ISSUE 33

NEWS

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EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

It has been a very challenging year for business and employees alike, and with an election upon us, there is plenty to mull over in the forthcoming weeks.

In an election dominated by COVID 19 and tax issues, it is fair to say employment relations policies have flown under the radar. In this edition of our newsletter, we run the ruler over the policies of the parties vying for our votes. We do this each election cycle to get a sense of where employment law is at – and where we might be headed.

We also look at an upcoming case in the Employment Court concerning pay for employees in essential services during the first COVID 19 lockdown. The case will be of interest for those employers who adopted the "ready, willing and able" test to paying (or not paying) employees during that lockdown.

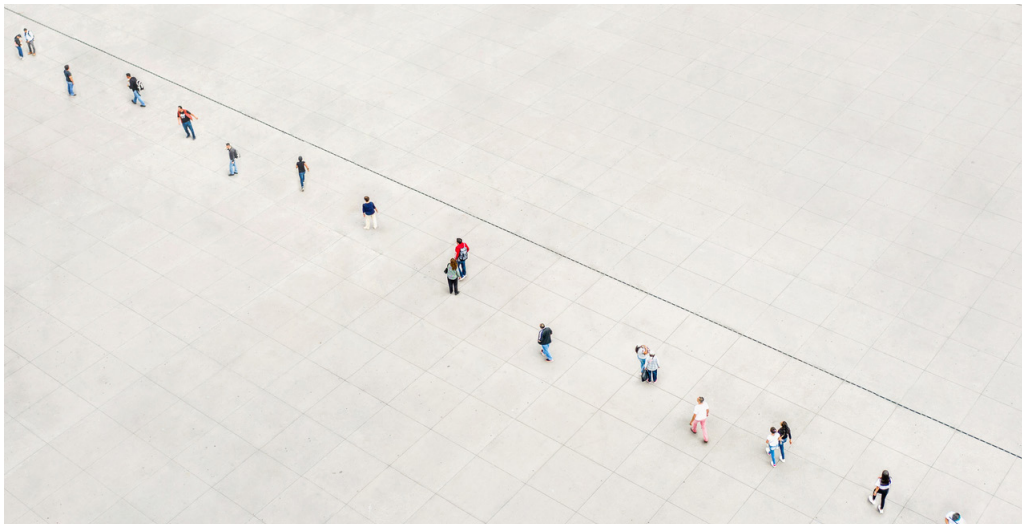
Finally, we also look at the new Privacy Act 2020, which will be in force in December, as well as providing an update on some recent cases.

In the meantime, MBIE has released a Bullying and Harassment at Work issues paper.

MBIE wants to explore how effective current systems are for preventing and responding to such behaviour.

MBIE is seeking feedback on its issues paper by 31 March 2021.

The issues paper is on the MBIE website: https://www.mbie.govt.nz/have-your-say/bullying-and-harassment-at-work/. SBM Legal can assist with a submission, or if you want to do so yourself, you can send your submission to HSWregs@mbie.govt.nz. There is also an online survey which provides a shorter option for those who do not have the time to engage in the full detail covered by the issues paper.



IN THIS ISSUE:

The Employment Relations Act 2000 has been in force for 20 years and there is little political appetite for wholesale change, but there are always subtle yet significant changes when the balance of power in the Beehive shifts. These usually involve unpicking the previous Government's amendments.

However, the introduction of Fair Pay Agreements if Labour returns to power would be reasonably significant. Increased unemployment and ongoing job insecurity arising out of the pandemic mean employment law is likely to be an important focus post-election.

National Party

National says it will:

- Repeal the Government's changes to the Employment Relations Act
- Simplify the employment dispute resolution process
- Get rid of the "no win no fee" basis of representing employees

Most of this is par for the course. 90-day trial periods would be restored to all businesses and bargaining and workplace access would get slightly more difficult for unions.

The "no win, no fee" part is more significant. It appears National wants to remove the ability of advocates to represent dismissed employees on a "no win, no fee" basis. The intended effect is to likely to remove the incentive for advocates to take unmeritorious claims to shake the money tree, knowing the employer is incurring costs.

This would not dispense with advocates altogether because the Employment Relations Authority and Employment Court is not restricted to barristers and solicitors representing employees, including because there is a long tradition of representation by union officials and employers' advocates.

Labour Party

Labour says it will:

- Have a $20 minimum wage from 1 April 2021
- Increase sick leave from 5 days to 10 days
- Implement Fair Pay Agreements (FPAs)
- Legislate for "dependent contractors"

The increase to the minimum wage under the Ardern Government was very significant and had a knock on effect to maintain relativity. If Labour comes to power again, the minimum wage will increase to $20 from 1 April 2021, but it is not clear whether we will see the same significant increases to the minimum wage over the remainder of the electoral cycle.

