sbm

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NEWS

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EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

Kathryn Beck appointed Employment Court Judge

We are proud and delighted to announce that one of the founding partners of SBM Legal, Kathryn Beck, has been appointed a Judge of the Employment Court.

Kathryn's appointment is the culmination of a very successful legal career, which has most recently included her role as President of the New Zealand Law Society (2016–2019).

Kathryn will remain at the firm until the end of July as we work towards a seamless transition of her existing commitments. She will be sworn in on 7 August 2020. She will be based in Auckland.

We will miss having Kathryn at the firm but we are sure you will join us in congratulating her on this achievement and next phase in her career.

COVID 19 and restructuring processes – a reminder

What a year it has been already with COVID 19 upending our lives, and the lockdown meaning incredible challenges for workplaces.

No one could have anticipated at the dawn of 2020 that everything that had been forecast for 2020 in employment law – fair pay agreements, reform of the Holidays Act etc – would disappear from the agenda.

Instead, workplaces have been faced with a wage subsidy scheme that changed numerous times without notice, revenue disappearing overnight, and the need to put in place stringent health and safety measures to re-open safely.

It is fair to say that while some workplaces are back to (relative) normality, many are still struggling under the weight of depressed revenue. Many are contemplating – or have gone through – significant redundancies.

It is a timely reminder that while we have been through extraordinary times, normal employment obligations in any redundancy process remain. It will always be of critical importance for an employer to consult with its employees about any proposal to make redundancies. These processes can be difficult to manage and we at SBM Legal are here to guide you through.

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Contractor courier driver found to be employee

The Employment Court has recently issued an important decision (*Leota v Parcel Express Ltd*) regarding a courier driver for Parcel Express Limited. This is the latest in a trend of cases dealing with individuals engaged on contracts as independent contractors but who are in fact employees. The distinction is critical because an employee will have legal entitlements to rights such as holiday pay, sick leave, and access to personal grievance procedures that are not available to independent contractors.

The fact situation was as follows. Mr Leota is Samoan, with English as a second language. He was approached by Parcel Express to be a courier driver via a member of his church.

To be engaged by Parcel Express, the company required Mr Leota to buy his own van (the company sold him one for $17,000), which had to have the company's signwriting (at his expense), pay a bond of $2,000, and sign an independent contractor agreement.

Mr Leota received a minimum sum of money per day. He was expected to undertake deliveries during particular hours set by the company and only within the area that his assigned route covered. His hours were long, which effectively meant he could not work for himself or for others in addition to Parcel Express. He was expected to have any leave approved by the company, and was unable to provide a substitute driver without that person also being approved. The company prepared a monthly tax invoice of payments due to Mr Leota, and made various deductions.

Matters came to a head when Mr Leota refused to undertake additional work at the request of the company, for which he was not going to be paid. His contract was terminated immediately. Mr Leota sought a declaration from the Employment Court that he was an employee, to enable him to challenge the termination.

In cases of this type, the Court is required to consider the real nature of the relationship between the parties, regardless of the way the parties may have described it in their written arrangements.

The Court found that, while there were some indications of independent contracting, the reality was that Mr Leota was not in business on his own account. He had little to no ability to run his own enterprise or to profit from that enterprise. The Judge was confident Mr Leota was in fact employed by Parcel Express.

The Court was at pains to state that the case turned on its own facts, and did not apply generally to the courier driver industry. However, this case follows closely on the heels of an earlier case (*Prasad v LSG Sky Chefs*) in which individuals contracted by a labour hire company successfully obtained a declaration that they were actually employees of the company their labour was supplied to.

Individuals like Mr Leota are effectively "dependent contractors"; those who are entirely dependent on another party for their income, and who are not really in business on their own account.

It is clear that the issue of "dependent contractors" is not going away. This decision is a timely reminder for many industries to look carefully at their contracting models.

