Prāctica Legal March 2015

EMPLOYMENT LAW FOCUS

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Employment Law Focus is a regular online newsletter which, as the name suggests, will focus on employment law.

Each issue will summarise a selection of interesting employment law decisions that have been recently published by the Employment Relations Authority and the Employment Court, along with any upcoming law changes or topics of interest.

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AUTUMN 2015 CHANGES TO EMPLOYMENT LAW

Make sure you're ready!

As we enter into a relatively hot Autumn, many employers will be preparing for a number of employment law changes resulting from the Employment Relations Amendment Act 2014 ('Act'). The Act which came into force on 6 March 2015 amends the Employment Relations Act 2000 (but does not repeal it).

For pub quiz enthusiasts, it may interest you to know that this is the first piece of legislation passed since the National government won the election in September 2014. The commencement date is also a little unusual (traditionally 1 April) and is merely the result of the Act specifying a commencement date four months after the date it received the Royal assent, which in this case was 6 November 2014.

Many of the changes relate to negotiations during collective bargaining with unions, which will only affect those workplaces that are unionized. With insufficient space in an article this size to discuss all the changes, here are just some of the changes most likely to affect the average local business and their employees.

Flexible Work: Under current legislation, the right to request flexible work hours belongs only to those who have care of another person and who have been working for an employer for six months. Any eligible employee may only submit a request to work flexibly once in a 12 month period and the employer has three months in which to consider and decide whether to accept the request or to reject it based on 'Recognised Business Grounds.'

From 6 March 2015, the right to request flexible work hours will be extended to all employees (not just caregivers), there is no limit on how many requests can be made in a given period of time, the employee may do so from the commencement of employment (without waiting for six months) and the employer must consider and respond to the request within one month rather than the current three months.

Employers should give careful consideration to any requests for flexible work hours and objectively decide whether the business can or cannot realistically accommodate such a request. In some cases it would be operationally difficult (one example being where nurses change shifts and a staggered handover could result in crucial information being overlooked). The plus side on granting flexible work hours where it is operationally feasible is that it creates a better work/life balance for employees, improves workplace harmony and this usually results in increased productivity and retention of skilled workers. Greater flexibility may also be a benefit to the employer.

PAID PARENTAL LEAVE EXTENDED

From 1 April 2015 the parental leave payment period will be extended from 14 weeks to 16 weeks.

Meal and Rest Breaks: The new Act permits employers to not provide rest and meal breaks *under certain circumstances*. These circumstances are where an employer and employee have agreed that the employee will be provided with compensation instead of meal breaks or where the nature of the work means an employer is not reasonably able to provide a meal break (such as where an employee does the graveyard shift at a gas station and is the sole employee on duty). In either circumstance, the employer is required to compensate the employee and such compensation must be *reasonable*.

Provision of Information: The case of *Vice-Chancellor of Massey University v Wrigley* [2010] NZEmpC 37 made it a requirement that employers provide all relevant information to an employee where a decision that may adversely affect the continuation of that employee's employment is being considered. Unfortunately, this case raised tensions between the requirement to provide all relevant information (particularly when evaluating and selecting employees for redundancy) and an employer's obligation to protect the confidential information of other employees pursuant to the Privacy Act 1993. The amendments will allow an employer to withhold confidential information relating to another identifiable individual, evaluative material about the affected employee and information regarding the person who provided the evaluative material. Where an employer can provide the

information and still protect another individual by redacting (blacking out) information identifying that individual, the obligation to provide the information will still likely exist.

INCREASE TO THE MINIMUM WAGE

From 1 April 2015 the adult minimum wage will increase by 50c per hour to $14.75. The starting-out and training hourly minimum wage will increase by 40 cents to $11.80 an hour, as this is set at 80 per cent of the adult minimum wage.