The increase in sick leave from 5 days to 10 days is significant and this policy arose post-pandemic for obvious reasons. While Australia has 10 days' paid sick leave, this is pro-rated for part-time employees. In New Zealand, it doesn't matter whether you're full or part time, you get 5 days of sick leave. This means that employees who work 1 day a week essentially have 5 weeks of sick leave, whereas their full time colleagues have 1 week. This is a real issue in industries where there is a significant proportion of part time employees. It seems inequitable to have this outcome, and we hope that consideration is given to this issue, particularly as many businesses are struggling.

FPAs are intended to be a base set of terms and conditions of employment that, once negotiated, would apply to an entire industry regardless of whether a particular business had been involved in the bargaining. FPAs would be a significant shift away from individual or enterprise bargaining. FPAs could provide a floor of terms and conditions of employment for employees who might lack bargaining power in their own workplace and they could also act to prevent competition based on squeezing down labour costs; but they could also create an uneven playing field for small businesses who are less able to absorb additional costs than their larger counterparts.

It is not clear what legislation for "dependent contractors" would involve, but the policy seems to be intended to offer protection similar to employee rights, and is a reaction to the emerging gig economy. This is an emerging trend worldwide. Notable examples include cases taken in the UK and US seeking declarations that Uber drivers were employees, and there is case pending in the Employment Court about the status of Uber drivers.

Green Party

The Green Party policy largely aligns with Labour, but includes proposals to further extend paid parental leave, although this would presumably be a cost for Government, not employers. The Greens also propose a minimum redundancy payment for all employees of four weeks' pay.

