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EMPLOYMENT LAW FOCUS

This Issue: Health and Safety Reform Bill Update; Disciplinaries from Hell: 3 Demons Employed by the Devil Advocate

It would be no exaggeration to say that when the Health and Safety Reform Bill was first introduced to Parliament in March 2014, widespread panic ensued and literally overnight, a whole new industry of experts and consultants mushroomed, ready to advise employers as to what they would need to do to comply. One client seminar I ran had to be scheduled three times due to overwhelming interest, and that had not happened before!

The original Bill, although worthy in its vision to see a 25% reduction in workplace deaths and injuries by 2020, appeared to place an almost impossible standard on New Zealand employers, both large and small.

The latest amendments appear to have recognised that whilst significant improvement is needed in our health and safety record, the bar cannot be set so impossibly high that no employer would realistically, be able to meet it.

On the other hand, the amendments have been criticised for watering down the intent of the bill and for the definition of 'high-risk industries' which saw farming, arguably one of the highest-risk industries in the country left off the list.[1]

Below are some of the main amendments that affect New Zealander employers.

Definition of 'Officer'

The definition of an 'officer' of a PCBU ('Person Conducting a Business or Undertaking') has been narrowed to include only those persons in senior governance roles and in a position to

THIS MONTH'S DEAL!

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[1] The Government has defined 'high-risk' industries as those who have had 25 fatalities per 100,000 workers since 2008. According to information from Workplace Relations Minister, Michael Woodhouse, sheep, beef and grain farming has a fatality rate of 12 per 100,000 and dairy farming of 16 per 100,000.

exercise significant influence over the management of the business or undertaking and now expressly excludes from the definition *a person who merely advises or makes recommendations*.

Worker Participation and Engagement

Businesses with fewer than 20 workers that are *not* within designated high-risk sectors or industries are not required to have a health and safety representative or a health and safety committee, even if it is requested by workers.

Definition of 'Workplace'

This definition has been amended so that workplaces are only deemed workplaces when work is being carried out or is customarily being carried out, and a location therefore does not indefinitely remain a workplace once work has been carried out.

Volunteers

The definition of 'worker' now includes volunteer workers who carry out work for a PCBU on an ongoing and regular basis, with the knowledge and consent of the PCBU, where the work forms an integral part of the business. It excludes a number of activities such as fundraising, helping with sports and recreation, providing care for another person in the volunteer's home and when assisting educational institutions off-site of their premises.

The bill is set to pass into law late August 2015 and take effect in early 2016. To access all information on the bill to date, including Supplementary Order Papers, go to: www.parliament.nz and search for 'Health and Safety Reform Bill' or email us at: **info@practicalegal.co.nz**

The Health and Safety Reform Bill:

- **Was introduced to Parliament in March 2014;**
- **Had its second reading in Parliament on 30 July 2015 incorporating amendments recommended by the Select Committee on 24 July 2015;**
- **Is due for its third and final reading on 27 August 2015; and**
- **Is expected to come into effect early 2016 as the Health and Safety at Work Act 2015.**

Disciplinaries from Hell: 3 Demons Employed by the Devil Advocate

First: The Employer's Obligations

Under New Zealand employment law, the actions of an employer when taking disciplinary action against an employee, must be fair and reasonable. Section 103A of the Employment Relations Act 2000 ('Act') states *The test is 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*.

This section of the Act (also known as the Test of Justification) specifies the criteria the Employment Relations Authority or the Court must consider when applying the test and includes:

- Whether the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee; and
- any other factors the Authority or Court may consider appropriate.

Unfortunately, complying with this test can be considerably more difficult than the simple outline above implies--particularly when the employee engages a lawyer or advocate whose sole purpose appears to be to derail your fair and reasonable disciplinary procedure!

Demon 1: My lawyer/support person is unavailable

When asking an employee to attend a disciplinary meeting, it is fair and reasonable to, amongst other things, provide at least 2-3 days notice of that meeting AND notify the employee they have a right to bring a support person or legal representative. Enter the devil advocate!

