Trials and tribulations

This month, **Corbin Child** looks at recent amendments to the Employment Relations Act 2000 and how they will have an impact on the delicate balance between the rights of an employee, and those of the employer.

CHANGE IS IN THE AIR. IN December 2018 the Labour and NZ First Government passed legislation amending the Employment Relations Act 2000. The changes will strengthen employee and union rights.

The first round of changes (in effect since December 2018) requires the Employment Relations Authority and the Employment Court to order that a wrongfully dismissed employee be reinstated "wherever practical and reasonable".

Historically, the Authority was reluctant to order reinstatement. In 2008, reinstatement was ordered in about 0.02 percent of cases, in spite of it being a primary remedy. So it is uncertain whether this legislative change will lead to more orders to reinstate aggrieved employees.

In December 2018, unions were given a jump-start in collective bargaining. They can now initiate bargaining 60 days prior to the expiry of an existing agreement (20 days earlier than employers). Union representatives are now permitted to enter a workplace without seeking the employer's consent, although reasonable limits may still be imposed to ensure compliance with health and safety policies and to minimise disruption. Later this year, other amendments to the Act will take effect requiring:

- Unions and employers to conclude a collective agreement "unless there are reasonable grounds not to";
- New employees to be automatically employed according to the terms of a collective agreement for the first 30 days; and
- Union delegates to be given reasonable time to conduct union activities on pay and during work hours.

PROBATION WITHOUT TRIAL

The most controversial change to the Act will come into force on 6 May 2019, making it unlawful for employers with 20 or more employees to rely upon the 90-day trial period.

Employers with fewer than 20 employees can continue to rely on 90-day trial periods so long as the employee has not previously worked for them. It is unclear whether subsidiaries of a large corporation, each employing fewer than 20 employees, will be entitled to rely on 90-day trial periods.

Larger businesses will have to rely on probationary periods in order to assess the competency of new employees. About 70 percent of New Zealand's workforce will be exempt from trial periods because they are employed by businesses with more than 20 employees.

Large business owners can still dismiss an employee at the end of a probationary period by conducting a competency process and by providing reasons for the employee's dismissal. In comparison, an employer can dismiss an employee during a trial period without giving any reason.

During a probationary period the employer must notify the employee of any work related issues, then seek feedback from the employee and provide suitable guidance and training, before making a decision.

A mismanaged process may open the door to personal grievances on procedural and substantive grounds.

REST AND RELAXATION

Work-life balance and health and safety continue to be a focus with changes to an employee's right to have rest and meal breaks (in effect from 6 May 2019).

An eight-hour work day must include two 10-minute rest breaks and one 30-minute meal break, while a four-hour work day must include one 10-minute rest break.

Employers and employees can still agree when to take their breaks, however if they cannot agree, the break must be in the middle of the day (so long as this is practicable).

The above is not an exhaustive list of the amendments to the Act. We recommend that you consult your professional advisors to determine how the changes will affect you.

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