

New Employment & Holidays Legislation

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Disclaimer: this booklet has been prepared for the purpose of a seminar. It is not intended to be a comprehensive statement of the law or practice and should not be relied upon as such. If advice on the law is required it should be obtained on a professional basis.

Introduction

In accordance with electoral promises, the National led government has implemented a number of changes to the Employment Relations Act 2000 and Holidays Act 2003.

The stated purpose for the amendment to the Employment Relations Act 2000 is, in the words of the Bill, to provide more flexibility, greater choice and ensure a balance of fairness for both employers and employees in the principal Act while improving its overall operation and efficiency. These changes will allow for employment problems to be resolved more quickly, reduce costs, support more efficient, effective and flexible processes around ending the employment relationship, and help restore the confidence of all parties in the personal grievance system and the employment institution. It is also intended that, by assisting employment relationship problems to be resolved more quickly, the negative impact of these problems on workplace productivity will be reduced.

The stated purpose for the amendment to the Holidays Act 2003 is, in the words of the Bill to seek to provide greater choice for employers and employees, make the Holidays Act easier for employers and employees to understand and comply with, and improve the balance of fairness between employees and employers.

Changes to the Employment Relations Act 2000

These changes will take place as of 1 April 2011, excepting where otherwise stated.

Personal Grievances

The stated aim of the changes to personal grievance law is to reduce compliance costs, improve resolution processes, and reduce delays in the personal grievance system.

Extension of trial period to all employers

Currently, only employers with less than twenty employees can agree with the employee that the employee be hired on a 90 day trial period.

The amendment proposes extending that right to all employers, irrespective of the number of employees. The current requirements and law relating to the 90 day trial period will also remain.

Amending test of justification – S.103A of the Employment Relations Act 2000

Since 2004, the Act specified an objective test of justification that required an employer, in deciding on any action affecting an employee, to be fair and reasonable in all the circumstances. The test was *“would a fair and reasonable employer in the circumstances have acted in the same way”*.

The amendment proposes substituting the word *“could”* for *“would”*. What this would mean is that, when reviewing the actions of an employer, say when dismissing an employee, it will now be recognised that there are a range of fair and reasonable responses that could be made by the employer in that situation.

Minimum requirements of a fair and reasonable process

Currently, even a minor defect in process can give rise a successful and costly personal grievance. If you turn to page 7 of the attached copy of the Employment Relations Amendment Act 2010 Bill, you will see at Section 15(3) that the Authority will be required to consider a number of factors when determining whether the actions of the employer were fair and reasonable in the circumstances.

Those factors are, briefly:

- Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- Whether the employer had raised the concerns the employer had with the employee before taking any action;
- Whether the employer had given the employee a reasonable opportunity to respond to the employer's concerns before taking action;
- Whether the employer genuinely considered the employee's explanation in relation to the allegations against the employee before taking any action, such as dismissal.

It is important to note that the factors described above are not exclusive and the Authority can take into account any other factors that it would consider appropriate.

Most importantly, you will see that at Section 15(5) the Authority or Court may no longer determine a dismissal as unjustified solely because of a defect in the process, if the defect was minor and did not result in the employee being treated unfairly. This is a major change to the current situation and, in the author's opinion, a very good and timely change.

Reinstatement no longer primary remedy for a personal grievance

Currently reinstatement is the primary remedy but reality has shown that very rarely do employees seek reinstatement. They prefer to seek compensation.

The amendment effectively proposes to retain reinstatement as one of the remedies, when practical and reasonable, but it no longer becomes the required primary remedy to be considered.

Allowing mediation and the Employment Relations Authority to make recommendations on how to resolve employment relationship problems

This is a novel mechanism whereby the Authority or mediators may assist in bringing a personal grievance to a close by allowing for a quick settlement. Currently, when the parties ask the mediator to make a decision under Section 150 of the Employment Relations Act, they are bound by it. With this change, the parties will have time to consider the recommendation and to either accept or not accept it. Thus, it allows for the parties to rely on the expertise and knowledge of the mediator without being necessarily bound by the recommendations.

Improvement to the Employment Relations Authority's processes

The stated aim of the changes is to improve the operation of the system. Some of the changes appear to be designed to require the Authority to act in a formal, prescribed and consistent manner, without affecting its investigative rights.

There are also other changes clarifying the operation of the Authority and outlining the accountability of the Authority members to the Chief of the Authority.

There are also greater powers for the Authority to refer cases to the Employment Court.