Calculation of holiday pay – discretionary payments under the Holidays Act 2003

The Full Employment Court recently considered the issue of what is a "discretionary payment" under the Holidays Act 2003. This issue is important for whether such payments should be taken into account for holiday pay calculations. The case is Metropolitan Glass & Glazing Ltd v Labour Inspector [2020] NZEmpC 39.

Metropolitan Glass & Glazing Limited ("Metro Glass") operated a Short Term Incentive scheme. The scheme was not referred to in its employment agreements.

Employees of Metro Glass who were eligible for the scheme were invited by letter to join the scheme. The letter set out a number of performance targets which, if met, would lead to potential payments.

The letter described the scheme as a "discretionary bonus scheme". Payments were to be "totally at the discretion of Metro's Board of Directors, and there [was] no guarantee of payment" even if the various performance targets were met. The letter also recorded: Metro Glass's right to "amend, revoke, or discontinue" the scheme at any time; it was "not a term and condition of the employment agreement"; and also said any bonus payments made "did not fall within the definition of gross earnings under the Act".

In deciding whether payments made under the scheme fell within the definition of "gross earnings" under the Act, a number of issues were considered by the Court.

First, the Court held that it was reasonable to infer that the terms of the scheme had contractual force. This was because among other things the scheme was put in place to incentivise employees to meet key deliverable targets, and payment was based on meeting those targets. The scheme was therefore incorporated into employment agreements as a result.

Secondly, the Court also concluded that productivity and incentive payments are captured within "gross earnings" whether those payments arise out of a written employment agreement, from policy documents, or are contained in separate, standalone documents.

Finally, the Court considered whether payments were truly "discretionary" in any case. Such payments are not "discretionary" simply because the amount of payment is determined by the employer, or because they are only payable if certain conditions are met. The Court found that the various labels that Metro Glass attributed to the scheme to the effect that it was discretionary effectively had no weight.

The case is a reminder that simply labelling a payment as "discretionary" does not mean that it will be treated in that way for Holidays Act purposes. How a scheme is designed, and how payments are calculated and paid, will largely determine whether or not it is "discretionary" and whether payments made under it are part of gross earnings. Failure to account for such payments risks incorrect Holidays Act calculations being made, as well as exposure to penalties.

Triangular employment ~ new law

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. This law will particularly affect users of labour supplied by labour hire companies, and the labour hire companies themselves.

We reported on this new piece of legislation in late 2019, but given it will come into force imminently it is timely to consider some important issues that may arise.

Essentially, the law will now provide the ability for employees and employers to join a "controlling third party" to an employee's personal grievance claim.

A "controlling third party" is an entity that has a contract or arrangement with an employer where the controlling third party gets the benefit of the employee's work, and exercises control and direction over the employee that is similar or substantially similar to the control and direction an employer exercises.

The essential purpose of the law is to allocate liability for remedies between the employer and controlling third party, where the controlling third party has caused or contributed to the personal grievance.

Key to the ability to pursue a controlling third party is notification of the personal grievance to the controlling third party occurring in time. An employee must do this within the same 90 day period for raising personal grievances as applies to their employer. Employers can also notify the controlling third party of the personal grievance within 90 days of having received the employee's personal grievance. The law then deals with the formalities of the controlling third party actually being joined to a claim that is filed in the Employment Relations Authority.

In practice, we expect employees who believe a "controlling third party" has some potential liability in their claim will try to involve such a party at an early stage of their grievance. There may however be circumstances where an employer (such as a labour hire company) might wish to avoid having an entity with which they may be in a commercial relationship (such as their client user of temporary labour) involved. We expect such commercial considerations may be as important for employers and controlling third parties as actually dealing with a grievance.

Given this law, employers who engage labour hire or temp workers, or who have employees working for or at other commercial parties, should be thinking carefully about how they manage that relationship. Further, commercial parties will likely be wise to consider, as part of their commercial agreements, whether it is appropriate to provide for such matters as indemnification for liabilities and costs, and any processes for dealing with employees' complaints.

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