

Employment Law Changes 2011

There are changes to the Employment Relations Act 2000 and Holidays Act 2003 that employers need to be aware of and prepare for. I have outlined below the changes and the implications for your business. Please feel free to contact me to discuss further.

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Employment Relations Amendment Act 2010

The below amendments to the Employment Relations Act 2000 come into force on 1 April 2011, and have been made to provide flexibility and ensure a balance of fairness for both employers and employees, while improving operation and efficiency of the Act.

1. Union Access to Workplace

A representative of Union must obtain consent to enter workplace. Union access to the workplace is now conditional on the consent of the employer, but such consent may not be unreasonably withheld. If an employer denies consent, but does not provide reasons in writing for the refusal, the employer would be subject to a penalty action.

2. Clarification Concerning Communications with Employees During Collective Bargaining

The Act clarifies that an employer may communicate directly with their employees while bargaining for a collective employment agreement is underway (and that those communications may include the employers proposals for the collective agreement), provided that the communications are consistent with the duty of good faith.

3. Individual Employment Agreements

The employer must retain a copy of an individual employment agreement or individual terms and conditions of employment. If the employer has provided an employee with an intended agreement, the employer must retain a copy even if the employee has not signed the intended agreement or agreed to any of the terms and conditions. If requested by the employee, the employer must provide the employee with a copy of the agreement or the intended agreement. An employer who fails to

comply with these requirements is liable in an action brought by a Labour Inspector to a penalty.

The Labour Inspector may also bring a penalty action for a breach of the required terms of conditions of an individual agreement, under the Act.

It is crucial therefore that employers provide employees with employment agreements, ensure that they sign those agreements, and that they retain a copy of the agreement for their records. Given the law change, it would be timely to conduct an audit to ensure compliance and ensure that you have the necessary processes and documentation in place.

4. Trial Period Provision Extended To All Employers

The trial period (of 90 days or less), has been extended to all employers and not just those who employ fewer than 20. In the event that an employee's employment is terminated during the trial period, they can not take a personal grievance based on unjustified dismissal. They could however still raise a personal grievance on the grounds of sexual or racial harassment, duress, breach of employee protection provisions or unjustified disadvantage. In addition access to mediation is still available.

To be covered by the trial period provisions, employers would need to include a specific clause in their employment agreements, which could only apply to new employees, who had not previously been employed by the employer.

5. Reinstatement Removed as the Primary Remedy

Reinstatement has been retained as a remedy, but has been removed as a primary remedy. It still remains an option where practicable and reasonable. This amendment reduces the effort required for employers to demonstrate that reinstatement is neither desirable nor feasible.

6. Personal Grievances

The Act changes the test of justification for dismissal (s103) to a subjective test rather than an objective test.

For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable is now to be determined, not on an objective basis, but considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer "could" have done in all the circumstances at the time the dismissal or action occurred. The substitution of the word "would" with "could", recognises that there is a range of responses for a fair and reasonable employer, and not just one.

The Act now sets out explicitly the minimum requirements of a fair and reasonable process. The specified process, does not change the law in this area, but simply codifies it. The process is:

- Sufficiently investigate the allegations (taking into regard the resources available to the employer)
- Raise the concerns with the employee

- Give the employee a reasonable opportunity to respond
- Genuinely consider the employees explanation before taking action

It also specifies that a dismissal or action will not be determined as unjustifiable solely because of defects in the process, as long as the defects were minor and did not result in the employee being treated unfairly.

7. Employment Institutions

The Act also introduces changes to Mediation Services and the Authority to improve the operation of the system for resolving employment relationship problems. These changes are as follows:

- a) The Authority can award a monetary penalty against a person who, without sufficient counsel obstructs or delays an Authority investigation, including failing to attend as a party before an Authority investigation. It may be awarded by the Authority of its own motion or as a result of a party seeking a penalty.
- b) The Act promotes mediation in order to provide for early problem resolution, by clarifying that mediation services include early problem resolution and that this may occur (at the request of the parties) without legal representation being present.
- c) The Act clarifies that minimum entitlements may be matter for mediation, but lawful amount may not be subject of negotiation or reduction.
- d) The Act enables minors aged 16 years to over to sign agreed terms of settlement and for those settlements to be final and binding.
- e) The Act sets out a process where the parties to an employment relationship problem can confer powers on the Mediator and/or Authority to make recommendations on how to resolve employment relationship problems. Parties can request a recommendation which they can then consider and then choose whether or not to accept it.
- f) The Act introduces a new factor for the Authority to consider when considering directing the parties to mediation. The Authority is not required to direct the parties to mediation if it would be impractical or inappropriate in the circumstances. The Act requires the Authority to actively consider appropriateness of referring demand notices to mediation.
- g) The Act promotes mediations as the first problem solving option by allowing cases that have been to mediation to be prioritized by the Authority.
- h) The Act allows only the Court to issue ex parte freezing order and ex parte search order.
- i) The Act empowers the Chief of the Authority to oversee the operation of the Authority and make such arrangements, including issuing instruction to ensure members of the Authority are discharging their function in an orderly and expeditious way.

