

## Trial Periods out for some, statutory rest and meal breaks in for everybody

One of the final acts in the Government's 100-day plan was to introduce a Bill which aims to tilt the balance of New Zealand's labour law landscape more in favour of employees and unions.

While the legislation may be new, for the most part, it simply reverses many of the changes made by the previous Government.

### Restriction on the use of 90 day trial periods

A trial period allows employers to dismiss employees within a 90 day period without being subject to a claim of unjustified dismissal.

Employers with more than 19 employees will no longer be able to make use of trial periods and benefit from the above protection. For most employers, this is probably the most significant change in the Bill. This will return the law in relation to trial periods to where it was when initially introduced by the National-led Government in 2009.

Employers with more than 19 employees will still be able to make use of probationary periods. However, an employee employed under a probationary period is still able to make bring a claim of unjustified dismissal. As a result, an employer must have a good reason for dismissal and a fair procedure must be followed.

In terms of a dismissal for poor performance (which is likely to be the reason for an employer wanting to dismiss a new employee who 'hasn't worked out'), this will require that the employee receives a series of warnings in relation to their performance along with support, adequate training and an opportunity to improve. As a result, it is going to be significantly more difficult for those employers who can't make use of trial periods to dismiss new employees who haven't worked out as planned.

### Reinstatement restored as primary remedy

Reinstatement was the primary remedy under the Employment Relations Act 2000 until 2011. It was then relegated to one, of a number, of remedies available to employees. Reinstatement will now be reinstated as the primary remedy if an employee is successful with a claim of unjustified dismissal. If reinstatement is requested by an employee, then the Employment Relations Authority will be required to order reinstatement wherever practicable and reasonable.

### Rest and meal breaks

Currently, employers have flexibility as to when and how they provide their employees with rest and meal breaks. This can include not providing any rest or meal breaks and instead providing employees with compensatory measures (such as finishing a shift early).

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The Bill, to a large extent, removes this flexibility and requires that employers provide employees with rest and meal breaks of prescribed duration at set times. Only employers who are engaged in essential services will be exempt from these requirements and only in limited circumstances.

## **Vulnerable Employees**

The exemption which currently applies if the 'new employer' in a restructuring (a contracting-in, contracting out or subsequent contracting) has 19 or fewer employees will be removed. As a result, vulnerable employees will be entitled to elect to transfer, on their existing terms and conditions of employment, regardless of the size of the 'new employer'.

## **Collective Bargaining and Unions**

The Bill includes a raft of changes designed to strengthen unions' presence and bargaining power in New Zealand work-places. However, for the most part, these are not significant changes and again mostly restore the position to what it was before the changes made by the National-led Government.

### *Return of the 30 day-rule and provision of information*

As was the case until 2015, any new employee, whose work is covered by a collective agreement, will be employed under the terms and conditions of that collective for the first 30 days of their employment. The employer must, at the same time, provide to the employee a copy of the collective agreement along with information, provided to the employer from the union, about the role and functions of the union. There is currently little restriction in the Bill on what information a union can provide to an employer for passing on to employees.

The employer must also, where the 30 day-rule applies and the employee does not object, provide information to the applicable union about the new employee and whether or not they have elected to join the union.

### *Union Delegates*

Union delegates will now be entitled to reasonable paid time off to represent other employees of the employer. There is no requirement that the other employees are members of the union or that the

employer has concluded a collective agreement with the union or the union delegate. The Bill also expands the discrimination protections which apply to union delegates and union members. Union representatives will also now be able to access workplaces without prior consent.

### *Initiating Bargaining*

The 'head start' period of 20 days, or 60 days in the case of a multi-employer collective agreement ('MECA'), in which unions can commence bargaining, but an employer cannot, has been reinstated.

### *Concluding Bargaining*

Parties will now be required, as they were until 2015, to conclude collective bargaining unless there is a genuine reason, based on reasonable grounds, not to. Employers will also not be able to opt out of bargaining for a MECA and any collective agreement will now be required to include rates of wages or salary.

### *Partial Strikes*

The Bill removes the ability of employers to make deductions from employees' pay when they engage in partial strike action (such as working to rule or undertaking a 'go-slow').

## **Learning Point**

The Bill is currently going through the Select Committee process. While there is no immediate requirement to take action, employers should ensure that they are well aware of these changes and in a position to adapt when the legislation is passed. Larger employers who have made use of trial periods will have to amend their employment agreements and think about how going forward they are going to address those new employees who haven't 'worked out'.

This Bill is unlikely to be the end of the Government's reform to employment law. Further changes have been signalled in relation to redundancy protection, the film-industry, minimum terms and conditions for particular industries and the rights of 'dependent contractors'. We will keep you updated on these changes as they progress.