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QUIGG PARTNERS

Season's Greetings from Quigg Partners

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Employment Relations Amendment Bill Passes

The Employment Relations Amendment Bill has passed with support from Labour, NZ First and the Green Party. The Bill's purpose was to restore key minimum standards for employees and strengthen collective bargaining and union rights.

Key changes in the Bill are:

1. Businesses with more than 19 employees will no longer be able to utilise 90 day trial periods (which prevent employees from bringing a personal grievance for unjustified dismissal) when employing new employees. Probationary periods can still be used by businesses of all sizes.
2. The Bill sets new minimum entitlements for rest and meal breaks including prescriptive requirements as to where breaks should fall during a shift.
3. Businesses will again have a duty to conclude single-employer collective bargaining unless there is a genuine reason not to.
4. The '30 day rule' will return; new employees whose work is covered by a collective agreement, will work under the terms of that collective agreement for the first 30 days' of employment and must choose whether they will join the Union and be permanently covered by the collective agreement within those 30 days.
5. Unions will no longer need employer consent to enter unionised workplaces when bargaining is taking place.

The National Party opposed the Bill and has promised to repeal it if they come back into power. National's Scott Simpson said the Bill "does pretty much just one thing, and that is that it grows the market share of the trade union movement." We do however note that the vast majority of the changes under the Bill simply return the law to its position prior to various minor amendments made by National during its last term. In reality these changes are more a case of returning to the previous status quo during the mid to late 2000s.

Some of the changes come into force immediately. Most of the Bill (including the restriction on the use of trial periods) will come into force on 6 May 2019.

Notice requirements and 90 day trial periods

An employee dismissed under a contended 90 day trial period has been awarded 12 months' remuneration and compensation after the employer failed to comply with contractual notice requirements

Mr Roach initially accepted the position of Business Manager with Nazareth Care Charitable Trust Board. Before he started work he accepted a different role of General Manager. Both employment agreements contained a 90 day trial period provision. Mr Roach began work as the General Manager but was summarily

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dismissed within the 90 day period and was paid in lieu of notice. Mr Roach claimed he was unjustifiably dismissed because the trial period was not valid and the notice given did not comply with his employment agreement.

The validity of the trial period

90 day trial provisions may only be used where an employee has not been 'previously employed' by that employer. The definition of 'employee' includes a person who has been offered and accepted work as an employee. Mr Roach argued that before he accepted the General Manager position he had been an employee of Nazareth because he been offered and accepted work as the Business Manager. As a result, Mr Roach said that the 90 day trial period in the General Manager agreement was unlawful as he had been previously employed.

The Employment Court stated that a meaning of 'employee' that is consistent with the purpose of trial periods must be adopted. Therefore, where the Employment Relations Act 2000 refers to an employee that has not been previously employed it means an employee who has not yet performed work for the employer, as the purpose of the trial period is to allow the employee to be assessed while working. Therefore Mr Roach had not been 'previously employed' as he had not started working and the 90 day trial period in the General Manager agreement was valid.

This is difficult to reconcile with previous decisions of the Employment Court which have held that where an offer of employment has been accepted a trial period cannot be subsequently imposed as the individual becomes an employee at the point the offer is accepted.

The notice period requirements

Mr Roach was paid in lieu of his one week contractual notice provision which said "The Employer might decide to pay the Employee not to work." Mr Roach said that 'notice' in the Act's trial period provisions meant contractual notice, and that the contractual notice provision allowed for a period of paid leave but not for dismissal followed by payment.

As 90 day trial periods remove an employee's fundamental rights they must be strictly interpreted. The Court held that there were no grounds for summarily dismissing Mr Roach and that the employment agreement did not allow for payment in lieu of notice. When Nazareth summarily dismissed Mr Roach it did not comply with the employment agreement so it was unable to rely on the valid trial period provision. This opened Nazareth to a claim of unjustified dismissal.

Was Mr Roach's dismissal justified?

Nazareth dismissed Mr Roach over performance concerns but none of those concerns were discussed with Mr Roach because Nazareth believed it would rely on the protection

of the trial period. The deficiencies in the dismissal process were significant and it was found that Nazareth did not act as a fair and reasonable employer. Mr Roach was found to have been unjustifiably dismissed and he was awarded 12 months' lost remuneration. The Employment Court elected to exercise its discretion to award more than the usual three months lost remuneration on the basis that there was no evidence Mr Roach's employment was in jeopardy. The Court also awarded compensation for humiliation, loss of dignity and injury to feeling of $25,000.

