce has not produced its final report and it is now long overdue.

It had earlier been said that a new regime for calculating holiday pay would likely be two to three years away from a final report in any case.

So, we continue to be stuck with what we have got in the meantime.

We hope to be providing you more concrete updates in the New Year on these two very important possible changes to law, as we have no doubt that they will have important consequences for employment law.

Holiday Pay: WHAT'S ORDINARY?

EVEN THOUGH PROGRESS WITH THE HOLIDAYS ACT REVIEW IS SLOW, THE EMPLOYMENT COURT HAS RECENTLY SHED LIGHT ON ORDINARY WEEKLY PAY ("OWP") CALCULATIONS FOR THOSE WHO RECEIVE COMMISSION.

The Court has said that OWP is what is "ordinarily or usually payable" to an employee for an ordinary working week. The Employment Court's judgment is *Tourism Holdings Ltd v A Labour Inspector* [2019] NZEmpC 87.

Tourism Holdings Ltd ("THL") operates tour bus business throughout New Zealand called Kiwi Experience. The tour bus drivers' pay included commission earned on the sale of activities booked by them for passengers. Basically, if passengers wanted to book a side trip, like a bungy jump, the drivers would sell the trip and get commission on the sale.

THL's position was that this commission was only "earned" after a number of steps had been taken, the last being drivers attending a debriefing session where commission documents were submitted. A reconciliation would then follow.

THL's view was that the commissions were not a "regular part of the employee's pay" for an ordinary working week and so should not be included in the calculation of OWP.

They argued that the commissions were not earned weekly, but at irregular intervals measured by the length of each trip and the subsequent reconciliation. Because of this, it was argued that the commission did not fall within the meaning of a "regular part of the employee's pay".

The Labour Inspector opposed this view, but the Court agreed with THL that the commission did not form part of the drivers' OWP.

It was determined that the commissions were paid "commonly", but they were earned over varying intervals of time. They were therefore not "regular" in that they were not payments received under the employment agreement for an ordinary working week.

While every situation where commission is earned will depend on the particular facts, what this means is that the frequency in which pay is earned (i.e. regularly or irregularly) impacts whether such payments are ordinarily or usually payable for an ordinary working week, and therefore whether they are included in the calculation of OWP.

This is helpful clarity from the Court on a piece of legislation that has very many grey areas, however, we understand the Court of Appeal has granted leave to appeal, so this may not be the final word.

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