

## **Amendments to the Employment Relations Act 2000 and Holidays Act 2003**

With the start of the new financial year on 1 April 2011, we also herald a few relevant legislative changes.

### **Employment Relations Act**

#### **Trial Period – An Option Available to All Employers**

Initially, the 90 day trial period was only an option available to businesses with 19 or less employees. The amendment will enable all employers to use this option when taking on a new employee. Existing employees transferring or being promoted into to a new role are exempt.

Any trial period must be agreed to in writing and negotiated in good faith as part of the employment agreement. This includes considering and responding to any issues raised by the prospective employee regarding the offer. Please note that for the trial period to be effective, the employment agreement must be signed before the employee starts work. As you need to give new employees the opportunity to review their employment agreement in full prior to signing it, we recommend that you give new recruits the agreement as soon as possible after the verbal offer has been made and accepted.

The maximum duration of a trial period is 90 days. An employee who is dismissed before the end of the trial period cannot raise a personal grievance on the grounds of unjustified dismissal. However, they may raise a personal grievance on other grounds, for example, for discrimination, harassment, or unjustified action by the employer.

The trial period presents employers with a low risk opportunity to ensure that their onboarding process is as robust as possible. It is during this time that you can quickly set up a new starter to succeed by helping them to understand their role and see how their contribution fits into the overall plan of your business. The time limit imposed by the trial period also enables you to implement a structured induction programme with targeted weekly and monthly review meetings that dovetail into your ongoing performance appraisal process.

The notice period in the trial period can be as low as a week or a few days.

### **Personal Grievances - What Could a Fair And Reasonable Employer Do?**

The test of justification for dismissal/disciplinary action and steps required in a fair process will also be amended to “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.” The key to this change is the replacement of the word “would” with “could” which eliminates the need for the employer to objectively consider what the hypothetical reasonable employer would have done in the same situation and instead, providing the employer can justify their actions as something a reasonable employer could have done, then a more subjective approach is possible.

The minimum requirements of a fair process in taking disciplinary action should include:

- raising your concerns with the employee in the first instance
- a thorough investigation into the allegations against the employee
- a reasonable opportunity for the employee to respond to the allegations and concerns
- genuine consideration of the employee's explanation and responses

### **Personal Grievances- Reinstatement Not Primary Remedy**

Reinstatement restores the employee to the situation they were in prior to dismissal and was the primary remedy provided for in the Act. Oftentimes, this is not a practical solution for either the employee or the employer as damage to the employment relationship is often difficult to overcome. The amendment means that the Employment Relations Authority will no longer have to consider reinstatement as the first option in deciding an award for unjustified dismissal. However, reinstatement will be retained as a remedy where practicable and reasonable.

### **Personal Grievances - Early Problem Resolution Without Representation**

Mediation is a formal process that usually involves professional advocates. However, employers and employees can opt for a low cost solution before formal mediation. Parties may obtain an assessment from a mediator over the telephone or the mediator may visit the work site regarding the risk of proceeding with or defending a claim. This can take place without formal representation if both parties agree and request this.

### **Personal Grievances – Promoting Mediation**

If you have already been to mediation but the matter is still unresolved, your case will be given priority at the Employment Relations Authority.

### **Personal Grievances – Recommendations by a Mediator or Authority Member**

Mediators and Authority members will have a new power to make written recommendations to the parties if requested to do so. The recommendation will be about how the problem will be solved and parties must agree in writing to such a recommendation. This will be full and final settlement and enforceable under the Act unless one party objects within a set time frame. If there is an objection, the investigation will continue. The parties can request a different mediator or Authority member continue the investigation.

### **Union Access to Workplaces**

From 1 April 2011, union access entitlements will be amended so that an employer will have to give consent to union access. However, consent can not unreasonably be withheld and there will be a time limit for responding to a request for access. Failure to respond within two working days will be deemed as consent.

### **Communications During Collective Agreement Bargaining**

Regardless of union membership, a good employer seeks to ensure that their workforce is well informed and has access to relevant information. As such, one of the challenges during bargaining is how to ensure information is shared with employees. This change may alleviate some of the complexity as, provided that communications are in good faith, employers will be allowed to communicate with employees directly during bargaining for a collective agreement.

### ***Coming into Effect 1 July 2011:***

#### **Employer must keep copy of Employment Agreement**

From 1 July 2011, you will be required to keep a copy of employment agreements regardless of whether these are signed or unsigned. Agreements must be available to employees on request. Ideally, a written employment agreement should be signed by both you and your employee before their first day of work.

### **Holidays Act Changes**

#### **Cashing Up of Annual Leave**

Employees can request to be paid out for up to one week of their four weeks of annual leave each year. The request must be made in writing and the request may be for less than a week to be cashed up.

You may have a policy that states that you will not consider any requests to cash up leave however, the absence of such a policy obligates you to consider any such requests in good faith.

### **Transfer of Public Holidays**

At the employee's request, you can agree with individual employees to transfer a public holiday to be observed on another day. This other day must be an otherwise working day for the employee.

### **New Average Daily Pay Calculation**

For employers with variable roster patterns, the default calculation of Relevant Daily pay has been problematic. The changes to the Act now provide an alternative calculation if it is not possible or practicable to work out Relevant Daily Pay for sick, bereavement or alternative leave and public holidays. Average Daily Pay is calculated by dividing gross earnings for the previous 52 weeks by the number of days worked during that period.

### **Definition of Discretionary Payments and Allowances**

Discretionary payments are payments that an employer is not bound by an employment agreement to pay. For example, bonuses that are not referenced in an employment agreement or associated policy would be considered as a discretionary payment. However, if a bonus payment is referenced in the employment agreement this is not a discretionary payment, even if the amount is variable or conditions need to be met, and will need to be included in the calculation of gross earnings.

### **Proof of Sickness or Injury**

Employers are able to require an employee to provide proof of sickness or injury for any length of sick leave. If the employee has been absent for less than three consecutive days, the employer must meet any reasonable expenses in obtaining this proof.

### **Increase in Penalties For Non Compliance**

There has also been an amendment so that the maximum penalties for non-compliance are doubled to \$10,000 for individuals and \$20,000 for companies for each instance of non-compliance.

If you haven't already reviewed your employment agreements, now would be an opportune time to do so to ensure that you are compliant with the amendments and well prepared for any questions your employees may have leading up to 1 April 2011.