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Fair pay agreements on the horizon

The Fair Pay Agreements Bill was introduced into Parliament on 29 March 2022 and is currently continuing through parliament's Select Committee process. The Bill provides a framework for bargaining for fair pay agreements (FPAs). It is expected to receive royal assent later this year and it will come into force one month after it does so. Given that implementation of this legislation is a key government policy, we expect the Bill to pass through the parliamentary process without significant change.

The purpose of the fair pay legislation is to enable collective bargaining across entire occupations or industries. It therefore has the potential to affect any employer in any occupation or industry. Whilst FPAs may initially have been intended to increase the base wages of vulnerable or lower-paid employee groups such as cleaners or support workers, the Bill does not limit FPAs to such workers.

Instead, the only threshold for initiating bargaining is that 1,000 covered employees or 10% of all covered employees support initiating bargaining (or a public interest test is met). It does not matter whether the employees are union members or what their remuneration is. Only a union may initiate bargaining for an FPA, as long as it has members who would be covered by the eventual FPA. In theory, any group of workers, including high-earning salaried workers, could organise themselves to meet the threshold and form a union, or join a union, to initiate bargaining for an FPA.

Consequently, any employer could inadvertently be expected to participate in the bargaining process and irrespective of whether they did so, have industry-wide minimum employment standards, including remuneration, set for their employees.

Key points of the legislation

The Bill is very detailed and in its present form is about 160 pages long. The following is therefore necessarily only a very high level explanation of the key points.

Where an FPA is negotiated and ultimately ratified, the FPA will apply to every employer and every employee engaged in the industry or occupation that is covered by the FPA. Such coverage will occur automatically (with no way for employers or employees to be excluded) and will include workplaces where no unions are involved and nobody is a union member. If the bargaining does not result in an FPA, the Authority will ultimately fix the terms of the FPA.

During the course of the bargaining process, the legislation provides for unions to arrange two paid meetings for workers who will be covered, and to enter workplaces to discuss matters related to FPAs with employees, who will continue to be paid during such discussions. These provisions are similar, and additional, to the rights that already exist in the Employment Relations Act.

If the terms of the FPA are more favourable than in employment agreements (whether collective employment agreements or individual employment agreements) the FPA term will prevail and the employment agreement deemed to be amended accordingly. The FPA will not prevent or replace workplace bargaining.

Only unions can initiate an FPA process and will set out the work they want covered in an FPA when they do so. The FPA will then be negotiated by a union or unions and employer bargaining parties which comprise one or more employer associations. Individual employers (or employees) will not be part of the bargaining.

The Bill defines an employer association as a registered incorporated society with at least one member that is an employer covered by the FPA and that has a purpose that enables the Association to promote the collective interests of covered employers for the purposes of an FPA.

Consequently, for employers to participate in the FPA process they will need to form or be members of registered incorporated societies with other employers in their industry. A policy amendment by the Government since the Bill was introduced, which will be included in the legislation, indicates that if there is no bargaining party (for example, no relevant employer association is formed that could be a bargaining party, or existing employer associations choose not to be involved in the FPA), the terms of the FPA will be fixed by the Employment Relations Authority without their input (but before the FPA is referred to the Authority, Business NZ will have a month to decide if it will step in). There are very limited rights to appeal the Employment Relations Authority's determination of the FPA's terms.

In short, once the Fair Pay Agreements Bill is enacted and comes into force, affected employers or industries who choose not to be involved in bargaining for an FPA should expect to have terms and conditions imposed on them. It is therefore in employers' interests, even if they object in principle to FPAs, to take steps to ensure their views can be represented.

If you are interested in finding out more information about the new legislation, please don't hesitate to give us a call.

Gloriavalue Employment Court decision – a landmark case and what it means for other employers

It is somewhat ironic that you would have to be living without access to media (as they do at Gloriavale) to have missed the outcry following the Employment Court's decision in a case involving the Christian community in which three ex members were found to have been employees from the age of 6 until they left the community.

