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EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

Vaccination rollout likely to give rise to employment issues

It is hard to believe it is almost a year ago New Zealand went into its first lockdown. However, with the COVID 19 vaccination rollout poised to be extended to all New Zealanders, we are on the cusp of a new phase in the fight against the virus.

Key issues will be whether an employer can legally require an existing employee to be vaccinated against COVID 19, and whether employers can require employees (or potential employees) to advise their vaccination status.

These issues are particularly complex, and will require balancing health and safety obligations with an individual's right under the Bill of Rights Act 1990 not to be subjected to medical treatment (the vaccination) without consent, or the right under the Privacy Act 2020 not to have personal information collected (whether a person is vaccinated) unless that is for a lawful purpose connected with the employer. The usual obligations of good faith and consultation will also apply.

An employer's obligation to take reasonably practicable steps to keep safe employees and others in the workplace (other people who work there, and anyone else in the workplace including customers or clients) will likely be critical to the assessment being made.

In our view, a vaccination is unlikely to be a mandatory requirement for existing employees, but other measures may have to be taken if an employee is not vaccinated or cannot prove that they are vaccinated. Those measures will vary according to the nature of the employment.

The situation will be different with recruitment of new employees to roles where there is a higher health and safety risk, either to the employee or to others in the workplace. In such cases it may be reasonable and appropriate to make proof of vaccination a pre-requisite of employment.

Overall, we suggest that employers carefully consider their own circumstances before formulating policies about vaccination. There is no issue with encouraging and enabling employees to be vaccinated, and that will likely be the best course of action in the first instance. We are always available and happy to provide advice on your particular circumstances.

IN THIS ISSUE:

EMPLOYMENT COURT FINDS UBER DRIVER NOT AN EMPLOYEE

The Employment Court recently decided an Uber driver was not an employee, in *Arachchige v Rasier New Zealand Limited* and *Uber B.V.* [2020] NZEmpC 230.

Mr Arachchige was an Uber driver between May 2015 and June 2019. His access to the Uber driver app was deactivated following a complaint from a passenger.

He applied to the Employment Court for a declaration he was an employee, so he could progress a personal grievance for unjustifiable dismissal. Such a finding would also likely have meant an entitlement to certain other rights, such as being paid at least the minimum wage and holiday pay.

Uber argued Mr Arachchige was not an employee, and Uber was ultimately successful.

Uber describes itself as a "*technology business with its value being in the lead generation software application it provides and the related Uber brand*". Users of Uber will obviously be familiar with the passenger app. However, there is also a separate app for drivers. Uber essentially said it sat in the middle – it connected drivers and passengers via Uber's lead generation service to enable drivers to receive requests for transportation.

Cases like these boil down to the "real nature of the relationship", and whether the person is effectively in business on their own account. The Employment Relations Act 2000 requires consideration of all relevant matters, including the intention of the parties, which essentially means looking closely at all of the facts about how the relationship operates in practice. A statement about the relationship – i.e. a contract that says a person is a contractor – is not the start and finish of the enquiry.

The key factors the Court considered in determining Mr Arachchige was not an employee were:

1. The written Services Agreement between Mr Arachchige and Uber was not in form an employment agreement. This of course is the position in many cases of this type, and as noted above isn't a complete answer.
2. However, in entering into this Services Agreement, Mr Arachchige was not particularly vulnerable or lacking in comprehension. He made a considered decision to move from Alert Taxis, where he previously owned a franchise. He sold the franchise to a friend, apparently because the regular taxi industry business was declining due to Uber setting up in NZ. It seems the Court thought he was going into this "eyes wide open".
3. The Court found the way the relationship operated in practice was in line with the Services Agreement in any case:
   - There were very few requirements imposed on Mr Arachchige by Uber. Essentially, he needed to be licensed, and his vehicle insured and registered with a current COF.
   - Uber did not direct or control when or how Mr Arachchige worked. If he wanted to work, he logged into the driver app. He could select or decline jobs as he wished. When he took on jobs Uber had no control over how he did those jobs. If he did not want to work at all, he simply did not log into the app.
   - Mr Arachchige provided all the necessary equipment (including a vehicle, and smart phone with a data plan) to carry out the work. He met his own tax obligations.
   - While he did not actually do so, Mr Arachchige could have worked elsewhere, including driving for Uber's competitors, like Zoomy and Ola.
   - While Uber effectively set the price paid by passengers, he could improve his profitability by determining what vehicle to use, when he carried out the services (to take advantage of "surge pricing"), what sorts of expenses he incurred, and he could also share the vehicle with others to reduce costs even further.

The Court ultimately placed a great deal of weight on the detailed written Services Agreement, and the lack of any evidence of any departure from the written agreement in practice, over a period of 4 years. The Court was essentially convinced Mr Arachchige was in business on his own account.

