cullings

SEPTEMBER 2012

cullings is the newsletter of
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Taken to the cleaners

For many businesses who gain new cleaning contracts, the obligation to take on vulnerable employees such as cleaners and kitchen staff can be somewhat of a shotgun marriage. Employers wanting a clean break could at least look forward to the prospect of ending the marriage through a restructure. The law in this situation has been criticized as unclear. Now a recent ruling of the Supreme Court has provided new guidance on how to interpret this law.

Love me tender

In January 2010 Massey University decided to put up for tender its cleaning contracts across its Albany, Palmerston North and Wellington campuses. OCS Limited won the tender.

The existing cleaners who were employed by Spotless Services Limited and Total Property Services Group Limited elected to transfer their employment to OCS. This is an entitlement available to vulnerable workers under Part 6A of the Employment Relations Act ("ER Act").

Take it or leave it

Even before the cleaners had transferred, OCS had already decided that changes were necessary in the way cleaning was managed at the campuses. From these changes it was clear that there would be less work available.

OCS began a consultation process with the affected staff before they had officially transferred their employment. OCS told the cleaners that if they did not agree to the proposed changes then they could be made redundant.

Unfortunately for the cleaners their collective agreement stated that in the event of loss of employment, the downsizing of a client contract or the loss of a client contract, no claims for redundancy payments could be made.

Despite this clause the cleaners argued that Part 6A of the ER Act entitled them to bargain with the new employer for redundancy entitlements. OCS disagreed.

The law

Under the ER Act when a new employer refuses to negotiate redundancy entitlements then the transferred employees can have these entitlements determined by the Employment Relations Authority. However, this right depends on the employment agreement:

- not providing for redundancy entitlements; or
- not expressly excluding redundancy entitlements.

The cleaners' arguments

The cleaners' first argument was that all they had to do was satisfy one of the above limbs, and then they would be entitled to bargain with OCS for redundancy.

The Supreme Court disagreed with this argument. Instead these provisions should be read cumulatively. Otherwise an employer who has expressly excluded redundancy entitlements in the agreement would always be forced to bargain simply by not providing for redundancy entitlements in the agreement. The Court did not accept that Parliament intended to achieve this result.

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The cleaners' second argument was that even though the contract excludes redundancy payments, this does not exclude them bargaining for non-monetary entitlements.

The Supreme Court agreed with this argument. The Court decided that because "redundancy entitlements" are defined under Part 6A as including redundancy compensation, logically there must be other forms of non-monetary compensation that can be included as redundancy entitlements. For this reason, the cleaners were allowed to bargain for other benefits, such as the right to be retrained.

The wash up

The Supreme Court ruling narrows the circumstances in which vulnerable employees will be allowed to bargain for redundancy entitlements. The silver lining for employees is that even if bargaining for monetary compensation is a no-go, they can still bargain for other compensatory measures.

Employers will be forgiven for scratching their heads when trying to decipher this area of the law, but at least they are in good company. The law has been widely criticized and the Government has been lobbied to repeal it.

In the meantime employers considering a restructure which would affect transferred employees should consider the following:

- in order for vulnerable workers to bargain for redundancy they need to show:
  - that there is no provision for redundancy entitlements in their employment agreement, and
  - that their employment agreement does not expressly exclude redundancy entitlements;
- only the forms of redundancy entitlements that are expressly excluded in the agreement cannot be bargained for; and
- exclusion of some entitlements does not exclude them all.

If you are likely to employ vulnerable employees, we recommend that you review your employment agreements to ensure that all redundancy entitlements are expressly excluded to the extent that has been agreed to.

Panel for External Legal Services to Government

Cullen – The Employment Law Firm is one of only eleven law firms appointed to the Panel for External Legal Services to Government to provide employment law advice to government (and all of their associated entities) throughout New Zealand.

Sickness, Stress and Medical Incapacity Lunchtime Webinar — 10 October 2012

This webinar looks at an all-too-common frustration for employers—sick employees. It explores a range of issues, explains the relevant law, and gives advice on how to deal with sick employees. Simon Ryder-Lewis will also speak on his experience with sickness and stress and the effects on an employee.

Peter Cullen, Partner of ***Cullen—The Employment Law Firm***, and Dr Simon Ryder-Lewis, Director of ***Work Health Solutions Limited***, will present this interactive webinar which aims to provide employers with a toolbox of strategies to use when dealing with sick and stressed employees.

Employers can log into the webinar and submit written questions to the presenters.

Date: Wednesday 10 October 2012
Time: 12pm-1pm
Location: Log in remotely from your office computer
Price: $50 for HRINZ members, $80 for non-members
Enrol at: www.hrinz.org.nz (national events > professional development programme > courses > webinars)

The webinar will cover the following issues:

- The meaning of sickness and stress
- The abuse of sick leave
- The taking of excessive sick leave
- Obtaining medical certificates
- Dismissing an employee for medical incapacity