Similar case

In *Ioan v Scott Technology NZ Ltd (trading as Rocklabs)* Mr Ioan was dismissed under a 90 day trial period. The employment agreement provided for a four week notice period but said Rocklabs could choose whether Mr Ioan would be required to work through the notice period. After performance concerns were raised, Mr Ioan was told his employment was to end "effective immediately" and the "effective last day of work" was that day. The letter acknowledged the four week notice period and said Mr Ioan would be paid in lieu.

The Employment Court held the employment was validly terminated. Mr Ioan was given four weeks' notice for which he was not required to work but would be paid. While Mr Ioan's performance of work was terminated that day, the employment agreement technically continued for a four week period.

The distinction between *Roach* and *Ioan* is that Nazareth terminated the employment immediately in breach of the contractual notice requirements. In *Ioan* Rocklabs acknowledged the employment agreement would remain in effect during the notice period.

Take away point

Employers should be especially aware of notice requirements in trial period provisions. Where notice requirements are ambiguous employers should seek advice and consider reviewing the requirements for future agreements. When dismissing employees under a 90 day trial period, employers should ensure they strictly adhere to notice requirements.

A five step approach to compensation for humiliation, loss of dignity and injury to feelings

After finding an employee was unjustifiably dismissed the Employment Court took a detailed five step approach to compensation for humiliation, loss of dignity and injury to feelings and confirmed that these awards should be considered in three general financial bands

Ms Cheng worked for Richora Group Limited for three months before her employment was terminated. She successfully brought a claim against Richora in the Employment Relations Authority for unjustified dismissal. Richora challenged the Authority's determination in the Employment Court.

Background facts

Ms Cheng suffered from depression. Mr and Mrs Li, who ran Richora and knew about her depression, offered her administration work. Ms Cheng began work in January 2017. The employment was not formally documented. After a month Ms Cheng had not received any wages.

On 7 March 2017 the Li's accountant told them the IRD had been in contact about not paying any employee wages. Later that day Ms Cheng found she had been locked out of the Richora offices by the Li's.

On 8 March 2017 Ms Cheng's husband met with Mr Li at Mr Li's request. Ms Cheng did not attend due to illness. Mr Li said Ms Cheng had contacted the IRD (which she denied) and offered $3,000 for Ms Cheng's resignation. The next day Ms Cheng attempted to commit suicide.

Later that month Mr Li posted online about an unnamed employee who he described as "despicable and shameless… villainous". The post caused further emotional damage. On 11 April 2017 Ms Cheng raised a personal grievance.

The Court's analysis

The Court found that Ms Cheng had been unjustifiably dismissed on 7 March 2017. It held that the Li's did not adequately engage Ms Cheng, she was not told the purpose of the 8 March 2017 meeting and it continued despite her absence. She was not given an opportunity to respond to Mr Li and she was pushed to resign. The Court ordered Richora to pay unpaid wages and three months' lost remuneration.

Of greater interest was the following five step approach the Court took to assess any compensation for humiliation, loss of dignity and injury to feelings.

Step 1 Harm – Richora's conduct on 7-8 March 2017 damaged Ms Cheng's self-esteem, made her feel devalued, caused her to experience depression, anxiety and acute stress.

Step 2 Extent of loss – Ms Cheng suffered acute loss: she experienced a dramatic decline in health. The severity of the harm was compounded by pre-existing conditions but the Li's were always aware of Ms Cheng's mental state.

Mr Li's online posts were made after she was terminated. The loss that is compensated must arise from the grievance, in this case the unjustified dismissal. While the posts were linked to the employment, the harm arising from the posts could not be linked to the unjustified dismissal and compensation for loss caused by the posts could not be awarded.

Step 3 Where on the spectrum of cases does this case sit in terms of harm suffered? – The Court found the harm fell in the upper band: Ms Cheng was seriously impacted by the sudden end to her employment, especially as she held the Li's in high esteem and placed value on their relationship.

Step 4 Where on the spectrum of cases does this case sit in terms of quantum? – The Court confirmed the 'band' approach first seen in *Waikato District Health Board v Archibald* and stated that the bands are: band 1 (low range harm) $0-$10,000; band 2 (mid range harm) $10,000-$40,000; band 3 (upper range harm) over $40,000. The Court looked at awards in similar cases and placed this case in band 3.