The term modern day slavery has been used to describe the conditions at Gloriavale. More broadly, the case reinforces the importance of ensuring employees have a real and genuine opportunity to obtain advice before entering into an agreement, as well as the legal test being the real nature of the relationship and labels or contracts not being determinative on their own.

Key aspects of the Employment Court decision

Three ex-Gloriavale members applied to the Employment Court for declarations that they were employees while they lived at Gloriavale. Gloriavale argued that the work the plaintiffs did as children could be classified as chores, the work that they did at the age of 15 was educational work and training, and the work they did after turning 16 was covered by an agreement which declared that they were not employees but were volunteers.

The Court specifically held that:

- Work that the plaintiffs performed from the *ages of 6 to 14* could *not be classified as chores.* The work had a *commercial* element to it, was *strenuous*, performed for extended periods of time and *sometimes dangerous.* The plaintiffs' parents had little to no involvement in when, how and what work their children performed, these decisions were made by a Gloriavale leadership group. If the work was not performed quickly enough to the right standard, the children were denied food and sometimes beaten as punishment.
- Work that the plaintiffs performed at the *age of 15* could not be classified as educational work experience. This work was covered by an agreement titled "Transitional Education Agreement" which the plaintiffs signed. The agreement stated that the plaintiffs had received their education so far, agreed that the work was for their own benefit, agreed that they were not an employee or a partner, and agreed that they will not be entitled to wages or payment for the work they perform. The plaintiffs were required to do whatever hours were necessary to complete the task at hand. The nature of work was more akin to the work an adult does in the workforce instead of work experience for educational and training purposes. The Court held that the *label* applied to this relationship was *misleading* and *failed to reflect the real nature* of the relationship and the work performed.
- Work from the age of 16 onwards was covered by an agreement that labelled the plaintiffs Associate Partners. Again the Court held that the *label was misleading* and did not reflect the real nature of the relationship. The plaintiffs did not have any understanding of the agreement they had and *did not have any real opportunity* to get *proper guidance* or *advice* regarding the obligations under the agreement. The work that they did was *not as volunteers*. The plaintiffs had *no choice* but to enter into the engagement and perform the work. The plaintiffs were paid money from the profits made on the company shares they held, but the money was then transferred straight back to the Gloriavale shared account.

The benefits the plaintiffs received for the work they did through the different stages were provision of food and accommodation, the necessities of life and the ability to participate in the Community.

Key considerations

The key considerations that the Court took into account in this case were:

- A strict contractual approach is not appropriate in employment matters. The focus must be on *all relevant matters* to determine the *real nature* on the relationship. Irrespective of what label is given to the relationship, the *"underlying policy intent of s 6* (of the Employment Relations Act 2000) was to *prevent employers avoiding statutory employment protections and standards* by use of agreements and arrangements which placed form over substance".
- *Involvement of religious beliefs* and values *does not raise a presumption against* the existence of an *employment relationship.* The involvement of religious beliefs is just one factor that needs to be considered along with all other relevant factors. In any case, any such presumption would "restrict classes of workers from accessing statutory employment protections".
- If the working conditions amounted to slavery or forced labour, that did not exclude the application of s6 and did not exclude the Court from having jurisdiction in the matter. Parliament excluded certain types of workers from holding employment status but working as slaves or in servitude was not excluded.

Importance and relevance of the case

The Court reiterated in this case that, whether a worker is an employee depends on the *real nature and substance of the relationship,* and how the relationship operated in practice. The *label* given to the relationship or what either party subjectively considered the relationship to be is *not the determining factor* in the matter.

The case highlights the importance of having agreements that reflect the true nature of the working relationship and that parties *cannot contract out* of *minimum statutory* employment *standards*. It also highlights the importance of each party having the right to *seek independent legal advice.*

The principles discussed in the case are particularly relevant for organisations that engage workers as independent contractors or volunteers – it is essential to ensure that the arrangements entered into actually operate in the manner that the agreement or the label stipulates. Incorrectly labelling the relationship can result in the organisation becoming liable for severe penalties and back pay for the employee.

If you have any questions about the working arrangements at your organisation, please feel to contact our team for specific advice regarding your circumstances.

