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cullings is the newsletter of ***Cullen – the Employment Law Firm***
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Arrival of the Employment Law Package

It has arrived. National's new employment law package was passed by a majority vote in Parliament on 23 November 2010. The changes to employment law are said to aim to give greater flexibility to the employment relationship, to increase the performance of the economy and to create more jobs.

The following changes do not come into force until 1 April next year.

Justification for dismissal or action

The test of justification for an action or dismissal by an employer has been amended. The word 'could' replaces the 'would' in section 103A of the Employment Relations Act. The test is now "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." Inherent in this semantic change is the notion that there is a range of actions open to a reasonable employer, not just one.

As a quid pro quo for this more employer favoured amendment, the Act has been amended to include four procedure related factors that the Authority or Court can look at to determine whether a dismissal or action was "what a fair and reasonable employer *could* have done". The factors are whether, considering the employer's resources:

- there was sufficient investigation of the allegations;
- the employer raised concerns with employee before taking action;
- the employer gave the employee reasonable opportunity to respond; and
- the employer genuinely considered the employee's explanation before taking action.

However, the Act provides that the Authority or the Court must not determine a dismissal or an action to be unjustifiable solely because the defects in the process were "minor" and did not result in the employee being treated unfairly.

Reinstatement only if practicable and reasonable

Reinstatement is currently the "primary remedy" in the Act although the Authority and Court have often declined to reinstate a dismissed employee because it has not been practical. The Act has now been amended; reinstatement is no longer the primary remedy and will only be ordered where it is practicable and reasonable to do so.

Extension of 90-day trial period

The 90-day trial period, previously only available to employers with fewer than 20 employees, now extends to cover all employers. To be enforceable, the trial period must be agreed to by the employer and employee and written into the employment agreement.

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THE EMPLOYMENT LAW FIRM

Employment Law Package ... continued

Changes to the Employment Relations Authority's powers

The Employment Relations Authority will be able to filter out vexatious or frivolous claims early on. The Authority's new power has been promoted as a measure to reduce the cost of disputes, to improve confidence in the system and to help resolve employment problems faster. Behaviour that delays the Authority can be penalised to reduce cost and improve efficiency. If the Authority dismisses a case because it is frivolous or vexatious, a party can challenge this decision in Court within 28 days of the Authority's decision to dismiss the case.

The Authority will now operate in a more judicial manner. It must allow the parties to cross-examine a party or witnesses to proceedings; previously cross-examination could only occur at the discretion of the Authority member. The Authority also now has the power to remove cases to the Employment Court by its own motion.

Union access and communication during collective bargaining

Before entering a workplace, a union representative must now request and obtain the consent of the employer. Consent to union access must not be unreasonably withheld by the employer. The employer must make a decision as soon as reasonably practicable but no later than the following working day. If the employer withholds consent, it must give reasons in writing for that decision to the union representative, no later than the working day following the decision.

The Minister of Labour has said the aim of this change is to ensure that agreement is reached about times unions can access workplaces and to ensure that health and safety and workplace operations are not compromised by inconvenient access.

The new package also clarifies that employers can communicate directly with their employees during collective bargaining, including talking to them about the employer's proposals for collective bargaining as long as this is consistent with the good faith obligation.

Changes to holidays

Cashing in one week's holiday pay

Employees will now be able request to be paid out a maximum of one weeks' annual leave in lieu of taking the time off. However, the employer does not have to agree to the request and must bear the cost, effectively paying 53 weeks wages each year. The trade-in must not be a term or condition of the employee's employment and the employer may not raise the matter in salary negotiations.

Calculation of leave entitlements

The calculation of pay for leave entitlement has been amended. "Relevant daily pay" will be used to calculate entitlements. However, where it is not possible or practicable to determine an employee's "relevant daily pay" or the employee's daily pay varies within the pay period when the holiday or leave falls, leave entitlements will be based on the "average daily pay".

Proof of sickness within 3 days

An employer will be able to request proof of sickness or injury within three consecutive calendar days if the employer informs the employee as early as possible and agrees to meet the employee's reasonable expenses in obtaining the proof.

Penalties for non-compliance

Maximum penalties will double for employers who don't comply. The maximum penalty for employer individuals increases from $5,000 to $10,000 and $10,000 to $20,000 for employer companies.

Summary

These changes are largely employer friendly. The problem with changing the law is that relatively tested aspects of most of the Employment Relations Act have been amended. Until there are some cases to test the real effects of the changes employers may want to exercise some caution (or run a question past us).

At the least, employers should utilise the trial employment period provision and have their employment agreements amended to enable them to do so from 1 April 2011. We, of course, would be happy to help in that regard.