The employee engages a lawyer or advocate who informs you they are now acting for the employee and further informs you they are not available for your meeting scheduled for Thursday. Neither are they available on Friday or next Monday. In fact, they are flat out and cannot attend anytime next week or the week after that either.

Your objections to this delay tactic will often be met with a claim you are breaching s 236 of the Act which states that *....Where any Act to which this*

section applies confers on any employee the right to do anything or take any action...<u>that employee may choose any other person to represent the employee</u>...[emphasis added]. The devil advocate will no doubt inform you that your intention to proceed whether the employee's chosen representative is available or not, is breaching the employee's right to *choose any other person to represent* them. Wrong!

Section 236 of the Act has been held by the Authority *not* to apply to representation at meetings conducted by an employer as part of a disciplinary process, as such meetings are not convened pursuant to a statutory right ...*to do anything or take any action*. Further, in the case of *Watson v Progressive Enterprises Ltd* ERA Auckland AA38/10 the Authority lamented that this was yet another case where the unavailability of the employee's representative had become a focus of the disciplinary process indicating the frequency with which this tactic is used. The Authority held that the employee had chosen his advocate from a large number of lawyers/advocates who could have provided timely representation in his matter, and if his advocate was unavailable then he should have chosen someone else.

Tip: If, after offering a range of reasonable alternative times and days, the lawyer/advocate continues to be unavailable, inform them in writing that the employee needs to consider engaging someone who *is* available. Further, offer the opportunity for the employee to comment either in person *or* in writing, no later than a certain time and date. Inform the representative that if the employee fails to avail themselves of this opportunity to put forward comments and explanations the employee feels the employer needs to know prior to making any final decision in the matter, the employer will have no other option than to make a decision after that deadline, based on the information they currently hold.

Demon 2: Demands to Attend Meditation During a Disciplinary Process

Another tactic commonly used by the devil advocate to avoid having their client front up to a disciplinary meeting in a timely fashion, is to demand that the parties attend mediation in the middle of the disciplinary process. This is most inadvisable as anything said during mediation is confidential and on a "without prejudice" basis. The latter means

that nothing said during mediation can be put before the Court and that is going to cause considerable difficulties if a large chunk of your disciplinary investigation occurred under these conditions. Anything said during mediation cannot subsequently be referred to in open letters and communications you may need to rely on to support your process and decision making. Remember, you may ultimately be required to demonstrate to the Authority or Court that your actions pass the test of justification, and how will you do that if half of it occurred in a forum that cannot be raised or even referred to in legal proceedings?

The devil advocate may rail that you are in breach of the s 4 good faith obligations in the Act to remain "communicative and responsive" and while they are trying to resolve the situation amicably by suggesting mediation, you are clearly being unreasonable by refusing to attend. They may threaten that a refusal to attend mediation will look very unreasonable before the Court and may even suggest that such a refusal provides grounds for an unjustified disadvantage grievance. Wrong!

The Authority dealt with this matter in the recent case of *French v Waikato Business Publications Limited* [2015] NZERA Auckland 22. The employer refused to attend mediation in the middle of its disciplinary process and the employee used this refusal as the grounds for one of her unjustified disadvantage grievances. The Authority dismissed this grievance and held at [147] that ...*Mediation is a voluntary process; there is no requirement that any party attend mediation unless it is directed by the Authority or the Court, and certainly it is an understandable stance of an employer that it wishes to complete its own disciplinary inquiries before undertaking dispute resolution. After all, the whole process of a disciplinary inquiry is designed to elicit facts in response to a concern and then make judgments about what should happen next. Arguably, only when those conclusions have been made can parties properly mediate in a useful way.*

Tip: Politely but firmly decline the request for mediation, in writing, and state that the request for mediation is premature and that nothing can be meaningfully mediated until the employer has completed the disciplinary investigation and has obtained all the information it needs to make a judgment on what should happen next.

Where the devil advocate continues to refuse to attend (or allow the employee to attend) a disciplinary meeting, again, offer the opportunity for the employee to comment either in person *or* in writing, no later than a certain time and date. Inform the representative that if the employee fails to avail themselves of this opportunity to put forward comments and explanations the employee feels the employer needs to know prior to making any final decision in the matter, the employer will have no other option than to make a decision after that deadline, based on the information they currently hold.