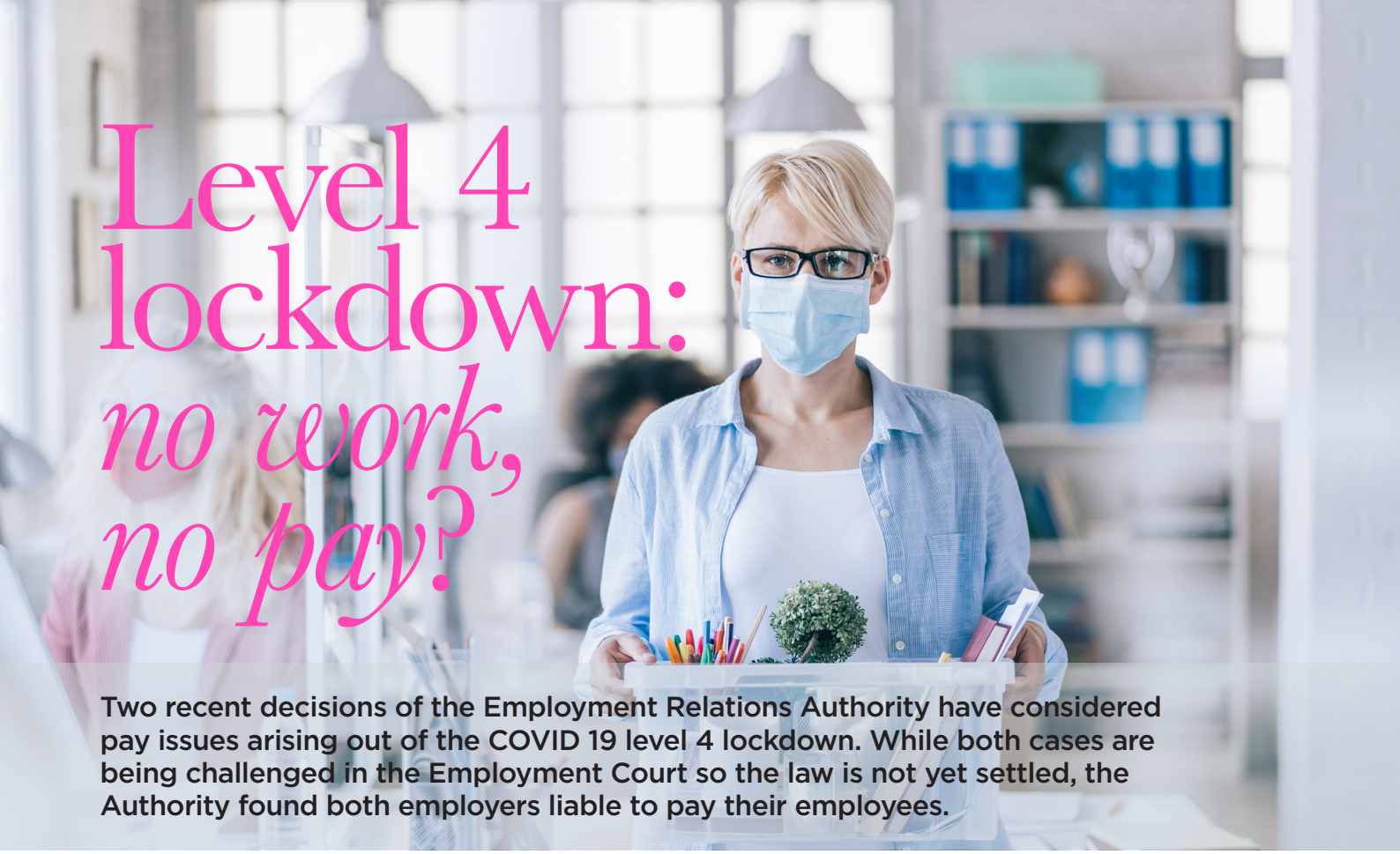
ACT Party

ACT would restore 90-day trial periods for all businesses and put a moratorium on minimum wage increases while the economy is recovering from COVID-19.

There is also a policy about streamlining the personal grievance process, including performance management and dismissal processes. This would likely allow more flexibility in dismissal processes and less focus on procedural errors. It would also simplify the Employment Relations Authority process. This latter policy is sensible, as often the cost involved in dealing with a personal grievance is out of proportion to the amount of money at stake, and can make access to justice harder for both employers and employees.

Conclusion

The nature of New Zealand's MMP system and the variables in any election mean it is difficult to predict what might happen with employment law after the election, but there will no doubt be some changes to employment law that employers, employees and unions will need to navigate and adapt to.



Level 4 lockdown: *no work, no pay?*

Two recent decisions of the Employment Relations Authority have considered pay issues arising out of the COVID 19 level 4 lockdown. While both cases are being challenged in the Employment Court so the law is not yet settled, the Authority found both employers liable to pay their employees.

The cases are *Sandhu v Gate Gourmet New Zealand Limited* [2020] NZERA 259 and *Raggett v Dove Hospice* [2020] NZERA 266.

Gate provides inflight catering services for aircraft at Auckland airport. It was an "essential service", so could operate during the level 4 lockdown.

However, there was very little work for employees. Few aircraft were flying. Gate therefore closed operations partially, and directed employees to stay home unless rostered. Gate obtained the COVID 19 wage subsidy, and paid employees not working only 80% of their normal pay. Employees were normally paid the minimum wage ($17.70 before 1 April 2020), and normally worked 40 hours work per week.

On 1 April 2020, the minimum wage increased to $18.90. Employees who did not work continued to be paid 80% of their normal pay based on the $17.70 minimum wage.

Employees argued they could not be paid less than the minimum wage. They also argued they were entitled to be paid 100% of normal pay because they were ready and willing to work. Gate argued employees were not ready, willing and able to work, were not actually working, and so were not entitled to be paid at all.

The Authority sided with the employees. It concluded they were not working due to Gate's directions, rather than lockdown restrictions. Employees were therefore ready, willing and able to work. Further, by paying employees at 80% of normal pay, Gate had breached the Minimum Wage Act, and so employees were entitled to pay for the 20% difference.

In contrast, Dove ran retail stores in addition to hospices. The stores were not "essential services", so legally had to close during lockdown. Employees could not work in the stores.

Dove also obtained the wage subsidy, and also paid employees not working 80% of their normal pay. Dove then made some employees redundant. Employees received extended redundancy notice of 8 weeks (their employment agreements provided 4 weeks' notice). Employees were paid 80% of normal pay for the first 4 weeks, and only the wage subsidy for the second 4 weeks. Dove's employees appear to have been paid over the minimum wage.

The employees argued they did not agree to be paid anything less than normal pay. Dove ran the same argument as Gate; that the employees were not ready, willing and able to work.

Again, the Authority sided with the employees. It concluded the employees were ready and willing to work. It also concluded Dove had made a unilateral deduction from pay from what was required under employees' employment agreements, which was unlawful.

Unfortunately, what the Authority did not do in this case was analyse whether employees were "able" to work. In our view, employees in Dove's stores simply were unable to work during the lockdown. That was as a result of a legal restriction, rather than any decision by Dove. We think this is the distinguishing factor between the cases, but the ultimate outcome is hard to predict.

The Gate case was heard by a Full Court of the Employment Court on 13 October 2020, with the CTU and Business NZ involved in the case. The Dove case will be heard by a Full Court in early December. We will update you when a decision is released.