Allowing penalties for obstructive or delaying behaviour

The Bill allows the Authority to award a monetary penalty against a person, that is a party or their representative, who without sufficient cause obstructs or delays an Authority investigation. The penalty can be awarded by the Authority on its own motion or as a result of a party seeking a penalty.

Providing for early problem resolution

The Bill clarifies that mediation services include early problem resolution that may occur without legal representation and at the request of the parties. This could be, for example, by way of telephone.

Clarifying minimum entitlements may be a matter for mediation but lawful minimum entitlements may not be subject to negotiation or reduction

Here the Bill is clarifying that minimum entitlements cannot be negotiated away at mediation. It does not mean that minimum entitlements will not be a matter of consideration in mediation, but the lawful amount of those entitlements cannot be subject to negotiation and possible reduction. An employee will not be able to trade away what they are entitled to by law. A mediator will no longer be able to sign agreed terms of settlement that would have the effect of breaching a party's minimum entitlements.

It is the author's opinion that this is a strange amendment as it could give rise to challenges against mediated agreements if there is a dispute as to what an employee's minimum entitlement might be. A good example could be a dispute relating to accrued holiday pay or notice period.

Minors aged 16 years or over will be able to sign an agreed term of settlement

Currently, although a person aged 16 to 17 can sign a settlement agreement, as well as be employed, the settlement is not enforceable until Employment Relations Authority approval. The Bill will now allow those minors to sign agreed terms of settlement without having to go the Employment Relations Authority and incur the costs of approval.

Clarifying when parties can go to the Authority without mediation

Currently, mediation is compulsory. The Bill is making a change by acknowledging there are situations where mediation could be impractical or an inappropriate prerequisite to an Authority investigation.

Case law will define impractical or inappropriate circumstances for mediation.

Promoting mediation as first problem solving option

If a matter has been to mediation but has not settled, then the Authority will give that case priority over cases that have not gone to mediation.

Allowing only the Court to issue ex-parte freezing orders and ex-parte search orders

Currently the Employment Relations Authority does have some powers to issue ex-parte freezing orders and ex-parte search orders. The change will ensure that only the Employment Court has such powers and, therefore, in any situation where a party wishes to see the assets of the other party frozen or obtain an order searching documents held by the other party, they will have to go to the Employment Court.

Employment Relations Authority Chief is empowered to oversee the operations of the Employment Relations Authority

This is quite a useful change, in that it is providing the Chief of the Authority certain powers to issue instructions to Authority members as to process, timeliness and other matters.

It is the writer's experience that parties are facing increasing frustration with delays arising from Employment Relations Authority members being overworked. Some cases take up to a year before a decision has been issued. This is to be contrasted with other Authority members who issue decisions within one month.

The Author supports the change in principle but the proof will be in the pudding.

Statutory right of cross-examination

Currently cross-examination of parties is only allowed if the Authority permits. The change will now provide the right to cross-examine subject to the Employment Relations Authority controlling the exercise of that right.

The Authority is empowered to refer cases to Court

Currently, the Authority can only remove a proceeding to Court if a party asks to do so. The Bill will now allow the Authority to remove cases to the Court at its own discretion.

Filtering out frivolous or vexatious cases

This change is useful, in that the Authority will be able to dismiss frivolous or vexatious claims or defences of claims. If so, where the Authority considers, in the first instance, there is little or no merit to an actual claim, the claim could be dismissed outright. Naturally, the parties can appeal to the Employment Court and, if the Employment Court did not agree with the initial dismissal, the matter would be referred to the Employment Relations Authority with an order for a full investigation.

Authority required to actively consider appropriateness of referring demand notices to mediation

This is a technical change which requires the Employment Relations Authority to actively consider whether it is appropriate to direct demand notices that relate to minimum entitlements to mediation before taking any action before it. These minimum entitlement claims relate to minimum wage and holiday entitlements.

Extending application of pre-proceeding discovery

This is another technical change. It relates to when a party is going to be proceeding against another party and they want to have access to information prior to filing their claim, so they can identify whether to go to the Employment Relations Authority or the Employment Court.

Imposing penalty interest for failure to comply with demand notice

Currently, if an employer ignores obligations in relation to wage and holiday entitlements, there is a minor consequence.

The amendment is adding penalty interest as an incentive for employers to adhere to the demand notices through ongoing penalties.

