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BARRISTERS AND SOLICITORS

Employment Update

Autumn 2016

Employment Law Changes 2016

Over the past few months there has been considerable media coverage about the Employment Standards Bill. Following the Select Committee Report in February 2016 the Bill was subject to some final changes before being passed in March 2016. It was then split into five separate Amendment Acts to amend the relevant statutes. The Bill amends the law in relation to parental leave, strengthens the enforcement of employment standards, *'bans'* zero hour contracts and prohibits certain employment practices.

The two key amendments which have gained the most media attention are the changes relating to parental leave and *'zero hour'* contracts.

Zero hour contracts

A zero hour contract is an agreement under which an employer does not guarantee any minimum hours of work, but the employee must work if requested to do so. In practice, this means that while an employee may not be offered any work during a week, they cannot undertake other secondary employment because they have to be available to work if requested by their primary employer.

Zero hour contracts are commonly used in the fast food and hospitality industries but the Employment Relations Amendment Act 2016 has effectively *'banned'* this practice.

The Amendment Act defines an *'availability provision'* as an arrangement where the performance of work by an employee is conditional on the employer making work available to the employee, and the employee being required to be available to accept any work the employer offers.

An availability provision may only be included in an employment agreement that specifies agreed hours of work, and that includes guaranteed hours of work among those agreed hours, and furthermore the provision may only relate to a period for which the employee is required to be available that is in addition to those guaranteed hours of work. This means that an employee must be guaranteed some hours of work but an employer can use an availability provision in relation to extra *'availability'* hours providing:

- The employer has genuine reasons based on reasonable grounds for including the availability provision and the number of hours specified in that provision; and
- The availability provision provides for the payment of reasonable compensation to the employee for making themselves available to perform work under the provision.

The Amendment Act sets out factors which must be taken into consideration by an employer in determining whether there are genuine reasons based on reasonable grounds, and whether the compensation provided is reasonable.

If an availability provision does not comply with these requirements, it is unenforceable. Moreover, if the provision does not provide for the payment of reasonable compensation, the employee is entitled to refuse to perform work in relation to those availability hours.

If an employee is remunerated by way of salary, the parties can agree that the salary includes compensation for the employee making themselves available to work.

This amendment is not intended to prohibit employers engaging in genuine casual arrangements where there is no obligation for employers to offer work or for employees to accept work offered. Instead, it is intended to prohibit agreements where there is a lack of mutual obligations between the parties.

Parental leave

The changes made by the Employment Standards Bill (now the Parental Leave and Employment Protection Amendment Act 2016) have gained significant attention in the media as they amend entitlements for parents, including the amount of leave which can be taken and who can take it.

The main changes under the Act are:

- The introduction of the term *"primary carer"*, which is defined as someone who takes *"permanent primary responsibility for the care, development and upbringing"* of a child under the age

of 6. This is intended to better reflect the intention to extend entitlements only to those with permanent responsibility for a child and not to daily care minders.

- Primary carers who meet the 6 month or 12 month employment test are entitled to primary carer leave of 18 weeks (increased from 16 weeks).
- Primary carers who meet the 6 month employment test will now be entitled to apply for extended leave of 26 weeks which may be shared with their spouse or partner.
- Eligible employees are entitled to receive parental leave payments of up to 18 weeks and preterm baby payments of up to 13 weeks.
- If an employee does not meet the 6 month employment test but meets the parental leave payment threshold test, their employer can allow them to take a period of negotiated carer leave and to receive up to 18 weeks' parental leave payments and up to 13 weeks' preterm baby payments.
- A spouse who meets the 6 month employment test can take not only 1 week of partner's leave but extended leave of 26 weeks which may need to be shared with the primary carer.
- The introduction of keeping-in-touch (KIT) hours of 40 hours (or fewer) of paid work, which allows primary carers to stay in touch with their workplace during parental leave without losing their parental leave entitlements. KIT hours are available during an employee's parental leave *'payment period'*, and not during the unpaid extended leave period.
- Primary carers are not permitted to use KIT hours during the first 28 days of the baby's life, unless they are receiving preterm baby payments, which recognises that if a baby is preterm, the primary carer may not have time to complete a handover. This gives people flexibility before going on leave.
- In order to provide greater flexibility as to how people take parental leave, employees may take their extended leave entitlement over more than one period. However, employees and employers must reach mutual agreement about the dates of extended leave.