A NEW PRIVACY ACT

The long awaited Privacy Act 2020 will come into effect on 1 December 2020, replacing legislation on the books since 1993. This has long been considered outdated, because it never contemplated the explosion of technology since the 90s, nor the almost limitless ability of agencies to collect information.

While the Act is intended to make privacy laws "fit for purpose", much of the Act retains a similar structure to existing legislation. However, aspects of it draw on overseas developments, particularly 2018 European Union data privacy laws.

The Information Privacy Principles (IPP's) which underpin the Act are broadly the same as at present. Agencies collecting and storing personal information will face similar obligations. Requests for access to personal information still have to be addressed as soon as reasonably practicable but by no later than 20 working days after receipt of a request.

Of note is the following:

1. An agency must notify the Privacy Commissioner and affected individual(s) of a "Notifiable Privacy Breach" as soon as practicable. This is a privacy breach that "is reasonable to believe has caused or is likely to cause serious harm".

   This may well prove to be a fraught issue for an agency caught up in the maelstrom of a privacy breach. Not all privacy breaches have to be reported. Further, "serious harm" is not defined. In assessing the likelihood of serious harm, the Act sets out mandatory factors to consider, including whether the agency has taken any action to reduce the risk of harm following the breach, and whether the information is sensitive (e.g. medical records). This could prove contentious, and of course is untested.

2. Currently, the Privacy Commissioner has no ability to force an agency to provide access to personal information if it has been refused. The Privacy Commissioner now has such powers, which can be backed up by financial penalties, giving the Privacy Commissioner more teeth to deal with reluctant agencies.

3. There are now additional grounds for refusing requests for personal information. An agency may refuse if disclosure would be likely to: pose a serious threat to the life, health, or safety of any individual, or to public health or public safety; create a significant likelihood of serious harassment of an individual; or cause significant distress, loss, or injury to feelings for someone who is the victim of an offence or alleged offence.

4. Agencies will now have additional obligations to ensure personal information sent to an overseas person or entity is either subject to the New Zealand Act (because the entity carries on business in New Zealand), or is subject to comparable overseas privacy standards to those in New Zealand.

While much of the Act is similar to current law, now is a good time to get ready for the new Act by reviewing and updating existing privacy policies, and processes for dealing with requests for access to personal information. It is also worth considering how your organisation might respond to a future privacy breach, and who would be responsible for dealing with the fallout.

What constitutes a disadvantage?

A recent Employment Court decision may have extended the reach of what constitutes an unjustified action causing disadvantage to an employee. The case is *Johnson v Chief of the New Zealand Defence Force* [2019] NZEmpC 192.

Mr Johnson was accused of sending an email to the Deputy Prime Minister alleging the Defence Force was rife with "institutional disobedience" and "dysfunctional leadership".

The Defence Force commenced a preliminary investigation. Mr Johnson denied sending the email. He argued his email account may have been hacked. After completing the preliminary investigation, the Defence Force sent Mr Johnson a letter concluding it was "very likely" he sent the email but it was prepared to give him "the benefit of the doubt". No disciplinary process was pursued, so Mr Johnson never received any disciplinary action.

Mr Johnson raised a personal grievance of unjustified disadvantage. Commonly, an employer will respond that there has been no disadvantage to the employee's employment because there has been no disciplinary action. This is exactly what the Defence Force argued and the Employment Relations Authority agreed.

However, the Employment Court disagreed. The Court held that Mr Johnson had been disadvantaged by the letter even though it stated no disciplinary action or process would occur. The letter was found to have had implications for trust in the employment relationship, made Mr Johnson's employment less secure and was effectively a formal record of wrongdoing.

The Court found the investigation was inadequate for a number of reasons. The onus had effectively been put on Mr Johnson to prove his email account had been hacked. There was also predetermination as the Defence Force had assumed from the outset that Mr Johnson had in fact sent the email (rather than approaching this question with an open mind).

The Court also said that, despite no formal disciplinary action being taken, it was clear from the letter the Defence Force believed Mr Johnson did in fact send the email. Emails uncovered after the fact demonstrated the decision not to pursue disciplinary action was a strategic one to avoid Mr Johnson bringing a legal claim rather than any view that the accusation against Mr Johnson had not been substantiated – basically Mr Johnson was given a warning without Defence Force actually saying that explicitly.

Mr Johnson was awarded $20,000 as compensation for injury to feelings as a result of the health impacts and stress of the investigation and letter. He was also reimbursed 50% of his IT and legal costs incurred in participating in the investigation.

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