AND SOME OTHER THINGS YOU SHOULD KNOW ABOUT

There's a lot going on in employment law at the moment – here's a heads up about a few other things that have happened or are in the pipeline:

Income Insurance Scheme

The Government (in conjunction with Business NZ and the Council of Trade Unions) has developed an income insurance scheme to provide financial protection for workers who lose their jobs because of redundancy or illness. It will not cover termination for any other reason (e.g. poor performance, serious misconduct or resignation).

The scheme is not yet in operation, however, the legislation that will enable it has been passed into law (the Income Insurance Scheme (Enabling Development) Act 2022). Further legislation will be required to put the scheme in place and, should it be established, the Scheme's likely commencement date will be 2024. $60 million has been set aside in the Budget for ACC (which will administer the scheme) to carry out design work for it.

The Government's proposal is that employees who are terminated due to redundancy or medical incapacity will receive six months' pay at a rate of 80% of their regular income as well as a four-week notice period and a four-week 'bridging payment'.

The notice period and bridging payment will be paid by employers and the remainder is to be financed by compulsory levies on wages and salaries paid in equal proportions by employers and employees. Such levies are proposed to be universal (rather than an opt-in scheme) and both employers and employees are set to pay 1.39%.

The scheme will cover most workers, including fixed-term, seasonal and casual employees as well as some self-employed and contractors. It will be limited to New Zealand citizens and residents and will only start after a worker has made six months' worth of levy contributions in the previous 18 months. The 80% rate for replacement income will apply up to a maximum income level, currently proposed to be $130,911 (gross) and the income cap will be adjusted annually.

Claimants who have been made redundant will be required to make appropriate efforts to obtain further work in order to be eligible for the scheme, and payments will cease when they fail to accept any job that matches their previous income and other terms and conditions. The scheme even proposes a 28-day grace period for travel overseas without affecting claimants' entitlement.

We will keep you updated.

Increased protection for whistleblowers

New "whistleblower" legislation will come into effect on 1 July 2022 when the Protected Disclosures (Protection of Whistleblowers) Act 2022 repeals and replaces the current Protected Disclosures Act 2000.

The new Act is intended to make the legislation more accessible, to facilitate protected disclosures, and enhance protection for those who report serious wrongdoing in their workplace.

Key changes include extending the definition of "serious wrongdoing", which will now include allegations relating to the misuse of public funds; the delivery of public services by the private sector; and behaviour that is a serious risk to the health and safety of any individual. It will also be easier to report serious wrongdoing directly to an appropriate authority at any time (currently this can occur in limited circumstances).

Further protections for whistleblowers will include the introduction of a new ground of personal grievance to cover the situation where an employer retaliates or threatens to retaliate against a disclosure, and making the victimisation of disclosers a breach of the Human Rights Act 1993.

Employers will need to consider updating their Whistleblower/Protected Disclosure policies in light of the new legislation.

If you require any further information or assistance in relation to this issue, please don't hesitate to contact us.

Changes to the costs regime in the Employment Relations Authority

The Authority has recently issued a Practice Note stating that from 2 May 2022 the way it will approach awarding costs to the successful party has changed. The daily tariff approach (of $4500 for the first day of hearing and $3500 for subsequent days) will still apply to disputes including personal grievance claims and wage claims etc.

However a raft of other matters will not be subject to a daily tariff, and successful parties will be expected to bear their own costs. Those matters can broadly be categorised as cases that are disputes between unions and employers such as referrals for bargaining facilitation; disputes about the application, interpretation or operation of a collective agreement; pay equity processes; disputes about union access to workplaces; etc.

Note that the Authority has an overriding discretion in any case to award costs as it sees fit, depending on the circumstances – the above is what will occur in most cases.

Possible change to timeframe to raise a Sexual Harassment Personal Grievance

A Private Member's Bill is currently before a Select Committee, proposing to extend the time available to raise a personal grievance that involves allegations of sexual harassment to 12 months, rather than the 90 days that applies to other personal grievances.

Given the Bill has been put forward by a Labour MP, we expect it will become law, likely next year. We will keep you posted.

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