Step 5 What is a fair and just award in the present case? – In the Authority Ms Cheng was awarded compensation of $20,000 for humiliation, loss of dignity and injury to feelings. The Court considered Ms Cheng should have been awarded more to reflect band 3 harm. However, Ms Cheng had not sought a greater award and so the Employment Court did not have the jurisdiction to award an amount higher than that claimed.

Take away points

This case set a new five step approach to determining the level of award made for humiliation, loss of dignity and injury to feelings. It also confirms the banding approach recently adopted by the Employment Court. Employers should be wary of the increased awards now being made; even harm in the middle range could warrant an award of close to $40,000.

Although post termination conduct can often not be taken into account when determining compensation for loss, employers should note that employees are not barred from seeking redress through other means.

Overseas snippets

Labour hire changes on the horizon

An Australian woman employed by a labour hire agent has been reinstated to her position after the agent dismissed her on the orders of the host business

The recent Australian decision of *Star v WorkPac Pty Ltd* has put current labour hire practices under threat. Ms Star was employed by WorkPac as a casual employee to work in a mine operated by BMA. After commencing work, Ms Star was told by WorkPac that BMA were disestablishing her position. She was not assigned to an alternative role and understood her employment was terminated.

The Australian Fair Work Commission found her employment was terminated when WorkPac complied with BMA's decision to remove her from the mine. The Commission found WorkPac did not have valid reason for the dismissal and should have considered alternative roles. WorkPac was ordered to reinstate Ms Star but BMA refused to reinstate her to the mine. Ms Star's union sought relief and BMA was required to allow Ms Star to return to work.

This case emphasises that labour hire companies cannot ignore dismissal requirements and merely pass the buck to the client. It also indicates that host businesses should be aware that they may not able to remove casual or temporary staff from their workplace without good reason.

This case is interesting in the New Zealand context as our Government has given signals that they intend to further regulate this sector and potentially expand protections for temporary workers.

A reminder of employees' duties of loyalty

A business's competitor has been ordered to pay over $14 million to the business after the competitor assisted the business's employees to divert clients to the competitor

Two employees of an Australian pre-paid funeral business approached their employer's competitor with a plan to divert business to the competitor. The competitor assisted the employees with this plan while they were still employed by the employer and after the employees had started working for the competitor. The Federal Court ordered the competitor to account for its profits in the first five years of the plan.

On appeal the competitor was ordered to account for the total capital value of the business appropriated, being $14,838,063, rather than the profits alone. The competitor could not prove any of its increased business did not come from the appropriated business from the employer, nor could it show that after five years the business it had appropriated would expire.

Employers and employees should take note of the duties of fidelity owed by employees to their employers to protect the employer's business and to act in their employer's best interest. This duty exists whether or not employment agreements contain clauses to this effect. Businesses that are approached by the employees of their competitors with 'business plans' should be aware of the potential cost of assisting those employees to breach their duty of fidelity.

"Fat ginger pikey" jibe not harassment

The UK's Employment Appeal Tribunal has upheld a decision of the Employment Tribunal which found that calling an employee a "fat ginger pikey" did not amount to harassment

The employee was part of a competitive sales team with a culture of teasing and jibing which the employee participated in. When a colleague made the 'fat ginger pikey' jibe he did not react or otherwise complain at the time. Later, the employee was put on a performance improvement plan. The employee then brought a grievance in relation to the 'fat ginger pikey' jibe alleging it amounted to harassment and discrimination based on disability and race.

The Employment Tribunal found that the employee was ultimately dismissed due to poor performance and the employment relationship breaking down. He was treated in the same way as other employees who performed poorly and the dismissal process was not discriminatory.

The harassment and discrimination claims failed. The employee's colleagues knew he was diabetic, which was considered a disability, but the employee was unable to prove his diabetes and his size were linked. Plus no one considered him 'fat'. Further only one colleague knew about the employee's links with the travelling community. The jibe was simply a generic, unflattering remark.

This case is a good example of how important context is to harassment claims. In this case the context of the employee actively participating in the teasing culture and not raising a complaint until he felt his employment was threatened meant that the Tribunal correctly determined he had not been harassed or discriminated against. When an employee alleges harassment or discrimination employers should carefully consider the wider context of the remarks made including the workplace culture.