Enabling cases that have been inactive for 3 years in the Authority to be treated as withdrawn

The Bill provides that if a personal grievance claim has not been actively pursued or progressed by a party within 3 years from the last time they took any action in respect to that claim, it is deemed to have been automatically withdrawn. Once withdrawn, it can no longer be pursued.

Labour Inspector enforcement powers

Currently, Labour Inspector demands attract minimum penalties and are sometimes ignored. The Bill is basically designed to widen the Labour Inspector's role and forces the employer to be more responsive to Labour Inspector investigations.

Employers are required to retain copy of employment agreements and current terms and conditions of employment

With this change, which will come into place on 1 July 2011, a failure to comply will result in a penalty, but the penalty action will have to be preceded with a written notice of breach to the employer with 7 working days to rectify the breach.

Increasing maximum penalty for non-compliance

Currently, the maximum penalties for non-compliance with the Employment Relations Act are \$5,000 for an individual and \$10,000 for a company. These are now being increased to \$10,000 for an individual and \$20,000 for a company.

Defining function of Labour Inspector

The Bill now clarifies the role of Labour Inspectors as managing complaints as well as supporting business to achieve to compliant practices and systems. Please refer to Section 37 at page 17 of the attached Employment Relations Amendment Act 2010 Bill.

Enforceable undertakings

The Bill introduces a new concept of enforceable undertakings so Labour Inspectors can negotiate an outcome of compliant practice with willing employers and those undertakings can be enforced. Please note that, if an employer does not comply with a written undertaking, that undertaking can be enforced through the Employment Relations Authority or the Employment Court.

Please refer to pages 17 and 18 of the attached Employment Relations Amendment Act 2010.

Improvement Notices

The Bill now provides that Labour Inspectors will be able to issue statutory improvement notices. This is very similar to the provisions of the Health and Safety and Employment Act 1992.

Please refer to pages 18 and 19 of the attached Employment Relations Amendment Act 2010.

Union access to workplaces with consent of the employer

Currently, unions can pretty much attend any workplace to meet members and recruit new members. The Bill is now restricting union access to the workplace by making it conditional upon the consent of the employer, but such consent cannot be unreasonably withheld. The Bill justifies this change on the basis that it is intended to increase levels of choice and fairness for employers by enabling them to gain control over who is on a work site and when.

If a union does ask for access and it is denied, reasons must be provided in writing and, if those reasons are not provided or if the reasons are not reasonable, the employer could be subject to a penalty action.

This change has riled the unions but it is the Author's opinion that, in practical terms, most unions tend to seek the employer's consent anyway as a matter of common courtesy.

Clarifying that communication with employees during collective bargaining may occur

Essentially, the Bill is clarifying that an employer can communicate directly with the employees when it is bargaining for a collective employment agreement, provided the communications are consistent with the obligation of good faith in the Employment Relations Act. To act in good faith means not to mislead and to be transparent and honest.

Reaction to the Changes

The Unions and the Labour Party oppose the changes

This is not a surprise.

It is important to note that the main tactic available to the unions in opposition to the changes will be through collective bargaining. The author has sighted a number of communications from unions to their members whereby the unions are assuring their members that when negotiating new collective employment agreements they will ensure that a number of changes that have arisen from this new Bill will not apply to the collective employment agreement. The author anticipates that there could be industrial action at the point of negotiation of new collective employment agreements, with the employers wishing to rely on some, or all, of the changes and the unions resisting every change arising from the bill.

Employer organisations and business support the changes

This is not a surprise and it is fair to say that the changes have been designed to support businesses and create a perception, if not a reality, of a more equal standing between the employer and employee as far as the Employment Relations Act 2000 is concerned.

Changes to the Holidays Act 2003

Paying out annual holiday entitlement

This is change that was highly publicised. It will allow an employer and employee to agree that an employer will pay up to 1 week of the employee's minimum annual holiday entitlement in any one year, if the employee so requests.

Employees may only request payout of annual holidays to which they are entitled

One of the important features of the change is that the employer and employee cannot agree to pay out annual holidays in advance of the employee's entitlement.

Maximum of 1 week's annual holidays may be paid out in any entitlement year

Basically, as a result of this restriction, employees will always be entitled to a minimum of 3 weeks' annual leave away from work during the course of the year.

Payment for annual holidays paid out

The same rate of pay will be used for paying out annual holidays and taking annual holidays away from work.