The case is also of interest because in contrast the UK Supreme Court recently found Uber drivers in London were "workers" in *Uber BV v Aslam* [2021] UKSC 5. The UK has this third "worker" category sitting in between contractors and employees, which we do not have in NZ.

This means that the UK Uber decision has no factual or legal relevance to NZ cases, but it does show that cases will continue to arise from the "gig" economy, and challenge what might be considered employment or contracting in the modern world.

Continuing COVID 19 lockdown & pay issues

In our October 2020 newsletter we highlighted two Employment Relations Authority decisions dealing with pay issues arising out of the March 2020 COVID 19 level 4 lockdown. The full Employment Court has recently released its decision in an appeal of one of those, *Gate Gourmet New Zealand Limited v Sandhu* [2020] NZEmpC 237.

Gate provides in-flight catering services. It was an essential service, and could therefore operate during the level 4 lockdown, but there was little work for employees as few aircraft were flying. Some employees remained working and others were told to remain at home.

Gate obtained the COVID 19 wage subsidy and paid employees who did not work 80% of their normal pay. There was a separate dispute as to whether this was agreed with the employees and/or their union. As their normal pay was the minimum wage, paying employees only 80% meant they received less than the minimum wage.

The Authority found that these employees were not working due to Gate's decision, rather than the lockdown decision. They were therefore "ready, willing and able to work" and had to be paid the minimum wage.

Gate appealed to the Employment Court, and argued that employees were only entitled to the minimum wage for "work" they had actually performed. They argued being "ready, willing and able" to work was not the same thing as actually working. Business NZ supported this position and argued that it was consistent with advice provided by the Government at the time of the level 4 lockdown and the introduction of the wage subsidy.

By contrast, the employees and the Council of Trade Unions argued that the minimum wage must also apply to situations where an employee is ready, willing and able to work but the employer decides that the employee will not work their contracted hours.

The majority of the Court held that an employee is only entitled to receive the minimum wage if s/he actually works. Because Gate's employees were not working at the applicable time, they did not have to receive the minimum wage. Gate was therefore not in breach of the minimum wage legislation.

However, the Chief Judge of the Court disagreed with the majority and referred to the legislative provisions stating that no deductions may be made from an employee's entitlement to receive the minimum wage other than in very limited circumstances. Those circumstances include, for example, time lost by reason of the worker's illness. The Chief Judge's reasoning, therefore, was that if a deduction is permitted to be made in respect of absence due to illness (when an employee has not worked), it must be the case that the law does not always require the employee to have actually "worked" in order for the initial entitlement to receive minimum wage to have arisen.

This appeal was limited to the narrow point about the statutory right to receive the minimum wage. It did not touch on whether there was a contractual entitlement to be paid during the lockdown.

We anticipate that it is likely that the decision will be appealed to the Court of Appeal.

In a separate note, we understand the other relevant case (Raggett v Eastern Bays Hospice Trust t/a Dove Hospice [2020] NZERA 266) which had been challenged to the Employment Court, will now not proceed. Unfortunately, this means that there will now not be a decision providing the clarity many employers are seeking about important pay issues which arose from the lockdown.

An update on ordinary weekly pay and regular commission payments

The Court of Appeal in *Labour Inspector v Tourism Holdings Limited* [2021] NZCA 1 has recently clarified the circumstances in which an employee's incentive-based payments, such as commission, are included in calculations for ordinary weekly pay ("OWP").

The issue ultimately boils down to what is a "regular" part of pay.

Tourism Holdings Ltd ("THL") operates the Kiwi Experience tour bus business. The bus drivers receive a daily rate for days on tours and their pay also includes commission earned on the sale of activities to passengers. The commission is paid in the week following the end of each tour. Each tour can vary considerably in length, as do the commission amounts.

The Holidays Act 2003 sets out two methods for calculating OWP.

The standard calculation is the pay the employee receives under their employment agreement for an ordinary working week. Where it is not possible to calculate this (for whatever reason) an alternative calculation must be used to determine an average over the previous four weeks. Both exclude incentive payments if they are not a regular part of pay.

THL calculated OWP without including commissions. THL argued they were not a regular part of pay. THL argued this concept of regular pay related to what is regular for an ordinary working week. It argued that these commission payments weren't regular because they didn't relate to the work the employees ordinarily performed in a working week. THL succeeded in the Employment Court but the Court of Appeal has now overturned that decision.

The Court of Appeal concluded the only requirement is that payments must be a regular part of employee's pay.

So, what is "regular" then?

The Court of Appeal said commission payments are a regular part of an employee's pay if they are made either substantively regularly (that is, systematically and according to rules) or temporally regularly (that is, uniformly in time and manner).

In the Court's view, THL's employees' commission payments met both concepts. They received commission in accordance with the rules in their employment agreements; there were terms (or rules) set out in the agreement for commission payments for making bookings for additional activities. And they were uniformly paid commission in the week following the conclusion of their tours (irrespective of the varying lengths of those tours).