- j) The Act establishes the statutory right of cross-examination, in matters before the Authority.
- k) The Act empowers the Authority to refer cases to the Court at its own discretion.
- l) The Act allows for filtering out frivolous or vexatious cases by allowing the Authority to dismiss cases the Authority considers to be frivolous or vexatious (and make an order for costs), without the need for the matter to be fully investigated by the Authority. It also introduces a process to challenge such a decision by the Authority.
- m) The Act extends the application of pre-proceeding discovery that apply in the District Court to the Employment Court and the Authority.
- n) The Authority may now impose penalty interest for failure to comply with a demand notice.
- o) The Act enables cases that have been inactive for 3 years in Authority to be treated as withdrawn.

8. Labour Inspector enforcement powers

The Act introduces changes to strengthen and improve overall compliance and fairness, and widen the role of Labour Inspectors. This is done by:

- a) Further defining the functions of Labour Inspectors to clarify the role of Labour Inspectors in managing complaints as well as supporting businesses to achieve compliant practices and systems.
- b) Introduces enforceable undertakings so Labour Inspectors can negotiate an outcome of compliant practice (which can be enforced by a compliance order).
- c) Introduces enforceable Statutory Improvement Notices which may be issued by Labour Inspectors (which can be enforced by a compliance order).

9. Recovery of penalties

The Act increases the maximum penalty:

From \$5,000 to \$10,000 for individuals
From \$10,000 to \$20,000 for companies

10. Commencement

The commencement date for the provisions in the Act is 1 April 2011, except for the provisions concerning the retaining of employment agreement which is 1 July 2011.

Holidays Amendment Act 2010

The Act Amends the Holidays Act 2003 to improve the overall operation and efficiency of the Act.

1. Paying out annual holiday entitlement

The Act allows an employee and employer to agree that an employer may pay out up to one week of an employee's minimum annual holiday entitlement in any 1 entitlement year. This can only be done at the employee's written request. Employers can also formulate a policy preventing such payouts.

2. Calculating pay for public holidays, alternative holidays, sick leave and bereavement leave.

The Act provides for payment of either "relevant daily pay" or "average daily pay" (which is a newly defined term) for public holidays, alternative holidays, sick leave and bereavement leave.

The Act makes changes to when an employer may apply the averaging formula, and the period that the averaging formula applies.

In the first instance payment should firstly be determined by what an employee would have earned on the day (relevant daily pay). The trigger for when it moves to an averaging formula is when it is not possible or practicable to determine what the employee would have earned or where the employee's relevant daily pay varies within the pay period in which holiday or leave falls.

The new averaging formula is:

$$\frac{a}{b} = \text{employees gross earnings for 52 calendar weeks}$$
$$b = \text{no. of days earned}$$

Rather than:

$$\frac{a}{b} = 4 \text{ weeks pay}$$
$$b = \text{days in which pay earned}$$

3. The Labour Inspector may determine ordinary weekly pay or relevant daily pay or average daily pay in circumstances where the employer and employee can not agree on the amount.

4. Transferring observance range of whole public holiday to another working day.

The Act restores the ability for employees and employers to agree to transfer the observance of the whole of a public holiday to another working day.

5. Alternative Holiday

The Act allows the employer to direct when an "alternative holiday" must be taken, if the employer and employee can not agree. In such circumstance the employer must give 14 days notice to the employee of the requirements to take the alternative holiday on a date determined on a reasonable basis by the employer.

6. Determination of what would otherwise be a working day

The Act has added an additional factor for determining what would "otherwise be a working day", i.e. whether but for the day being a public holiday an alternative holiday, or a day on which the employee was on sick or bereavement leave the employee would have worked on the day concerned.

7. The Act clarifies that an employee is entitled to be paid for public holidays or leave falling during a closedown if the day would otherwise be a working day for the employee.

8. Proof of sickness

The Act states that employers may request proof of sickness or injury for sick leave within 3 consecutive calendar days, as long as they inform the employee as soon as possible that the proof is required and agrees to meet the employees reasonable expenses in obtaining proof. The employer is not required to have reasonable grounds to suspect that sick leave is not genuine.

9. Compliance

The Act increases maximum penalties for non-compliance:

\$5,000 to \$10,000 for employer who is an individual

\$10,000 to \$20,000 for employer that is a company

10. Discretionary payments and allowances

The Act clarifies the meaning of discretionary payments and allowances.

11. Commencement

The Act commences on the day after the date on which the Act receives the Royal assent, for any changes which impact on s29 (closedown). The rest of Act comes into force on 1 April 2011.