There are many significant changes made by the Employment Standards Legislation Bill which will affect employers and employees. We recommend obtaining advice to ensure you are complying with your legal obligations, and ensure you make any necessary changes to ensure compliance within the coming months.

Dealing with Complaints of Bullying – a Reminder for Employers

Three recent decisions of the Employment Court and Employment Relations Authority provide some useful reminders for employers when dealing with complaints of bullying in the workplace. Employers need to take these complaints seriously because bullying is a hazard in the workplace that can affect people both physically and mentally. Employers have a duty to provide a safe and secure workplace and a failure to properly address complaints of bullying can have significant legal consequences.

Be receptive to complaints of bullying

The first reminder is that employers need to be alert and receptive to employees raising bullying complaints. The Authority's determination in *Beckingsale v Canterbury District Health Board* is a recent example of where the employer failed to appropriately respond to and address an employee's complaints of bullying. Ms Beckingsale worked as a social worker for the Canterbury District Health Board ('DHB') from 2002 until she resigned in January 2013. She claimed that she was constructively dismissed because the DHB did not appropriately investigate and address her complaints of bullying. Ms Beckingsale claimed that she was subjected to *"16 months of systemic targeting, bullying and undermining."* Her resignation letter made it clear that she was resigning because she felt *"vulnerable and intimidated at work"* and that she had no other option but to resign.

The DHB claimed that Ms Beckingsale resigned without making a formal complaint which meant that it was not able to carry out a proper investigation and resolve the bullying concerns raised by Ms Beckingsale. However, the Authority disagreed and found that Ms Beckingsale raised her concerns about bullying in writing, by email, which constitutes a formal complaint and that the DHB's failure to investigate the complaint amounted to a breach of its duty of good faith. The Authority found that Ms Beckingsale's resignation amounted to an unjustified constructive dismissal and she was awarded $10,000.00 compensation for hurt and humiliation.

Raise the complaints with the employee in question

The second reminder is that employers need to raise any complaints of bullying with the employee in question as soon as they come to the employer's attention. Employers must act reasonably and fairly in conducting an investigation into bullying allegations because the employer has a duty of good faith to both the employee who makes the complaint and also to the employee against whom the complaint is being made.

Wellington Free Ambulance Service v Austing and Gibson-Horne is a recent example where the Court found that the employer's failure to raise the bullying complaints with the employees in question meant that they did not have an opportunity to respond to the allegations and therefore had an arguable case for unjustified dismissal.

The two employees in this case were employed as paramedics with the Wellington Free Ambulance Service ('WFA'). In September 2014 the WFA received complaints regarding the employees' conduct including allegations of aggressive and inappropriate behaviour and bullying towards their manager. The employees

attended a meeting and received a letter regarding the allegations but were not provided with details of the alleged behaviours or conduct. Following a report from an external barrister, which concluded that three allegations against the employees had been substantiated, the WFA dismissed the employees on 29 June 2015.

The employees subsequently initiated proceedings in the Authority for unjustified dismissal and sought orders for interim reinstatement pending the Authority's investigation. The Authority criticised the WFA's approach of investigating the two employees together: *"it cannot be the action of a fair and reasonable employer to attribute culpability to one employee for the actions of another because they were working together at the time."*

The Authority found that the employees had an arguable case for unjustified dismissal because none of the examples that were referred to in the investigation report had been brought to their attention. This meant that the employees never had the opportunity to respond to and improve on these areas of concern. The Authority consequently ordered reinstatement for both employees. The WFA's challenge to the Authority's order for reinstatement was dismissed by the Employment Court.

Respond appropriately

The third and final reminder is that employers should carefully consider each bullying complaint, taking into account all the relevant circumstances, and then decide on the best course of action for responding to the complaint. The Authority's decision in *Adams t/a Untouchable Hair & Skin v Brown* suggests that certain bullying complaints may not need to be addressed through a formal investigation if the employer is able to adopt an informal process that resolves the problem.

Ms Brown worked as an apprentice hairdresser at Untouchable Hair & Skin which is operated by Mr and Mrs Adams. One of the issues the Court had to consider was whether the employer had adequately investigated and dealt with allegations raised by Ms Brown that she had been bullied by another employee.