Demon 3: Medically Unfit to Attend

This is probably the trickiest of the three demons to slay, and one that would definitely benefit from the advice of a trusted employment lawyer or adviser. Basically, the employee goes to their GP and obtains a medical certificate stating they are medically unfit for work for two weeks, which

includes the period when the disciplinary meeting is scheduled. Two weeks later, another medical certificate is produced stating they are medically unfit for another month (the ongoing issue of the validity of these medical certificates will be addressed in a future article). The devil advocate will often inform you it is the stress of the disciplinary process that has brought on the illness and you are left in a quandary as to how much information you request about the illness, whether insisting on attendance at a disciplinary meeting will be seen as unfair and unreasonable conduct and how long an employer should reasonably be expected to accommodate this situation.

First, unless there is something in the employment agreement that requires you to pay them in these exceptional circumstances, the employee is on sick leave and once those entitlements have been exhausted, you have every right to ask the employee whether they wish to spend the remainder of their time using their accrued annual leave entitlements or to go on leave without pay.

If the employee is on paid suspension or special leave, the assumption is they can still attend a disciplinary. Once they declare they cannot due to illness, then they are on sick leave. At this point, the parties are at somewhat of a Mexican standoff. The employee cannot go on forever like this, and the disciplinary matter is not going away any time soon.

For cases where the sick leave has all the hallmarks of an attempt to avoid a disciplinary meeting, eating into their entitlements can make sick leave suddenly look very unappealing to an employee. Beware, however, that not all sick leave taken in these circumstances is illegitimate and an employer really does need to swim carefully in these waters. Disciplinary investigations *are* by their very nature, stressful, particularly where the allegations are very serious.

The recent case of *Ward v St Peter's School Trust Board* [2014] NZERA Auckland 520 dealt with just such a case scenario. The employee had been on sabbatical for a lengthy time when evidence of alleged serious misconduct was discovered. Once the allegations were raised, she produced what her lawyer described as a 'report' from a doctor which stated:

> *Miss Carol Ward was seen me on 26/9/2014. She was expressing her current health problems including her stress, related to her work place. I understood she is suffering from lots of stress at*

this stage. My feeling here is that, over the years she was inappropriately treated in her work place and that is possibly causing mental health problem [sic]*. It also could turn into further health problem* [sic] *in future*.

Ms Ward then produced successive medical certificates stating she was *medically unfit to attend* (although, as the Authority pointed out, attend what was not specified). The employer dismissed the employee during her sick leave, partly on the basis that the employer concluded her medical leave was merely an attempt to avoid participating in the disciplinary investigation. The employee argued her dismissal was unjustified as she was not given the opportunity to respond to the allegations, given she had been dismissed while on sick leave.

The employee was granted interim reinstatement. This was a preliminary matter which has not, at this stage, progressed to a substantive hearing. The Authority did indicate that if and when it did, the employee's failure to attend might sound in remedies in relation to contributory conduct

The Authority noted that the school should not have assumed that her medical incapacity was merely a *go-sick-and-delay tactic*. The Authority stated that had the employer made further enquiries as to the nature of her illness, sought authorisation to seek further information from her doctor and find out what exactly she was medically unfit to attend (work or a disciplinary meeting), they would have been on stronger ground.

Tip: Even where sick leave during a disciplinary looks dubious, proceed with caution. Ask the employee's advocate, in writing, to provide more detailed information as to the nature and cause of the illness. Ask the employee (through their advocate) to sign an authorisation permitting the employer to communicate with their treatment provider for the purpose of ascertaining the prognosis and whether the employee would be able to attend a disciplinary meeting.

Ask the employee to provide a medical clearance before returning to work and inform them that the disciplinary meeting will be rescheduled as soon as they are cleared fit for work. Finally, if they continue to be unable to attend, inform the employee's advocate that you are happy to receive their comments and explanations in writing, if that makes it easier for the employee, given their current health issues.

(Please note that the information contained in this article is of a general nature and is not a substitute for legal advice which may be more appropriate to a particular fact scenario.)

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