For a more detailed outline of all the changes that will come into force on 6 March 2015, go to the Legislation Reviews section of MBIE's website or email us at: info@practicalegal.co.nz

COURTSIDE

Recent Employment Court and Authority Decisions

Employee ordered to pay $1,500 penalty for providing misleading medical information

Twentyman v The Warehouse Limited **[2015] NZERA Auckland 39**

Ms Twentyman, an employee of The Warehouse Limited ('TWL'), has been ordered to pay a $1,500 penalty to TWL for breaching the implied terms of her employment agreement. Ms Twentyman was declared unfit for work for the better part of two years following a work place injury to her shoulder. TWL is an Accredited Employer under the ACC Act and uses private insurance provider Care Advantage to cover workplace injuries. From March 2012 through to March 2014 Ms Twentyman self-reported to her doctors that the range of movement in her shoulder (which was operated on in November 2012) meant she could only abduct her arm 25 degrees and could not drive her manual car. During December 2013 and January 2014 TWL engaged a surveillance company to follow and video Ms Twentyman and the

evidence indicated that her self-reported capabilities to her doctor were considerably less than what she could actually do. Although Ms Twentyman tried to deny before the Employment Relations Authority that the photos were of her, the Authority held that they clearly were! The provision of the false information to TWL and to her doctors in order to obtain medical certificates provided to TWL was considered a breach of the implied terms of trust and confidence.

Employer fined $5,000 penalty for failing to provide employment agreements and filing false documents

Spence v Bay Enterprises Limited **[2015] NZERA Auckland 26**

Bay Enterprises Limited provides contract workers to the kiwifruit industry. In May 2014 the company was issued with an improvement notice by a labour inspector over its failure to provide written employment agreements to employees in breach of s 65(1) of the Employment Relations Act 2000. In July 2014 a revisit from the labour inspector indicated there were still employees who had not been provided with or signed employment agreements. Mr Singh of Bay Enterprises informed the labour inspector this was because the employees didn't want them. Further complaints were made to the labour inspector regarding lack of employment agreements and in August 2014, Mr Singh supplied the labour inspector with two signed employment agreements to support his contention he was complying. When these signed agreements were shown to the two employees concerned, they confirmed that they had never seen nor signed the agreements.

NB: Penalties ordered by the Employment Relations Authority for failure to provide an employment agreement are usually less this. The $5,000 penalty in this case reflects that this particular employer provided false documents to a labour inspector...never a good idea!

Finally, a comment on the $168,000 cake and the $1,000 'pile of crap.'

Two cases that have come out in the last week have sounded warning bells to employers and employees alike, when it comes to post-employment relationships.

***Hammond v Credit Union Baywide* [2015] NZHRRT 6 (2 March 2015)**

The 43 page decision published by the Human Rights Review Tribunal dealt with an ex-employee's complaint alleging a breach of the Privacy Act 1993. Likely to be referred to for ever more as the $168,000 cake case, the matter involved Ms Hammond, an ex-employee of Credit Union Baywide, and a cake which she baked and iced with expletives about her ex-employer. A photo of the cake was then uploaded on Facebook, with a privacy setting making it only visible to Ms Hammond's Facebook friends. An over-zealous HR manager, Louise Alexandra, first compelled a young employee who was a Facebook friend of Ms Hammond's to log into Facebook and thus obtained a picture of the cake. Ms Alexandra then sent the picture to a number of recruitment agencies warning them against employing Ms Hammond, effectively preventing her from applying for any jobs that used recruitment agencies. Although Ms Hammond had already obtained alternative employment in the industry, Baywide exerted considerable pressure on Ms Hammond's new employer to dismiss her saying it would refuse to deal with her which would cause significant business difficulties for the new employer. Ms Hammond felt compelled to resign rather than cause her new employer any further losses. Ms Hammond was awarded $98,000 for severe loss of dignity, humiliation and injury to feelings. In addition she was also awarded $38,350 for lost income, $15,543 for legal expenses and $16,177 for loss of benefit.

***Simpro Software NZ Ltd v Nuttall* [2015] NZERA Auckland 64**

Simpro's ex-employee, Mr Nuttall, signed a settlement agreement with Simpro which amongst other things, contained a clause that the parties would not make disparaging comments about each other. Mr Nuttall then posted comments on a Xero blog site stating that Simpro was "a pile of crap" and "a waste of space". Mr Nuttall was found to have breached the settlement agreement and was ordered to comply with the terms of the settlement and pay $1,000 to Simpro for legal fees