
EMPLOYMENT

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EMPLOYMENT BILLS UNDER CONSIDERATION - LAW CHANGES OPEN TO SUBMISSIONS



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Parliament is seeking views on proposed changes to the Employment Relations Act 2000 (ERA) and the Holidays Act 2003 contained in two amendment Bills released earlier this month.

The timeframe for public submissions is short. The deadline for submissions on the ERA Amendment Bill is **Monday, 13 September 2010**, and on the Holidays Amendment Bill is **Friday, 17 September 2010**.

The Bills are now with the Parliamentary Select Committee for review. The Select Committee is due to report back in November this year, and it is anticipated that most of the changes will take effect from 1 April 2011.

Interested parties can comment on the changes and how they might be improved by lodging written submissions and then deciding whether to appear in person before the Committee.

The changes are aimed at providing flexibility and giving employers increased control over their work places. However, employers may perceive that certain changes do not either go far enough or fulfil legislative objectives.

Communications to employees during collective bargaining

The Bill clarifies that an employer may communicate directly with employees during bargaining for a collective agreement. Such communications are

subject to the overriding statutory duty of good faith, which specifically prohibits an employer (and union) from doing anything that is likely to undermine the bargaining.

It remains unclear what types of employer communications would “undermine” bargaining for this purpose, and whether, for example, statements of fact could breach the good faith duty. This is perhaps an area that requires further clarification.

90 day trial period

The Bill extends the availability of statutory trial periods to all employers. Employees subject to a trial provision who are dismissed or given notice during the trial period cannot raise a personal grievance in relation to the dismissal. Trial periods are by agreement in writing and only at the commencement of the employment relationship.

Employment Court refuses to apply trial provision

The potential for disputes over trial provisions is highlighted by an Employment Court decision delivered this week – the first on statutory trial periods (*Smith v Stokes Valley Pharmacy Ltd*).

Ms Smith succeeded in her claims for unjustified disadvantage and unjustified dismissal, despite a trial period provision contained in her employment agreement. The Court allowed the personal grievance claims in relation to her dismissal on two counts. First, she was not a new employee when she signed her employment

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agreement (as she had already worked for one day). Secondly, the employer had failed to comply with her employment agreement by giving her the requisite notice. Notice had to be more than simple advice of dismissal – the applicable contractual notice period (or if none, reasonable notice) was required for termination in reliance on a trial provision. The court held that in this particular case, therefore, the statutory benefits of a trial period did not apply.

The Court found that her dismissal was procedurally unfair and substantively unjustified. Also, the employer's failure to comply with contractual training and appraisal obligations amounted to an unjustified disadvantage.

The Court confirmed that where a statutory trial period applied, the employer was not required to provide written reasons for dismissal on request. However, the Court considered that the duty of good faith still required an employer to be responsive and communicative by providing reasons for the dismissal at the time of giving notice.

Incidentally, the Court expressed uncertainty as to whether following a business sale, existing employees who transfer to the purchaser should be considered new employees (of the purchaser) for trial period purposes.

New employees covered by collective agreements

Widespread union contempt for statutory trial periods may well precipitate collective bargaining claims for terms precluding trial periods.

Such action would have the effect of prohibiting a new employee covered by the collective agreement from agreeing an additional term for a trial period on the basis that it would be inconsistent with the collective agreement terms. This would have a significant impact on any workforce which is mostly collectivised. For the first 30 days of employment, collective agreement terms would apply to non-union members (as well as their union member

counterparts) provided that their work fell within the agreement's coverage clause. Therefore, any restriction on agreeing trial periods contained in the collective agreement would apply.

Automatic trial periods

It is not uncommon in other jurisdictions around the globe for trial periods to apply across the board without the need for agreement. For example, in the UK an employee cannot claim unfair dismissal (as it is there) during the first 12 months of their employment.

Holidays

Employers may want to consider whether there is any scope for further simplification of the various formulae applicable for calculating different rates of leave pay.

As it currently stands, the legislation has been criticised for allowing certain employees to inflate holiday pay by arranging their annual leave immediately after bonus or other lump sum payments, or increased overtime, so as to incorporate these amounts in the calculation.

The Holidays Amendment Bill introduces a new calculation for "average daily pay" based on an averaging formula over 52 weeks as an alternative to relevant daily pay for public holidays, alternative holidays, sick leave and bereavement leave. The new pay rate may be used when it is not possible or practicable to determine what the employee would have earned or where an employee's daily pay varies throughout the pay period in which the leave falls.

For annual leave, where it is not possible to determine an employee's pay for an ordinary working week under their employment agreement, the existing 4 week averaging formula for ordinary weekly pay still applies under the bill.

Further information on making submissions is available at the New Zealand Parliament website: www.parliament.nz