Mr Adams became concerned about Ms Brown's performance, in particular whether she was working proper hours and whether she was incorrectly applying discount codes to families and friends. Mr Adams arranged a series of meetings to discuss these concerns with Ms Brown. During these meetings Ms Brown raised a concern that she was being bullied by another employee which involved the exchange of inappropriate text messages. Mr Adams decided to deal with this concern by banning the use of cell phones at work and prohibiting the employees from texting each other outside of work.

The Court found that the process Mr Adams undertook for dealing with the bullying issue was not unreasonable. The focus on encouraging cooperation within the workplace was appropriate and appeared to resolve the problem. The Court also took into consideration that the text messages sent from Ms Brown to the other employee were aggressive *"indicating that she gave as good as she got."* Since the employer had adequately dealt with the issue the Court was not satisfied that the allegation of unjustifiable action through failure to investigate a bullying complaint had been established.

It is important for employers to note that this informal response to a bullying complaint may not be appropriate in some cases. The employer will need to consider the circumstances of each case and decide whether a formal investigation into the complaints or an alternative informal process is the best response for dealing with the complaints raised.

Further guidance

If you would like further information on the practical steps you need to take in relation to dealing with complaints of bullying you can refer to WorkSafe's Best Practice Guidelines on *'Preventing and Responding to Workplace Bullying'* which is available online: www.business.govt.nz/worksafe.

Immigration

Kiely Thompson Caisley's immigration team regularly advises employers on a range of employment related visa applications and associated issues.

In particular, we assist individuals wanting to work in New Zealand on a temporary or long term basis, and employers wishing to recruit foreign workers with the following:

- Work visas;
- Renewals of existing visas; and
- Approvals in principle.

If you require immigration advice please contact Simon Lapthorne on lapthorne@ktc.co.nz or Chontelle Climo on climo@ktc.co.nz.

Events

As part of our Autumn Seminar Series we will be holding the following events in our Auckland office:

- Seminar – Holiday Pay: Are you getting it right? on Thursday 12 May 2016;
- Seminar – Bullying and Harassment on Thursday 9 June 2016; and
- Seminar – Drug & Alcohol Testing on Wednesday 22 June 2016.

If you are interested in attending any of these events please RSVP to mollison@ktc.co.nz.

Collective Bargaining Roundtable

A number of KTC clients have recently been involved in collective bargaining under the new regime introduced last year. In the 12 months since the statutory framework for collective bargaining was changed, there have been two significant Employment Court decisions in relation to conferring an unlawful preference and good faith in bargaining.

We will be holding several *'roundtable'* luncheon sessions to consider:

- Notices to initiate bargaining;
- Good faith requirements in bargaining; and
- Passing on.

It's a specialist topic. If you are interested in attending please RSVP to mollison@ktc.co.nz

Staff Update

2016 has seen 3 new additions to the team at Kiely Thompson Caisley.

Simon Lapthorne – Senior Associate

Simon joined Kiely Thompson Caisley from a large national legal practice, having also previously worked as a Partner in a London law firm.

Simon has particular expertise in employee relations and dispute resolution, disciplinary investigations, performance management, restructuring and redundancies, restraints of trade and confidentiality. He also has significant litigation experience, including health and safety prosecutions.

Simon is also admitted as a Solicitor in England and Wales.

Julia MacGibbon – Senior Solicitor

Julia has experience in civil and criminal litigation after working for the Crown Solicitor's office in Auckland, becoming an Intermediate Prosecutor prior to joining KTC.

Julia studied at Otago University completing a Bachelor of Laws and Bachelor of Arts degree in 2010. She completed her Masters in Law in 2011, before being admitted as a Barrister and Solicitor of the High Court of New Zealand in September 2011.

Maria Bialostocki – Solicitor

Maria was admitted as a Barrister and Solicitor of the High Court of New Zealand in October 2014. After completing her Bachelor of Arts and Bachelor of Laws (Honours) conjoint degree at the University of Auckland in 2014 Maria worked as a Judges' Clerk at the Employment Court in Auckland.

Maria also worked for a US law firm in London, where she gained experience working on large scale employment disputes, including redundancies, equal pay claims and whistleblowing allegations.

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