The upshot of the Court's ruling is that in the event the alternative method of calculating OWP is to be applied, productivity or incentive-based payments must be included where they are made on a regular basis (that is, according to a rule or in a uniform time and manner), regardless of whether they are tied to an ordinary working week.

The Court of Appeal's overruling of the Employment Court should lead to employers looking again at holiday pay calculations for commission-based employees, to make sure that regular commission payments are being included in OWP calculations.

Reforming the Holidays Act

THE ARTICLE ABOVE SHOWS JUST HOW COMPLICATED SOME HOLIDAYS ACT CONCEPTS ARE. AN OVERHAUL OF THE HOLIDAYS ACT IS LONG OVERDUE.

The Government has just released the final report of the Holidays Act Taskforce. The report makes 28 recommendations for change and the Government has accepted them all, intending to introduce amendments to the Holidays Act in 2022.

Until we see a draft Bill it is hard to be definitive about what the changes will be. We sincerely hope the problems in the Act will be fixed, but we fear that in trying to do so, the Government may create new headaches. Some of the recommendations retain or appear to add in further complexity. Nevertheless, there is also a range of sensible suggestions for improvement. As always the devil will be in the detail.

Following is a summary of some key proposed changes:

Annual leave

Currently, annual leave is paid at the higher of average weekly earnings over the previous 12 months and ordinary weekly pay (what the employee receives for an ordinary working week). Where it is not possible to determine ordinary weekly pay, an alternative formula is used: the employee's average earnings over the past 4 weeks.

The Taskforce recommends annual leave is paid at the highest of three separate calculations: average weekly earnings over the previous 52 weeks, average weekly earnings over the previous 13 weeks and "ordinary leave pay". Ordinary leave pay is a new concept replacing ordinary weekly pay, and is what the employee would have earned if they had been at work on the day(s) in question.

The upshot is that on each occasion when an employee takes annual leave, three different calculations will need to be made. It is difficult to see how an additional required calculation is going to reduce complexity or errors.

Gross earnings

Currently, the definition of gross earnings does not include discretionary payments. This has led to a lack of clarity around which payments are truly discretionary, and has particularly been an issue with bonus or incentive arrangements.

The Taskforce recommends that all cash payments made to employees (except reimbursing ones) are included in gross earnings. This will remove any lingering confusion, but may be at overall greater cost for employers.

Leave in advance

Currently, employees have to rely on their employer to agree to them taking annual leave in advance. The Taskforce recommends all employees being eligible to take leave on a pro-rata basis from day 1. This strikes us as fair, but also enables an employer to manage leave accruals sensibly.

Pay-as-you-go holiday pay

The Taskforce proposes a requirement for employers to review PAYG employees every 13 weeks to check eligibility. The proposals would also remove the ability to pay PAYG for employees on fixed-term contracts of less than 12 months.

FBAPS leave

Currently, leave pay for sick days, public holidays, alternative holidays, bereavement and family violence is paid at relevant daily pay (what the employee would otherwise have earned for the day in question) or average daily pay over the last 52 weeks if it is not possible to calculate relevant daily pay.

The Taskforce recommends relevant daily pay is replaced by ordinary leave pay, and the average daily pay calculation be changed from a 52 weeks to 13 weeks divisor. However it also recommends that leave pay be at the greater of these 2 calculations.

Again, an additional required calculation is going to lead to more, not less, complexity.

Currently, employees must wait six months before they are eligible for sick, bereavement and family violence leave. The Taskforce recommends bereavement and family violence leave be available from the first day of employment, and that sick leave accrues from day one on the basis of one day per month until the five-day entitlement is reached. The Taskforce also recommends extensions to bereavement leave to cover additional family relationships.

Determining an otherwise working day

The Taskforce recommends dealing with the current ambiguity by a formula where if the employee has worked on 50% or more of the corresponding days in either the previous 4 weeks or previous 13 weeks, that day is deemed an otherwise working day. This will provide clarity for employers and employees.

Sale and transfer of a business

The Taskforce recommends that on the sale and transfer of a business, employees should have a choice about whether to transfer all of their leave entitlements to the new employer or have them paid out and reset. Parties negotiating the sale of a business would then need to deal with this additional factor when negotiating the terms of any business sale. This will match what commonly occurs in practice.

Summary

At a fundamental level, we are disappointed the Taskforce rejected the concept of an "hours" based system for calculations, rather than the current weeks, which has caused enormous compliance difficulties. If there was one obvious place to start it was here, and we think this could have been the basis for a simpler piece of legislation.

We are also disappointed the Taskforce is recommending more – not fewer – calculations. We think that is a recipe for more – not less – confusion.

The Taskforce report can be found here: https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-legislation-reviews/holidays-act-review/

We will keep you updated about the progress of this important legislation, and encourage you to consider making a submission to the Select Committee at the appropriate time to ensure the Select Committee hears the views of employers who will need to administer the Act in their workplaces. We would be happy to provide advice and assistance in this regard.

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