Protections for employees and employers

Under the changes employees cannot be pressured into requesting that a portion of their annual holidays be paid out and employers cannot be pressured to agree to the request for a payout. There must be agreement between the parties and it can only be instigated by the employee.

Your attention is drawn to page 8 of the attached Holiday Amendment Act 2010 Bill, and in particular Sections 28C, 28D and 28E.

What these mean is that, first, the employer cannot make it a term of the employment agreement that the employee makes a request for a portion of his holiday entitlements to be paid out. Similarly, a requirement that an employer payout a portion of the employee's entitlement to holiday pay cannot be a term of the employees agreement, nor can it be raised in negotiations between the employer and employee regarding terms and conditions relating to annual wages.

Finally, the employer can have a policy that allows the employer to decline a request by the employee for 1 week's holiday to be cashed in.

Enforcing payout provisions

Labour Inspectors and the Employment Relations Authority will have the power to enforce compliance with paying out annual holidays, and that will include penalties relating to any entitlements such as the 1 week's payout.

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

As you will all be aware, the definitions of relevant daily pay and average daily pay have created all sorts of problems for employers trying to work out employee's entitlements.

The concept of average daily pay will now replace the current 4 week averaging formula. As a result, when calculating payment for leave, employers will still be required to attempt to determine what an employee would have earned on the day (i.e. the relevant daily pay) but the trigger for an employer having to move to an averaging formula has been made more permissive. The averaging formula will be available when it is not possible or practical to determine what the employee would have earned, or where an employee's daily payment varies within the pay period in which the holiday or leave would fall. If the employer cannot determine the employee's relevant daily pay, the employer must pay according to the employee's average daily pay.

The reader is now referred to page 4 of the Holidays Amendment Act 2010, in particular Sections 9 and 9A, which define relevant daily pay and average daily pay.

You will see that the relevant daily pay is the amount of pay that the employee would have received had the employee worked on the day concerned, whereas the average daily pay is subject to a calculation called into a formula where the employee's gross earnings for the 52 calendar weeks before the end of the pay period immediately before the calculation is made is divided by the number of whole or part days during which the employee earned those gross earnings.

Clearly, it is best to have a relevant daily pay set in place, and you will note at Section 9(2) of the Act that an employment agreement may specify a special rate of relevant daily pay for the purpose of these calculations.

It is the author's recommendation that all employers focus on having a relevant daily pay inserted in their employment agreements.

Transferring observance of whole public holiday to another working day

The Bill amends the Holiday Act to reintroduce the ability of employees and employers to agree to transfer the observance of the whole of a public holiday to another working day.

So, if Waitangi Day falls on a Wednesday, the employer and employees who work Monday to Friday may agree to observe Waitangi Day on Friday or Monday, as the case may be. There are a number of criteria that have to be met if the parties wish to transfer a public holiday.

Further detail is set out in Section 12 of the Holidays Amendment Act 2010, as attached.

Allowing employers to direct when alternative holiday may be taken

The changes are that, if an employer and employee are unable to reach agreement, then the employer may reasonably determine when the alternative holidays be taken, irrespective of when the entitlement to the alternative holiday arose. However, the employer must be given 14 days' notice of the date on which the employer requires the alternative holiday to be taken.

Employers may request proof of sickness or injury within 3 consecutive calendar days without having reasonable grounds to suspect that sick leave is not genuine

Currently, the employer must have reasonable grounds for suspecting that the sick leave is not genuine before proof of sickness or injury can be requested within 3 consecutive calendar days of the employee being sick.

The change will mean that the employer may request proof of sickness or injury for any quantum time where an employee declares to the employer they are sick or injured.

The employer will be required to meet the employee's expenses in obtaining that proof, so this is not a change to the current law in that respect.

Clarifying employee entitlements during closedown periods

The new Bill is more about clarification than any change. An employee is entitled to be paid for public holidays, alternative holiday, sick leave or bereavement leave falling during a closedown period if the day would otherwise be a working day for the employee.

Increasing maximum penalties for non-compliance

Non-compliance fines have been increased from \$5,000 to \$10,000 against an employer who is an individual, and from \$10,000 to \$20,000 for an employer who is a company.

Reaction

The changes have been opposed by the unions and the Labour Party but have been supported by employer organisations and employers.

It is the author's view that some of the changes were necessary as the original Holidays Act was badly drafted, and created uncertainties for employers. However, some of the other changes are more political and the jury is out as to whether or not allowing an employee to take 1 week's leave as cash will be of benefit to employers.