
EMPLOYMENT

EMPLOYMENT LAW CHANGES ANNOUNCED

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On Sunday, Prime Minister John Key announced a number of changes to the Employment Relations Act 2000 (ERA) and Holidays Act 2003 as part of a new employment law package. Some of the planned changes follow recent Government reviews of both the Holidays Act and the personal grievance provisions contained in Part 9 of the ERA.

The Government is promoting the package to reduce compliance costs, increase business confidence in recruiting new staff, expedite resolution of workplace disputes and provide greater choice for employers and employees.

The changes announced to the ERA include:

90 day trial period

Extending the 90 day statutory trial period to all employers. Currently, the trial period is only available to employers with less than 20 staff. Trial periods, which have been available to small employers for employees engaged after March 2009, protect employers from unjustified dismissal claims. As under existing law, a trial period will only apply where the parties agree to it in writing at the commencement of the employment relationship.

Union access

Amending the rules on union access to workplaces, so that any access is subject to the employer's consent and such consent cannot be unreasonably withheld.

Communications during collective bargaining

Allowing employers to communicate directly with employees during collective bargaining (including details of any settlement offer), subject to the overriding duty of good faith.

Justification for dismissal and fair process

- Changing the test of justification for an employer's actions, including dismissal, under section 103A of the ERA to 'whether the employer's actions and how it acted were what a fair and reasonable employer could (rather than would) have done in all the circumstances at the time'. This amendment is aimed at acknowledging a range of possible reasonable responses in any situation.
- Inserting new statutory minimum requirements of a fair and reasonable process (codifying principles already established by case law) and inserting an express provision that employers' processes will not be subject to pedantic scrutiny with regard to minor deficiencies.
- Introducing a new code of employment practice on disciplinary and dismissal procedures.

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Mediation

- Promoting mediation, including providing mediation services for early problem resolution without external representatives, and providing for the Employment Relations Authority to give priority to mediated cases.
- Empowering mediators and Employment Relations Authority members to make recommendations which become binding if accepted by the parties within 7 days.

Employment Relations Authority

- Empowering the Authority to dismiss frivolous or vexatious claims.
- Reviewing existing Authority Regulations to formalise the conduct of investigations, and to provide for the right to cross-examine witnesses.

Remedies

- Removing reinstatement as the primary remedy for unjustified dismissal - it will remain a possible remedy in dismissal cases.
- Increasing penalties to a maximum of \$10,000 for individuals and \$20,000 for companies.

Holidays

Plans to amend the Holidays Act include:

- Allowing employees to “cash up” one of their 4 weeks of statutory annual leave entitlement. Cashing up will be permissible only at an employee’s request. Mr Key specified that employers will not be permitted to raise this issue during salary negotiations.

- Introducing a new calculation referred to as “average daily pay” for public and alternative holidays, and days of sick and bereavement leave, for employees who have irregular working hours and pay. Average daily pay will apply to these “irregular” employees instead of the current relevant daily pay (RDP) calculation, and will be based on gross earnings for the preceding 52 weeks. It is not yet clear whether the definition of “gross earnings” under the Act will remain the same for this purpose. RDP will continue to apply to employees with regular hours/pay.
- Allowing employers and employees to agree to transfer one or more public holidays to other (identified) working days.
- Providing employers with the right to request proof of sickness or injury at any time (including within the first three days of leave), provided that the employer covers the employee’s costs in obtaining such proof.
- Providing for employers to determine when an alternative holiday should be taken where agreement with the employee cannot be reached. Currently, employees can determine when to take alternative holidays during the first 12 months of the entitlement arising, and only after that 12 month period can the employer decide when this alternative holiday is to be taken.
- Doubling penalties as above.

The Government anticipates a new Bill amending the ERA will be drafted for introduction this year. It is likely that the above changes to the ERA and Holidays Act will come into force next year.